



# THE INDIAN LAW REPORTS

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# ORISSA HIGH COURT, CUTTACK

## CHIEF JUSTICE

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## PUISNE JUDGES

*The Hon'ble Shri Justice INDRAJIT MAHANTY, LL.M.*

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

*The Hon'ble Shri Justice SUJIT NARAYAN PRASAD, M.A., LL.B.*

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

*The Hon'ble Shri Justice J. P. DAS, M.A., LL.B.*

*The Hon'ble Shri Justice Dr. D.P. CHOUDHURY, B.Sc., LL.M., Ph.D.*

## ADVOCATE GENERAL

*Shri SURYA PRASAD MISRA, B.Sc., LL.B.*

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**ARBITRATION AND CONCILIATION ACT, 1996 – S.34**

Whether, an award delivered by an Arbitrator, which decides the issue of limitation, can be said to be an interim award and whether such interim award can be set aside U/s. 34 of the Act, 1996 ?

Held, decision taken by the Arbitrator on the issue of limitation finally vide award Dt. 23.07.2015 is an “interim award” within the meaning of section 2(1)(c) of the Act and being subsumed within the expression “arbitral award” can be challenged separately and independently U/s. 34 of the Act.

*M/s. Indian Farmers Fertilizer Co-Operative Ltd. -V- M/s. Bhadra Products.*

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**ADMISSION – B.Ed. course –** Appellants are untrained graduates appointed against Trained Graduate (TGT) posts in different Non-Government Aided Schools securing less than 50% of marks in graduation – Advertisement issued for admission wherein clause 3.12 of Information Brochure provides eligibility criteria for in-service candidates fixing 50% of marks for general in-service candidates and 45% of marks for reserved category in-service candidates in Bachelor’s Degree and/or in Master’s Degree – Action challenged, but the writ Court refused relief – Hence the appeals.

The in-service candidates stand in a different footing than that of the fresh candidates – Their legitimate expectation of being sponsored for B.Ed. training as in-service candidates cannot be taken away on the basis of the resolution of the Government passed much after their appointment against TGT posts – Held, clause 3.12 of the Information Brochure for admission of in-service candidates to Teachers Training Course i.e. B.Ed. Course restricting minimum qualifying marks in graduation is not applicable to the in-service candidates and such restriction shall not be imposed for the in-service candidates for taking admission to B.Ed. Course.

*Avimanyu Nayak-V- State of Odisha & Ors.*

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**CIVIL PROCEDURE CODE, 1908 – Ss. 10, 151**

Stay of suit – Prayer U/s. 10 C.P.C. was rejected as whole of the subject matter in two suits are not identical – Hence the CMP –

Section 10 C.P.C. has no application to the case at hand – Since the decision in the earlier suit has a relevancy on the decision in the latter suit and this Court, finds that the decision in the appeal i.e. RFA No. 8 of 2015 will have an influencing factor on the subsequent suit, has exercised its inherent power U/s. 151 C.P.C. and directed for stay of the subsequent suit vide C.S. No. 93 of 2013 till disposal of RFA No. 8 of 2015.

*Durgamadhab Das -V- Bhikari Charan Das & Ors.*

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**CRIMINAL PROCEDURE CODE, 1973 – S.245**

Whether the Magistrate is competent to discharge the accused in case of continuous or repeated absence of the complainant at the stage of adducing evidence before charge ? Held, yes. – The Magistrate is competent to exercise such power U/s. 245 (2) of the code.

*Sudhansubala Khatei -V- State of Orissa & Ors.*

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**Ss. 370, 392**

Hon'ble Judges of the Division Bench became unanimous to convict the appellant U/s. 302 I.P.C. but divided in their opinion on the question of sentence i.e. death or life imprisonment – Hence the matter before this Bench.

Normal rule is that the offence of murder shall be punished with the sentence of life imprisonment – However, the court can impose death sentence only if there are special reasons.

In this case, extreme fascination of the appellant towards the deceased and the failure on his part to win over her heart appears to have been the cause of frustration and the appellant being disturbed both emotionally and psychologically used the sharp cutting weapon of small size, inflicted blows but not attempted to harm the chastity of the deceased – The prosecution has not proved that the murder was executed after previous planning and the brutality was so high that imposition of life imprisonment would be altogether inadequate – There is also no material with the prosecution that the appellant would remain as continuous threat for the society and he cannot be reformed in future – There is also no adverse report from the jail authorities regarding his conduct during the period he was in jail – Held, the case in hand does not fall within the category of “rarest of rare” case – Hence the sentence of death awarded to the appellant be commuted to imprisonment for life.

*State of Orissa -V- Banabihar Behera @ Haria.*

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**S.439**

Bail – Offence U/ss. 120-B, 409, 420 I.P.C. and sections 4, 5 & 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 – Petitioner is an elected member of the Lok Sabha – Eighteen witnesses, who have implicated him have yet to be examined – Apprehension of the prosecution is reasonable that once the petitioner is released on bail by virtue of his influence may tamper with evidence and manipulate witnesses – Further there is no substantial change of circumstances or fresh grounds after rejection his earlier bail applications.

Interestingly people, even holding high positions have failed to learn the lesson from the replies given by the family members of Dasyu Ratnakar when he enquired from them if they would receive some portions of his vice which he had done for their maintenance – They also fail to recollect the last wishes of the great Greek King Alexander to put his hands outside the coffin to let people understand that he came to this world in empty hands and he will leave this world also in empty hands.

So in this case considering misappropriation of huge amount of public money, gravity of the accusation, nature of supporting evidence and its serious adverse impact on the fabric of the society and the severity of punishment in case of conviction, this Court is not inclined to reconsider the prayer to release the petitioner on bail – However, the petitioner may renew his prayer for bail before the learned trial court after examination of eighteen witnesses.

*Rama Chandra Hansdah -V- Republic of India (C.B.I.)*

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**S.482**

Interim order passed by this Court on 16.09.2013 directing both the parties to take instruction by the next date i.e. by 25.09.2013 with a further direction to the vigilance department not to submit final form till next date – Despite the same Vigilance Department submitted final form on 20.09.2013 – Action challenged.

Any action taken subsequent to the interim order passed by this Court is a nullify in the eye of law – Further the order having been passed in presence of the counsel appearing for the opposite parties, it is within the knowledge of the vigilance department – Held, final form submitted on 20.09.2013 is quashed.

*Suresh Ku. Mishra -V- State of Odisha & Ors.*

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**CRIMINAL TRIAL** – Appreciation of evidence – Appellant was convicted U/s. 304-Part I, I.P.C., basing on the evidence of P.Ws. 1, 5 and 19 – Though P.W.1 stated to have heard the incident from P.W.5 but P.W.5 has not deposed that she narrated the incident to P.W.1 – On the other hand P.W.5 though claimed to be an eye witness, she clearly stated in her evidence that she had not seen the occurrence and she had also not stated anything about that before the police – Moreover the evidence of the I.O. (P.W.19) relating to extra judicial confession and leading to discovery not supported by other prosecution witnesses – Held, since prosecution failed to prove chain of circumstances beyond all shadow of doubt, the appellant is entitled to benefit of doubt – Impugned judgment of conviction and sentence are set aside.

*Sanatan Munda -V- State of Orissa.*

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**CONSTITUTION OF INDIA, 1950 – ART.226**

Grant of Quarry lease – Petitioner became the highest bidder – He deposited the EMD and other relevant documents – Allegation of illegal quarry carried out on the area leased out to the petitioner – Petitioner was issued a show cause notice to which he gave a reply but his lease was cancelled for violation of terms of the lease deed – Hence this writ petition.

Authority failed to consider relevant documents and reply of the petitioner – Lease cancelled without application of mind – Held, impugned order is quashed – However, liberty granted to the Tahasildar to pass a fresh order after considering the reply given by the petitioner and other parties.

*Prafulla Ku. Sahoo -V- State of Orissa & Ors.*

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**CONSTITUTION OF INDIA, 1950 – ART.311(2)**

Compulsory retirement – Action challenged on the ground of non-supply of adverse entries made in the ACR and on the ground of jurisdiction of the authority who passed the order – This is the policy decision of the authority in public interest, having no stigma or punitive action to attract the provision under Article 311(2) of the Constitution of India – Moreover, the opposite parties have shown

their bonafide by granting one year time from the date of final decision and during that period also the petitioner could not be able to improve his performance rather his overall rating during such period was “poor” – Held, since the petitioner became a dead wood and has failed to make out a case for interference of this Court, the writ petition is liable to be dismissed.

*Bichitrananda Panda-V- Orissa Power Generation Corporation Ltd. & Ors.*

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**EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 – S.14-B**

Employer-O.P.No.1 defaulted in depositing Provident Fund Contribution of its employees as well as its own share from March, 1993 to Feb. 1997 – Petitioner-Authority imposed penal damages as fixed under Para-32A of the EPF Scheme, 1952 – Order challenged before the EPF Appellate-Tribunal – Tribunal set aside the order and remitted back the matter to the petitioner-Authority for re-assessing the damages at the rate of 5% in addition to the interest accrued on account of penalty for the period of default – Hence the writ petition.

Held, it is well within the competency of the Petitioner-Authority to impose penal damages U/s. 14-B of the Act – Rates of damages are to be imposed as specified in Para-32-A of the EPF Scheme, 1952 and the same cannot be modified or altered – Direction of the Appellate-Authority being contrary to law is set aside.

*Regionl provident fund commissioner, Rourkela-V- Sundergarh Mining Labour Contract Co-Operative Society Ltd. & Anr.*

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**EVIDENCE ACT, 1872 – S.133**

Evidence of approver – Appreciation of – Court can rely on the evidence of an approver if it is corroborated in material particulars by other independent evidence.

In this case, the sister of the approver was raped and murdered and he was examined as Court-Witness No. 1 – His statement corroborates the statement of P.W.6 – Further, his evidence recorded U/s. 164 Cr.P.C. during investigation also corroborates his statement recorded as Court Witness – So the argument advanced by the Counsel for the appellants that it is a case of suicide has no substance – Held, since appellant No.2 is dead, the impugned conviction and sentence passed

by the learned trial Court is confirmed in respect of appellant No.1.  
*Giridhari Parida & Anr.-V- State of Orissa.*

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**EVIDENCE ACT, 1872 – Ss. 137, 138, 146**

Examination-in-Chief of P.W.1 was conducted after the appellants set exparte – At a later stage on the same day appellants filed one petition to set aside the exparte order and another petition to recall P.W.1 for cross-examination – Learned Court below set aside the exparte order but rejected the application to recall P.W.1 by considering its power under order 18, Rule 17 C.P.C. – Hence this appeal.

P.W.1 is a relevant witness – No oral testimony can be considered valid or satisfactory unless tested by cross-examination – So the right of the defence to cross-examine the plaintiff's witness can be looked upon not as a part of its own strategy of defence but as a requirement without which the plaintiff's evidence can not be acted upon – When the designated Court set aside the exparte order, could have allowed the other petition for recall of P.W.1 for cross-examination, by applying its inherent power U/s. 151 C.P.C., in exercise of its judicial discretion as the applicant has some genuine grounds – Held, the impugned order is set aside – Direction issued to the designated Court to permit the appellants to cross examine P.W.1.

*Rose Velley Hotels & Enterinments Ltd. & Ors -V-State of Orissa.*

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**HINDU MARRIAGE ACT, 1955 – S.13**

Divorce – Respondent-husband moved the Court on the ground of mental cruelty – Decree passed for dissolution of marriage – Hence this appeal.

In this case, most of the allegations made by the respondent-husband have not been corroborated and proved, but the learned Judge, Family Court accepted it without critically dissecting the same – Moreover his allegations that the appellant never coming on vacation and picking up quarrel have been directly contradicted by P.Ws. 2 and 3 in their cross-examination – On the other hand the evidence of the appellant-wife that she was taking care of the mother-in-law and used to serve food to family members and taking proper medicine as advised by the doctor and her abortion was an unfortunate incident beyond her control and it was not correct that she did not

want to be a mother, have remained un-demolished – The respondent-husband has failed to discharge his burden to prove allegations of mental cruelty – Held, the impugned decree of divorce is set aside.

*Sujata Mohanty -V- Rudra Charan Mohanty.*

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**HINDU SUCCESSION ACT, 1956 – Ss. 4, 8, 14**

Once a female Hindu is vested with property U/s. 8 of the Act, 1956, upon the death of her husband in the year 1976, and became absolute owner there of U/s. 14 of the said Act, whether, such property will be divested after her remarriage in view of section 2 of the Hindu Widows Remarriage Act, 1856, which provides that a Hindu widow after remarriage will cease to have any right in husband's Property as if she had died ?

Held, in view of the over-riding effect of the Act U/s. 4 of the 1956 Act, section 2 of the 1856 Act would not prevail over the provisions of the Act, 1956 – So once property is vested in the widow of a Hindu male the same can not be subjected to divestment.

*Uma Sahu -V- Sabitri Sahu.*

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**GOVERNMENT SAVINGS CERTIFICATES ACT, 1959 – S.12**

Indira Vikas Patra Certificates – Destroyed by white ants – Maturity date was 28.11.1999 – Claim for maturity value with interest – Principle of unjust enrichment – When Governments and public authorities deal with a citizen they should not rely on technicalities – Held, learned trial court rightly allowed maturity value of the certificates and learned lower appellate court was correct in allowing simple interest @ 6% per annum from the date of maturity i.e. from 28.11.1999 till payment.

*The postmaster General, Sambalpur & Anr.-V- Miss Sanjukta Hota.*

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**IMMORAL TRAFFIC (PREVENTION) ACT, 1956 – Ss. 7, 18**

Attachment of petitioner's hotel by the commissioner of Police U/s. 18(1) of the Act on the ground that it is used as brothel – Order challenged.

Order of attachment U/s. 18(1) of the Act can only be passed after the State Government makes a notification U/s. 7(1)(a)(b) of the Act that the hotel is situated within 200 metres of any place used as public

religious worship, educational institution, hostel, hospital, nursing home or such other public place – In this case the notification having not been done, the hotel in question is not liable to be attached – Held, the impugned order of attachment is set aside.

*Sakhabul Khan @ Papu -V- State of Orissa & Ors.*

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**NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss. 138, 142**

Dishonour of cheque – On 20.06.2002 complainant got intimation from the bank – Complainant served personal notice to the petitioner on 04.07.2002 – Due to non-payment of the cheque dues he issued second notice by post on 26.10.2002 to which petitioner refused to receive – Complaint petition filed on 21.12.2002 and Magistrate took cognizance on 25.02.2003 which is now under challenge.

No provision in the N.I. Act to serve a second notice – Personal notice served on 04.07.2002 was a valid notice and since the petitioner failed to make payment of the cheque amount within 15 days of receipt of such notice cause of action arose to file complaint within one month – In this case, the complaint petition filed on 21.12.2002 was beyond the prescribed period as provided U/s. 142(1)(b) of the Act and the learned Magistrate had not condoned the delay being satisfied with sufficient cause shown by the complainant – Held, the impugned order taking cognizance of the offences against the petitioner is quashed.

*Babaji Charan Nayak -V- Orissa Machinery & Sanitary.*

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**ODISHA FOREST ACT, 1972 – Ss. 2 (g) (ii) (d), 56**

Whether the manganese ore carried in the seized dumper, being excavated from reserve forest area, can be construed as “forest produce” and if so whether the seized dumper together with manganese ore is liable for confiscation U/s. 56 of the Forest Act, 1972 ?

Manganese Ore comes within the meaning of minerals as defined in section 3(a) of the Mines and Minerals (Regulation and Development) Act, 1957 – Applying the meaning of “minerals”, in different statutes, to the meaning attached to section 2(g)(ii)(d) of the Odisha Forest Act, 1972, it can safely be construed that “minerals” includes manganese ore and it becomes “forest produce” within the meaning of section 2(g) of the Odisha Forest Act, 1972 – In this case since Manganese

ore was transported without any valid permit and without any authority of law i.e. in contravention of the provisions of the Timber Transit Rules, 1980, the same amounts to committing forest offence – Held, the impugned order passed by the learned District Judge is quashed and the order passed by the Authorized Officer directing confiscation of the seized vehicle and the manganese ore to the Government U/s. 56 of the Odisha Forest Act, 1972 is restored.

*State of Orissa & Ors.-V- Mahinder Singh.*

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**ODISHA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Ss. 4, 51**

Whether, the consolidation authorities have power and jurisdiction to decide the question of status of a person i.e. adoption and whether the decision of the Consolidation Authority that Dwija is the adopted son of Kapil, shall operate as resjudicata in the suit ?

If title to property as son by birth can be adjudicated by the consolidation authorities, by what logic or law such authorities denied jurisdiction to decide if a person is son by way of adoption, when sonship is acquired either by birth or by way of adoption – So if the issue of title is dependent upon adoption, the said issue can be decided by the consolidation authorities if arises ancilarily or incidentally for adjudication of the title – Held, the decision of the Consolidation Authority that Dwija is the adopted son of Kapil shall operate as resjudicate in the suit.

*Sarat Ch. Nayak & Anr.-V- Rama Ch. Nayak & Ors.*

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**ODISHA MUNICIPAL ACT, 1950 – S. 46-A(1)(b)**

“No Confidence Motion” against Chairperson – Collector decided to hold the Special Session with a gap of 37 days – During the pendency of such process amendment brought in the Act incorporating a “disqualification” clause – Action challenged – Held, the amending Act will not be applicable to the above process.

In this case, the petitioners made a resolution on 09.11.2015 to bring no confidence motion against O.P.No.5 and submitted a copy to the collector on 12.11.2015 – Though the petitioners requested to fix an early date by giving three clear days as provided U/s. 54 of the Act, the Collector on 21.11.2015 decided to hold the special session on 28.12.2015 – In the meantime, 2<sup>nd</sup> amendment to the Act was notified

on 18.12.2015 and came into force on 19.12.2015 and O.P.No.5 filed complaint petition before the State Election Commission on 05.01.2016 and the commission disqualified the petitioners – Hence the writ petition.

It is the constitutional right of the councilors to continue for five years – In view of the action of the Collector-O.P.No.3 in fixing the “No Confidence Motion” meeting after a considerable length of time i.e. 37 days from the date of requisition, the amending Act is not applicable and the petitioners can not be declared to be disqualified only on the ground of defying the whip or direction given by the party – Held, the impugned order passed by the State Election Commission in complaint Case No. 1 of 2016 is quashed – The petitioners are not disqualified for being members of the Municipality basing on the above amendment and they shall continue to represent their wards till end of their tenure.

*Sabita Sethy & Ors. -V- State of Odisha & Ors.*

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**ODISHA SERVICES ( MEDICAL ATTENDANCE) RULES, 1947 -  
RULE-7**

Government employee suffered from chronic renal failure and was in need of kidney transplantation – Inaction of the authorities in releasing timely medical advance – Premature death of the deceased – Claim for compensation by children – State owes an obligation to provide adequate medical facilities to its citizens – Violation of Article 21 of the constitution of India as right to life includes right to health – Held, since there is violation of right to life with dignity, direction issued to the state Government to pay compensation of Rs 2,00,000/- and recover the same from the authority responsible for the delay in releasing medical advance.

*Ganeswar Rout & Ors.-V- State of Orissa & Ors.*

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**ODISHA SPECIAL COURTS ACT, 2006 – S.19**

Release of Savings Certificates etc. seized during house search of the accused – Due to the death of the accused trial abated – Legal heirs of the deceased are the appellants – Question is who is the authority competent to release those documents ? – Held, the Authorised officer is the only authority competent to release the documents.

*Sangram Keshari Nayak & Ors. -V- State of Odisha (G.A. Deptt.)*

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**PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES,  
PROTECTION OF RIGHTS & FULL PARTICIPATION) ACT, 1995 – Ss.  
47, 62**

Petitioner-employee while in duty sustained 65% Locomotors disability – He remained absent for further treatment with permission of the competent authority – Departmental proceeding initiated against him treating him as unauthorized absent – Disciplinary authority dismissed him from service, which was confirmed by the Appellate, Revisional as well as Reviewing Authorities – Petitioner filed complaint petition before the Commissioner for persons with disabilities – Complaint petition rejected – Hence the writ petition.

Held, the commissioner is competent to consider the complaint relating to deprivation of rights of the person with disability and if necessary may suo-motu inquire into the matter upon hearing the parties concerned and can set aside the order of dismissal.

Since the State Commissioner has the jurisdiction to deal with the matter, this court declined to interfere with the order passed by the disciplinary authority and other authorities and while setting aside the order passed by the State Commissioner, remanded the matter to him to re-look the complaint and to take a lawful decision after hearing all the parties concerned.

*Jaya Chandra Mishra-V- Union of India & Ors.*

2018 (I) I.L.R. Cut.....

**SERVICE LAW** – Adverse entries in the CCR of the petitioner, for the years 2010 and 2011, communicated to her on 18.03.2015 – Hence the writ petition – Held, delayed communication of CCR itself is bad in law and the same is liable to be quashed.

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Object of communicating adverse entries cannot be achieved unless it is made within a reasonable period as belated communication of entries resulted in denial of reasonable opportunity to improve the performance of the petitioner – Held, the impugned entry in the ACR 2010 and 2011 are liable to be expunged and the intimation vide Annexure 1 that the character roll of the petitioner in 2010 and 2011 as “poor” is also quashed.

*Suchismita Misra-V- Registrar (Administration), Orissa High Court, Cuttack.*

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**SUPREME COURT OF INDIA**

**R.F.NARIMAN, J. & NAVIN SINHA, J.**

CIVIL APPEAL NO. 824 OF 2018  
[ARISING OUT OF SLP(C) NO. 19771 OF 2017]

**M/S. INDIAN FARMERS FERTILIZER** .....Appellant  
**CO-OPERATIVE LTD.**

.Vrs.

**M/S. BHADRA PRODUCTS** .....Respondent

**ARBITRATION AND CONCILIATION ACT, 1996 – S.34**

**Whether, an award delivered by an Arbitrator, which decides the issue of limitation, can be said to be an interim award and whether such interim award can be set aside U/s. 34 of the Act, 1996 ?**

**Held, decision taken by the Arbitrator on the issue of limitation finally vide award Dt. 23.07.2015 is an “interim award” within the meaning of section 2(1)(c) of the Act and being subsumed within the expression “arbitral award” can be challenged separately and independently U/s. 34 of the Act. (Paras 16,29)**

**Case Law Relied on**

1. (1964) 1 SCR 495 at 501-503 : Ittavira Mathai v. Varkey Varkey.

**Case Laws Referred to**

1. (2007) 4 SCC 451: National Thermal Power Corpn. Ltd. v. Siemens Atkeingesellschaft,
2. (1999) 3 SCC 487 at 491 and 493 : Satwant Singh Sodhi v. State of Punjab.
3. (2006)11 SCC 181 : McDermott International Inc. v. Burn Standard Co. Ltd.
4. (1969) 3 SCR 92 at 99 : Official Trustee v. Sachindra Nath Chatterjee.
5. (1966) 1 SCR 102 at 107 : Pandurang Dhoni Chougule v. Maruti Hari Jadhav.
6. (1969) 2 AC 147 : Anisminic v. Foreign Compensation Commission.
7. (1972) 2 SCC 427 at 435 : M.L. Sethi v. R.P. Kapur.
8. (1974) 3 SCC 415 at 423-424 : Hari Prasad Mulshanker Trivedi v. V.B. Raju.
9. (2004) 3 SCC 48 at 74 : ITW Signode India Ltd. v. CCE
10. (2015) 6 SCC 412 : Foreshore Coop. Housing Society Ltd. v. Praveen D. Desai

For Appellant : Mr. Balaji Srinivasan  
For Respondent : Mr. Upasana Nath[Caveat]  
Ashwarya Sinha[R-1]

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Date of Judgment : January 23, 2018

### **JUDGMENT**

***R.F. NARIMAN, J.***

1. Leave granted.
2. An interesting question arises as to whether an award delivered by an Arbitrator, which decides the issue of limitation, can be said to be an interim award, and whether such interim award can then be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”). The brief facts necessary to dispose of the present appeal are as follows.
3. The appellant before us issued a tender enquiry to 19 parties, including the respondent, for supply of Defoamers. The respondent submitted its bid, pursuant to which a Letter of Intent dated 2nd November, 2006 was issued to the respondent for supply of 800 Metric Tonnes of Defoamers to be used for production of 3,08,880 Metric Tonnes of P2O5. By 11th April, 2007, the respondent had supplied 800 Metric Tonnes of Defoamers, however, they could not achieve the targeted production by the end of 1st November, 2007, which was the validity of the supply period. After considerable delay, on 6<sup>th</sup> June, 2011, the respondent issued a legal notice demanding payment of Rs.6,35,74,245/- on 27th September, 2012. The appellant made it clear that there was nothing due and payable to the respondent. Since disputes arose between the parties, on 1st October, 2014 the respondent invoked arbitration, and on 25th January, 2015, Justice Deepak Verma, a retired Judge of the Supreme Court, was appointed as the sole arbitrator. On 3rd March, 2015, issues were framed. On 23rd July, 2015, the learned Arbitrator thought it fit to take up the issue of limitation first, inasmuch as the counsel appearing for both the parties submitted that this issue could be decided on the basis of documentary evidence alone. This issue was then decided in favour of the claimant stating that their claims had not become time barred. A petition filed under Section 34 of the Act challenged the aforesaid award, styling it as the ‘First Partial Award’. On 8th October, 2015, the District Judge, Jagatsinghpur, dismissed the Section 34 Petition stating that the aforesaid award could not be said to be an interim award and that, therefore, the Court

lacked jurisdiction to proceed further under Section 34 of the Act. The appeal to the High Court of Orissa was dismissed by the impugned order dated 30th June, 2017, reiterating the reasoning of the learned District Judge.

4. Appearing on behalf of the appellant, Mr. K.K. Venugopal, learned Attorney General, has argued before us that the award made on 23rd July, 2015 is an interim award under the Act and would, therefore, be amenable to challenge under Section 34 of the Act as such. He referred us to various provisions of the Act and buttressed his stand with reference to a number of judgments, including, in particular, the judgment of **National Thermal Power Corpn. Ltd. v. Siemens Atkeingesellschaft**, (2007) 4 SCC 451. He also referred us to various judgments on what constitutes an interim award and argued that, according to him, the point of limitation being one of the issues raised by the parties, was finally decided by the aforesaid award and would, therefore, be amenable to challenge.

5. Shri Ajit Kumar Sinha, learned senior advocate appearing on behalf of the respondent, also placed reliance on various sections of the Act, in particular Sections 16 and 37 thereof. According to the learned senior advocate, a ruling on the point of limitation is a ruling on “jurisdiction” and any finding thereon goes to the root of the case. This being the case, the drill of Section 16 has to be followed, and as the plea of limitation has been rejected by the learned Arbitrator, the arbitral proceedings have to continue further and the challenge has to be postponed only after all other issues have been decided. According to the learned senior advocate, the scheme of Section 37, in particular Section 37(2)(a), also makes it clear that appeals lie only from an order under Section 16 accepting the plea but not rejecting it. Also, according to the learned senior advocate, the present award cannot be said to be an interim award, but is merely an order passed under Section 16 of the Act. He also relied upon several judgments to buttress his point of view and relied heavily upon judgments which held that a decision on a point of limitation goes to jurisdiction in which case Section 16 of the Act would get attracted.

6. Having heard learned counsel for both parties, it is important to first set out the relevant provisions of the Act, which are as under:

“**2. Definitions.**—(1) In this Part, unless the context otherwise requires,—

(c) “arbitral award” includes an interim award;

XXX XXX XXX

**16. Competence of arbitral tribunal to rule on its jurisdiction.—**

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration

agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

XXX XXX XXX

**31. Form and contents of arbitral award.—**

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

XXX XXX XXX

**32. Termination of proceedings.**—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

XXX XXX XXX

**37. Appealable orders.**—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

- (a) refusing to refer the parties to arbitration under section 8;
  - (b) granting or refusing to grant any measure under section 9;
  - (c) setting aside or refusing to set aside an arbitral award under section 34.
- (2) Appeal shall also lie to a court from an order of the arbitral tribunal—
- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
  - (b) granting or refusing to grant an interim measure under section 17.
- (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

7. The point at issue is a narrow one: whether an award on the issue of limitation can first be said to be an interim award and, second, as to whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act.

8. As can be seen from Section 2(c) and Section 31(6), except for stating that an arbitral award includes an interim award, the Act is silent and does not define what an interim award is. We are, therefore, left with Section 31(6) which delineates the scope of interim arbitral awards and states that the arbitral tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

9. The language of Section 31(6) is advisedly wide in nature. A reading of the said sub-section makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the arbitral tribunal, and that it

extends to “any matter” with respect to which it may make a final arbitral award. The expression “matter” is wide in nature, and subsumes issues at which the parties are in dispute. It is clear, therefore, that any point of dispute between the parties which has to be answered by the arbitral tribunal can be the subject matter of an interim arbitral award. However, it is important to add a note of caution. In an appropriate case, the issue of more than one award may be necessitated on the facts of that case. However, by dealing with the matter in a piecemeal fashion, what must be borne in mind is that the resolution of the dispute as a whole will be delayed and parties will be put to additional expense. The arbitral tribunal should, therefore, consider whether there is any real advantage in delivering interim awards or in proceeding with the matter as a whole and delivering one final award, bearing in mind the avoidance of delay and additional expense. Ultimately, a fair means for resolution of all disputes should be uppermost in the mind of the arbitral tribunal.

10. To complete the scheme of the Act, Section 32(1) is also material. This section goes on to state that the arbitral proceedings would be terminated only by the final arbitral award, as opposed to an interim award, thus making it clear that there can be one or more interim awards, prior to a final award, which conclusively determine some of the issues between the parties, culminating in a final arbitral award which ultimately decides all remaining issues between the parties.

11. The English Arbitration Act, 1996, throws some light on what is regarded as an interim award under English Law. Section 47 thereof states:

**“47 Awards on different issues, &c.**

- (1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.
- (2) The tribunal may, in particular, make an award relating—
  - (a) to an issue affecting the whole claim, or
  - (b) to a part only of the claims or cross-claims submitted to it for decision.
- (3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.”

12. By reading this section, it becomes clear that more than one award finally determining any particular issue before the arbitral tribunal can be made on different aspects of the matters to be determined. A preliminary issue affecting the whole claim would expressly be the subject matter of an interim award under the English Act. The English Act advisedly does not use the expression “interim” or “partial”, so as to make it clear that the award covered by Section 47 of the English Act would be a final determination of the particular issue that the arbitral tribunal has decided.

13. In **Exmar BV v National Iranian Tanker Co.** [1992] 1 Lloyd's Rep. 169, an interim final award was made, which contained the decision that it would not issue any such award in the claimant's favour pending determination of the respondent's counter claims. Detailed reasons were given for this decision. The Judge, therefore, characterized the aforesaid award as an award finally deciding a particular issue between the parties, and concluded that as a result thereof, he had jurisdiction to review the tribunal's decision.

14. In **Satwant Singh Sodhi v. State of Punjab** (1999) 3 SCC 487 at 491 and 493, an interim award in respect of one particular item was made by the arbitrator in that case. The question before the Court was whether such award could be made the rule of the Court separately or could be said to have been superseded by a final award made on all the claims later. This Court held:

“6. The question whether interim award is final to the extent it goes or has effect till the final award is delivered will depend upon the form of the award. If the interim award is intended to have effect only so long as the final award is not delivered it will have the force of the interim award and it will cease to have effect after the final award is made. If, on the other hand, the interim award is intended to finally determine the rights of the parties it will have the force of a complete award and will have effect even after the final award is delivered. The terms of the award dated 26-11-1992 do not indicate that the same is of interim nature.”

On the facts of the case, the Court then went on to hold:

“11. This Court in **Rikhabdass v. Ballabhdas** [AIR 1962 SC 551 : 1962 Supp (1) SCR 475] held that once an award is made and signed by the arbitrator, the arbitrator becomes *functus officio*. In **Juggilal**

*Kamlapat v. General Fibre Dealers Ltd.* [AIR 1962 SC 1123 : 1962 Supp (2) SCR 101] this Court held that an arbitrator having signed his award becomes functus officio but that did not mean that in no circumstances could there be further arbitration proceedings where an award was set aside or that the same arbitrator could never have anything to do with the award with respect to the same dispute. Thus in the present case, it was not open to the arbitrator to redetermine the claim and make an award. Therefore, the view taken by the trial court that the earlier award made and written though signed was not pronounced but nevertheless had become complete and final, therefore, should be made the rule of the court appears to us to be correct with regard to Item 1 inasmuch as the claim in relation to Item 1 could not have been adjudicated by the arbitrator again and it has been rightly excluded from the second award made by the arbitrator on 28-1-1994. Thus the view taken by the trial court on this aspect also appears to us to be correct. Therefore, the trial court has rightly ordered the award dated 28-1-1994 to be the rule of the court except for Item 1 and in respect of which the award dated 26-11-1992 was ordered to be the rule of the court.”

It is, thus, clear that the first award that was made that finally determined one issue between the parties, with respect to Item no.1 of the claim, was held to be an interim award inasmuch as it finally determined claim 1 between the parties and, therefore, could not be re-adjudicated all over again.

15. In **McDermott International Inc. v. Burn Standard Co. Ltd.** (2006) 11 SCC 181 at page 211-212, under the heading ‘validity of the partial award’, this Court held:

“68. The 1996 Act does not use the expression “partial award”. It uses interim award or final award. An award has been defined under Section 2(c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

69. The learned arbitrator evolved the aforementioned procedure so as to enable the parties to address themselves as regards certain disputes at the first instance. As would appear from the partial award

of the learned arbitrator, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the learned arbitrator to advert thereto at a later stage. If the partial award answers the definition of the award, as envisaged under Section 2(c) of the 1996 Act, for all intent and purport, it would be a final award. In fact, the validity of the said award had also been questioned by BSCL by filing an objection in relation thereto.

70. We cannot also lose sight of the fact that BSCL did not raise any objection before the arbitrator in relation to the jurisdiction of the arbitrator. A ground to that effect has also not been taken in its application under Section 34 of the Act. We, however, even otherwise do not agree with the contention of Mr Mitra that a partial award is akin to a preliminary decree. On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred to the arbitrator which are subject-matters of such award. We may add that some arbitrators instead and in place of using the expression “interim award” use the expression “partial award”. By reason thereof the nature and character of an award is not changed. As, for example, we may notice that in arbitral proceedings conducted under the Rules of Arbitration of the International Chamber of Commerce, the expression “partial award” is generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. We may state that both the partial award and the final award are subject-matter of challenge under Section 34 of the Act.”

The aforesaid judgment makes it clear that an interim award or partial award is a final award on matters covered therein made at an intermediate stage of the arbitral proceedings. 16. Tested in the light of the statutory provisions and the case law cited above, it is clear that as the learned Arbitrator has disposed of one matter between the parties i.e. the issue of limitation finally, the award dated 23rd July, 2015 is an “interim award” within the meaning of Section 2(1)(c) of the Act and being subsumed within the expression “arbitral award” could, therefore, have been challenged under Section 34 of the Act.

17. However, Shri Sinha has argued before us that the award dated 23rd July, 2015 being a ruling on the arbitral tribunal’s jurisdiction would fall

within Section 16 of the Act, and inasmuch as the decision taken on the point of limitation was rejected, the drill of Section 16 must be followed in which case all other issues have to be decided first, and it is only after such issues are decided that such an award can be challenged under Section 34 of the Act. Section 16 of the Act lays down what, in arbitration law, is stated to be the *Kompetenz-kompetenz* principle, viz. that an arbitral tribunal may rule on its own jurisdiction. At one time, the law was that the arbitrator, being a creature of the contract, could not rule on the existence or validity of the arbitration clause contained in the contract. This, however, gave way to the *Kompetenz* principle which was adopted by the UNCITRAL Model Law. Article 16 of the UNCITRAL Model Law, on which Section 16 of the Act is based, reads as follows:

**“Article 16. Competence of arbitral tribunal to rule on its jurisdiction**

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a

request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

18. The Statement of Objects and Reasons of the Act expressly refers to the UNCITRAL Model Law in the following terms:

“3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.”

19. It may be noticed that Section 16(1) to (4) are based on Article 16 of the UNCITRAL Model Law. The *Kompetenz* principle deals with the arbitral tribunal’s jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement. What is important to notice in the language of Section 16(1) is the fact that the arbitral tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the arbitral tribunal may embark upon an inquiry into the issues raised by parties to the dispute.

20. Here again, the English Arbitration Act of 1996 throws some light on the problem before us. Sections 30 and 31 of the said Act read as under:

**“30 Competence of tribunal to rule on its own jurisdiction. - (1)** Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

**31 Objection to substantive jurisdiction of tribunal. - (1)** An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the

time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may— (a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits. If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).”

These sections make it clear that the *Kompetenz* principle, which is also followed by the English Arbitration Act of 1996, is that the “jurisdiction” mentioned in Section 16 has reference to three things: (1) as to whether there is the existence of a valid arbitration agreement; (2) whether the arbitral tribunal is properly constituted; and (3) matters submitted to arbitration should be in accordance with the arbitration agreement.

21. That “jurisdiction” is a coat of many colours, and that the said word displays a certain colour depending upon the context in which it is mentioned, is well-settled. In the classic sense, in **Official Trustee v. Sachindra Nath Chatterjee**, (1969) 3 SCR 92 at 99, “jurisdiction” is stated to be:

“In the order of Reference to a Full Bench in the case of *Sukhlal v. Tara Chand* [(1905) ILR 33 Cal 68] it was stated that jurisdiction may

be defined to be the power of a Court to *hear and determine a cause, to adjudicate and exercise any judicial power in relation to it*: in other words, by jurisdiction is meant *the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision*. An examination of the cases in the books discloses numerous attempts to define the term 'jurisdiction', which has been stated to be *'the power to hear and determine issues of law and fact'*, the authority by which the judicial officer take cognizance of and 'decide causes'; *'the authority to hear and decide a legal controversy'*, 'the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;' 'the power to hear, determine and pronounce judgment on the issues before the Court'; 'the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect'; 'the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution'." (Mukherjee, Acting CJ, speaking for Full Bench of the Calcutta High Court in **Hirday Nath Roy v. Ramachandra Barna Sarma** ILR 68 Cal 138)

22. A Constitution Bench of this Court in **Ittavira Mathai v. Varkey Varkey**, (1964) 1 SCR 495 at 501-503, made a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court, and a decision where the Court acts without jurisdiction in the following terms:

"The first point raised by Paikedy for the appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be

doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh* [AIR (1935) PC 85] and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.”

23. It is in this sense of the term that “jurisdiction” has been used in Section 16 of the Act. Indeed, in *NTPC* (supra) at 460-461, a Division Bench of this Court, after setting out Sections 16 and 37 held:

“10. Now, the only question that remains to be decided in the present case is whether against the order of partial award an appeal is maintainable directly under Section 37 of the Act or not. We have considered the submissions of learned counsel for the appellant and after going through the counterclaim and the partial award, we are of the opinion that no question of jurisdiction arises in the matter so as to enable the appellant to file a direct appeal under Section 37 of the Act before the High Court. As already mentioned above, an appeal under sub-section (2) of Section 37 only lies if there is an order passed under Sections 16(2) and (3) of the Act. Sections 16(2) and (3) deal with the exercise of jurisdiction. The plea of jurisdiction was not taken by the appellant. It was taken by the respondent in order to meet

their counterclaim. But it was not in the context of the fact that the Tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in Counterclaims 1 to 10 had already been settled in the minutes of meeting dated 6-4-2000/7-4-2000 and it was recorded that no other issues were to be resolved in first and third contracts. Therefore, we fail to understand how the question of jurisdiction was involved in the matter. In fact it was in the context of the fact that the entire counterclaims have already been satisfied and settled in the meeting that it was concluded that no further issues remained to be settled. In this context, the counterclaims filed by the appellant were opposed. If any grievance was there, that should have been (*sic* raised) by the respondent and not by the appellant. It is only the finding of fact recorded by the Tribunal after considering the counterclaim vis-à-vis the minutes of meeting dated 6-4-2000/7-4-2000. Therefore, there was no question of jurisdiction involved in the matter so as to enable the appellant to approach the High Court directly.”

Interestingly, in a separate concurring judgment, P.K. Balasubramanyan, J., held:

“17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In *Pandurang Dhoni Chougule v. Maruti Hari Jadhav* [AIR 1996 SC 153 : (1996) 1 SCR 102] this Court observed that: (AIR p. 155, para 10)

“It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code.”

In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

18. The expression “jurisdiction” is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. *SBP & Co. v. Patel Engg. Ltd.* [(2005) 8 SCC 618] in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the award. Under sub-section (6), a party aggrieved by such an arbitral award may make an application for setting aside such arbitral award in accordance with Section 34. In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression “jurisdiction” and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim

by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.

19. In a case where a counterclaim is referred to and dealt with and a plea that the counterclaim does not survive in view of the settlement of disputes between the parties earlier arrived at is accepted, it could not be held to be a case of refusal to exercise jurisdiction by the Arbitral Tribunal. Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudications by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision. It would not be open to that party to take up the position that by refusing to go into the merits of his claim, the Arbitral Tribunal had upheld a plea that it does not have jurisdiction to entertain the claim and hence the award or order made by it, comes within the purview of Section 16(2) of the Act and consequently is appealable under Section 37(2) (a) of the Act.”

(at pages 463-464)

24. This judgment is determinative of the issue at hand and has our respectful concurrence. However, various judgments were referred to by learned senior advocate appearing on behalf of the respondent, in which “jurisdiction” in the wide sense was used. Thus, a jurisdictional error under Section 115 of the Code of Civil Procedure, 1908, dealing with revision petitions, was held to include questions which relate to *res judicata* and limitation. [See **Pandurang Dhoni Chougule v. Maruti Hari Jadhav** (1966) 1 SCR 102 at 107)].

25. This judgment was expressly referred to in the context of **Anisminic v. Foreign Compensation Commission**, (1969) 2 AC 147, delivered in England, which virtually made all “errors of law” “errors of jurisdiction” in the Administrative Law sphere and explained in **M.L. Sethi v. R.P. Kapur**, (1972) 2 SCC 427 at 435 as under:

“...The dicta of the majority of the House of Lords in the above case would show the extent to which “lack” and “excess” of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of “jurisdiction”. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as “basing their decision on a matter with which they have no right to deal”, “imposing an unwarranted condition” or “addressing themselves to a wrong question”. The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the court is prepared to allow. In the end it can only be a value judgment (see H.N.R. Wade, “Constitutional and Administrative Aspects of the *Anisminic* case”. *Law Quarterly Review*, Vol. 85,1969, p. 198). Why is it that a wrong decision on a question of limitation or *res judicata* was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or *res judicata* would oust the jurisdiction of the court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court...”

26. Likewise, in **Hari Prasad Mulshanker Trivedi v. V.B. Raju** (1974) 3 SCC 415 at 423-424, a Constitution Bench of this Court again referred to the blurring of lines between errors of law and errors of jurisdiction found in **Anisminic** (*supra*) as follows:

“Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in *the Anisminic case*, [(1967) 3 WLR 382] we do not

think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word “jurisdiction” is an expression which is used in a variety of senses and takes its colour from its context, (see per Diplock, J., at p. 394 in the *Anisminic case*). Whereas the “pure” theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. “At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic”. [S. A. Smith :

“Judicial Review of Administrative Action”, 2nd Edn., p. 98] And viewed from the aspect of public policy as reflected in the provisions of the 1950 and 1951 Acts, we do not think that a wrong decision on a question of ordinary residence for the purpose of entering a person's name in the electoral roll should be treated as a jurisdictional error which can be judicially reviewed either in a civil court or before an election tribunal.”

27. In **ITW Signode India Ltd. v. CCE** (2004) 3 SCC 48 at 74, a case strongly relied upon by Shri Sinha, this Court held in the context of limitation qua recovery of duty under Section 11A of the Central Excise Act, 1944 as follows:

“69. The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, wilful misstatement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of Rule 10 could have been issued.”

28. Given the context of Section 11A of the Central Excise Act, 1944, obviously the expression “jurisdiction” would mean something more than

merely being able to embark on the merits of a dispute. In a recent judgment under Section 9A of the Code of Civil Procedure, 1908 (as inserted by the State of Maharashtra), this Court in **Foreshore Coop. Housing Society Ltd. v. Praveen D. Desai** (2015) 6 SCC 412, referred to the expression “jurisdiction” occurring in Section 9A and held an earlier judgment of this Court to be *per incuriam*. Though the Constitution Bench judgment in **Ittavira** (supra) was mentioned by the Bench, referring to the argument of one of the counsel for the parties, in the concluding portion, this judgment is not referred to at all. In any case, the reasoning of the Court in that case was in the context of Section 9A which, when contrasted with Order XIV of the Code of Civil Procedure, 1908, made the Court accept the wider concept of “jurisdiction” as laid down in **Pandurang** (supra).

29. In our view, therefore, it is clear that the award dated 23<sup>rd</sup> July, 2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not relate to the arbitral tribunal’s own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.

30. The appeal is, accordingly, allowed and the impugned judgment is set aside. The Section 34 proceedings before the District Judge, Jagatsinghpur may now be decided. There shall, however, be no order as to costs.

Appeal allowed.

2018 (I) ILR - CUT- 21

**VINEET SARAN, C.J. & DR.B.R.SARANGI, J.**

W.P.(C) NO. 15128 OF 2016

**PRAFULLA KU. SAHOO**

.....Petitioner

.Vrs.

**STATE OF ORISSA & ORS.**

.....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – ART.226**

**Grant of Quarry lease – Petitioner became the highest bidder – He deposited the EMD and other relevant documents – Allegation of illegal quarry carried out on the area leased out to the petitioner – Petitioner was issued a show cause notice to which he gave a reply but his lease was cancelled for violation of terms of the lease deed – Hence this writ petition.**

**Authority failed to consider relevant documents and reply of the petitioner – Lease cancelled without application of mind – Held, impugned order is quashed – However, liberty granted to the Tahasildar to pass a fresh order after considering the reply given by the petitioner and other parties.** (Paras 7,8,9)

**Case Laws Referred to :-**

1. AIR 1974 SC 87 : Union of India -V- Mohan Lal Capoor
2. AIR 1981 SC 1915 : Uma Charan -V- State of Madhya Pradesh

For Petitioner : M/s. A.A.Dash, B.K.Parida, A.N.Pattanayak  
and M.Panda

For Opp. Parties : Mr. B.P.Pradhan, Addl.Govt.Adv.

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Date of Judgment: 11.12.2017

**JUDGMENT*****VINEET SARAN, J.***

The Government of Odisha, Steel and Mines Department, for grant of quarry lease for a period of five years, issued notification dated 16.09.2014 inviting applications from the intending applicants in prescribed Form-J. Pursuant thereto, the petitioner applied for grant of lease in respect of Laterite Stone Quarry at Bailo under Tahasildar, Gondia in the district of Dhenkanal. The petitioner, being the highest bidder, was called upon by the Tahasildar, Gondia, vide letter dated 21.03.2015, to deposit Rs.8,34,000/- as EMD in

shape of demand draft in favour of the competent authority, and also to submit mining plan as well as environmental clearance within thirty days. In compliance thereof, petitioner deposited Rs.8,34,000/- towards EMD before opposite party no.3, along with the mining plan for the period 2015-16 to 2019-20 and environmental clearance issued by the State Improvement Impact Assessment Authority (SEIAA), Odisha dated 22.06.2015. Consequently, Government of Odisha executed a lease deed on 07.10.2015 in respect of Khata No.25, Plot No.110 of Kissam-Patharachatan measuring Ac.6.50/Hec.2.63 for Bailo Laterite Stone Quarry in Mouza-Bailo, for the period 2015-16 to 2019-20. Pursuant to such execution of lease deed, Tahasildar, Gondia, vide letter dated 09.10.2015, directed Revenue Inspector, Pingua for demarcation of stone quarry. Despite compliance of all formalities, when the land for operation of the stone quarry was not handed over, the petitioner on 22.12.2015 submitted a representation before the Collector, Dhenkanal that even though he had deposited the bid amount, yet he was not informed as to the full bid amount to be deposited before the authority and, on the other hand, illegal quarry was being carried out by other person, in the site leased out in his favour. On 26.12.2015, the petitioner submitted another representation to Tahasildar, Gondia requesting to inform him of the quarterly deposit of the amount to obtain the stone quarry. Not only that, for illegal quarry which was being carried out on the area leased out to the petitioner, he also lodged an FIR. Without considering the grievance of the petitioner made in the representation, he was issued with a show-cause notice on 25.01.2016, to which he gave reply on 08.02.2016. But Tahasildar, Gondia, by order dated 27.04.2016, cancelled the lease of the petitioner for violation of terms of the lease deed, hence this application.

2. Mr. A.A. Das, learned counsel for the petitioner has contended that there was no violation of conditions of the lease deed made by the petitioner and the allegations in the show cause notice dated 25.01.2016 against the petitioner were duly replied on 08.02.2016, but the same has not been considered and the lease deed has been cancelled primarily on the ground that the petitioner had carried on quarrying activity in the neighboring plot, which was not leased out to the petitioner and that there was no proper boundary pillars and display sign boards put up by the petitioner. It is contended that said allegations are wrong, and though a specific reply to the same had been given by the petitioner, the same has not been considered and as such, the order passed by the Tahasildar, Gondia is totally illegal and has been passed without application of mind and thus, is liable to be quashed.

3. Per contra Mr. B.P. Pradhan, learned Addl. Government Advocate appearing for the opposite parties has stated that the impugned order has been passed after complying the principle of natural justice and after considering the reply of the petitioner and as such, the cancellation order does not call for interference.

4. We have heard Mr. A.A.Dash, learned counsel for the petitioner and Mr. B.P.Pradhan, learned Addl. Government Advocate appearing for the State and have perused the record. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties, this petition is disposed of at the stage of admission.

5. As it transpires, a notice was issued on 25.01.2016 by the Tahasildar, Gondia asking the petitioner to show-cause within seven days as to why (a) the mining area allotted in favour of the petitioner has no display board at the quarry site; (b) the mining area has no poll of demarcation; and (c) the petitioner is accessing the endowment land instead of the mining area which is leased out in his favour. In response to such notice, the petitioner submitted his reply, wherein he produced the photocopy of the display board constructed by him at the entry point of the quarry site and also produced all the relevant documents substantiating that he has not violated any of the terms and conditions of the lease deed. But, without considering his reply and also the documents filed by him, the Tahasildar, Gondia, vide order dated 27.04.2016, cancelled the lease deed executed in favour of the petitioner in respect of Bailo Laterite Stone Quarry, and prohibited the petitioner from entering into the said stone quarry. The order so passed on 27.04.2016 by the Tahasildar, Gondia, as would be evident, does not contain any reason whatsoever and is a cryptic one.

6. In *Union of India v. Mohan Lal Capoor*, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision so reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in *Uma Charan v. State of Madhya Pradesh*, AIR 1981 SC 1915.

7. Having gone through the records what we find is that the order does not discuss the contents of the reply and merely reiterates the averments made in the show cause notice and further merely proceeds to certify that the allegations in the show cause notice are correct. Merely stating that the reply to the show cause notice has been received would not be sufficient. The officer passing the order has to state as to what has been mentioned in the reply and consider the same and give a finding as to why it is not accepted. It is only thereafter that a proper order can be said to be passed, which has not been done in the present case. As such, we are of the opinion that the submission of learned counsel for the petitioner, to the extent that the order has been passed without considering the relevant documents and the reply of the petitioner, has force.

8. In view of the aforesaid facts, we are of the opinion that the impugned order dated 27.04.2016 passed by the Tahasildar, Gondia has been done so without dealing with the reply of the petitioner and has thus been passed without application of mind and as such, is liable to be quashed.

9. Accordingly, the writ petition stands allowed. The order dated 27.04.2016 passed by the Tahasildar, Gondia is quashed. The Tahasildar shall, however, be at liberty to pass a fresh order in accordance with law after considering the reply given by the petitioner and other parties, if there be any.

Writ petition allowed.

**2018 (I) ILR - CUT- 24**

**I.MAHANTY, J. & BISWAJIT MOHANTY, J.**

MATA NO. 64 OF 2010

**SUJATA MOHANTY**

.....Appellant

.Vrs.

**RUDRA CHARAN MOHANTY**

.....Respondent

**HINDU MARRIAGE ACT, 1955 – S.13**

**Divorce – Respondent-husband moved the Court on the ground of mental cruelty – Decree passed for dissolution of marriage – Hence this appeal.**

**In this case, most of the allegations made by the respondent-husband have not been corroborated and proved, but the learned Judge, Family Court accepted it without critically dissecting the same – Moreover his allegations that the appellant never coming on vacation and picking up quarrel have been directly contradicted by P.Ws. 2 and 3 in their cross-examination – On the other hand the evidence of the appellant-wife that she was taking care of the mother-in-law and used to serve food to family members and taking proper medicine as advised by the doctor and her abortion was an unfortunate incident beyond her control and it was not correct that she did not want to be a mother, have remained un-demolished – The respondent-husband has failed to discharge his burden to prove allegations of mental cruelty – Held, the impugned decree of divorce is set aside.**

(Paras 9,10,11)

**Case Laws Referred to**

1. AIR 1994 SC 710 : V.Bhagat -V- D.Bhagat
2. AIR 2002 SC 2582 : Praveen Mehta -V- Inderjit Mehta
3. (2007) 4 SCC 511 : Samar Ghose -V- Jaya Ghosh

For Appellant : M/s.Ramakanta Mohanty, D.K.Mohanty,  
S.Mohanty, D.Varadwaj, Ch.N.C.Dash,  
S.Mohanty, S.K.Mohanty, P.Jena & S.N.Biswal

For Respondent :Mr. Sidhartha Misra

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Date of Judgment: 12.01.2018

**JUDGMENT*****BISWAJIT MOHANTY, J.***

The respondent's application under Section 13 of the Hindu Marriage Act, 1955 praying for decree of divorce having been allowed by the learned Judge, Family Court, Cuttack in Civil Proceeding No.792 of 2004, the appellant has filed the present appeal.

**2.** The case of the respondent, who was the petitioner before the learned Judge, Family Court, Cuttack in the above noted Civil Proceeding is that he married the appellant on 30.01.2001 at the appellant's residence at Banei. Prior to marriage, the appellant was serving as an Assistant Teacher at Town

U.P. School in Banei. After solemnisation of marriage, both the parties lived as husband and wife and later, the appellant left for her service place at Banei. After some months of marriage, the appellant instigated the respondent to come and live at Banei permanently to which the respondent refused as he belonged to a joint family consisting of the elder brothers, their wives, children and his widow mother. During School Vacation and Holidays, the appellant-wife never came to Athagarh and on the eve of each such Vacation, the appellant-wife used to phone to respondent-husband to come to Banei. In such background, with much reluctance, the respondent used to go to Banei and when there he tried to bring her (appellant) to Athagarh, she (appellant) used to pick up quarrel and become furious. In one or two occasions when the appellant-wife came to reside Athagarh she never did any household work and never took care of her old widow mother-in-law. When the respondent suggested the appellant to do household work, the appellant quarrelled with family members of the respondent. Though the appellant was provided treatment for ovary infection, but she avoided taking any medicine as she was not willing to become a mother. The appellant visited Athagarh last in 2003 in Dasahara vacation when her mother-in-law was to undergo the eye operation at Cuttack. When the respondent-husband proposed the appellant-wife to attend her mother-in-law at Cuttack, she turned down the said proposal. Thus, since Dasahara festival 2003, the respondent had no sexual relationship with the appellant. Despite invitation by the sister and brother-in-law of the appellant at Banei to attend their daughter's marriage, she did not attend the marriage function held in July, 2004. She refused the invitation by saying that she would not go to Athagarh in her life time. On 12.12.2004, the old widow mother of the respondent went to Banei to bring her to Athagarh for X-mas vacation but the appellant misbehaved with her saying that she would not return to Athagarh as she was not dependant on them. On account of all these, the respondent along with his family members suffered enormous mental pain and agony. According to the appellant, all these constituted the mental cruelty inflicted on him by the appellant and as such, it was not possible to live with her and lead a conjugal life.

3. The appellant contested the case by filing the written statement. The case of the appellant is that marriage was solemnised on 30.1.2001 at Banei. Before marriage, it was duly informed to the respondent and his family members that she was serving as a teacher at Banei. It was initially decided that the respondent would make efforts to transfer the appellant to any school

in Athagarh so that she could live at Athagarh permanently. As per the demand of appellant, his uncle and brother and her father was forced to give items indicated in Schedule-A of the written statement. Though after marriage after staying for sometime at Athagarh, she returned to Banei, however, she was regularly going to Athagarh in each short/long vacation and sometime also by taking leave. She never compelled the respondent to stay with her at Banei. She never quarrelled with the respondent. She was frequently coming to Athagarh and taking all care of her mother-in-law and doing household work. She also used to serve foods to all the family members of the respondent whenever it was required and she was never adamant at any time. She was taking proper medicine as per the advice of the doctor and never neglected it. The case of the abortion was an unfortunate incident and beyond the control of the appellant. She never avoided any treatment and it is not correct to say that she did not want to be a mother. It is incorrect to say that the appellant last visited Athagarh in Dasahara in 2003. In fact she attended the eye operation of her mother-in-law and she never neglected her. She also denied the allegation that since Dasahara 2003, there has not been any sexual relationship between her and her husband. With regard to the marriage function of the niece of the respondent in July, 2004, her stand was during entire Summer Vacation of 2004, she stayed at Athagarh but after reopening of the school she could not get leave from the school for which she was not able to attend the above noted marriage function. The respondent's sister and brother-in-law had never come to Banei personally to invite her for the above noted marriage. She never instigated him nor humiliated him nor any of his family members. Her mother-in-law had never gone to Banei on 19.12.2004 to bring her to Athagarh. She has never threatned the respondent or his family members to prosecute them if the respondent failed to join her at Banei. She never misbehaved with respondent a caused mental agony to him.

4. In order to prove his case, the respondent examined three witnesses. He examined himself as P.W.1, his elder brother as P.W.2 and his neighbour, Manorama Pattnaik as P.W.3. The appellant examined two witnesses. She examined herself as O.P.W.1 and her brother as O.P.W.2. Though the respondent prayed for a decree for divorce being passed in his favour on the ground of cruelty and desertion, however, the learned court below clearly came to a finding that since the desertion by appellant as alleged by the respondent as per his evidence as P.W.1 starts from 2003 and since the civil proceeding was filed by the respondent on 22.12.2004, the intervening period

fell short of two years as required under Section 13 (i-b) of the Hindu Marriage Act, 1955. Further on analysis of evidence, the learned Judge, Family Court, Cuttack came to hold that the evidence adduced on behalf of the respondent clearly proves that he was subjected to cruelty by the appellant. On the basis of these findings, the civil proceeding was allowed and the marriage solemnised between the parties on 30.1.2001 was directed to be dissolved by a decree of divorce. The respondent was further directed to pay Rs.1.00 lakh as permanent alimony to the appellant within a period of three months from the date of the judgment/order.

**5.** Learned counsel for the appellant assailed the judgment by submitting that such judgment has been pronounced by making a wrong approach in analysing the evidence on record. Instead of analysing the evidence of the respondent for finding out as to whether he has discharged the burden of proving mental cruelty as alleged by him, the learned court below has mainly analysed the evidence of the appellant as if burden was on the appellant to prove the case of the respondent. According to him, the learned court below ought to have scrutinised the pleadings and evidence of respondent to find out whether he has been able to make out a case of mental cruelty against the appellant or not. The learned court below did not do this in the present case. Secondly, he submitted that the findings of the learned court below that the respondent was deprived of sexual relationship is based on no material. Thirdly, he submitted that the plea of cruelty has not at all been established from the evidence on record. Thus, the learned court below has gone wrong in allowing the civil proceeding in favour of the respondent and granting him a decree of divorce. According to him, there is no evidence on record to show that the appellant had by her own conduct inflicted mental cruelty on the respondent. Lastly, he submitted that the evidence of appellant has not been considered by the learned court below in proper prospective. For all these, he contended that the impugned judgment, order and decree resulting in dissolution of marriage be set aside and resultantly Civil Proceeding No.792 of 2004 filed by the respondent for divorce be dismissed.

**6.** Mr. Sidhartha Misra, learned counsel on behalf of the respondent stoutly defended the impugned judgment and submitted that the learned Judge, Family Court, Cuttack has committed no illegality in passing the impugned judgment which has resulted in dissolution of marriage between the respondent and the husband as the respondent has succeeded in proving mental cruelty inflicted by the appellant on her husband. He further submitted that pursuant to order passed by this Court on 10.9.2014, the appellenat was

handed over Bank Draft No.059403 dated 21.10.2014 for an amount of Rs.1.00 lakh and this Court permitted the appellant to get the same encashed. He also submitted that pursuant to order dated 6.5.2016, the respondent had tendered a Bank Draft No.866231 dated 8.7.2016 drawn on State Bank of India, Athagarh Branch for an amount of Rs.2.00 lakh in the Court and the said draft has been kept in sealed cover in the custody of the Registrar (Judicial) of this Court as per the order dated 11.7.2016.

7. Before proceeding further, we have to understand the concept of mental cruelty. In the case of *V.Bhagat v. D.Bhagat* (AIR 1994 SC 710), the Supreme Court has held that mental cruelty can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it impossible for that party to live with the other. To put it differently, the mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further held that while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinised in the context in which they are made.

In *Praveen Mehta v. Inderjit Mehta* (AIR 2002 SC 2582), it has been observed that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The interference has to be drawn from the attending facts and circumstances taken cumulatively.

In *Samar Ghose v. Jaya Ghosh* (2007) 4 SCC 511, the Supreme Court has made it clear that the concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational,

family and cultural background, financial position, social status, customs, traditions, religious belief, human values, and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc.etc. What may be mental cruelty now may not remain mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

**8.** In such background, let us scrutinise the evidence on record. The respondent as P.W.1 has reiterated most of his contentions in examination-in-chief and at Para 21 of his cross-examination. However, in Para-21, he has admitted that after the marriage and till filing of civil proceeding while the appellant had come to Athagarh for 3-4 times, he has visited her for 20-25 times. As indicated earlier, the respondent filed C.P. No.792 of 2004 before the learned Judge, Family Court, Cuttack on 22.12.2014. So, this shows that till filing of the case, he was in visiting terms with her. In such background, his evidence to the effect that since December, 2003, he had no sexual relationship with the appellant is not believable. Further, neither in the pleadings of respondent nor in his evidence, there is anything to show that the appellant had refused to have sexual relationship despite the request of the respondent. The testimony of respondent is only to the effect that he has no sexual relationship with the appellant since 2003 Dasahara vacation and not that the appellant has refused his request for sexual union since 2003. If it had come out in the evidence that the appellant had refused the sexual advance of respondent certainly it would have constituted a grave instance of mental cruelty but the same is not the case here. Further in their evidence, the respondent, P.W.2 and P.W.3 have stated that the appellant never used to come in vacations to Athagarh and he had to go to Banei and when he tried to bring her to Athagarh, she picked up quarrel. However, P.W.2 who happens to be the elder brother of the respondent in his cross-examination at para-16 has candidly admitted that the appellant was coming to her in-laws house on holidays and with regard to the appellant picking up quarrel at Banei, none from Banei has been examined by the respondent to corroborate his version. Though both the brothers, namely, respondent, P.W.2 and P.W.3 have stated that the appellant has visited their house at Athagarh only 2-3 occasions, however, such a thing cannot be believed as P.W.2 in his cross-examination

has admitted that the appellant was coming to their house in holidays. Furthermore, P.W.1 in his cross-examination has stated that he had come to Cuttack with the appellant six times for her treatment. In such background, the earlier testimony of the respondent as well as the elder brother (P.W.2) that the appellant visited Athagarh only 2-3 times after her marriage cannot be believed. It cannot be believed that the appellant had accompanied the respondent to Cuttack for her treatment six times without visiting their matrimonial home at Athagarh. Though the respondent has stated in his examination-in-chief that the appellant never thinks of his old mother-in-law nor does any household work on the occasions she visited Athagarh; P.W.2, the elder brother of the respondent except making general statement that the appellant never discharged his duty of a house wife has not corroborated the above testimony of the respondent in material particulars. With regard to pleading of the respondent that the appellant never served foods to the family members and threw away cooking apparatus at Athagarh, the same cannot be believed as the same has not been testified by the appellant nor corroborated by P.W.2. The only statement that has been made by P.W.2 as indicated earlier is a general statement that the appellant has never discharged the duty of a house wife at Athagarh. Similarly, the testimony of the respondent that the appellant knowingly avoided to take medicine as she did not want to become mother cannot be accepted as the same has not been corroborated either by P.W.2 or P.W.3, who claims to be a close family members of the appellant and respondent. With regard to testimony of the respondent that the appellant did not come to attend the eye operation of mother-in-law at Cuttack such testimony on the respondent is vague as neither the date of such operation has been proved nor the doctor conducting operation has been examined. Further, the testimony of the respondent in this regard that she has attended the eye operation of the mother-in-law at Cuttack has remained undemolished. Though the respondent in his examination-in-chief has stated that his sister and brother had been to Athagarh to invite the appellant to attend the marriage of the niece of respondent which was scheduled to be held during July, 2004 and that the appellant had refused to attend the same saying that she would never go to Athagarh in her life time, however, in the cross-examination the respondent has candidly admitted that his sister and brother-in-law are not going to prove these aspect of the matter. Thus, this throws a cloud on the version of the respondent. Further, while in examination-in-chief at para-14, the respondent as P.W.1 testified that while on 19.12.2004 his old mother had gone to Banei to bring appellant to Athagarh on the eve of ensured X-mas vacation and she was ill-treated by

appellant, however, in cross-examination the respondent has stated that on 19.12.2004 he along with his mother had gone to Banei to bring the appellant. Strangely, mother of the respondent has not been examined in this case to throw light on this aspect of evidence. Moreover, testimony in this regard of appellant relating to non-visit of her mother-in-law on 19.12.2004 remains undemolished. Though P.W.1 in his testimony has stated that during the stay the appellant at Athagarh when he suggested to do the household work she became violent and picked up quarrel with the family members, however, P.W.3 who claims to be the close to the family of the respondent in her cross-examination has admitted that she has never seen the parties quarreling with each other. It may be noted here that P.W.3 is a neighbour of the respondent at Athagarh.

9. All these analysis would show that most of the allegations made by the respondent as discussed above have not been corroborated and proved. Rather, his allegations relating to appellant never coming on vacation and picking up quarrel at Athagarh having been directly contradicted by P.Ws.2 and 3 respectively in their cross-examination. Only the evidence led by the respondent that the appellant instigated him to come to Banei has been corroborated by P.Ws.2 and 3. But denial of such instigation by the appellant in her evidence has not been demolished in her cross-examination. Similarly, the evidence of O.P.W.2 that the appellant never compelled the respondent to stay at Banei has remained un-demolished in the cross-examination. Though in her written statement the appellant has stated that she was staying at Athagarh, however, in her testimony she has explained that after marriage, they lived happily together as husband and wife at Athagrh and after one month she had to return to Banei. Obviously she was to return to Banei to join her services. Further, the evidence of appellant that she was taking the care of mother-in-law while visiting Athagarh and used to serve foods of the family members and was taking proper medicine as advised by the doctor have remained un-demolished in the cross-examination. In her testimony, she has clearly stated that the case of her abortion was an unfortunate incident beyond her control and it was not correct that she did not want to be a mother. For all these reasons, particularly since the respondent has not been able to prove majority of the allegations made by him with cogent evidence, we are inclined to hold that the allegations of mental cruelty have not been proved. There is nothing to show that the conduct of the appellant was of such intensity and gravity so as to bring it within the parameters on mental cruelty.

**10.** Further, in our view the learned court below while analysing the evidence has made a wrong approach by mainly the analysing the evidence of appellant as if the burden of proving mental cruelty was on the appellant. The learned Judge, Family Court, Cuttack ought to have analysed the evidence of respondent in details as it was he who has moved the court with a prayer for decree of divorce. So the burden was clearly on the respondent to prove his case. A perusal of the judgment under challenge reveals that the allegations made by the respondent have been accepted at para-6 of the impugned judgment without critically dissecting the evidence led by him. On account of these, the learned court below has lost sight of the impact of testimony of P.W.2 where he has clearly admitted that the appellant was coming to her in-laws house on holidays and the testimony of P.W.3, a neighbour of respondent who has stated that she has never seen the parties quarrelling with each other. The learned court below has also lost sight of many contradictions as discussed earlier in the evidence of P.Ws.1,2 and 3. Thus, on a cumulative analysis of the entire evidence it is clear that the mental cruelty that is required to be proved by the respondent was never proved by him.

**11.** Keeping in mind such discussions, we are of the considered opinion that the learned court below has gone wrong in allowing the prayer of the respondent for dissolution of marriage. Accordingly, we allow the present appeal and set aside the impugned judgment and order dated 6.8.2010 passed by the learned Judge, Family Court, Cuttack in C.P. No.792 of 2004 and dismiss the said Civil Proceeding.

**12.** Since we are allowing the appeal, we direct the Registrar (Judicial) of this Court to return the Bank Draft No.866231 dated 8.7.2016 drawn on State Bank of India, Athagarh Branch for an amount of Rs.2.00 lakhs to the respondent.

Appeal allowed.

2018 (I) ILR - CUT- 34

**INDRAJIT MAHANTY, J. & K.R.MOHAPATRA, J.**WRIT APPEAL NO. 372 OF 2016  
WITH BATCH**AVIMANYU NAYAK**

.....Appellant

.Vrs.

**STATE OF ODISHA & ORS.**

.....Respondents

**ADMISSION – B.Ed. course – Appellants are untrained graduates appointed against Trained Graduate (TGT) posts in different Non-Government Aided Schools securing less than 50% of marks in graduation – Advertisement issued for admission wherein clause 3.12 of Information Brochure provides eligibility criteria for in-service candidates fixing 50% of marks for general in-service candidates and 45% of marks for reserved category in-service candidates in Bachelor’s Degree and/or in Master’s Degree – Action challenged, but the writ Court refused relief – Hence the appeals.**

**The in-service candidates stand in a different footing than that of the fresh candidates – Their legitimate expectation of being sponsored for B.Ed. training as in-service candidates cannot be taken away on the basis of the resolution of the Government passed much after their appointment against TGT posts – Held, clause 3.12 of the Information Brochure for admission of in-service candidates to Teachers Training Course i.e. B.Ed. Course restricting minimum qualifying marks in graduation is not applicable to the in-service candidates and such restriction shall not be imposed for the in-service candidates for taking admission to B.Ed. Course.**

(Paras 13,14)

**Case Laws Referred to**

1. 2009 (Sup-II) OLR 412 : Anil Kumar Das and others -v- State of Odisha and others.
2. 108(2009) CLT 44 : Prafulla Behera Vs. Commissioner-cum-Secretary, School and Mass Education Department and Ors.

For Appellant : M/s. Dillip Ku. Mohapatra, A.Sahoo &amp; N.Nayak

For Respondents : Standing Counsel (S&ME)  
Mr. Siddhartha Sankar Mohapatra

Date of Judgment: 09.01.2018

**JUDGMENT**

**K.R. MOHAPATRA, J.**

These intra-Court appeals have been filed assailing the common order dated 16.07.2016 (Annexure-1) passed by learned Single Judge in W.P.(C) No.9003 of 2015 and similar other writ applications heard and disposed of analogously.

For the sake of convenience of discussion and adjudication, we take up Writ Appeal No.372 of 2016 arising out of W.P.(C) No. 9003 of 2015 as the lead case and dispose of these appeals by a common judgment.

2. The appellant in the aforesaid writ appeal is an Assistant Teacher in Sankata Tarini High School, Melan in the district of Keonjhar. The appellant is an untrained graduate and has been appointed against a trained graduate post. Teachers similarly placed as that of the appellant undertake B.Ed. course as in-service candidates for their substantive appointment and approval of their services as a Trained Graduate Teacher. Each year, the Directorate of Teacher Education and S.C.E.R.T., Odisha, Bhubaneswar publishes advertisement inviting applications from the candidates (both direct and in-service) seeking admission to different teachers training courses including B.Ed. Likewise, an advertisement was published by the Director of T.E. & S.C.E.R.T., Odisha, Bhubaneswar-opposite party No.3 in local daily newspaper "Sambad" on 23.04.2015 inviting applications for admissions into B.Ed. course for the academic Session 2015-2017.

Clause-3 of the Information Brochure to the said advertisement deals with eligibility criteria for the candidates seeking admission to the B.Ed. course. Clause-3.12 deals with eligibility criteria for in-service candidates. The petitioner had filed the writ petition assailing the said Clause-3.12 of the Information Brochure, which reads as follows:-

**“ 3.12 Inservice Candidates:****There will be no Entrance Test for In-service Candidates.****Eligibility:**

- General candidates having 50% marks and reserved category i.e. SC,ST,OBC/SEBC, PH having 45% marks in aggregate, either in Bachelor's Degree and /or in the Master's Degree or any other qualification equivalent thereto are eligible to apply.

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It was the case of the petitioner before the writ Court that the requirement of minimum 50% of marks in graduation or Master's degree for taking admission in B.Ed. course for general in-service candidates and minimum 45% of marks for the reserved category in-service candidates is not only illegal, but also contrary to the guidelines issued by N.C.E.R.T. Requirement of minimum percentage of marks as stated above is also arbitrary, unreasonable and violative of Article 14 of the Constitution of India. The same cannot be made applicable to the in-service candidates. Such a restriction, if insisted upon, many of the in-service candidates like that of the appellant cannot take admission in the teachers' training course and will face termination in service. There is also no object sought to be achieved by imposing such a restriction.

3. It is contended in the writ petition that in previous years, no such condition (either for direct or for in-service candidates) was imposed for taking admission into the B.Ed. course. Further, the condition of minimum percentage of marks for admission into the B. Ed. course for the in-service candidates is illegal as there is no such stipulation in the statutory rules for appointment to the post of Trained Graduate Teachers. Hence, it was prayed to quash the Clause-3.12 of the Information Brochure for the Session 2015-2017 issued by the TE & SCERT, Odisha, Bhubaneswar and for a declaration not to make it applicable to the in-service candidates.

4. Counter affidavit was filed by the Director of TE & SCERT (opposite party No.3) stating *inter alia* that the guidelines fixed by National Council for Teacher Education (NCTE) is being followed for the purpose of admission into different teachers training courses. Section 32 of National Council for Teachers Education Act, 1993 (for short 'the Act, 1993'), confers power on NCTE to make regulations. Section-32 (2) (d)(ii) of the Act, 1993 empowers the Council to make regulations with regard to the norms, guidelines and standard in respect of specific category of courses or training in teachers education. Section-12 (e) of Act, 1993, which deals with functions of NCTE, reads as follows:-

**“12. FUNCTIONS OF THE COUNCIL** It shall be the duty of the Council to take all such steps as it may think fit for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act, the Council may –

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(e) lay down norms for any specified category of courses or trainings in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum;

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Accordingly, in exercise of power conferred under Section 32(2) (d) (ii) read with Section-12 (e) of the Act, 1993, NCTE, vide its notification dated 28.11.2014 framed ‘National Council for Teachers Education (Recognition Norms and Procedure) Regulations, 2014’ (for short, “Regulations, 2014”) in supersession of the earlier Regulations of 2009 of NCTE. Clause-3.2 of Appendix-4 of the Regulations, 2014 provides as follows:-

**“3.2 Eligibility**

(a) Candidates with at least fifty percent marks either in the Bachelor’s Degree and/or in the Master’s Degree in Sciences/Social Sciences/Humanity, Bachelor’s in Engineering or Technology with specialization in Science and Mathematics with 55% marks or any other qualification equivalent thereto, are eligible for admission to the programme.

(b) The reservation and relaxation for SC/ST/OBC/PWD and other categories shall be as per the rules of the Central Government/State Government, whichever is applicable.”

Clause-3.12 of the Information Brochure is in consonance with the Act, 1993 and Regulations made thereunder. As such, stipulation of such an eligibility criteria in the Information Brochure is neither legal nor arbitrary as alleged by the Petitioner.

5. Rejoinder affidavit was filed by the petitioner, wherein, it was contended that National Council for Teachers Education (Recognition Norms and Procedure) Regulations, 2009, came into force with effect from 13.05.2009, i.e., from the date of publication in the official gazette. As per Appendix-4 of the said Regulations, eligibility criteria for admission into the B.Ed. course was 50% marks in graduation for the general candidates. As such, the eligibility criterion for admission into B.Ed. course is one and the same in Regulations, 2014. But, the same was not insisted upon for the in-service candidates in previous years as the said eligibility criteria was meant for the fresh candidates only and not for the in-service candidates. There is no specific provision for in-service candidates in 2014 Regulations. Such an

eligibility criteria was restricted to fresh candidates consciously with certain objective and it can never be made applicable to the in-service candidates, as the untrained in-service candidates require B.Ed. qualification to be substantively appointed to the post of Trained Graduate Teacher against which they are appointed. It is further contended that since there was no reservation for in-service candidates to take admission in B.Ed. course, the same was a subject matter of challenge before this Court in the case of *Anil Kumar Das and others –v- State of Odisha and others*, reported in 2009 (Sup-II) OLR 412, wherein, this Court held that in-service teachers, who have been appointed against trained graduate post, are required to undergo B.Ed. training as in-service candidates for the purpose of holding the post substantively and for approval of their appointment.

In the paragraph–8 of *Anil Kumar Das (supra)*, this Court has held as follows:

“8. Applying the above principles & the ratio laid down by the Apex Court, to the facts of the present case, it is amply clear that the decision of the Government in withdrawing reservation of seats for in-service candidates in B.Ed. course for the session 2009-2010 has not only been done in a casual manner but on judicial review, it is found that the same is arbitrary & unreasonable as well as contrary to the enforceable legitimate expectation of the Petitioners. There is also absence of any overriding public interest for which such deviation of the policy could have been made. The principles of natural justice has been manifestly violated as the change in the policy was made without giving an opportunity to the affected persons & the same was resulted in unfairness which is not in conformity with article 14 of the constitution.”

Accordingly, this Court, realizing the exigency of undertaking B.Ed. training course by the in-service candidates, directed for making reservation for the in-service candidates, as was being done in previous years. Further, Regulation 12 of the NCTE Regulations, 2014, empowers the State Government to make necessary relaxation in the Clause in case of hardship.

6. The Regional Director, Eastern Regional Committee, NCTE (opposite No.6) also filed its counter affidavit contending the assertion of petitioner with regard to the eligibility criteria prescribed in the Information Brochure, at Clause-3.12, is not sustainable in the eyes of law as the same has been incorporated in terms of Clauses-3.2 and 3.3 under Appendix-4 of NCTE Regulations, 2014. The provisions of Act, 1993 are intended to improve the standards of teachers' education throughout the nation and

authorities under the Act have been given exclusive responsibility to coordinate and determine the standard of teachers' education. As such, opposite party No.6 prayed for dismissal of the writ petition. The petitioner also filed a rejoinder affidavit to the counter filed by opposite party No.6.

7. While issuing notice in the matter, this Court, vide order dated 05.05.2015, passed in Misc. Case No. 8526 of 2015, directed the opposite parties to entertain the application form submitted by the in-service candidates having one year experience pursuant to the Information Brochure issued for admission into B.Ed. course for the Session 2015-17 without putting a restriction for fixation of cut off marks relating to the eligibility as 50% marks by general category candidates and 45% marks for reserved category candidates. However, this Court, finally disposed of this writ petition along with similar other matters, such as W.P.(C) No. 9003, 8546, 8831, 9000, 8920 and 8934 of 2015, vide order dated 16.07.2016, with the following orders:

All the writ petitions are analogous in nature inasmuch as the issues involved in all the petitions are same. They are heard together and disposed of by this common order.

The petitioners are teachers. They assail the notification issued by the Director, T.E. & S.C.E.R.T., Orissa, Bhubaneswar, opposite party no. 3 for admission into in-service B.Ed. course for the academic session 2015-2017, vide Annexure-2, and action of the opposite parties in fixing the cut off mark.

The course is for two years. In the meantime one year has elapsed. No mandamus can be issued to the opposite parties to admit the students after lapse of one year, when the course is for two years.

At this juncture, learned counsel for the petitioners submits that the cases may be heard on merits. But then in Loknath Padhan-Vrs.-Birendra Kumar Sahu, AIR 1974 SC 505, the apex Court in no uncertain words held that:-

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It is a well settled practice recognized and followed in India as well as England that a Court should not undertake to decide an issue, unless it is a living issue between the parties. If an issue is purely academic in that its decision is one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it.

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It would be clearly futile and meaningless for the Court to decide an academic question, the answer to which would not affect the position of one party or the other. The Court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the Court would properly decline to do so.

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Accordingly, all the petitions are dismissed.”

8. Learned counsel for the appellant, assailing the impugned order, contended that the issue involved in this case has a far reaching consequence and wide ramification and the writ Court ought to have decided the said issue on merit instead of bringing an abrupt end to the writ petition holding that no mandamus could be issued to the opposite parties to admit the students after lapse of one year of commencement of the course, when the course was for 2 years. It also, relying upon the decision in the case of **Lokanath Padhan Vs. Birendra Kumar Sahu**, reported in AIR 1974 SC 505, came to a conclusion that the entertainment of the writ petition would be futile and meaningless. Accordingly, the impugned order in dismissing the writ petitions is *per se* illegal. Reiterating the contentions raised before the writ Court, learned counsel for the appellant submitted that minimum eligibility criteria provided for admission into the B.Ed. course in NCTE Regulations, 2009 was made applicable for fresh candidates only, considering the fact that such a condition cannot be made applicable to the in-service candidates as there is no prescription of minimum qualifying marks in graduation for the candidates to be appointed as TG Teachers in Government as well as aided Schools. Accordingly, no such restriction was provided in the Information Brochures of previous years. Hence, such a condition in the Information Brochure for the session 2015-17 is not only illegal but also the same is arbitrary and unsustainable being violative of Article 14 of the Constitution of India. Consequent upon such a restriction, the untrained candidates who have already been appointed in TG Teacher post securing less than 50% marks in graduation and have continued for substantial period would face termination, as approval of a teacher to a TG Teacher post requires B.Ed. qualification. Moreover, in view of restrictions imposed, a large number of seats reserved for in-service candidates are lying vacant in past two years. The in-service candidates stand in a complete different footing than that of the fresh candidates. As such, both the categories cannot be equated. Further,

prescription of minimum qualifying mark in graduation for admission into the B.Ed. course would frustrate the purpose of reservation for in-service candidates in B.Ed. course. Accordingly, he prayed for setting aside of the impugned order passed by the writ Court and prayed for striking down the provision of Clause-3.12 of the Information Brochure for admission to Teachers' Training Course and also prayed for a direction to the NCTE-respondent No.4 not to impose such a condition in respect of the in-service candidates.

9. Respective counsel for the respondents reiterated the plea they have taken before the writ Court. They also submitted that since the academic sessions is already over no fruitful purpose would be served by entertaining the appeal and allowing prayer made therein.

10. We have heard learned counsel for the parties and gone through the case record as well as the citations made at the bar.

Upon hearing on learned counsel for the parties and on scrutiny of the record, we are of the opinion that the issue involved in the writ petition as well as in this appeal has a far reaching consequence and wide ramification and is essential to be answered as it involves service career of untrained in-service candidates seeking admission into the B.Ed. course. They are required to acquire B.Ed. qualification for their substantive appointment against TGT post, failing which they would lose their job. Thus, the issue requires adjudication and the writ petition could not have been dismissed relying upon *Loknath Padhan (supra)* observing that the adjudication of the issue will be only academic. The case law supports the case of the appellant, as it involves a controversy involving the right of the appellant to undertake B.Ed. course. Learned Single Judge has not taken this material aspect into consideration while disposing of the writ petition.

11. Since, we have heard learned counsel for the parties at length and devoted a considerable time in hearing the matter on merit, we feel it proper to answer the issue of validity of Clause-3.12 of the Information Brochure fixing minimum eligibility criteria for the in-service candidates for taking admission into B.Ed. course by ourselves, instead of reemitting the matter to learned Single Judge for adjudication.

In exercise of power conferred by Section 32 (2)(d)(ii) of the Act, 1993, National Council for Teachers Education (Recognition, Norms and Procedure) Regulations, 2009 was framed and published in the official

gazette on 31<sup>st</sup> August, 2009. The Regulations were made applicable to all matters relating to teachers' education programme covering norms and standards and procedure for recognition of institutions, commencement of new programme or addition to sanctioned intake in existing programmes and other matters incidental thereto.

Appendix-4 of Regulations 2009, provides the norms and standard for Bachelor of Education programme, namely, Bachelor of Education (B.Ed. degree) Clause-3.2 deals with eligibility candidates.

Prior to publication of the Regulations, 2009, there was reservation of seats for in-service candidates in B.Ed. course for the previous year, such as, 2006-07, 2007-08 and 2008-09. Accordingly, untrained teachers, who have been appointed by the management of various educational institutions against the trained graduate post, were being sponsored to acquire B.Ed. qualification for their approval and substantive appointment in those posts. But in the Regulations of 2009 there being no provision for reservation for in-service candidates in B.Ed. course they had to compete with fresh candidates for taking admission in B.Ed. course. Assailing the same, Anil Kumar Das and twelve others, who were untrained teachers appointed against trained graduate posts, moved this Court under Article 226 of Constitution of India. This Court, taking into consideration various aspects, directed that there should be reservation for the in-service candidates in B.Ed. course, relevant portion of which has been quoted above.

The eligibility criteria for the candidates seeking admission to B.Ed. course are one and the same in both 2009 and 2014 Regulations. Further, neither the Regulations, 2009, nor subsequent Regulations, 2014 made any special provision for in-service candidates. However, the eligibility criteria of minimum 50% marks for the general candidates and 45% marks for the reserved category candidates for admission into B.Ed. course was not being insisted upon for the in-service candidates prior to 2015-17 session. While the matter stood thus, Regulations, 2014, came into force from the date of publication in the official gazette, i.e., on 28<sup>th</sup> November, 2014, incorporating *pari materia* provision with regard to minimum eligibility criteria for taking admission into the B.Ed. course. Basing upon the eligibility criteria provided in the Regulations, 2014, Information Brochure, provided along with admission form, contained the minimum eligibility criteria for in-service candidates at Clause-3.12, which is quoted hereinabove. The same has been the subject matter of challenge.

12. Respondent No.3-TE and SCERT, in its counter affidavit filed in the writ petition, stated that the requirement of minimum 50% marks in graduation for the general candidates and 45% marks for reserved category was made in compliance of Clause-3.2 of Appendix-4 to the 2014 Regulations. The eligibility criteria for taking admission into B.Ed. course in Regulations, 2009 being one and the same in the Regulations, 2014, imposition of such a restriction for the in-service candidates, who stand in a different footing from the fresh candidates to take admission into B.Ed. course, appears to be outcome of total non-application of mind and colourable exercise of power, inasmuch as the same does not stand to the scrutiny. Further, as held in *Anil Kumar Das (supra)*, the in-service candidates have the legitimate expectation to take admission into the B.Ed. course, as they form a separate class altogether than that of fresh candidates.

This Court in *Prafulla Behera Vs. Commissioner-cum-Secretary, School and Mass Education Department and Ors., reported in 108(2009) CLT 44* held as under:

“14. From the above analysis, it is clear that untrained graduate teachers teaching Sanskrit, Hindi or graduate P.E.Ts do not require B.Ed. qualification to hold such posts substantively, whereas untrained teachers, who are holding the post of trained graduate teachers (T.G.Ts) either in Science or in Arts subjects as per the sanctioned yardstick are required to have B.Ed. training to continue in such posts as well as to receive grant-in-aid. The object to be achieved by allowing in-service candidates to take admission to B.Ed. course is, therefore, clear that teachers, who are holding such T.G.T posts, as per the sanctioned yardstick on regular basis, are to be given admission to B.Ed. course as in-service candidates in order to facilitate them for continuing in such posts and making them eligible to receive grant-in-aid. There is no requirement of B.Ed. training for Classical teachers, Hindi teachers and P.E.Ts, who are graduates, for continuing in their respective posts. As already discussed, such training is also not necessary for the aforesaid classes of teachers for being promoted to O.S.E.S. cadre as they are not in Government service.

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16. Under Article 14 of the Constitution of India, equals cannot be treated as un-equals. Similarly, as in the instant case, un-equals cannot be treated as equals. No acceptable reason has also been brought to the notice of this Court as to for what purpose, the Classical teachers, Hindi teachers and P.E.Ts were included within the definition of in-service candidates in the Information Brochure of 2008-09, when such teachers were not included in

the Information Brochure for the year 2007-08. ( See (2008) 2 SCC (L&S) 1000).”  
(*emphasis supplied*)

13. In course of hearing, learned counsel for the appellant produced a copy of Government of Odisha Resolution No.5793/SME dated 31.03.2017 (Department of School and Mass Education), obtained by the appellant from the Directorate of TE and SCERT, Odisha, Bhubaneswar under the provisions of Right to Information Act. Said Government Resolution relates to the ‘Training Policy for In-service Untrained Elementary and Secondary School Teachers/SS in the State’ The object behind such resolution is as follows:-

“1. State’s education system requires to be effective in terms of enhanced learning outcomes, professionally qualified and committed teachers in adequate numbers. The State has been committed to ensure that students have the right to access to competent teachers. In pursuit of this commitment, due to a number of compelling circumstances, teachers, including Shiksha Sahayaks (SSs), without pre-service training qualifications (D.El.Ed. for primary level, B.Ed. for upper primary level, and B.Ed./B.H.Ed. for secondary level) were engaged. Such professionally un-trained teachers were inducted into the system as SSs and teachers primarily due to : (i) non-availability of trained teachers belonging to the SC/ST/PH category; ii) compulsion to comply with the RTE 2009 mandated teachers – pupil ratio (1:35) for upper primary schools for which permission of NCTE (Academic Authority declared under RTE Act) was obtained by the State Government; (iii) dearth of trained teachers with Science and Mathematics background and (iv) need for filling up of vacant teacher posts in tribal dominated district inflicted with several educational disadvantages and deprivations. Moreover, the training programme through distance mode taken up by the State Government was not able to provide training to such category of teachers/SSs.

2. In view of this the urgency of making provision for “in-service training” for such professionally untrained teachers has assumed critical importance on account of : first, to comply to RTE (2009) mandated qualifications, the deadline for which was April 01, 2015; second, to ensure that students have access to quality teachers and third, the direction of the Hon’ble High Court of Odisha to draw up a concrete and comprehensive training policy for the untrained teachers who have been pressed into service under compelling circumstances. Keeping these necessities in view after careful consideration the State Government have decided to formulate a training policy to provide training facilities to such teachers/SSs in the regular B.Ed./B.H.Ed. course within a specific time-frame in the following

manner. Colleges of Teacher Education and Institutes of Advanced Studies in Education in the State shall be enhanced to 25% w.e.f., the academic session, i.e., 2017-2018. Out of the 25% reserved seats, 20% of seats shall be earmarked for untrained Graduate teachers/SSs working in upper primary schools and the remaining 5% seats shall be kept reserved for untrained teachers posted against sanctioned Trained Graduate posts in recognized Govt. Aided/Block Grant Secondary Schools under the Schools and Mass Education Department.”

*(emphasis supplied)*

However, the eligibility of the candidates to be enrolled for professional training has been fixed as follows:-

### **“3. Eligibility**

The untrained qualified teachers who have been appointed by the competent authority as per rule and having NCTE prescribed percentage of marks in their last qualifying examinations (50%/45% for unreserved/reserved category candidates) are eligible to be enrolled for professional training.”

On a close reading of the Resolution, it appears that the eligibility criteria provided in the Resolution is diametrically opposite to the object sought to be achieved by such Resolution. The Policy making Body has not taken into consideration the case of the untrained teachers who have been holding TGT posts in different Non-government Aided Schools. Their legitimate expectation of being sponsored for B.Ed. training as in-service candidates cannot be taken away casually on the basis of a resolution of the Government which has been passed much later to their appointment against TGT posts (refer to Anil Kumar Das supra). Thus, the Government Resolution dated 31.03.2017 (supra) cannot be made applicable to the untrained teachers who have been appointed against TGT posts as per the sanctioned yardstick on regular basis.

Further, an educational institution for being eligible to get recognition under Section-6 of the Orissa Education Act, 1969 (for short ‘the Act,1969’) has to appoint qualified teachers and non-teaching staff in accordance with the prescribed procedure and yardstick as provided under Section 6-A (g) of the Act, 1969. Rule-16 of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of Staff of Aided Educational Institutions) Rules, 1974 makes provision for probation and confirmation of teachers. Rule-16(2) of the said Rules provides that no teacher who has not undergone the training prescribed for the post shall hold the post substantively. It further makes provision for untrained teachers to

undergo training as in-service candidates. The qualification for Trained Graduate Teachers has been provided in Clause- (2) of Schedule-1 of Orissa Selection Board (Education Circle) Recruitment Rules, 1994. It provides that Trained Graduate Teachers in High Schools and Headmasters in Upper Primary Schools shall have Bachelor's Degree in Arts, Science, Commerce or an equivalent examination from a recognized University and successful completion of a course of training equivalent to Bachelor's of Education from a recognized University. Thus, an untrained teacher appointed against a TGT post has to acquire B.Ed. qualification for his sustentative appointment in the said post. However, it neither provides any minimum qualifying mark at Bachelor's degree for such appointment nor it provides untrained graduates to be appointed against TGT post. Rather Rule 16 (2) of the 1974 Rules makes provision for untrained teachers to undergo training as in-service candidates. Thus, the respondents are making sincere endeavour to bring an end to the employment of quite a large numbers of untrained teachers, who do not satisfy the impugned minimum eligibility criteria by imposing the restriction as at impugned Clause-3.12 of the Information Brochure and also in the subsequent resolution dated 31.03.2017, which is not the intent and object of Regulations, 2014, and as such, the same is not at all applicable to the appellant and similar other untrained teachers, who have been appointed much before imposition of such a restriction.

There being no provision for securing minimum mark in the graduation to be appointed as a trained graduate teacher, such a restriction for taking admission into B.Ed. course, would render the in-service candidates jobless as the in-service candidates appointed against trained graduate post required to acquire B.Ed. degree for approval of their services and substantive appointment to the said post. The appellant could not get admission in previous years due to paucity of seat in B.Ed. course meant for the in service candidates. Thus, imposition of the impugned condition for taking admission into B.Ed. course, would not only amount to discrimination but also the same is arbitrary and unreasonable in respect of in-service candidates.

14. In that view of the matter, we are constrained to strike down Clause-3.12 of the Information Brochure for admission of in-service candidates to Teachers' Training Course, namely, B.Ed. course and hold that the restriction of minimum qualifying marks in graduation is not applicable to the in-service candidates and direct that such a restriction shall

not be imposed for the in-service candidates for taking admission to B.Ed. course.

15. The writ appeals are accordingly allowed. Common order dated 16.07.2016 (Annexure-1) passed by learned Single Judge in W.P.(C) No.9003 of 2015 and similar other writ petitions, is accordingly set aside.

Appeals allowed.

**2018 (I) ILR - CUT- 47**

**S. PANDA, J. & K.R.MOHAPATRA, J.**

CRIMINAL APPEAL NO. 95 OF 2001

**GIRIDHARI PARIDA & ANR.**

.....Appellants

.Vrs.

**STATE OF ORISSA**

.....Respondent

**EVIDENCE ACT, 1872 – S.133**

**Evidence of approver – Appreciation of – Court can rely on the evidence of an approver if it is corroborated in material particulars by other independent evidence.**

**In this case, the sister of the approver was raped and murdered and he was examined as Court-Witness No. 1 – His statement corroborates the statement of P.W.6 – Further, his evidence recorded U/s. 164 Cr.P.C. during investigation also corroborates his statement recorded as Court Witness – So the argument advanced by the Counsel for the appellants that it is a case of suicide has no substance – Held, since appellant No.2 is dead, the impugned conviction and sentence passed by the learned trial Court is confirmed in respect of appellant No.1.**  
(Paras 10,11)

**Case Law Referred to**

1. AIR 1957 SC 637 : Sarwan Singh Rattan Singh -V- State of Punjab

For Appellants : Mr. L.N.Patel & B.S.Dasparida  
Amicus Curiae

For Respondent : Addl. Standing Counsel.

Date of Judgment: 30.01.2018

**JUDGMENT**

**S. PANDA, J.**

This Jail Criminal Appeal is directed against the judgment dated 05.03.2001 passed by the learned Addl. District and Sessions Judge, Nayagarh in Sessions Trial Case No. 96/23/150 of 1997/1996 in convicting the appellants for commission of offence under Sections 376 (2)(g) and 302 / 34 of the Indian Penal Code and sentencing them to undergo Rigorous Imprisonment for 10 years each under Section 376 (2) (g) I.P.C and to undergo Rigorous Imprisonment for life for the offence under Section 302/34 IPC. Both the sentences are directed to run concurrently.

Appellant No.2-Babula @ Ashok Mallick @ Ashok Kumar Samantaray has expired in the meantime. Thus, the present appeal is confined to Appellant No.1-Giridhari Parida only.

2. The prosecution case in brief is that the deceased Namita Mohapatra was residing in her house situated at village Telipatna with her brother i.e. the Niranjan Mohapatra (C.W.1) and her mother Pramodini Mohapatra. One of the rooms of their house was given on rent to Dillip Kumar Pani (P.W.2) who was running a T.V. repairing shop in that room. It is alleged that on 19.9.1995, the mother of the deceased had been to her daughter's house at Odagaon. Niranjan Mohapatra (C.W.1) and the deceased were in their house. In that night a feast was arranged in the house of the deceased Namita by her brother Niranjan Mohapatra. The appellants Babula @ Ashoka Mallik @ Ashok Kumar Samantray, Giria @ Giridhari Parida were invitees. P.W.2 was also invited to that feast. The appellants Ashok Samantray and Giridhari Parida took liquor and at their instance C.W.1 also took liquor. P.W.2 also took a little quantity of liquor in their company. One Rajkishore Rana was also present in the feast during the relevant time and took liquor heavily for which he slept in the house being unable to take care of himself. Thereafter, appellants Ashok Samantray and Giridhari Parida took the said Rajkishore Rana to his house and left him there. The deceased prepared rice and the appellant Giridhari cooked the chicken. At about 10.30 P.M. the food was served and when they were sitting to take the food, the appellant Ashok Samantray all of a sudden assaulted P.W.2 for which he fled away from that place out of fear. Appellants Ashok Samantray and Giridhari Parida chased P.W.2 up to his house and enquired about him from his mother and threatened him to do away with his life. Thereafter, they took the food and left the house. At about

mid night between 12 to 12.30 AM, the appellants again came to the house of the C.W.1 and appellant no.2 compelled C.W.1 to drink liquor further to which he protested and his sister Namita also protested. Thereafter, appellant No. 2 caught hold of the deceased while appellant No.1 caught hold of C.W.1 and poured liquor in his mouth. The appellant no.2 forcibly committed rape on the deceased at the sight of C.W. 1 when appellant no.1 had caught hold of him and thereafter appellant no.1 committed rape on Namita when appellant no.2 caught hold of him. As C.W.1 was restrained by the accused persons he could not rescue his sister Namita. Thereafter the appellants committed murder of the deceased after committing rape.

On the next day morning, all the accused persons cremated the dead body of Namita in the bari of C.W.1, which was detected by Gramarakshi Gunanidhi Naik (P.W.1). The said Gramarakshi reported the matter at the police station in writing, basing on which U.D. case was registered. During enquiry of that U.D. Case, the then O.I.C of Ranpur P.S. Mahendra Gumansingh visited the spot, held inquest over the un burnt pieces of flesh having in a charred condition and seized some burnt pieces of bones, ashes and charcoal. The post-mortem examination over the dead body was conducted. On the same day, a number of empty beer, and whisky bottles of different brands were seized from the house of C.W.1 and a letter alleged to have been written by the deceased to P.W.2 was also seized from his house. Subsequently, the C.I of Police Sarankul Circle took charge of the investigation of the case and accordingly the statements of P.Ws.2, 5 and 6 were recorded under Sections 164 Cr.P.C. The confessional statement of C.W. 1 was also recorded by J.M.F.C., Ranpur. The appellants were sent for medical examination. After completion of the investigation, charge sheet was filed against the accused persons for commission of offences under sections 376 (2)(g), 302/34 and 201/34 IPC.

**3.** The plea of the appellants was one of complete denial of the occurrence.

**4.** In order to bring home the charge, during trial the prosecution examined as many as thirteen witnesses and exhibited documents which have been marked as Ext. 1 to Ext.26/2. The prosecution proved nine material objects, which have been marked as M.O.I to M.O.IX. On the other hand, the defence neither examined any witness nor exhibited any document. One witness namely Niranjana Mohapatra was examined on behalf of the Court as Court Witness No.1.

5. The learned Sessions Judge after threadbare discussion of the materials available on record, came to a conclusion that the prosecution has successfully proved its case against the appellants under Section 376 (2)(g) and 302/34 IPC beyond all reasonable doubts. It also held that the prosecution has failed to prove the case against the appellants for commission of offences under Sections 201/34 IPC. Accordingly the court below sentenced the present appellants to undergo RI for 10 years each for the offence under section 376 (2)(g) IPC and to undergo R.I. for life for the offences under sections 302/34 IPC. Both the sentences were directed to run concurrently. C.W.1-Niranjan Mohapatra was tendered pardon by the Court below. All other co-accused persons, namely Banambar Parida, Dharam @ Dharama Bhotra and Ninanjan Mohapatra (C.W.1) were set at liberty.

6. Learned counsel for the appellant submitted that the impugned judgment of conviction and order of sentence are against the weight of evidence on record and contrary to law. The Court below relying upon the statement of the approver, which has been recorded after three years of the occurrence, came to such a finding. According to him after conclusion of the trial arguments were heard on 12.10.1998 and the case was adjourned to 23.10.1998 for judgment. However on the said date, the Court below resorting to the provisions of Section 307 Cr.P.C. tendered pardon to the accomplice Niranjan Mohapatra (C.W.1) whose statement was recorded under Section 164 Cr.P.C. during investigation and treated him as Court Witness. Therefore, according to him, the impugned judgment of conviction and order of sentence are unsustainable and liable to be set-aside.

7. Per contra, the learned Additional Standing counsel submitted that the evidence of the Court Witness, who is the eye witness to the occurrence is specific about the overt act performed by the appellants. His statement under Section 164 Cr.P.C. and his disclosure before P.W.6 and the statement of P.W.2 who was also present in the feast reveals about the presence of the appellants at the spot and their overt act for destroying the evidence. The circumstances pointed the guilt of the appellants. The said fact was also corroborated with the medical evidence. Thus, the impugned judgment of conviction and order of sentence warrant no interference in this appeal. This criminal appeal, therefore, being devoid of merit liable to be dismissed.

8. Perused the L.C.R. and went through the evidence on record carefully.

Niranjan Mahapatra, the brother of the deceased, whose statement was recorded under Section 164 Cr.P.C. on 11.10.1995 reveals that on 19.09.1995 the appellants compelled him to give a feast. One Dilip Pani, P.W.2, was also attended the feast, who was running a watch repairing and T.V. repairing shop taking the room of Niranjan Mahapatra on rent. During the feast they also consumed liquor followed by quarrel between P.W.2 and Appellant No.2. After the feast was over he along with his deceased sister went to sleep. While sleeping the present appellants again came to his house between 12.00 to 12.30 A.M. Appellant no.2 compelled him to drink further, to which his sister protested. The appellants were in drunken stage and they did not listen to the protest of his sister. Thereafter they poured liquor in his mouth and caught hold of him. Thereafter one after another while caught hold of him committed rape of her sister in his presence and at that time, her sister could not speak anything. They thereafter killed her sister and hanged the dead body on the *cudy* of the thatch house. The appellants further threatened him saying that if he (C.W.1) discloses to anybody or police, they will do away with his life and also life of his mother. However C.W.1 told the appellants and he will tell his *Dada* (P.W.6) about the death of her sister on the last night and accordingly the appellants went with C.W.1 to the house of his *Dada*. P.W.6 on seeing the dead body and scattered articles suspected the death and refused to cremate the same without intimation to the police. To this objection, appellant no.2 threatened his *Dada* with a broken liquor bottle for which the villagers left that place. After the villagers left the place, the appellants by using firewood, kerosene and cycle tyre burnt the dead body. Subsequently he became the Court witness by the Court resorting to the provisions of Section 307 of the Cr.P.C. With regard to his evidence under Section 164 Cr.P.C on 11.10.1995, he has explained that the appellants have threatened to kill him and his mother for which he has not disclosed earlier. However, he has disclosed it to P.W.6, who has insisted him to inform the fact to the police. However he could not inform the police out of fear to his life and his mother.

P.W.6, whose statement under Section 164 Cr.P.C. was recorded on 26.09.1995, had deposed in his examination-in-chief that on 20.09.1995 in the early morning, C.W.1 went to his house and told that his sister had committed suicide in the last night. When he asked the cause of death, C.W.1 had told that he, along with the appellants and some others had a feast in the last night in his house. After the feast was over and they left his house, thereafter he found his sister had committed suicide by hanging. He had

further stated that when he went inside the house, he saw tooth bite on the cheek of the deceased and the articles were lying scattered. He saw both the appellants standing there near a pillar. Appellant No.2 dragged him to the house and forced him to cremate the dead body. He also found a cloth in the mouth of the deceased.

9. P.W.11, the Doctor had deposed that when the police brought a portion of half charred dead body for examination, he advised them to take the same to SCB Medical College & Hospital Cuttack of F.M.T. Department for examination. Accordingly Post-Mortem was conducted under the guidance of Professor F.M.T. by a team of doctors, wherein he was a member. According to them the mode of death appears to be asphyxia.

10. According to *Modi's* text book of Medical Jurisprudence and Toxicology :-

Circumstantial evidence also has an important bearing. Homicidal hanging, though rare, has been recorded that usually, more than one person is involved in the act unless the victim is a child or very weak and feeble, or is rendered unconscious by some intoxicating or narcotic drug. In a case, where resistance has been offered, marks of violence on the body and marks of a struggle or footprints of several persons at or near the place of occurrence are likely to be found.

In the case of *Sarwan Singh Rattan Singh v. State of Punjab*, reported in *A.I.R. 1957 SC 637*, it has held that it would normally not be open to the appellants to raise question of fact before the supreme Court. Where the orders of conviction and sentence passed against the appellants are based on concurrent findings of fact, the Court would be slow to interfere with such findings unless they are satisfied that the said findings are vitiated by errors of law or that the conclusions reached by the Courts below are so patently opposed to well established principle of judicial approach, that they can be characterized as wholly unjustified and even perverse.

Courts are naturally reluctant to act on the tainted evidence of an approver unless it is corroborated in material particulars by other independent evidence. But it would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars.

In the present case, the statement recorded by P.W.6 corroborates with the statement of the approver C.W.1. That apart the statement of the C.W.1 recorded under Section 164 Cr.P.C. during investigation also corroborated with the statement recorded as court witness.

**11.** As discussed in the above paragraphs and on close scrutiny of the evidences on record, this Court is of the opinion that the Trial Court on a threadbare discussion has convicted the accused persons and passed the sentence. The argument advanced by the learned counsel for the appellants that it is a case of suicide has no substance. In such background, this Court is not inclined to interfere with the impugned judgment. The conviction and sentence passed by the Trial Court is hereby confirmed so far as appellant No.1-Giridhari Parida is concerned. The Criminal Appeal stands dismissed accordingly.

Appeal dismissed.

**2018 (I) ILR - CUT- 53**

**B. K. NAYAK, J.**

CRLMC NO. 1040 OF 2004

**SUDHANSUBALA KHATEI**

.....Petitioner

.Vrs.

**STATE OF ORISSA & ORS.**

.....Opp. Parties

**CRIMINAL PROCEDURE CODE, 1973 – S.245**

**Whether the Magistrate is competent to discharge the accused in case of continuous or repeated absence of the complainant at the stage of adducing evidence before charge ? Held, yes. – The Magistrate is competent to exercise such power U/s. 245 (2) of the code.** (Para 5)

For Petitioner : M/s. D.P. Dhal

For Opp. Parties : ASC

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Date of Order : 13.12.2017

**ORDER**

**B. K. NAYAK, J.**

Heard learned counsel for the petitioner.

2. Order dated 13.05.2003 passed by the learned JMFC, Puri in I.C.C. No. 48 of 2002 discharging the accused persons for the continuous absence of the complainant at the stage of adducing evidence before charge, as confirmed by the learned Ad-hoc Additional District and Sessions Judge (Fast Track Court-II, Puri) in Criminal Revision No. 43 of 2002, has been challenged in this application U/s. 482 of CrPC.

3. Cognizance was taken against the accused U/s. 294/379/323/34 of IPC in the complaint case and as such the case was triable by warrant procedure. The impugned order of the Magistrate reveals that the complaint case was fixed for evidence before charge, as per provision of Section 244, CrPC, but the complainant was absent on 09.10.2002, 06.12.2002, 24.01.2003, 06.03.2003 and 25.04.2003 before the date of passing of the impugned order and therefore, in exercise of power U/s. 245 of CrPC, the learned JMFC, Puri discharged the accused persons by the impugned order and the same was confirmed by the Revisional Court.

4. Section 245 of CrPC is as under:-

“245. When accused shall be discharged.-(1) if, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

5. Though Section 245(1) specifically says about discharge of the accused on consideration evidence recorded before charge, the Section does not specifically deal with a situation for continuous absence of the complainant when the case is posted for evidence before charge. Sub-section (2) of Section 245, CrPC confers power on the Magistrate to discharge the accused at a previous stage if he considers the charge to be groundless. Therefore, the learned Magistrate cannot be held to be powerless to discharge the accused, in case of continuous or repeated absence of the complainant to adduce evidence before charge. Such power squarely falls within the ambit of

Section 245(2), CrPC. Therefore, I find no infirmity in the impugned orders and accordingly the CRLMC is dismissed.

Application dismissed.

**2018 (I) ILR - CUT- 55**

**B. K. NAYAK, J.**

CRLMC NO. 903 OF 2017

**SAKHABUL KHAN @ PAPU**

.....Petitioner

.Vrs.

**STATE OF ODISHA & ORS.**

.....Opp. Parties

**IMMORAL TRAFFIC (PREVENTION) ACT, 1956 – Ss. 7, 18**

**Attachment of petitioner's hotel by the commissioner of Police U/s. 18(1) of the Act on the ground that it is used as brothel – Order challenged.**

**Order of attachment U/s. 18(1) of the Act can only be passed after the State Government makes a notification U/s. 7(1)(a)(b) of the Act that the hotel is situated within 200 metres of any place used as public religious worship, educational institution, hostel, hospital, nursing home or such other public place – In this case the notification having not been done, the hotel in question is not liable to be attached – Held, the impugned order of attachment is set aside.**

(Paras 7,8,9)

For Petitioner : M/s. Bigyan Kumar Sharma

For Opp. Parties :

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Date of Order :15.12.2017

**ORDER**

**B. K. NAYAK, J.**

Heard learned counsel for the petitioner and learned Additional Standing Counsel.

2. Order of attachment passed by the Commissioner of Police, Cuttack-Bhubaneswar with a direction for closure of hotel Jannat Palace belonging to

the petitioner in exercise of power U/s. 18(1) (wrongly mentioned as Section 18 (2)) of the Immoral Traffic (Prevention) Act, 1956 has been challenged in this proceeding.

3. Petitioner's hotel as aforesaid was raided on 19.02.2015 at 7 PM. Some men and women were arrested and rescued and Capital P. S. Case No. 56 of 2015 was registered U/ss. 3, 4, 5, 6 & 7 of the Immoral Traffic (Prevention) Act, 1956. Simultaneously, the proceeding U/s 18 (1) was taken up by the Commissioner of Police, Bhubaneswar-Cuttack.

4. It appears from the impugned order that in the proceeding before the Commissioner of Police, in pursuance of notice, the petitioner filed show-cause on 07.11.2016 contending inter alia that his hotel Jannat Palace is beyond 200 metres from Bapuji Nagar UP School and Durga Mandap and therefore, it is not liable to be attached. However, the Commissioner of Police, holding that the hotel itself is a public place and according to Section 2(h) of the IT (P) Act, it is liable to be attached and, accordingly passed the impugned order.

5. Section 2(h) of the IT (P) Act defines 'public place' meaning any place intended for use by, or accessible to, the public and includes any public conveyance.

6. Section 18(1) of the Act envisages that the house or room or place which is proposed to be attached must be within a distance of 200 metres from a public place referred to in Sub-section (1) of Section 7 of the Act. Sub-section (1) of Section 7 of the Act does not contemplate all such places intended for use by or accessible to public. It reads as under:-

**“7. Prostitution in or in the vicinity of public places.-**[(1) Any [person], who carries on prostitution and the person with whom such prostitution is carried on, in any premises,-

(a) which are within the area or areas, notified under sub-section (3), or

(b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or Magistrate in the manner prescribed,

shall be punishable with imprisonment for a term which may extend to three months.]

[(1-A) Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment or either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.”

7. It is, therefore clear that in terms of Section 7(1) if house which is used as brothel is situated within 200 metres of any place used as public religious worship, educational institution, hostel, hospital, nursing home or such other public place as notified by the State Government under clauses (a) or (b) of Section 7(1), then only order of attachment in terms of Section 18 can be passed. Clause (b) by itself does not include ‘hotel’. It is conceded by the learned counsel for the State that no notification has been issued by the Government under Sub-section (1) of Section-7 of the Act.

8. In the aforesaid view of the matter passing order of attachment of the petitioner’s hotel without any indication as to how it comes within the meaning of clause (a) or (b) of Section 7(1), the hotel is not liable to be attached.

9. Accordingly, this court sets aside the impugned order. The CRLMC is disposed of.

Application disposed of.

2018 (I) ILR - CUT- 57

**B.K.NAYAK & DR.D.P.CHOUDHURY, J.**

W.P.(C) NO. 8231 OF 2015

**SUCHISMITA MISRA**

.....Petitioner

.Vrs.

**REGISTRAR (ADMINISTRATION),  
ORISSA HIGH COURT, CUTTACK**

.....Opp. Party

**SERVICE LAW – Adverse entries in the CCR of the petitioner, for the years 2010 and 2011, communicated to her on 18.03.2015 – Hence**

**the writ petition – Held, delayed communication of CCR itself is bad in law and the same is liable to be quashed.**

**Object of communicating adverse entries cannot be achieved unless it is made within a reasonable period as belated communication of entries resulted in denial of reasonable opportunity to improve the performance of the petitioner – Held, the impugned entry in the ACR 2010 and 2011 are liable to be expunged and the intimation vide Annexure 1 that the character roll of the petitioner in 2010 and 2011 as “poor” is also quashed.** (Paras 24,25,26)

**Case Laws Referred to :-**

1. (2013) 9 SCC 566 : Sukhdev Singh v. Union of India & Ors.
2. 2009 (16) SCC 146 : Abhijit Ghose Dastidar v. Union of India & Ors..
3. AIR 1999 SC 3273 : P.K. Shastri v. State of Madhya Pradesh & Ors.
4. 2001 (2) SCC 305 : Bishwanath Prasad Singh v. State of Bihar & Ors.
5. 1978(1) SLR 829 : Madan Mohan Khatua v. State of Orissa & Ors.
6. AIR 1997 SC 3671 : State of U.P. v. Yamuna Shanker Misra and another.
7. (2007) 9 SCC 436 : S.T. Ramesh v. State of Karnataka and another
8. AIR 1989 SC 2218 : Baidyanath Mahapatra v. State of Orissa and another
9. 2008) 8 SCC 725 : Dev Dutt v. Union of India & Ors.
10. (2013) 9 SCC 566 : Sukhdev Singh v. Union of India & Ors.
- 11.(2010) 8 SCC 155 : Kazia Mohammed Muzzammil v. State of Karnataka & Anr.
12. (2012) 6 SCC 357 : Registrar General, High Court of Patna v. Pandey Gajendra Prasad & Ors.
13. AIR 1989 SC 2218: Baidyanath Mahapatra v. State of Orissa and another.

For Petitioner : M/s. R.K.Rath, P.Rath & J.P.Behera

For Opp. Parties : Mr. K.K.Mishra, Addl.Govt.Adv.

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Date of hearing : 7.12. 2017

Date of Judgment:19.01.2018

**JUDGMENT**

***DR. D.P. CHOUDHURY, J.***

The captive writ petition assails the adverse entries against the petitioner’s CCR for the years 2010 and 2011 and illegal rejection of representation filed by the petitioner.

### FACTS

2. The factual matrix leading to this writ petition is that the petitioner entered into service and joined as Munsif on 2.1.1985. She got promoted to different cadres at different times such as to OJS Class-I (Junior), OJS Class-I, Chief Judicial Magistrate and then on 8.5.2009 she was promoted to the cadre of Orissa Superior Judicial Service and posted as Additional District & Sessions Judge, Jajpur. On 9.4.2010 she was absorbed as regular District Judge after facing the interview. Subsequently after completion of successful probation she was confirmed and substantially appointed in the cadre of District and Sessions Judge with effect from 8.4.2012 in terms of Rule 33 (5) of the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (hereinafter called “the Rules, 2007”).

3. Be it stated that on 10.2.2014 as the luck of the petitioner would have it, she received letter showing her Annual Character Roll as ‘Poor’ for the years 2010 and 2011. She made representation vide Annexure-2 but that was rejected being not considered. However, the petitioner was granted Selection Grade scale on 24.4.2015 and got Supertime scale on 29.6.2016 under Rules, 2007. Since she has been promoted from time to time and reached Super Time scale, any adverse entry in the CCR for the years 2010 and 2011 would cause a problem in the career of the petitioner in future for which the writ petition is filed to quash such entry in the CCR and the order of rejection of representation.

### SUBMISSION

4. Mr. R.K. Rath, learned Senior Advocate for the petitioner submitted that the petitioner has been promoted time to time after entry into judicial service and finally she has already got the Supertime scale as per Rule 5 of the Rules, 2007. The communication of the adverse entry for 2010 and 2011 was made after four years and 3 years respectively on 10.2.2014 which are based on no material. According to him, the delayed communication is itself bad in law which is liable to be quashed. He relied on the decisions in *(2013) 9 SCC 566; Sukhdev Singh v. Union of India and others, (2010) 8 SCC 155; Kazia Mohammed Muzzammil v. State of Karnataka and another, (2012) 6 SCC 357; Registrar General, High Court of Patna v. Pandey Gajendra Prasad and others* and *AIR 1989 SC 2218; Baidyanath Mahapatra v. State of Orissa and another*.

5. Mr. Rath, learned Senior Advocate further submits that entries have no value when promotion and service benefits have been confirmed notwithstanding such entries. But the career throughout having been maintained with good service record, such late rating on performance should be quashed. In 2010 itself the petitioner has appeared in the interview for the post of District Judge and became successful and in the years 2010 and 2011 she has served as Additional District Judge, Jajpur and till 2012 she completed the probation and was regularized as District Judge. According to him, the entries must be objective and should be written being supported by reasons. He relied on the decisions reported in *AIR 1999 SC 3273; P.K. Shastri v. State of Madhya Pradesh and others* and *2001 (2) SCC 305; Bishwanath Prasad Singh v. State of Bihar and others*.

6. Mr. Rath, learned counsel for the petitioner further contended that the representation was made by the petitioner but it was rejected without any reasons. According to him, as per the decision reported in *(2013) 9 SCC 566 (supra)*, the disposal of the representation should be done in a fair manner for which the rejection of the representation also suffers from infirmity. Learned counsel for the petitioner further submitted that there are no contemporaneous and simultaneous communications of any notice or intimation for the substantive remarks ultimately made in the CCR of the petitioner. On the other hand, since there being no such shortcomings got reflected in the CCRs, same is also bad in law. In this regard, he relied upon the decision reported in *1978(1) SLR 829; Madan Mohan Khatua v. State of Orissa & others* and also in *AIR 1997 SC 3671; State of U.P. v. Yamuna Shanker Misra and another*. Since the petitioner has been already promoted basing on merit-cum-seniority under Rules, 2007, the impugned adverse entry should be expunged for these two years.

7. Mr. K.K. Mishra, learned Additional Government Advocate submitted without disputing the facts that the writ petition is not maintainable as in the instant case the adverse entry has been communicated to the petitioner because of the shortcomings in the outturn in the civil side. The adverse entry was intimated in accordance with the Rules after the adverse entry was confirmed by the Full Court. According to him, the learned Administrative Judge having endorsed such adverse entry, it was placed before the Full Court dated 13.1.2014 and then the decision of the Full Court was intimated to the petitioner. Moreover, judicial review of the CCR/ACR or cases expunging this adverse remark is very limited and the writ Court can interfere only in exceptional circumstances for compelling reasons. If the

Court comes to the conclusion that there was no occasion for the authority to record adverse entries, then same may be interfered but not otherwise. Learned Additional Government Advocate further submitted that the Court's power of judicial review may be invoked sparingly and under compelling circumstances. Since in the instant case, the petitioner has been already promoted to the post of Super Time, there is no cause of action to file the writ petition to expunge adverse entry in the CCR for the years 2010 and 2011. When there is no cause of action, the writ petition is also not maintainable.

8. Learned Additional Government Advocate submitted that when there is no sufficient outturn in the civil side, she was intimated vide Court's letter No.7611 dated 27.9.2010 and No.5434 dated 12.7.2012 for which her claim that she has got high standard in service is not correct. It is further submitted on behalf of the opposite party that since the promotion of the petitioner was considered by the time of CCR up to 2009 and CCRs of 2010 and 2011 were not available at that time, the promotion was given to the petitioner in 2011. So, the entries in the CCRs of the petitioner made in 2010 and 2011 have no nexus with her promotion. Hence, it is submitted to dismiss the writ petition.

9. **The main point for consideration:**

(i) Whether the petitioner is entitled for expunction of the adverse entries in the CCRs for the years 2010 and 2011?

**DISCUSSION**

10. It is not in dispute that the petitioner was appointed as member of the OJS on 2.1.1985 and gradually got promoted without any break to the cadre of District Judge. It is also admitted fact that the petitioner was also confirmed as regular District Judge and has got Selection Grade and Supertime scale in spite of the adverse entry made in the C.C.R. for the years 2010 and 2011. It is not in dispute that the adverse entry was communicated on 18.3.2015.

11. Since the adverse C.C.R. is the issue, it is relevant to go through the G.R.C.O. (Civil) where the Guidelines have been given about the entry in the C.C.R. of the Judicial Officers.

**“NOTES ON PROCEDURE FOR RECORDING ANNUAL  
CONFIDENTIAL CHARACTER ROLL OF JUDICIAL OFFICERS  
NOTE**



(c) The Registrar (Administration) shall place the relevant C.C.Rs. before the Judge-in-charge of the District by the end of February and before the Hon'ble Chief Justice with the remarks of Hon'ble Judge-in-charge by 31st March and by order of Hon'ble the Chief Justice before the Standing Committee and the Full Court by 30<sup>th</sup> April every year.]”

The aforesaid provision in G.R.C.O. clearly shows that the C.C.R. of every Officer must be submitted by 31<sup>st</sup> January of next year for the previous year with self appraisal report and in the cadre of the Orissa Superior Judicial Service, the remark of the Administrative Judge is to be obtained by the end of February and the C.C.R. must be placed before the Standing Committee and the Full Court by order of the Chief Justice by 30<sup>th</sup> April every year. This shows that the procedure for adverse entry if any can only be known to the officer by the end of next year so that he or she can improve the standard and show better performance in the next year.

**12.** It is reported in (2007) 9 SCC 436; *S.T. Ramesh v. State of Karnataka and another*, where Their Lordships have observed at para-40 in the following manner:

“40.The confidential report is an important document as it provides the basic and vital inputs for assessing the performance of an officer and further achievements in his career. This Court has held that the performance appraisal through C.Rs. should be used as a tool for human resource development and are not to be used as a fault finding process but a developmental one. Except for the impugned adverse remarks for a short period of about 150 days, the performance of the appellant has been consistently of high quality with various achievements and prestigious postings and meritorious awards from the President of India. We have already seen that the appellant has been graded as "very good", "excellent" and "outstanding" throughout his career. It is difficult to appreciate as to how it could become adverse during the period of 150 days for which the adverse remarks were made. Furthermore, despite such adverse remarks, the Government of Karnataka, considering his merit and ability and outstanding qualities, has already promoted the appellant as the Inspector General of Police”.

**13.** With due regard to the said decision, it appears that confidential report is an important document to assess the performance of the employee and it should be maintained carefully.

**14.** In the same decision *Baidyanath Mahapatra (supra)* Their Lordships also observed at para-5 in the following manner:

“5. No exception can be taken to the Government's opinion in retiring the appellant prematurely on the basis of the aforesaid recommendation of the Review Committee as it clearly indicated that the appellant's retention in service was not in public interest. The purpose of the Rule conferring power on the Government to retire Government servants pre-maturely is to energise its machinery by "chopping of the dead-wood" as held by this Court in **Union of India v. J.N. Sinha, (1971) 1 SCR 791:AIR 1971 SC 40**). The question which falls for consideration is whether the Review Committee was justified in making its recommendations on the basis of adverse entries awarded to the appellant in remote past especially when the appellant had been promoted to the post of Superintending Engineer in 1976 and he had further been permitted to cross Efficiency Bar in 1979. The adverse entries relating to the years 1969-70, 1970-71, 1972-73 and 1975-76, had lost all significance, because in spite of those entries the appellant was considered to be an intelligent and efficient officer and in that view he was promoted to the post of Superintending Engineer. If those entries did not reflect deficiency in appellant's work and conduct for the purpose of promotion, it is difficult to comprehend as to how those adverse entries could be pressed into service for retiring him prematurely. When a Government servant is promoted to a higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and those remain on record as part of past history. It would be unjust to curtail the service career of Government servant on the basis of those entries in the absence of any significant fall in his performance after his promotion.”

**15.** With due regard to the aforesaid decision, it appears that any adverse entry communicated later to the promotion already made has no significance and that should be ignored.

**16.** It is reported in *AIR 1989 SC 2218; Baidyanath Mahapatra v. State of Orissa and another* where Their Lordships observed at para-6:

“6. The adverse entries for the years 1969-70, 1970-71, 1972-73 and 1975-76 were communicated in a lot to the appellant in 1978, although under the instructions issued by the State Government the adverse entries must be communicated by December of each year. The purpose of communicating adverse entries to the Government servant is to inform him regarding his deficiency in work and conduct and to afford him an opportunity to make, amend, and improvement in his work and further if the entries are not justified the communication affords him an opportunity to make representation. If the adverse remarks awarded to a Government servant are communicated to him after several years, the object of communicating

entries is defeated. It is therefore imperative that the adverse entries awarded to a Government servant must be communicated to him within a reasonable period to afford him opportunity to improve his work and conduct and also to make representation in the event of the entry being unjustified. In the instant case, adverse entries relating to a number of years were communicated to the appellant in one lot under a letter dated 27.2.1978 contrary to the instructions issued by the State Government as contained in Circular No. 29 dated 19.2.1953. Belated communication of the entries resulted into denial of reasonable opportunity to the appellant to improve his performance. Further since adverse remarks for several years were communicated with inordinate delay it was impossible for the appellant to make an effective representation against the same.

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**17.** With due regard to the said decision, it appears that the object of communicating adverse entries should be achieved if the communication is made within reasonable period and belated communication of entries resulted into denial of reasonable opportunity to improve his performance.

**18.** It is reported in *(2008) 8 SCC 725; Dev Dutt v. Union of India & others*, where Their Lordships observed at paragraphs-17, 18, 36 and 37 in the following manner:

“17. In our opinion, *every entry in the A.C.R.* of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India*; (1978)1 SCC 248 that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

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36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.”

**19.** With due regard to the aforesaid observation, the Hon’ble Apex Court emphatically direct that every entry in the ACR must be communicated within reasonable time so that the Officer concerned would know about the assessment of his work and conduct by superiors. By that means the Officer has got opportunity of making representation for communication of the ACR within time and awarding the chance of making representation are all factors to show the transparency of administration and fairplay. If the system would not work like this, there would be violation of natural justice of the concerned officer as per Articles 14 and 16 of the Constitution.

**20.** The aforesaid decision has been also followed in *(2013) 9 SCC 566; Sukhdev Singh v. Union of India and others* and in the decision reported in *2009 (16) SCC 146; Abhijit Ghose Dastidar v. Union of India and others*.

**21.** Now advertng to the case of the petitioner, it appears that for the years 2010 and 2011 the learned Administrative Judge has not found any

integrity of the Officer doubtful but has reported the overall rate 'Poor'. Moreover, the contents of CCR contradict the counter affidavit filed by the opposite party inasmuch as there is no observation in the impugned CCR for both years that she has got 'Poor' disposal of the cases at the civil side but some other ground she has been rated 'Poor'. It is true that the observation of the learned Administrative Judge cannot be re-appreciated by the Court even in judicial side but due to the inconsistency between the pleading and the material of the opposite party, the contents of the ACR lacks sufficient material to come to such conclusion as observed by the learned Administrative Judge. Leaving aside this aspect, it appears that both the CCRs do not disclose the date on which ACRs of both the years were endorsed by the learned Administrative Judge and it is also not found when those CCRs were received in the Registry. But it is revealed from the counter that the CCRs of the petitioner were put up before the Full Court on 13.1.2014. Thus, it is assumed that the ACRs for 2010 and 2011 have been received in 2014 which is long after four years and three years of the entry in the ACR. On the other hand the adverse entries were only communicated after 13.1.2014 that means long after one year of the relevant year entry. At any rate, the undated ACR and non-communicated ACR within reasonable time lose significance as per the decision in *Devi Dutt (supra)* and other decisions of the Hon'ble Apex Court as stated above.

**22.** It is admitted by opposite party in para-16 of the counter that CCRs for the years 2010 and 2011 were not taken into consideration where promotion of the petitioner was held to the rank of Supertime District Judge. Even if such adverse entry has not been utilized to stall the promotion but timely communication about same could have given the petitioner ample opportunity of meeting the lapses as observed in the ACR.

**23.** Even if adverse entries have not been reflected in the promotion but keeping such adverse entry in the career of the Officer would put a stigma which may be utilized in future while reviewing the whole career of the petitioner to continue in service. It is trite in law that the whole career of the Officer should be verified while his service is reviewed after the age of 50, 55 and 58 years in accordance with the Rules, 2007. So, the adverse entries for these two years have got cause of action to file the writ petition. That apart, the Officer has maintained the career throughout without any adverse entry like 'poor' and when the Officer has been promoted time to time and has no career with 'poor' entry except these impugned entries and she has no doubtful integrity even in 2010 and 2011, such entries have no significance.

24. In terms of the above discussion, we are of the view that the entry 'poor' in 2010 and 2011 as communicated having no significance should be expunged. Point is answered accordingly.

### **CONCLUSION**

25. In the writ petition, it has been prayed to quash the communication of the adverse entry for the years 2010 and 2011 vide Annexure-1 and order of rejection of the representation made by the petitioner and also prayer for upgrading the CCR of petitioner as outstanding for the year 2010 and 2011.

26. In view of the aforesaid observation that the entry in the ACR 2010 and 2011 are liable to be expunged, the Court do so. Accordingly, we hereby direct the intimation vide Annexure-1 that the Character Roll of the petitioner in 2010 and 2011 as 'Poor' is also quashed.

27. Moreover, Annexure-3 shows that the Special Officer (Administration)-opposite party has intimated the petitioner in the following manner:-

**“ORISSA HIGH COURT:CUTTACK**

2671  
XXV-12/2011

**From**

**Shri A.K. Chandan,  
Special Officer (Administration)**

**To**

**Smt. Suchismita Mishra,  
Registrar, Odisha Administrative Tribunal,  
Bhubaneswar.**

**Cuttack Dated the 18<sup>th</sup> March, 2015**

**Sub:- Expunction of adverse remarks in C.C.R. for the  
year, 2010 & 2011**

**Madam,**

With reference to your confidential letter No.25 dated 12.03.2014 on the above subject, I am directed to say that, the Court after careful consideration of your representation are pleased to observe that no further consideration is called for.

This is four favour of your information.

Yours faithfully,  
Sd/-

**Special Officer (Admn.)”**

**28.** The aforesaid Annexure-3 only shows that her representation for expunction of adverse remarks in the CCR for the years 2010 and 2011 has been rejected and communicated in 2015. No reason has been assigned for that. As observed in the decision *Dev Dutt v. Union of India and others (supra)* the rejection of the representation should be preceded with reasons. Since there is no reason assigned, such Annexure-3 is also liable to be quashed.

**29.** There is no Rule under Rules, 2007 or the Rule framed above to show what would be the remark if no adverse remark is communicated within two years from the last date of the year to which the CCR relates. So, in such circumstances, the circular of the State Government in G.A. Department dated 23.11.1987 may be pressed into service. According to Clause 21 of such circular if no remarks are received within two years from the last date of the year to which the C.C.R. relates, it would be presumed “no remarks”, and a note of “no remarks” would be kept in the C.C.R. folder of the respective officers. Now in the instant case, it is observed that the entries in 2010 and 2011 have been received on 13.1.2014 and put up before the Full Court, same are found received long two years after the respective years to which the CCR relates. Thus, in view of Clause-21 of the circular, the CCR of 2010 and 2011 must be recorded “no remarks”. Thus, Annexures-1 and 3 have been quashed, but the prayer of the petitioner that she should be rated ‘outstanding’ for the relevant years, cannot be acceded to because the Court cannot in judicial side substitute the remark except expunging the same which are found non est. Such adverse entries in 2010 and 2011 cannot be counted for any purpose whatsoever in future for the petitioner. We further direct accordingly. With the aforesaid direction, the writ petition is disposed of.

Writ petition disposed of.

2018 (I) ILR - CUT- 70

**S.K. MISHRA, J.**

W.P.(C) NO. 3428 OF 2016

**SABITA SETHY & ORS.**

.....Petitioners

. Vrs.

**STATE OF ODISHA & ORS.**

.....Opp. Parties

**ODISHA MUNICIPAL ACT, 1950 – S. 46-A(1)(b)**(As amended by the Odisha Municipal  
[second amendment] Act,2015)

**“No Confidence Motion” against Chairperson – Collector decided to hold the Special Session with a gap of 37 days – During the pendency of such process amendment brought in the Act incorporating a “disqualification” clause – Action challenged – Held, the amending Act will not be applicable to the above process.**

**In this case, the petitioners made a resolution on 09.11.2015 to bring no confidence motion against O.P.No.5 and submitted a copy to the collector on 12.11.2015 – Though the petitioners requested to fix an early date by giving three clear days as provided U/s. 54 of the Act, the Collector on 21.11.2015 decided to hold the special session on 28.12.2015 – In the meantime, 2<sup>nd</sup> amendment to the Act was notified on 18.12.2015 and came into force on 19.12.2015 and O.P.No.5 filed complaint petition before the State Election Commission on 05.01.2016 and the commission disqualified the petitioners – Hence the writ petition.**

**It is the constitutional right of the councilors to continue for five years – In view of the action of the Collector-O.P.No.3 in fixing the “No Confidence Motion” meeting after a considerable length of time i.e. 37 days from the date of requisition, the amending Act is not applicable and the petitioners can not be declared to be disqualified only on the ground of defying the whip or direction given by the party – Held, the impugned order passed by the State Election Commission in complaint Case No. 1 of 2016 is quashed – The petitioners are not disqualified for being members of the Municipality basing on the above amendment and they shall continue to represent their wards till end of their tenure.**

(Paras 20, 23)

**Case Laws Referred to :-**

1. AIR 2004 SC 355 : Ameer Trading Corporation Ltd., vs. Shapoorji Data.
2. (AIR 1996 SC 1963): Processing Ltd. Smt. Pek Kalliani Amma and

Ors vs. K. Devi and others

3. AIR 1955 SC 661 : Bengal Immunity Co. Ltd., v. State of Bihar and Ors.
4. AIR 1990 SC 78 : Goodyear India Ltd. v. State of Haryana and Another.
5. (2004) 8 SCC : Zile Singh v. State of Haryana and others.

For Petitioners : M/s. Amit Prasad Bose, R.K.Mahanta, N.Hota,  
S.S.Routray & V.Kar

For Opp. Parties : Mr. M.R.Dhal, Mr. Pitambar Acharya, S.Rath,  
B.K.Jena, J.P.Parida & D.Panigrahi  
Mr. Milan Kanungo, S.Das, S.K.Mishra,  
A.K.Mohanty & S.K.Maharulla  
Mr. Asim Amitav Das, B.P.Tripathy, R.Achary,  
T.Barik, N.Barik & S.Hidayatullha

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Date of Judgment : 05.01.2018

### **JUDGMENT**

***S.K.MISHRA, J.***

The petitioners are nine councillors representing different wards of the Keonjhar Municipal Council (KMC). They have been declared disqualified by the State Election Commission i.e. opposite party no.2 in Complaint Case No.1 of 2016 filed by the former Chairperson of Keonjhar Municipality i.e. opposite party no.5, namely, Mina Majhi under the provision of Section 46-A(1)(b) of the Odisha Municipality Act, 1950 as amended by the Odisha Municipal Laws (Second Amendment) Act, 2015 as per order dated 19.02.2016. The election to Keonjhar Municipality was held on 19.09.2013 pursuant to notification issued by the State Election Commission on 12.08.2013. The municipal council consists of 21 wards. All these petitioners contested the municipality election under the aegis and as candidates for the ruling Biju Janata Dal (BJD), hereinafter, referred to as the "BJD" for brevity. On 30.09.2013, election to the Chairperson of the Municipality was held and opposite party no.5 was elected as the Chairperson of the Municipality as 15 votes were cast in her favour. It is stated that the opposite party no.5 started involving monopolistic activity and for her alleged arbitrary and unbearable action, the petitioners on 09.11.2015 convened a special meeting under the Chairmanship of one Dilip Behera, the councillor of Ward No.13 of the KMC, where it was resolved that the councillors should request the Collector-cum-District Magistrate, Keonjhar to give protection to the councillors till consideration of motion of No Confidence against the Chairperson.

Pursuant to such resolution, all the petitioners approached the opposite party no.3-Collector-Cum-District Magistrate, Keonjhar on 12.11.2015 and served the notice 'No Confidence Motion' along with copy of the resolution, wherein they have categorically mentioned that the meeting may be fixed at an early date giving only three days time to avoid anticipated hazardous situation.

After receiving the notice 'No Confidence Motion', the opposite party no.5 allegedly tried her level best to influence the petitioners and other councillors through many ways since she belongs to an influenced political party and manage to influence local administration including the police. The petitioners also plead that they were receiving threatening calls on their mobiles. Though the petitioners on several occasions conveyed the same to the local administration and police, the authorities did not protect the petitioners. Finding no way, the petitioners approached the Court by filing an application under Article 226 of the Constitution registered as W.P.(C) No.20993/2015. This Court disposed of the aforesaid writ petition directing the District Administration to provide adequate protection to the petitioners.

On 21.11.2015, the opposite party no.3 notified the special meeting of the council for considering "No Confidence Motion" fixing date to 28.12.2015.

The petitioners plead that they have contested the election and were returned as councillors under the panel of BJD. They were dissatisfied with the party activity and have submitted their resignations in a phased manner by sending letters to the President of the aforesaid party. Annexure-4 series are the resignation letters. However, in course of hearing, Mr. A.P. Bose, learned counsel for the petitioners did not give much importance on this aspect of the case. While the No Confidence Motion was pending for consideration by the council, the ruling party allegedly in order to get over the No Confidence Motion, brought an amendment to the Odisha Municipal Act i.e. Odisha Municipal Laws (Second Amendment) Act, 2015 by incorporating the clause of disqualification. The Act was notified on 18.12.2015 and came into force on 19.12.2015. The draft rules were prepared and notified on 30.12.2015. It is also stated that the said notification containing the rules was published in the Extraordinary Gazette of the State on 09.01.2016.

2. Thereafter, the petitioners came to know that a compliant case No.1/2016 as well as writ petition has been filed by the opposite party no.5

stating that the President of the aforesaid party has authorized one Debasis Samantray, Member, Odisha Legislative Assembly on 23.12.2015 to personally tender the said direction to the petitioners and other councillors of the party. But, as the said whip could not be served upon the petitioners, a paper publication was made giving intimation to all councillors of the aforesaid party. It is claimed by the petitioners that they were not aware of any such publication. On 28.12.2015, the No Confidence Motion was held and a resolution was passed. The opposite party no.5 was ousted from the office of the Chairperson, Keonjharh Municipality. Thereafter, the said opposite party no.5 filed Complaint Case No.1 of 2016 before the SEC on 05.01.2016. She also filed a writ application before this Court on 06.01.2016, bearing W.P. (C) No.311/2016. However, the writ application was withdrawn and the complaint case was heard by the opposite party no.2. After considering the materials on record, the opposite party no.2 allowed the complaint case and passed the impugned order, Annexure-1, thereby all these petitioners were declared disqualified to continue as members of the aforesaid municipal council and further directed that the opposite party no.5 shall be deemed to have vacated such office with effect from date of passing of the Resolution on 28.12.2015 in view of the notification no.841 dated 11.01.2016.

Thus, on this factual background, the petitioners in this writ application challenge the order dated 19.02.2016 passed by the opposite party no.2 on the following grounds.

- a. The election to the Keonjharh Municipal Council was held in the year, 2013 when the amendment has not seen the light of the day, otherwise at the time of allotment of party symbols in election the councillors were not issued any direction nor they had knowledge if they defy the directions issued by the party, their councillorship will be terminated.
- b. The amendment Act, 2015 is prospective in nature and cannot be attracted once there is a no confidence motion already in process.
- c. the State machinery gave a very long period of time to the chairperson to face the no confidence motion, which is against the statute, thereby allowing the ruling party to take the advantage.
- d. the plea of the opposite party no.4 i.e. Ruling Political Party that it has not received the resignation letters is completely against the law of Section 27 of the General Clauses Act.

- e. The learned State Election Commission has not answered the contention raised by the nine petitioners that as the councillors constitute 2/3<sup>rd</sup> of the ruling party, they formed a separate group by virtue of a split in the party.
- f. There is no question of prior permission from the BJD that they have resigned from the BJD, no diktat of party whip can be issued against them.
- g. Without a draft rule, the proceeding of opposite party no.2 is itself vitiated in the eye of law.
- h. The opposite party no.2 acted in a partisan manner to benefit the ruling front.

Therefore, the petitioners prayed that after affording reasonable opportunity of hearing to the parties, a writ/writs in nature of certiorari/mandamus quashing Annexure-1 be passed in the interest of justice.

3. The opposite party no.1 through the Deputy Secretary to Government of Odisha, Housing and Urban Development Department, Secretariat, Bhubaneswar has filed a counter affidavit. The essential contents of the counter affidavit is that for providing stability to the institution of local-self-Government and to ensure candidates elected with party support and on the basis of its manifestoes remain loyal to the party politics, promote party discipline and strengthening the urban local governance, it was felt necessary by the Government for carrying necessary amendments in the Odisha Municipal Act incorporating the provisions for disqualification of elected members on the ground of defection, subject to certain exceptions i.e. in the case of merger or split vide Odisha Amendment Act, 2015 and Rules published therein.

Further, it was considered to prescribe the modality of the disqualification on the ground of defection by amending the Odisha Municipal Rules, 1953 and Odisha Municipal Corporation Rules, 2004. In the said Rules, it is stated that the Election Commission has been empowered to decide the question of disqualification on the ground of defection and his decision shall be final. Thereafter, the statement of objections and reasons have been quoted in the counter affidavit and on the basis of the same it is submitted that the only purpose of the Odisha Municipal Laws (Second Amendment) Act, 2015 was enacted to remove mischief of defection and it has no personal grievance against the petitioners.

4. The opposite party no.2 through its Secretary has filed a counter affidavit to this writ petition. The affidavit may be in the line of orders passed

by the learned State Election Commission in justifying the same. So, it is not necessary to take note of the entire pleadings raised by the State Election Commission at this stage as reproducing the counter affidavit will not serve any purpose. Be that as it may, whatever may be the other pleas raised in the counter affidavit, it cannot go beyond the order passed by the learned State Election Commission and the order passed by the State Election Commissioner shall be discussed at a later stage of this judgment.

5. The Executive Officer, Keonjharh Municipality for and on behalf of the opposite party no.3-Collector-cum-District Magistrate, Keonjhar has filed counter affidavit. From the affidavit, it is apparent that he has nothing to say in the averments made in the writ application and he asserts that he has no role in the whole process.

6. The opposite party no.4 i.e. the Ruling Party through its General Secretary has filed a counter affidavit. It is borne out from the records that in the Municipality Election, the party has fielded 21 candidates under the party symbol. After the results, the 14 of its candidates were elected and only one from the BJP and six candidates from the Indian National Congress were elected. Thereafter, there was a discussion for the election of the Chairperson. It is further pleaded that the President has never received any letters of resignation from the petitioners, rather the President has received a letter i.e. Annexure-A/4 where the petitioners have alleged against the Chairperson and submitted that they have reposed faith and confidence in the party and the leadership of the President of the BJD. Rest of the pleadings are repetition except with respect to the service of whip on the petitioners. However, it is not disputed in this case that such a whip has been issued by the party President through a sitting MLA and Mr. Bose did not seriously assert that the petitioners were not well aware about whip issued by the party under whose aegis they have been elected.

7. The opposite party no.5, the former Chairman of Keonjharh Municipality has filed a detailed counter. It is stated by her that the writ application filed by the petitioners is abuse of judicial process as the petitioners have no sustainable ground and as such the writ application should be dismissed in limine.

The main response that comes forth from opposite party no.5 is that all the petitioners remained present in the meeting of No Confidence Motion and voted in support of it and against the Chairperson of the Municipality on 28.12.2015, even though the political party to which they belonged had

issued a party whip through an authorized person that the councillor must remain absent from the no confidence motion meeting and thereby they have violated the mandate of Section 46-A(1)(b) of the Odisha Municipality Act.

The Keonjhar Municipality comprises of 21 wards and the election to the municipality was held on 19.09.2013 and the results were declared on 20.09.2013 and published in the Official Gazette on 24.09.2013.

The opposite party no.5 was elected as the Chairperson of the Municipality on 30.09.2013 as fifteen votes were cast in her favour and six votes were cast against her. Thereafter, the District Magistrate of Keonjhar District has intimated vide letter dated 21.11.2015 for holding of the special sessions of the council to consider the no confidence motion against the Chairperson of the Municipality to be held on 28.12.2015. The President of the aforesaid political party issued directions to the BJD councillors of Keonjhar Municipality that they should remain absent from the meeting of the Municipality scheduled to be held on 28.12.2015 and the President of the Party authorized a sitting member of the legislative assembly vide letter dated 23.12.2015. In compliance of such direction from the President of the party, five persons could be communicated with the order. They are Purna Chandra Sahu, Paresh Kumar Pradhan, Satyaprava Sahu, Krushna Chandra Rout and opposite party no.5-Mina Majhi. The representative could not serve the whip on the petitioners as they were absent from their house. Accordingly, the representative entrusted the work to the President of the party for the district, who also made an attempt but could not succeed. Further, the direction of the President was brought out in the Odia Daily Newspaper "the Samaj" on 27.12.2015. In other words, the whip was published in the newspaper having a wide circulation in that locality. Despite the whip issued by the political party, the petitioners went against the whip, attended the special session of the council and voted in favour of the no confidence motion, as a result of which opposite party no.5 was ousted from the office of the Keonjhar Municipality. Being aggrieved by their action, the opposite party no.5 approached the State Election Commission and her application was registered as Complaint Case No.1/2016 and she prayed for disqualification of the petitioners from the post of councillors as per the amended provision of the Odisha Municipal Act. The State Election Commissioner after hearing the parties concerned, as per the order dated 19.02.2016 pleased to disqualify the petitioners as councillors of the Keonjhar Municipality. It is contended by the opposite party no.5 that there is clear violation of the statute in this regard hence the learned State

Election Commission did not accept the contention raised by the learned counsel for the present petitioners, who were opposite party before the State Election Commission and allowed the complaint petition and has passed orders as described earlier in a preceding paragraph of this judgment. It is contended that the amended provision of the Odisha Municipal Act will also apply to the pending motion for no confidence and thereafter the opposite party nos. 4 and 5 has gone into elaborating on the order given by the State Election Commission and pleaded that there is no merit in the application.

8. In course of argument, Mr. Bose, learned counsel for the petitioners first raised a legal point. He contended that the complaint petition filed by the opposite party no.5 before the State Election Commission is not maintainable as the Act as amended by the Amending Act, 2015 did not provide for any member having the *locus standi* to file a complaint petition. Drawing attention of the Court to the Specific provisions of the Act amending, the learned counsel for the petitioners submits that it is only 'the' councillors appearing in Section 46-D(1)(a) of the Act can file a complaint. It is brought to the notice of the Court that at Sub-Section (1) of Section 46-A it is provided that a councillor belonging to a party shall be disqualified for being such councillor if he violates a party whip. Then, again in Section 46-B of the Act, it has been provided that where 'a' councillor claims that he or other political party constitute the group So, the word 'the' appearing in Section 46-D(1) of the Act that 'the' councillor or the political party may file a complaint before the election commission means that the person, who has been disqualified or the political party, whose whip is violated, can file complaint but the other councillors cannot file any such complaint before the election commission. It is also argued by Mr. Bose that if in the statute there is no ambiguity in the language used by the legislature, then its plain grammatical meaning has to be adopted by the court, which is the golden rule of interpretation of statute. Moreover, he argues that the very purpose of the Act will not be frustrated even if 'the' is not substituted and read as 'any' as the political party has the right to file an application before the Election Commission. Therefore, it is contended by him that the opposite party no.5-Mina Majhi does not have the *locus standi* to file an application.

The 2<sup>rd</sup> contention raised by the learned counsel for the petitioners is that the amending Act is prospective in nature and it has been passed by the legislature when the no confidence motion was already in process and, therefore, amending Act will not be applicable to the ongoing process.

The 3<sup>rd</sup> limb of argument advanced by the learned counsel for the petitioners is that though the Odisha Municipality Act itself provided at Section 54 that on receipt of a resolution proposed and requested to hold the meeting of the councillors to consider a no confidence motion, Collector should have issued notice giving at least three clear days and instead of doing so, the Collector-cum-District Magistrate has issued a notice on 21.11.2015 fixing the date to 28.12.2015, thereby giving the opposite parties scope to manipulate the no confidence motion by using the period of one month seven days approximately. Therefore, it is contended that the very action of the District administration is questionable and it is also argued that the counter affidavit by the District Administration did not reflect the reasons for giving such a long period for fixing a date when the statute recognizes only three clear days notice is mandatory.

The learned counsel for the petitioners also raised the contention that, as out of 14 elected members of the party, 9 split away from the others then the election commission should have been given findings on this aspect but the election commissioner has not considered this aspect. On such argument, it is contended that the writ application should be allowed and the order of disqualification should be quashed.

9. Having heard learned counsel and learned Senior Advocates appearing for the parties, this Court is of the considered opinion that the following issues need to be addressed on an effective and proper adjudication of the writ petition. They are:

- (i) Whether the word "the" appearing in Section 46-D (1) of Odisha Municipal Laws (Amendment) Act, 2015 prohibits with a councillor from making a complaint before the Election Commission or this word should be interpreted as 'any' councillor of the concerned party can file complaint before the State Election Commission ?
- (ii) Whether during the pendency of a no confidence motion, if an enactment is brought out by the Legislative Assembly, it affects the vested right of any of the petitioners and whether the amending Act shall be made applicable to the pending proceedings ?
- (iii) Whether there is a some malafide administration requiring the Court to intervene in the matter in view of the fact that the Collector-cum-District Magistrate has acted contrary to reasonable procedure laid by fixing a date of holding the no confidence motion on the requisition of the 9 councillors, after approximately, 37 days of issuance of notice by the Collector ?

(iv) Whether in this case the petitioners being 9 members of the Keonjharh Municipal Council belonging to the BJD party by submitting a no confidence motion can take advantage of the saving clause or a split up a party constituting 2/3<sup>rd</sup> members of the BJD councillors group.

10. The stand of the opposite party no.1 i.e. Government of Odisha in the Housing and Urban Development Department is that the essential requirement of making such an amendment in the Municipal Laws is for providing stability to institution of local self-Government and ensure to candidate selected with party support and on the basis of party manifesto loyal to the party discipline and strengthening urban local governance. In this context, the opposite party no.1 relied upon the statement of objectives and reasons of the amending legislation. Though the amending legislation, as notified, which has been in the Court, does not contain the statement of objectives and reasons as set out in the counter affidavit of opposite party no.1, I am inclined to look into it only because no rejoinder affidavit has been filed by the petitioners to assert that the statement of objectives and reasons as stated by the opposite party no.1 is wrong. So dealing with this aspect, it is appropriate to first take note of the exact language used by the executive while introducing the bill in the legislative assembly, which reads as follows:.

#### **STATEMENT OF OBJECTIONS ANDS REASONS**

“Parliament have passed the anti-defection of law in 1985 by the constitution (52<sup>nd</sup> Amendment) by inserting a schedule as tenth schedule to the Constitution of India. The main intent of the law way to combat “the evil of political defections” and strengthen the values of democracy.

2. The Elections to all the categories of Municipal Bodies like Municipal Corporations, Municipalities and N.A.Cs of the State are being held in party lines as per Section-74 of the Odisha Municipal Corporation Act, 2003 and Section 10 of the Odisha Municipal Act, 1950.

3. As per provisions of Section 54 of the Odisha Municipal Act, 1950 and Section 20 of the Odisha Municipal Corporation Act, 2003, no confidence against the Chair-person or the Vice Chairman or Mayor or Dy. Mayor can be moved after two years from the date of his/her election respectively. Taking advantage of this provision many no confidence motions are being moved against the Mayor or Deputy Mayor or Chair-persons or Vice Chair-persons once the wait period is over i.e. completion of two years of term of office. This results in poor urban Governance due to lack of stability of the leadership. Many a time, the no confidence motion is moved by

Corporators/Councillors of the same party by switching over party affiliations.

4. It aims act providing stability to the institution of local self-Government by preventing shifts or party allegiance and ensures that candidates were selected with party support and on the basis of party manifestoes remain loyal to the political parties and also promote party discipline. The Municipal Bodies being third tier of Government require a better cohesion among the elected members as they are at the cutting edge of service delivery platform. The intra party bickering affect the decision taking ability of the leader. This results in poor urban governance due to lack of stability of the leadership.

5. For strengthening the urban local governance, now it is proposed to provide for necessary legal provisions for prohibition of defection of elected members of ULBs from the political parties by which they were up as candidates. It is necessary to disqualify such elected members subject to certain exceptions i.e. in the case of a merger or split.

Therefore, it is considered expedient and accordingly proposed to prohibit defection of elected councillors of a Municipal Council and Corporators of Municipal Corporation from the parties by which they were set up as candidates by suitable amending the Odisha Municipal Act, 1950 and Odisha Municipal Corporation Act, 2003 respectively.

The Bill seeks to achieve the above objectives.”

11. It is apparent from the statement of objectives and reasons that the basic purpose of laying down such an Act of amendment in the legislature is to enact laws to prevent defections, akin to the 10<sup>th</sup> Schedule to the Constitution (52<sup>nd</sup> Amendment). The basic purpose of the enactment of the Act is to combat the evils of political defections. The exact provisions, which are most relevant in this case, are the amended provisions of Sections 46-A, B, C and 46-D of the Odisha Municipal Act, 1950. Section 46-A of the Odisha Municipal Act as amended provides for disqualification on the ground of defection. It is borne out from the Clause (b) of Sub-Section (1) of Section 46-A of Chapter IV-A of the aforesaid Act that if a councillor votes or abstains for voting in, or intentionally remain absent from, any meeting of the municipality on its election of chairperson or vice chairperson or vote of no confidence under Section 54, contrary to any direction issued any political party to which he belongs or by any person or authority authorised by such political party in his behalf, without obtaining, in either case, the prior permission of such party, person or authority and such voting, abstention or

absence has not been condoned by such political party, person or authority, as the case may be, within fifteen days from the date of voting, abstention or absence shall be disqualified being such a councillor. In the explanation to such Sub-Section (1), at Clause (a), it is provided that a person elected as a councillor shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election of such councillor. Sub-clause (b) is not relevant for the purpose of the case. Section 46-B of the aforesaid Act provides for disqualification not to be applicable to the case of split. Section 46B also provides that where a councillor making a claim that he or any other councillor of his political party constitute the group representing a faction, which has arisen as a result of split of political party and such group consists two-third of the members, he shall not be disqualified under sub-Section (1) of Section 46-A on the ground that he voted or abstained for voting contrary to any direction issued by the political party. Similarly Section 46-C provides for disqualification not to apply in case of merger. This Section is not relevant for the purpose of case. Section 46-D is the most important Section, which needs careful examination. This Court finds it appropriate to quote the exact words used.

“ 46D. **Decision as to disqualification on the ground of defection**, (1) A complaint that a Councillor has become subject to the disqualification under section 46A, may be made by the Councillor or political party to the Election Commission,-

(a) in a case failing under clause (a) of sub-section (1) of section 46A, within fifteen days from the date the Councillor gives up the membership of his political party;

(b) in a case falling under clause(b) of sub-section(1) of section 46A within fifteen days after expiry of period of fifteen days as specified therein;.

(c) in a case falling under sub-section (2) of section 46A, fifteen days after he joins the political party.

(2) Where complaint is received under sub-section (1), the Election Commission shall decide the question of disqualification within thirty days from the date of such receipt and his decision shall be final.”

12. Lying emphasis on the word “the” appearing in Section 46-D (1), as noted earlier, Mr. A.P. Bose, learned counsel for the petitioners argued that there is the use of ‘a’ councillor in the amending Act and there is also use of ‘he’ in Clause (b) of Section 46-A(1) and, therefore, contents that the statute

should be given a literal interpretation and only the councillor, who has become disqualified can maintain a complaint before the election commission of the State.

On the other hand, the learned Addl. Government Advocate, Mr. Pitambar Acharya and Mr. Milan Kanungo, Senior Advocates and Mr. Asim Amitav Das, learned counsel appearing for the opposite party no.5 submit that if such interpretation is adopted the very purpose for which this enactment has been brought out, introducing such an amendment will be frustrated as the petitioners, who have themselves become disqualified will never come forward against themselves to declare them as persons disqualified. Mr. Bose, on the other hands, submits that the purpose of the Act will not be frustrated as it is the councillor himself, who has disqualified 'or' the political party may file complaint before the Election Commission. The law regarding this aspect has to be considered very carefully. The 12<sup>th</sup> edition of Maxwell on interpretation of Statute in Chapter-2 provides for general principles of interpretation. In Chapter-2, 1<sup>st</sup> paragraph itself in the locus classicus lays down the principle of the primary rule of interpretation i.e. literal construction. It is apt to take note of the exact description by Maxwell. It reads as follows:

“ The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be constructed according to the rules of grammar. “The length and detail of modern legislation,” wrote Lord Evershed M.R., “has undoubtedly reinforced the claim of literal construction as the only safe rule.” If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.”

The rule of construction is “to intend the Legislature to have meant what they have actually expressed.” The object of all interpretation is to discover the intention of Parliament, “but the intention of Parliament must be deduced from the language used,” for “it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.”

Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. "The decision in this case," said Lord Morris or Borth-y-Gest in a revenue case, "calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision." Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands and to "leave the remedy (if one be resolved upon) to others."

However, Maxwell in the later section of the same Chapter-2 has dealt with the other main principles of interpretation. At paragraph-40, the mischief rule has been explained. This mischief rule has also become popular as the Heydon's Rule has been adopted by the Hon'ble Supreme Court while discussing the so called contradictions between the Order XVIII Rule 4 and Rule 5 of the Code of Civil Procedure, 1908, in the case of *Ameer Trading Corporation Ltd., vs. Shapoorji Data Processing Ltd.*, AIR 2004 SC 355, in a coram of three judges, the judgment rendered by Hon'ble Shri Justice S.B. Sinha, as His Lordship the then. In paragraph-21 of the aforesaid judgment, the Hon'ble Supreme Court has held that in a situation of this nature, the doctrine of suppression of mischief rule as adumbrated in Heydon's case (3 Co. Rep. 7a, 76 ER 637) was applicable. Such an amendment was made by the Parliament consciously and full effect thereto must be given. The Hon'ble Supreme Court has held that while considering whether there is any contradiction between Rule 4 & Rule 5 of Order XVIII of the Code, Rule 5 refers to the evidence which is required to be taken in cases where the appeal is allowed in contradistinction with cases where the appeal is not allowed as envisaged in Rule 13 of Order XVIII of the Code. Rule 5, therefore, invites a situation where the Court is required to take down evidence in the manner laid down which would mean that cross-examination or re-examination of the witness is to take place. Rule 4, on the other hand, provides that every case in the examination-in-chief of witnesses shall be filed on an affidavit and the Rule 5 provides that evidence should be recorded under the direct superintendence of a Judge in seisin of the matter. In order to resolve this

apparent conflict, the Hon'ble Supreme Court in the aforesaid case took into consideration the Heydon's Rule as described above. At paragraph-22 of the said judgment, the Hon'ble Supreme Court has quoted Halsbury's Laws of England, volume 44 (1), fourth reissue, para 1474, PP 906-07, which reads as follows:

“ Parliament intends that an enactment shall remedy a particular mischief and it is therefore presumed that parliament intends that the Court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief. The doctrine originates in Heydon's case where the Barons of the Exchequer resolved that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

- (1) what was the common law before the making of the Act:
- (2) what was the mischief and defect for which the common law did not provide:
- (3) what remedy Parliament has resolved and appointed to cure the disease of the commonwealth: and
- (4) the true reason of the remedy and then the office of all the judges is always to make such construction as shall:
  - (a) suppress the mischief and advance the remedy: and
  - (b) suppress subtle inventions and evasions for the continuance of the mischief pro privato commodo (for private benefit); and
  - (c) add force and life to the cure and remedy according to the true intent of the makers of the Act pro publico (for the public good).”

13. It is also seen from the aforesaid judgment that the Heydon's Rule has been applied by the Hon'ble Supreme Court in large number of cases in order to suppress the mischief which was intended to be remedied as against the literal rule which could have otherwise covered the field. For example, ***Smt. Pek Kalliani Amma and others vs. K. Devi and others***, (AIR 1996 SC 1963); ***Bengal Immunity Co. Ltd., v. State of Bihar and others***, AIR 1955 SC 661; and ***Goodyear India Ltd. v. State of Haryana and Another***, AIR 1990 SC 78. In view of such settled principles of law, it is the duty of the Court to

examine the amending legislation, whose interpretation is before this Court. Coming to the 1<sup>st</sup> requirement, it is seen that the common law before the amending Act i.e. Odisha Municipal Act, 1950 had no provision for any disqualification of a person, who indulge in defections or horse trading etc. and defy the directions given by the political party though they have got elected because of principles and policies the party follows. The common law before the making of the Act was that any elected person representing in the ward or council of Municipal Corporation had no obligation towards the directions given by the political party, which he represents. The 2<sup>nd</sup> limb is that the legislative assembly of the State of Odisha had resolved and appointed to cure the disease or defect, those appear from the statement of objectives and reasons of the aforesaid Act, which is quoted earlier and from the discussions in the Assembly, the copy of which is placed during the arguments, while passing of the Act in the legislative assembly shows that all members of the legislative assembly cutting across the party line wanted such a prohibition of voting or acting contrary to the directions given by the party should be remedied or should be done away with. Fourthly, the true reason of the remedy is to provide stability to the institution of local self-Government and to ensure candidate elected with party support and manifestoes loyal to the political party, promote party discipline and strengthen local urban governance. It is common knowledge that defections, horse trading etc among elected representative of the different institutions like the Parliament, the legislatures or the Municipal Corporations Council etc is a modern day malady to avoid this mischief, the Parliament has already enacted by virtue of 52<sup>nd</sup> Amendment in the year, 1985 the anti-defection law and it has been added in Schedule-10 to the Constitution. So any interpretation, which will suppress the mischief and advance the remedy, suppress the subtle invention and evasion for continuance of the mischief for the private benefit and to add force and life to the cure and remedy according to true intent of the makers of the Act for public good should be adopted.

14. If Mr. Bose's argument is accepted, then the very objective of introducing such an amendment will be frustrated. Firstly, no councillor, who has gone against the party directions will come forward and file an application before the Election Commission to disqualify himself. The argument advanced by the learned counsel for the petitioners is that similar provisions of the representative having doubt about his disqualification also appears in different provisions of the Orissa Grama Panchayat Act. However, while interpreting this provision only because the political party has the right

to maintain a complaint before the Election Commission, the right to maintain an application before the Commission by the person, who has defied direction of the political party will frustrate very purpose of the Amending Act and it shall not be in the interest of suppression of the mischief and advance remedy for non-continuance of the mischief for private benefit and to add force and life to remedy according to the true intent of the makers of the Act for public good. In my considered view, the word “the” appearing in Section 46-D is in fact should be read as “any” thereby giving liberty to any of the councillors of any Municipal Corporation of a council to maintain an application before the Election Commission regarding the disqualification of certain members, who do not come within the exception for disobeying the party directions. Accordingly, I hold that the opposite party no.5-Mina Majhi can maintain a complaint before the State Election Commission and on that ground, this Court is not willing to quash the order impugned.

15. The second important aspect of the case is that admittedly while this Act came into force, the process of no confidence motion has already been started and in this connection, it is argued at length by both the sides about the applicability of the Act to any proceedings. In this connection, in the reported case of *Zile Singh v. State of Haryana and others*, (2004) 8 SCC, the Hon’ble Supreme Court having a coram of three Judges regarding the retrospective action of Haryana Municipal Act, 1973, as amended by Haryana Municipal Act 15 of 1994, has taken note certain portion of “The Principles of Statutory Interpretation” by Justice G.P. Singh (9<sup>th</sup> addition, 2004 at page-438), at paragraph-13 of the aforesaid Judgment. In view of the approval of the Hon’ble Supreme Court all the commentaries made by Justice G.P. Singh in the locus classicus, this Court feels it appropriate to take note of the commentary appearing in the general principles guiding the retrospective operation of statute. It appears at the second heading i.e. appearing in Sub-heading (ii), page 474, Chapter-6 Synopsis-2 deals with statute dealing with substantive right. It is quoted below:

“ (ii) **Statutes dealing with substantive rights.** – It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested right or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is “deemed to be prospective only ‘*nova constitutio futuris formam imponere debet non*”

*praeteritis*. In the words LORD BLANESBURG, “provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. “Every statute, it has been said”, observed LOPES, J.J., “which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect. As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. In other words close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament. But if the literal reading of the provision giving retrospectivity produces absurdities and anomalies, a case not *prima facie* within the words may be taken to be covered, if the purpose of the provision indicates that the intention was to cover it. The inhibition against retrospective construction is not a rigid rule and must vary *secundum materium*. It has been said that “the basis of the rule is no more than simple fairness which ought to be the basis of every legal rule.”

It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.

The rule against retrospective construction is not applicable to a statute merely “because a part of the requisites for its action is drawn from a time antecedent to its passing”. If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its operation and the rule may well result in virtual nullification of most of the statutes. An amending Act is, therefore, not retrospective merely because it applies also to those to whom pre-amended Act was applicable if the amended Act has operation from the date of its amendment and not from an anterior date. But this does not mean that a statute which takes away or impairs any vested right acquired under existing laws or which creates a new obligation or imposes a new burden in respect of past transactions will not be treated as retrospective.” Thus to apply an amending Act, which creates a new obligation to pay additional compensation, or which reduces the rate of compensation, to pending proceedings for determination of compensation for acquisitions already made, will be to construe it retrospective which cannot be done unless such

a construction follows from express words or necessary implication. Similarly, a new law enhancing compensation payable in respect of an accident arising out of use of motor vehicle will not be applicable to accidents taking place before its enforcement and pending proceedings for assessment of compensation will not be affected by such a law unless by express words or necessary implication the new law is retrospective. It makes no difference in application of these principles that the amendment is by substitution or otherwise. The cases where the principle, that a statute is not retrospective simply because it takes into account past events has been applied are discussed hereinafter under titles 2(g) and 2(h).

In certain cases, a distinction is drawn between an existing right and a vested right and it is said that the rule against retrospective construction is applied only to save vested rights and not existing rights. This distinction, however, has not been maintained in other cases. The word 'retrospective' has thus been used in different senses causing a certain amount of confusion. The real issue in each case is as to the scope of particular enactment having regard to its language and the object discernible from the statute read as whole.

16. Thus, this commentary of Justice G.P. Singh is based on different rulings of the Hon'ble Supreme Court and some other judgments. Note of this author appears at the last paragraph of this exposition. It is apparent from the afore-quoted paragraph-C (iii) in certain cases Hon'ble Supreme Court as well as our Courts has held that in a situation where an Act is passed during pendency of a proceeding, it depends on the facts of the case as to whether it would be applied to that particular pending proceeding or not. In case of vested interest, some court has held that it should not be affect right of the parties when the proceedings are already pending.

17. Part IX-A of the Constitution of India provides for the Municipalities. Article 243-Q provides for constitution of Municipality. Article 243-R provides for composition of Municipality. It is provided that save as provided in clause (2), the seats of municipality shall fulfill by the persons chosen by district election from the territorial constituency in the municipal area and for this purpose, each municipality shall be shall be provided territorial constituency to be known as wards. Clause (2) provides that the legislature of a State may, by law, provide for representation of the municipality of (i) person having special knowledge or experience in Municipal administration; (ii) member of the house of the people and the member of the State representing constituency, which comprise wholly or partly the municipal area; (iii) member of the council or State and the member of the State

Legislative Council of the State registered as elector within the municipal area; (iv) Chairman of the committee constituted under clause (5) of Article 243-S. Article 243-S provides for constitution and composition of wards committees etc. Article 243-T provides for reservation of seats. For the purpose of this case, Article 243-U is very important, which provides for duration of municipality. It is appropriate to take note of the exact provision. The same is quoted hereunder.

**“243-U. Duration of Municipalities, etc –(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:**

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed –

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution :

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved.”

18. Thus, it is apparent from this provision of the Constitution that every municipality, unless dissolved under any law for time being in force, shall continue for five years from the date appointed. In other words, the municipality, which constitutes of councillors, shall continue for a period of at least 5 years unless it dissolved under any law in force at that time. Similar

provisions appear in the Odisha Municipal Act, 1950. Section 41 of the Act provides for term of office of the councillors. It is appropriate to take note of the exact provision.

“ **41. Term of office of Councillors-** [(1) Save as otherwise provided in this Act-

(i) a Councillor whether elected at a general election, or nominated, to a Municipality shall hold office for five years from the date appointed for the first meeting of the Municipality as referred to in Clause (a) of Sub-section (2) of Section 47;

(ii) a Councillor elected at a bye-election or elected or nominated against a casual vacancy in a Municipality shall hold office for the unexpired period of the term of office of the Councillor in whose place he has been so elected or, as the case may be, nominated.

(2) An outgoing Councillor, if otherwise qualified, shall be eligible for re-election.

(3) Whenever the number of Councillors of an existing Municipality is increased as a result of increase in the number of Wards thereof, the Additional Councillor or Councillors elected for the purpose shall, save as otherwise provided, continue till the expiry of the term of office of the other Councillors of the Municipality as provided in Sub-section (1)].”

19. Thus, it is apparent from this constitutional scheme as well as the Act itself that every councillor has a right to continue for five years once elected. Thus, any law that affects such right must be prospective in operation. Though it cannot be termed as vested right, it can be termed as a right guaranteed under the Constitution. Thus, in a situation, where the councillor has a right to continue for five years and as per the provisions of Section 54 of the said Act, he along with others claims for a vote of no confidence motion against the Chairman under Section 54 of the Odisha Municipal Act, any provision limiting such right of the councillors shall be held only to be prospective and it cannot be held to be applicable to a proceeding already initiated for no confidence at the time of passing of the Act in the legislature. Thus, this Court is of the opinion that in view of the commentary of Justice G.P. Singh's "Interpretation of Statute", the amending Act cannot be held to be retrospective in operation in the sense that it shall not be applicable to any action taken under the statute, especially under Section 54 of the Odisha Municipal Act having regard to its language and objectives discernible.

20. Viewing from another aspect of the case, this Court takes note of certain dates. It is recorded chronologically as follows:

On 12.08.2013, notification was issued for the elections of Municipal Corporation and notified area council elections were scheduled to be held on 19.09.2013 i.e. after a gap of 37 days. On 30.09.2013, the Chairperson was elected. On 09.11.2015, the resolution adopted by the petitioners to bring a no confidence motion against the opposite party no.5-Mina Majhi. The same was submitted to the Collector-cum-District Magistrate, Keonjhar on 12.11.2015. On 21.11.2015, the Collector decided to hold the special session of the municipal council on 28.12.2015. Thus, the meeting was scheduled to be held after a gap of 37 days. In the interregnum, on 18.12.2015, the 2<sup>nd</sup> Amendment was notified and it came into force w.e.f. 19.12.2015. On 23.12.2015, the whip was published in paper. The Rules were published on 09.01.2016 and it was published in the Official Gazette on 14.01.2016. The complaint has been filed on 05.01.2016 before the Election Commission by the opposite party no.5. Though the petitioners have averred at paragraphs 6, 7 and 8 that they have approached opposite party no.3 to fix an early date for holding meeting for no confidence motion, the meeting was fixed on 28.12.2015, which is more than a month of date of notification. Clause (c) of Sub-Section (2) of Section 54 of the Odisha Municipal Act, 1950 provides that within 10 days of receipt of such requisition, the date should be fixed and at least three clear days notice should be given. In this case, it is noticed that though the petitioners have claimed that the ruling party in order to foil of the bid to bring out a 'no confidence motion' against the opposite party no.5 has brought out this amendment of the Odisha Municipal Act, 1950. From the copy of the discussion held in the Orissa Legislative Assembly, it is apparent that all the parties have supported the amendment. So, it cannot be said that the ruling party had only the objective of foiling the efforts of the petitioners to bring out a no confidence motion against the opposite party no.5. However, this Court is of the opinion that the action of the opposite party no.3 in fixing the date of the special session of the council after 39 days of the production of resolution and requisition creates a doubt in the mind of the Court. It is noted that election commission had specified the date of election after 37 days of notification. In such a situation, it appears to the Court that the action of the Collector in scheduling the special session of the municipal council for considering 'no confidence motion' against the opposite party no.5 after almost 37 days of receipt of requisition is patently unreasonable. In this case, the opposite party no.3 though has filed a counter affidavit through

Executive Officer has not denied the allegations made in the writ application nor he has given any reasons for this unduly delayed date of the special session of the council. If the opposite party no.3 had taken pains to follow the statute and given a reasonable date giving three clear days or would have given notice fixing date within seven to ten days, this difficulty would not have been arisen and the issue of this anti-defection law in the municipal law would not have been attracted to this case. So, keeping this aspect in mind i.e. right of the councillors to continue for five years, which has a right recognized by the Constitution of India as well as the Odisha Municipal Act, 1950 as well as the action of the opposite party no.3 in fixing the date after a considerable length of time i.e. 37 days from the date of requisition, this Court is of the opinion that the amending Act is not applicable to the present case and the petitioners cannot be declared to be disqualified only on the ground of defying the whip or direction given by the party. On this score alone, the writ application is bound to succeed.

21. However, there is another aspect of the case which this Court considers necessary to discuss. It is apparent from the record that the amending Act i.e. Orissa Municipal Laws (Second Amendment) Act, 2015 consists of three Chapters. Chapter-I is the preliminary Chapter. Chapter-II relates to amendment to the Odisha Municipal Corporation Act, 2003. Chapter-III consists of two sections i.e. Sections 4 and 5. Section 4 provides for amendment of Section 17 of the Odisha Municipal Act, 1950 and Sub-section (2) has been inserted in the provision that a councillor shall cease to hold office, if he was disqualified under the provisions contained in Chapter IVA of the Act.

Section 5 of the aforesaid Act provides for insertion of Chapter-IV-A with the holding disqualification on the ground of defection. The 1<sup>st</sup> Section to be introduced is Section 46-A, which provides for disqualification on the ground of defection. The same has been discussed earlier. Section 46-B of the aforesaid Act has been inserted for saving disqualification in cases of split. Section 46-B needs to be taken into consideration and it is apt for this Court to quote the same.

**“46B. Disqualification not to apply in case of split-** Where a Councillor makes a claim that he and any other Councillors of his political party constitute the group representing a faction which has arisen as a result of a split in his political party and such group consists of not less than two-thirds of the members of such political party, –

(a) he shall not be disqualified under sub-section (1) of section 46A on the ground,-

(i) that he has voluntarily given up his membership of his political party; or

(ii) that he has voted or abstained from voting in, or intentionally remained absent from, any meeting of the Municipality in an election of its Chairperson, Vice-Chairperson or a vote of no confidence under section 54, contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by such political party in this behalf, without obtaining in either case, the prior permission of such political party, person or authority and such voting, abstention or absence has not been condoned by such political party, person or authority as the case may be, within fifteen days from the date of voting or such abstention or absence; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purpose of sub-section (1) of section 46A and to be his political party for the purpose of this section.”

Section 46-C of the aforesaid Act provides for disqualification shall not be applied in case of merger. It is not relevant in this case. Section 46-D provides for decision as to disqualification on the ground of defection shall be taken by the election commission on a complaint filed before it. Section 46-E provides for notwithstanding anything contain any Court shall have jurisdiction in respect of matters under the Chapter. Thus, there is only provision, which is appearing regarding the split and non-applicability of disqualification in the cases of split. Section 46-B has been newly inserted in the Act. It provides that where councillor makes a claim that he or his political party constitute the group representing a faction which has arisen as a result of split in the political party and such group consists of not less than two-third of the political party, (a) he shall not be disqualified under sub-section (1) of Section 46-A on the ground that he has voluntarily given up membership of political party or that he has intentionally remained absent from any meeting of the municipality in an election of its Chairperson or Vice-chairperson or a vote of no confidence under Section 54, contrary to any direction issued by the political party to which he belongs. Thus, in case the councillor constitutes a group, which constitute 2/3 of the members of such political party in the council, then the disqualification regarding defection will not be applicable. This Court takes note of the fact that except this right of a split, no provision has been made in the amending Act regarding the

procedure to be followed in case of split. In other words, no provision is there in the Act itself as to how a councillor shall stake his claim and before whom he shall stake his claim regarding a split in a political party in the council. The Rules framed under Section 387 of the Act also do not have prescribed any such procedure for enforcing right of split a political party by virtue of a  $\frac{2}{3}$  split in the political party in the council. There is no dispute that Keonjharh Municipality consists of 21 wards and the councillor elected with the party symbol of the Biju Janata Dal and elected to municipal council are 14 in numbers.  $\frac{2}{3}$  of 14 comes to 9.32, by approximation it comes to 9, because any faction which is less than 0.5 will be calculated to the next lower number and any faction of 0.5 or above will be counted as next higher number. In other words, 9 councillors, therefore, consist  $\frac{2}{3}$  of the 14 numbers of total representatives of the B.J.D. in the council. This Court is of the opinion that there is a split of the B.J.D. Keonjharh Municipal political party. This aspect was specifically raised by these petitioners in their counter before the Election Commission but the learned Election Commission has not given any findings on this aspect. This Court is of the opinion that since there is a split amounting to  $\frac{2}{3}$  of the total representatives of the BJD in the council, the petitioners shall be saved by such exception as provided under Section 46-B as this is a case of split. This Court is also conscious of the fact that the petitioners have not claimed before the Collector-cum-District Magistrate or any other authority that there has been a split as by then the Act has not come into force. Secondly, the Act and the Rules do not provide any procedure to claim a case of split. The Rules also do not provide any procedure for claiming split and they have in the instant case raised this point before the State Election Commission. So, in the alternative, the action of the petitioners shall be saved under Section 46-B of the Odisha Municipal Act and their action in attending the 'no confidence motion' contrary to the directions given by the political party would not make them disqualified from continuing as the councillors of the Keonjharh Municipal Council.

22. In view of the aforesaid detailed discussion, this Court is of the opinion that the order passed by the learned State Election Commission i.e. Annexure-1 dated 19.02.2016 fails the judicial scrutiny and it cannot be allowed to be stand.

23. Accordingly, the writ application is allowed. The order passed by the learned State Election Commission on 19.02.2016 in Complaint Case No.1 of 2016 i.e. Annexure-1 is hereby quashed. But, the order of the learned State Election Commission, as far as it relates to the observation that the opposite

party no.5 shall be deemed to have been vacated the office of the Chairperson of Keonjhar Municipal Council is concerned, shall remain unaffected. It is further declared that the petitioners are not disqualified from being the members of the Keonjhar Municipality under Section 46-A (1)(b) of the Odisha Municipal Act, 1950 as amended by the Odisha Municipal Laws (Second Amendment) Act, 2015 and they shall continue to represent their wards in the municipal council till end of their tenure. There shall be no orders as to costs.

Writ petition allowed.

**2018 (I) ILR - CUT- 95**

**DR. A.K. RATH, J.**

S.A. NO. 179 OF 1993

**SARAT CH. NAYAK & ANR.**

..... Appellants

.Vrs.

**RAMA CH. NAYAK & ORS.**

..... Respondents

**ODISHA CONSOLIDATION OF HOLDINGS AND PREVENTION OF  
FRAGMENTATION OF LAND ACT, 1972 – Ss. 4, 51**

**Whether, the consolidation authorities have power and jurisdiction to decide the question of status of a person i.e. adoption and whether the decision of the Consolidation Authority that Dwija is the adopted son of Kapil, shall operate as resjudicata in the suit ?**

**If title to property as son by birth can be adjudicated by the consolidation authorities, by what logic or law such authorities denied jurisdiction to decide if a person is son by way of adoption, when sonship is acquired either by birth or by way of adoption – So if the issue of title is dependent upon adoption, the said issue can be decided by the consolidation authorities if arises ancilarily or incidentally for adjudication of the title – Held, the decision of the Consolidation Authority that Dwija is the adopted son of Kapil shall operate as resjudicate in the suit.**  
(Paras 10, 11)

**Case Law Relied on :-**

1. 70 (1990) CLT 439 : Jairam Samantray -V- Baikuntha Samantray

For Appellants : Mr. Biekananda Bhuyan, Manoj Ku. Behera  
For Respondents : Mr. Ramakanta Mohanty, Sr. Adv.,  
Mr. Kalyan Ku. Mohapatra

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Date of Hearing : 11.12.2017

Date of Judgment: 20.12.2017

### **JUDGMENT**

***Dr.A.K.RATH, J.***

The plaintiffs are the appellants against a reversing judgment in a suit for permanent injunction.

2. The case of the plaintiffs was that Pankaj and Kapila were two brothers. Pankaj had two sons, namely, Dwija and Kusuna. Dwija died in the year 1981 leaving behind his wife Labani-plaintiff no.1 and one daughter, namely, Srimati, defendant no.7. Kusuna died in the year 1980 leaving behind his three sons, namely, Ram Chandra, Chandramani and Indramani, defendants 1 to 3 and three daughters, namely, Malati, Ahalya and Charu, defendants 4 to 6. Subash is the son of Kapila. He possessed his separate share. Dwija and Kusuna were separated. There was severance of joint family property by metes and bounds. Dwija adopted Sarat, plaintiff no.2. There was a giving and taking ceremony in presence of the villagers and relations. After death of Dwija, plaintiff no.1 executed a deed of acknowledgement of adoption-cum-gift deed on 4.1.1982 in favour of plaintiff no.2. Plaintiffs 1 and 2 were in possession of the property of Dwija. Since the defendants threatened to dispossess them, they instituted the suit seeking the relief mentioned supra.

3. Defendants 1 to 3 resisted the claim of the plaintiffs mainly on the ground that Kapila was issueless. Kapila adopted Dwija. Thus, Dwija had no right to inherit any property from the branch of Pankaj. After death of Pankaj, Kusuna inherited the property being the sole surviving heir. After death of Kusuna, the defendants succeeded to the property.

4. Stemming on the pleadings of the parties, the learned trial court framed five issues. Parties led evidence. The suit was decreed. The defendants 1 to 3 filed T.A.No.25 of 1986. The learned appellate court set aside the judgment and remitted the matter back for de novo hearing. After remand, the learned trial court again upheld the contention of the plaintiffs on the question of adoption and decreed the suit. The defendants 1 to 3 filed

T.A.No.7 of 1992 before the learned Sub-Judge, Jagatsinghpur, which was allowed. It is apt to state here that during pendency of the Second Appeal, appellant no.1 died.

5. The Second Appeal was admitted on the following substantial questions of law:

“1. Whether the lower appellate court was entitled to apply the theory of ancient adoption in coming to its conclusion on the question as to whether Dwija is the adopted son of Kapila or not.”

2. Whether the decision of Consolidation Authority that Dwija is the adopted son of Kapila, shall operate as res judicata in the suit ?”

6. Heard Mr.Bibekananda Bhuyan, learned Advocate along with Mr.Manoj Kumar Behera, learned Advocate for the appellants and Mr.Ramakanta Mohanty, learned Senior Advocate along with Mr.Kalayan Kumar Mohapatra, learned Advocate for the respondents.

7. Mr.Bhuyan, learned Advocate for the appellants submitted that Dwija is the son of Pankaj. He is not the adopted son of Kapila. There is no pleading with regard to giving and taking ceremony. The finding of the learned appellate court that instant is a case of ancient adoption is perverse since one D.W.1 deposed that he was a witness when the adoption took place. In view of the same, the court cannot proceed with assumption that the evidence regarding actual giving and taking is lost. The learned appellate court erred in law in holding inter alia that the finding of the Consolidation Authority regarding adoption will operate as res judicata inasmuch as the finding was rendered when the civil suit was pending where adoption was the main issue. The finding of the Consolidation Authority shall not operate as res judicata. The learned appellate court brushed aside the documentary evidence on record as well as admission of the defendants. Non-consideration of the same vitiates the judgment.

8. Per contra, Mr.Mohanty, learned Senior Advocate for the respondents submitted that issue of adoption has been set at rest by the Consolidation Authority. The matter in issue was directly and substantially before the Consolidation Authority. If the issue of title is dependent upon adoption, the said issue can be decided by the Consolidation Authority ancillary and incidentally. The issue of adoption has been decided by the Consolidation Authority. The same cannot be reopened in the present suit. He relied on a

decision of this Court in the case of Jairam Samantray Vrs. Baikuntha Samantray, 70 (1990) C.L.T. 439.

9. The area, where the suit schedule land falls, came under the purview of the consolidation operation. Thirteen Objection Cases were filed under Section 9 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 by the respective parties to record the land in their favour. The same having been dismissed, the matter was carried in Appeal Case No.32 of 1985 before the Deputy Director, Consolidation Authority. In a well discussed order dated 17.10.1985, the Deputy Director, Consolidation Authority held that Dwija is the adopted son of Kapila.

10. In Jairam Samantray (supra), a Division Bench of this Court went in-depth into the matter. The Court posed the question "Don't the consolidation authorities decide such question of legal character in cases after cases day in and day out?" The Court held that "If then the consolidation authorities have jurisdiction to decide the question as to whether a person is son by birth, by what logic or law are they denied jurisdiction to decide if a person is son by way of adoption. Sonship is acquired either by birth or by way of adoption. They are the different modes of acquisition. If title to property as son by birth can be adjudicated upon by the consolidation authorities, we fail to understand why adjudication of claim to title as son by way of adoption should be out of bounds to them". It was further held that "the statement of law that the consolidation authorities have no jurisdiction to decide the question of adoption, that being a question of status, is not correct. In almost every case, consolidation authorities are deciding the question of status but a declaration of the law to the effect that the consolidation authorities have no jurisdiction to decide the question of adoption, if such question arises ancillary or incidentally for adjudication of right, title and interest in property, is insupportable."

11. The ratio in the case of Jairam Samantray (supra) applies with full force to the facts of this case. The matter in issue was directly and substantially issue before the Consolidation Authority. Thus, the decision of the Consolidation Authority that Dwija is the adopted son of Kapila shall operate as res judicata. The substantial questions of law are answered accordingly.

12. A priori, the appeal fails and is dismissed. Consequently, the suit is dismissed. No costs.

Appeal dismissed.

2018 (I) ILR - CUT- 99

**DR. A.K. RATH, J.**

RSA. NO. 132 OF 2008

**THE POSTMASTER GENERAL,  
SAMBALPUR & ANR.**

.....Appellants

. Vrs.

**MISS SANJUKTA HOTA**

.....Respondent

**GOVERNMENT SAVINGS CERTIFICATES ACT, 1959 – S.12**

r/w Section 72, Contract Act, 1872 &amp; Rule 8 of I.V.P.Rules, 1986

**Indira Vikas Patra Certificates – Destroyed by white ants – Maturity date was 28.11.1999 – Claim for maturity value with interest – Principle of unjust enrichment – When Governments and public authorities deal with a citizen they should not rely on technicalities – Held, learned trial court rightly allowed maturity value of the certificates and learned lower appellate court was correct in allowing simple interest @ 6% per annum from the date of maturity i.e. from 28.11.1999 till payment. (Paras10 to18)**

**Case Law Referred to**

1. AIR 2002 Gujarat 180 : Narendrabhai Shankarlal Joshi v. Post Master General, Gujarat Circle and another
2. (2011) 8 SCC 161 : Indian Council for Enviro-Legal Action v. Union of India and others,
3. AIR 1990 SC 313 : Mahabir Kishore and others v. State of Madhya Pradesh.

For Appellants : Mr. Anup Bose, Asst. Solicitor General  
Ms. Sanjuktabala Das, CGC

For Respondent : Mr. G.P. Dutta

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Date of hearing : 27.10.2017

Date of judgment: 06.11.2017

**JUDGMENT*****Dr. A.K.RATH, J***

Defendants are the appellants against a reversing judgment.

2. The plaintiff-respondent instituted T.S. No.64 of 2000 in the court of the learned Civil Judge (Senior Division), Sambalpur for declaration that she is the owner of the damaged Indra Vikas Patras (IVPs) having the face value

of Rs.5000/- each totaling Rs.1,00,000/- and for a direction to the defendants to pay the maturity value with interest and costs.

**3.** The case of the plaintiff is that on 28.5.1994 she had purchased twenty numbers of IVPs amounting to Rs.50,000/- from Sambalpur Post Office having maturity value of Rs.1,00,000/-. The date of maturity was 28.11.1999. She had kept the IVPs in a wooden box. The same were destroyed by white ants. On 5.8.1998, she made a representation to defendant no.2 to replace the damaged IVPs by issuing duplicates. Since no action was taken, she instituted the suit after issuing notice under Sec. 80 CPC claiming right, title and interest over the IVPs.

**4.** Defendants filed a written statement denying the assertions made in the plaint. It is pleaded that there is no provision to replace the damaged IVPs. The defendants are not entitled to pay the maturity value of IVPs to the plaintiffs.

**5.** Stemming on the pleadings of the parties, learned trial court struck six issues. Parties led evidence. Learned trial court declared the title of the plaintiff over IVPs and directed the defendants to pay the maturity value. Assailing the judgment and decree of the learned trial court in not allowing the interest, the plaintiff appealed before the learned District Judge, which was subsequently transferred to the learned Addl. District Judge, Sambalpur and renumbered as RFA No.14/38 of 2005. Learned lower appellate court directed the defendants to pay simple interest @ 6% per annum from the date of maturity of the IVPs i.e. from 28.11.1999 till payment.

**6.** The second appeal was admitted on the following substantial questions of law;

“1. Whether the defendants are liable to pay interest on the maturity value of Indira Vikash Patra from the date of its maturity ?

2. Whether the suit will fail in absence of notice under Section 80 CPC ?

**7.** Heard Mr. Anup Bose, learned ASG along with Ms. Sanjuktabala Das, learned CGC for the appellants and Mr. G.P. Dutta, learned counsel for the respondent.

**8.** Mr. Bose, learned Asst. Solicitor General submitted that as per the provisions of the IVP Scheme, an IVP lost/stolen/mutilated/destroyed/defaced

beyond recognition will not be replaced by issue of duplicate. The plaintiff was not in possession of IVPs. The mutilated pieces were beyond recognition. The same could not be replaced. The plaintiff filed a representation to the defendant no.2 requesting latter to issue duplicate IVPs vide Ext.2. By letter dated 22.3.2000, the defendants informed the plaintiff that IVPs could not be replaced. He further submitted that for lackadaisical attitude exhibited by the plaintiff, she is not entitled to any interest. No notice under Sec. 80 CPC has been issued before institution of the suit. He further contended that in identical matter, the Gujarat High Court in the case of *Narendrabhai Shankarlal Joshi v. Post Master General, Gujarat Circle and another*, AIR 2002 Gujarat 180, refused to grant interest.

9. Per contra, Mr. Dutta, learned counsel for the respondent submitted that the plaintiff purchased twenty numbers of IVPs from Sambalpur Post Office having maturity value of Rs.1,00,000/-. Since IVPs were mutilated, she made a representation to the defendant no.2 vide Ext.2 requesting latter to replace the same. Defendant no.2 maintained a sphinx like silence. Thereafter, the plaintiff instituted the suit. Learned trial court decreed the suit in part with a direction to the defendants to pay the maturity value. Defendants did not challenge the judgment and decree; rather the plaintiff filed appeal. Thus defendants cannot challenge the judgment and decree of the learned lower appellate court wherein interest was awarded. He further contended that principle of unjust enrichment applies in the facts scenario. The learned lower appellate court has rightly awarded interest. He relied on the decision of the apex Court in the case of *Indian Council for Enviro-Legal Action v. Union of India and others*, (2011) 8 SCC 161.

10. The plaintiff had purchased twenty numbers of IVPs from Sambalpur Post Office. The maturity value of the IVPs was Rs.1,00,000/-. Since the same were mutilated, she made a representation vide Ext.2 for replacement. Since IVPs were not replaced, she issued notice under Sec. 80 CPC claiming maturity value and interest. Learned trial court decreed the suit in part. The plaintiff assailed the judgment and decree. Learned lower appellate court allowed the appeal and directed the defendants to pay interest. In view of the same, the defendants cannot deny payment of the maturity value.

11. The only question survives as to whether plaintiff is entitled to interest ?

12. Sec. 72 of the Indian Contract Act deals with liability of person to whom money is paid, or thing delivered, by mistake or under coercion. It

says that the principle of unjust enrichment requires; first, that the defendant has been 'enriched' by the receipt of a "benefit", secondly, that this enrichment is "at the expense of the plaintiff", and thirdly, that the retention of the enrichment be unjust.

**13.** Sec. 72 of the Indian Contract Act was the subject-matter of interpretation of the apex Court in the case of *Mahabir Kishore and others v. State of Madhya Pradesh*, AIR 1990 SC 313. The apex Court held thus;

"11. The principle of unjust enrichment requires: first, that the defendant has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient's wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.

12. Another analysis of the obligation is of quasi contract. It was said: "if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and give this action rounded in the equity of the plaintiff's case, as it were, upon a contract (quasi ex contracts) as the Roman law expresses it." As Lord Wright in *Fibrosa Spolka v. Fairbairn Lawson*, [1943] AC 32 : (1942) 2 All ER 122 pointed out, "the obligation is as efficacious as if it were upon a contract. Such remedies are quasi contract or restitution and theory of unjust enrichment has not been closed in English law."

**14.** In *Indian Council for Enviro-Legal Action* (supra), the apex Court held:

"151. Unjust enrichment has been defined as:

"Unjust enrichment.- A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."

See *Black's Law Dictionary*, 8th Edn. (Bryan A. Garner) at p. 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."

152. “Unjust enrichment” has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.”

**15.** The ratio in the decisions cited supra apply proprio vigore to the facts of the case.

**16.** About 60 years back in the case of Firm Kaluram Sitaram vs. The Dominion of India, AIR 1954 BOMBAY 50, Chief Justice Chagla (as he then was) speaking for the Bench stressed that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person. The claim of the plaintiff was denuded on jejune grounds.

**17.** In the Madras Port Trust v. Hymanshu International by its Proprietor V. Venkatadri (dead) by L.Rs, AIR 1979 SC 1144, the apex Court held that it is high time that Governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens.

**18.** In the case of Narendrabhai Shankarlal Joshi (supra), doctrine of “unjust enrichment” was not the subject-matter of consideration. The said decision is distinguishable. The substantial questions of law are answered accordingly.

**19.** A priori, the appeal fails and is dismissed. There shall be no order as to costs.

Appeal dismissed.

2018 (I) ILR - CUT-104

DR. A.K. RATH, J.

S.A. NO. 139 OF 2002

UMA SAHU

.....Appellant

. Vrs.

SABITRI SAHU

.....Respondent

**HINDU SUCCESSION ACT, 1956 – Ss. 4, 8, 14**r/w Sec. 2 of Hindu Widows  
Remarriage Act, 1856

**Once a female Hindu is vested with property U/s. 8 of the Act, 1956, upon the death of her husband in the year 1976, and became absolute owner there of U/s. 14 of the said Act, whether, such property will be divested after her remarriage in view of section 2 of the Hindu Widows Remarriage Act, 1856, which provides that a Hindu widow after remarriage will cease to have any right in husband's Property as if she had died ?**

**Held, in view of the over-riding effect of the Act U/s. 4 of the 1956 Act, section 2 of the 1856 Act would not prevail over the provisions of the Act, 1956 – So once property is vested in the widow of a Hindu male the same can not be subjected to divestment.**

(Paras 11,12)

**Case Laws Referred to**

1. AIR 2008 SC 1467 : Cherotte Sugathan (D) by L.Rs. & Ors. -V- Cherottee Bharathi & Ors.
2. AIR 1983 Patna 33 : Chando Mehtain & Ors. -V- Khublal Mahto & Ors.
3. AIR 1976 SC 2595 : Kasturi Devi -V- Dy. Director of Consolidation
4. AIR 1999 Kerala 62 : Thankam -V- Rajan

For Appellant : Mr. G.N. Mishra

For Respondent : Mr. P.K. Kar

Date of Hearing : 24.11.2017

Date of Judgment: 08.12.2017

**JUDGMENT*****Dr.A.K.RATH, J.***

The defendant is the appellant against a confirming judgment. The suit was for partition between the mother and daughter.

2. The case of the plaintiff-respondent was that the suit land belonged to her husband Sadhu Sahu. The defendant is their daughter. Her husband died in the year 1976. After death of her husband, she remarried to Chaitanya Sahu. As widow of Sadhu, she has a share in the suit land.

3. The defendant resisted the claim on the ground that the plaintiff is not entitled to any share in the property of Sadhu after her remarriage to Chaitanya Sahu.

4. Stemming on the pleadings of the parties, the learned trial court struck three issues. The parties led evidence both oral and documentary. In an elaborate consideration of the oral and documentary evidence and pleadings, the learned trial court came to hold that once the property has been vested in plaintiff upon death of her first husband, the same cannot be divested on remarrying to Chaitanya Sahu and, as such, the plaintiff is entitled to half share over the suit schedule property. Held so, it decreed the suit. The unsuccessful defendant appealed before the learned District Judge, Sambalpur, which was subsequently transferred to the court of the learned Additional District Judge, Sambalpur and renumbered as Title Appeal No.43/8 of 1999-2000. The appeal was eventually dismissed.

5. The appeal was admitted on the following substantial question of law: “Whether Section 14 of the Hindu Succession Act, 1956 declaring that the property possessed by a female Hindu shall be held by her as full owner and not as a limited owner sets at naught Section 2 of the Hindu Widows Remarriage Act, 1856, providing that a Hindu widow after remarriage will cease to have any right or interest in husband’s property as if she had died.”

6. Heard Mr.G.N.Mishra, learned Advocate for the appellant and Mr.P.K.Kar, learned Advocate for the respondent. 7. Mr.Mishra, learned Advocate for the appellant would urge that the plaintiff upon her remarriage met a civil death. Her right in deceased husband’s property cease on her remarriage in view of Section 2 of the Hindu Widows’ Remarriage Act, 1856.

8. Per contra, Mr.Kar, learned Advocate for the respondent would urge that Section 4 of the Hindu Succession Act, 1956 has an overriding effect and abrogates the operation of 1856 Act. Once the property vested, the same cannot be divested. The plaintiff has half share over the suit property.

9. The Hindu Widows’ Remarriage Act, 1856 Act (‘1856 Act’) was

enacted to remove all legal obstacles to the marriage of Hindu widows. Section 2 of 1856 Act reads thus:

“2. Rights of widow in deceased husband’s property cease on her remarriage :

All rights and interests which any widow may have in her deceased husband’s property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heir of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same.”

10. Section 4 of the Hindu Succession Act, 1956 (‘1956 Act’) reads as under:

“4. Overriding effect of Act.-(1) Save as otherwise expressly provided in this Act,-

(a) Any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.”

11. Section 2 of 1856 Act and Sections 4 and 24 of 1956 Act were the subject matter of interpretation before the Apex Court in the case of Cherotte Sugathan (D) by L.Rs. and others v. Cherottee Bharathi and others, AIR 2008 SC 1467. The apex Court held thus:

“11. The Act brought about a sea change in Shastric Hindu Law. Hindu widows were brought on equal footing in the matter of inheritance and succession along with the male heirs. Section 14(1) stipulates that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, will be held by her as a full owner thereof.

Section 24, as it then stood, reads as under :

[“24. Certain widows remarrying may not inherit as widows. Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a predeceased son of a pre-deceased son or the widow of a brother shall not be

entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.”

13. xxx xxx xxx

Section 4 of the 1956 Act has an overriding effect. The provisions of 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Section 4 and 24 thereof.

14. The question posed before us is no longer res integra.

In *Chando Mehtain & Ors. v. Khublal Mahto & Ors.* [AIR 1983 Patna 33], the Patna High Court opined :

“The Hindu Widow’s Remarriage Act, 1856 has not been repealed by the Hindu Succession Act, 1956 but Section 4 of the latter Act has an overriding effect and in effect abrogates the operation of the Hindu Widows Remarriage Act, 1856. According to Section 4 of the Hindu Succession Act all existing laws whether in the shape of enactments or otherwise shall cease to apply to Hindus in so far as they are inconsistent with any of the provisions contained in this Act.”

In *Kasturi Devi v. Deputy Director of Consolidation* [AIR 1976 SC 2595], this Court categorically held that a mother cannot be divested of her interest in the deceased son’s property either on the ground of unchastity or remarriage.

Kerala High Court, in *Thankam v. Rajan* [AIR 1999 Kerala 62], held that remarriage of the wife cannot be a ground for her losing right to succeed to her deceased husband’s property.” (emphasis laid)

12. Sadhu died in the year 1976. Upon death of Sadhu, his share vested in the plaintiff and defendant. The right of the plaintiff has to be determined with reference to the time when Sadhu died. Such absolute vesting of property could not be subjected to divestment. The 1956 Act in terms of Section 8 permits the widow of a Hindu male to inherit simultaneously with the son, daughter and other heirs specified in Class I of the Schedule. The widow of a Hindu male takes her share absolutely and not the widow’s estate only in terms of Section 14. The 1956 Act had its full play on the date of her remarriage. The substantial question of law is answered accordingly.

13. Resultantly, the appeal fails and is dismissed. No costs.

Appeal dismissed.

2018 (I) ILR - CUT-108

**DR. B.R. SARANGI, J.**

W.P.(C) NO. 4764 OF 2004

STATE OF ORISSA &amp; ORS. ....Petitioners

. Vrs.

MAHINDER SINGH .....Opp. Party

**ODISHA FOREST ACT, 1972 – Ss. 2 (g) (ii) (d), 56**

**Whether the manganese ore carried in the seized dumper, being excavated from reserve forest area, can be construed as “forest produce” and if so whether the seized dumper together with manganese ore is liable for confiscation U/s. 56 of the Forest Act, 1972 ?**

**Manganese Ore comes within the meaning of minerals as defined in section 3(a) of the Mines and Minerals (Regulation and Development) Act, 1957 – Applying the meaning of “minerals”, in different statutes, to the meaning attached to section 2(g)(ii)(d) of the Odisha Forest Act, 1972, it can safely be construed that “minerals” includes manganese ore and it becomes “forest produce” within the meaning of section 2(g) of the Odisha Forest Act, 1972 – In this case since Manganese ore was transported without any valid permit and without any authority of law i.e. in contravention of the provisions of the Timber Transit Rules, 1980, the same amounts to committing forest offence – Held, the impugned order passed by the learned District Judge is quashed and the order passed by the Authorized Officer directing confiscation of the seized vehicle and the manganese ore to the Government U/s. 56 of the Odisha Forest Act, 1972 is restored.**

(Paras 6 to10)

**Case Law Referred to :-**

1. (1993) 3 SCC 343 : Stonecraft Enterprises -V- CIT
2. (2003) 9 SCC 534 : V.P.Pithupihai -V- Spl. Secy., Govt. of T.N.
3. AIR 1963 Orissa 24 : Kasi Prasad Sahu -V- State of Orissa & Anr.

For Petitioners : Mr. D.K.Pani, A.S.C.

For Opp. Party : M/s.B.K.Kar, M.Acharya &amp; S.C.Dash

Date of Hearing : 18. 10.2017

Date of Judgment: 27.10.2017

**JUDGMENT**

**DR. B.R. SARANGI, J.**

The petitioners, by means of this writ petition, seek to challenge the judgment dated 20.09.2003 passed by learned District Judge, Keonjhar in FAO No.19 of 2003 allowing the appeal by reversing the order dated 05.07.2002 passed by the Authorized Officer to confiscate the seized vehicle bearing registration no.OR-06-1535 and the manganese ore to the Government under Section 56 of the Orissa Forest Act, 1972.

2. The factual matrix of the case, in brief, is that in the night of 10.08.2002 the Forester of Joda Section of Champua Range, while performing night patrolling inside Baitarani reserve forest accompanied by other forest guards, detected a dumper bearing registration no.OR-06-1535 carrying manganese ore. So, they chased the dumper and seized it along with the manganese ore, though its driver managed to escape. Ultimately, the seized vehicle along with manganese ore, which was being transported without any authority of law, construing the same to be the forest produce, was produced before the Authorized Officer-cum-Assistant Conservator of Forests, Keonjhar Division, who initiated confiscation proceeding under Section 56 of the Orissa Forest Act, 1972.

On being noticed, the opposite party appeared before the Authorized Officer and denied his involvement in the case. He specifically contended that transportation of manganese ore from the reserve forest did not amount to commission of forest offence either under the Orissa Forest Act, 1972 or Rules made thereunder. But the Authorized Officer, after giving due opportunity, by order dated 05.07.2002 coming to hold, that such action amounts to commission of forest offence under Section 27 of the Orissa Forest Act, 1972 and Rules 4 and 12 of the Orissa Timber and Other Forest Produce Transit Rules, 1980, directed for confiscation of seized dumper and manganese ore to the Government. Against the said order of the Authorized Officer, the opposite party preferred appeal (FAO No. 19 of 2003) under sub-section (2-e) of Section 56 of the Orissa Forest Act, 1972 before the learned District Judge, Keonjhar, who, relying upon the judgment of this Court in OJC Nos.15947 of 2001, 14011 of 2001 and 15948 of 2001, wherein it has been held that manganese ore does not come within the definition of forest produce, by judgment dated 20.09.2003 set aside the order of confiscation passed by the Authorized Officer. Hence this application.

3. Mr. D.K. Pani, learned Additional Standing Counsel for the petitioners-State vehemently urged that manganese ore, being a “mineral”

within the meaning of Section 2(g)(ii)(d), is a “forest produce” and the same having been excavated from the reserve forest area and transported therefrom without any valid permit, the opposite party has committed forest offence and is thus liable for punishment. As such, the seized vehicle including the forest produce is liable for confiscation under Section 56 of the Orissa forest Act, 1972. But, however, learned District Judge, Keonjhar has committed gross error by holding, that the manganese ore excavated and transported from reserve forest area is not a “forest produce”, and reversing the order of confiscation passed by the Authorized Officer, which is absolutely misconceived, and therefore, interference of this Court is warranted.

4. Although Mr. B.K. Kar, learned counsel along with his associates entered appearance for the opposite party, none was present at the time of hearing. Since it is a year old case, without giving further adjournment, the same is being disposed of finally on perusal of the records and upon hearing learned counsel for the petitioners.

5. In view of the factual matrix, as narrated above, the sole question which has cropped up for consideration by this Court is whether the manganese ore carried in the seized dumper, being excavated from reserve forest area, can be construed as “forest produce” and if so whether the seized dumper together with manganese ore is liable for confiscation under Section 56 of the Orissa Forest Act, 1972?

6. In order to have an effective adjudication of the case, it is worthwhile to go through Section 2(g)(ii)(d) of the Orissa Forest Act, 1972 which reads as follows:

*“2- Definitions:*

*xxx                      xxx                      xxx*

*(g) “forest produce” includes*

*xxx                      xxx                      xxx*

*(ii) the following when found in or brought from a forest, that is to say-*

*(d) peat, surface soil, rock, sand and minerals (including limestone, laterite, mineral oils and all products of mines or quarries);”*

From the above quoted provisions, in which the meaning of “forest produce” has been literally defined, it is clear that when any peat, surface soil, rock, sand and minerals (including limestone, laterite, mineral oils and all products

of mines or quarries) ‘found in’, or ‘brought from’ a forest, the same are to be considered as “forest produce”. No doubt, the manganese ore has not been specifically mentioned in the said provision, but fact remains whether the manganese ore comes within the meaning of ‘minerals’ as specified under Section 2(g)(ii)(d). If minerals includes manganese ore, then it is to be seen when it is ‘found in’ or ‘brought from’ a forest and can be construed as a “forest produce”.

7. As per the provisions contained in Section-2(jj) of the Mines Act (35 of 1952), “minerals” means all substances which can be obtained from the earth by mining, digging, drilling, dredging, hydraulicizing, quarrying or by any other operation and includes mineral oils (which in turn include natural gas and petroleum). According to Section 2(c) of Atomic Energy Act (33 of 1962) “minerals” include all substances obtained or obtainable from the soil including (alluvium or rocks) by underground or surface working.

7.1 In *Stonecraft Enterprises v. CIT*, (1999) 3 SCC 343, it has been held by the apex Court that the word ‘minerals’ occurring in Section 80-HHC 2b(ii) of Income-tax Act (43 of 1961) includes all minerals extracted from the earth including granite.

7.2 In *V.P. Pithupihai v. Special Secretary, Govt. of T.N.*, (2003) 9 SCC 534, it has been held by the apex Court that the word ‘mineral’ means ‘a naturally occurring, homogeneous substance or material formed by inorganic processes and having a characteristic set of physical properties, a definite range of chemical composition, and a molecular structure usually expressed in a crystalline forms. Any inorganic substance, as ore, a rock, or a fossil. It is also stated that a mineral as judicially defined would mean an inorganic substance found either on or in the earth which may be garnered and exploited for profit.

7.3 Section-3(d) of the Mines and Minerals (Regulations and Development) Act (67 of 1957) “minerals” includes all minerals except mineral oils. The first Schedule Part-C Clause-9 thereof deals with manganese ore. Similarly, Section 9 deals with royalties in respect of mining lease. Second Schedule Sl. No.24 deals with manganese ore while the royalty has been fixed by the authority concerned.

7.4 In view of such position, there is no iota of doubt that manganese ore comes within the meaning of minerals as defined in Section 3(a) of the Mines and Minerals (Regulation and Development) Act, 1957. Applying the

meaning of “minerals”, as discussed above, to the meaning attached to Section 2(g)(ii)(d) of the Orissa Forest Act, 1972, it can be safely construed that ‘minerals’ includes manganese ore.

8. On a plain reading of the expressions ‘found in’ or ‘brought from’ mentioned in Clause-(4) of Section 2 of the Orissa Forest Act, 1972, there can hardly be any doubt that both of them indicate the forest to be the source or original depository of the forest produce in question. The term ‘found in’ a forest does not necessarily require an actual discovery of those items by a living person before those items can become forest-produce. The term ‘found in’ actually refers to things growing in a forest like timber trees, fuel trees, fruits, flowers, etc., or mineral deposits or stones existing in the forest. The distinctive feature is either the existence or the growth or deposit within the area of a forest and not their discovery by some living person. The idea underlying the expression ‘brought from’ is equally emphatic of the source of the thing so brought being within the area of a forest. The conveyance or transport involved in the idea of a thing being brought undoubtedly has its beginning in the forest by virtue of the use of the expression ‘from’.

8.1. In *Kasi Prasad Sahu v. State of Orissa and another*, AIR 1963 Orissa 24, while considering the provisions contained in Rules 2(4), 41, 43 and 85-A of the Orissa Timber and Forest Produce Transit Rules, 1958, the Division Bench of this Court held as follows:

*“On an interpretation of the expression “forest produce” as used in the Indian forest Act, there was an implied power in the government to regulate the transit of timber even if it may not be the property of Government.”*

8.2. As already stated, the materials available make it evident that the dumper bearing registration no.OR-06-1535 was seized when it was found loaded with manganese ore excavated from reserve forest. As such, the manganese ore having been ‘brought from’ the forest, it becomes “forest produce” within the meaning of Section 2(g)(ii)(d) of the Orissa Forest Act, 1972. Furthermore, as the manganese ore was being transported without any valid permit/document and without any authority of law and more particularly, in contravention of provisions of Rules 2(4) and 12 of the Timber Transit Rules, 1980, the same amounts to committing forest offence. Section-27(3)(b) of the Act makes it clear that in a reserve forest quarries stone, burns lime or charcoal or collects, subjects to manufacturing process or removes any “forest produce” constituted a forest office. Since the manganese ore was seized in the reserve forest on a loaded vehicle it also

attracts Section 73-A which provides that any person found in possession of any “forest produce” within the limits of any reserve forest shall, until the contrary is proved, be presumed to be guilty of removing or, as the case may be, transporting such forest produce from the reserve forest without authority.

9. Reliance placed on the order of this Court passed in ***Kashinath Behera v. Officer-in-Charge*** (O.J.C. Nos. 15947, 14011 and 15948 of 2001) cannot have any application to the present context as the opposite party has already been found to be guilty of committing forest offence by removing manganese ore which is a mineral within the meaning of Section 2(g)(ii)(d) of the Orissa Forest Act. Therefore, learned District Judge has committed gross error in allowing the appeal preferred by the opposite party vide order dated 20.09.2003 in F.A.O. No.19 of 2003.

10. In the aforesaid facts and circumstances, this Court is of the considered view that the order dated 20.09.2003 passed by the learned District Judge, Keonjhar in F.A.O. No.19 of 2003 cannot sustain in the eye of law. Accordingly, the same is hereby quashed and consequentially, the order dated 05.07.2002 passed by the Authorized Officer-cum-Assistant Conservator of Forests, Keonjhar Division, Keonjhar in O.R. Case No.21 Ch of 2002-2003 is restored.

11. The writ petition is accordingly allowed. No order as to cost.

Writ petition allowed.

**2018 (I) ILR - CUT-113**

**DR. B.R. SARANGI, J.**

WPCRL NO. 1211 OF 2013

AND

CRLMC NO. 2659 OF 2016

**SURESH KU. MISHRA (IN BOTH)**

.....Petitioner

.Vrs.

**STATE OF ODISHA & ORS. (IN BOTH)**

.....Opp. Parties

**CRIMINAL PROCEDURE CODE, 1973 – S.482**

**Interim order passed by this Court on 16.09.2013 directing both the parties to take instruction by the next date i.e. by 25.09.2013 with a**

**further direction to the vigilance department not to submit final form till next date – Despite the same Vigilance Department submitted final form on 20.09.2013 – Action challenged.**

**Any action taken subsequent to the interim order passed by this Court is a nullify in the eye of law – Further the order having been passed in presence of the counsel appearing for the opposite parties, it is within the knowledge of the vigilance department – Held, final form submitted on 20.09.2013 is quashed.** (Paras 9,10)

**Case Laws Referred to :-**

1. (2010)11 SCC 557 : Manohar Lal (dead) by LRs.-V-Ugrasen (dead) by LRs.
2. AIR 1967 SC1386 : Mulraj -V- Murti Raghunathji Maharaj
3. (1995) 6 SCC 50 : Surjit Singh -V- Harbans Singh
4. (2007) 11 SCC 374: All Bengal Excise Licensees' Assn. -V- Raghabendra Singh

For Petitioners : M/s. Gautam Mishra, D.K.Patra, A.S.Behera,  
A.Dash & J.Biswal

For Opp. Party : Mr. D.K.Pani, Standing Counsel (Vig.)`

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Decided on : 13.10.2017

**JUDGMENT**

***DR. B.R. SARANGI, J.***

The petitioner was working as Grama Panchayat Technical Assistant (GPTA) on contractual basis and was posted in the office of Boudh Panchayat Samiti, Boudh. While working as such, having been sponsored by the Chairman Committee of Chief Engineers and Engineer-in-Chief (EIC), Odisha, he was posted to District Rural Development Agency (DRDA), Boudh. Subsequently, Panchayati Raj Department, which is the controlling authority of the DRDA, posted the petitioner under Boudh Block and allowed to discharge his duty at Badhigaon Grama Panchayat of the Block. The Collector, Boudh, who is the Chief Executive Officer, DRDA, Boudh, directed the petitioner to “supervise the works executed through Boudh Block and DRDA in Boudhgarh area”. Again the Project Director, DRDA, as directed by the Collector, Boudh vide office order dated 11.11.2009, intimated the petitioner to work as part time Junior Engineer of Boudhgarh Notified Area Council (NAC).

1.1 While the petitioner was continuing as such, on 18.03.2012 the Deputy Superintendent of Police (Vigilance), Boudh Unit, Boudh lodged an FIR in the Vigilance Police Station, Berhampur alleging that the petitioner (Junior Engineer, Boudhgarh NAC) had misappropriated Rs.76,601/- during 2010-11 in execution of 2<sup>nd</sup> Daily Market inside Boudhgarh NAC area. Consequently, Berhampur Vigilance P.S. Case No.11 of 2012 was registered, which corresponds to Vigilance G.R. Case No.11 of 2012 on the file of Special Judge (Vigilance), Berhampur [which has been subsequently renumbered as G.R. Case No. 104 of 2013(v)/T.R. No.4 of 2014 pending before the learned Special Judge, Vigilance, Phulbani].

1.2 The petitioner on 22.03.2012, wrote to the Collector, Boudh explaining the position of the case and requested to move the Vigilance Officers for proper investigation into the allegation, which was transmitted to the Superintendent of Police (Vigilance), Berhampur vide DRDA letter no. 920 dated 31.03.2012. But the same having not been responded to, the petitioner approached this Court seeking anticipatory bail vide BLAPL No. 24257 of 2012, which was granted by order dated 27.09.2012. As the request made by the petitioner was not responded to, he met the Inspector General (Vigilance) on 19.08.2013 and submitted his explanation praying for appropriate action. Further on 20.08.2013, the petitioner submitted a representation to the Collector, Boudh, who was the immediate controlling authority, seeking exemption from the liability of Rs.50,699/-, which was levelled against him as per the FIR lodged by the Deputy Superintendent of Police. Subsequently on 29.08.2013, petitioner submitted another representation to the Inspector General (Vigilance) ventilating his grievance. Since no development took place, he filed WPCRL No. 1211 of 2013.

1.3 While entertaining the said writ application, this Court passed an order on 16.09.2013 to the following effect:

*“Learned counsel for both the parties are directed to take instruction as to who are the executive officers of Boudh N.A.C. during the relevant period.*

*List this matter on 25<sup>th</sup> September, 2013.*

*It is directed that no Final Form shall be submitted by the Vigilance Department till next date.”*

During continuance of the aforesaid interim order, the Vigilance Department in gross violation of the said order of this Court dated 16.09.2013 submitted the final form on 20.09.2013. Consequent thereupon, learned Special Judge,

Vigilance, Phulbani had issued summons to the present petitioner. As a result, the petitioner filed CRLMC No. 2659 of 2016 seeking to quash the proceedings in exercise of power under Section 482, Cr.P.C. in view of the final form submitted in violation of order dated 16.09.2013 passed in WPCRL No. 1211 of 2013. Since both WPCRL No. 1211 of 2013 and CRLMC No. 2659 of 2016 have arisen from the selfsame cause of action, they were heard together and are being disposed of by this common judgment.

2. Mr. G. Mishra, learned counsel for the petitioner contended with vehemence that the petitioner had filed WPCRL No.1211 of 2013 seeking direction to opposite party no.5 to cause investigation into the matter as per the FIR lodged in Berhampur Vigilance P.S. Case No.11 of 2012 under Section 13(2) read with Section 13(1)(c) of the Prevention of Corruption Act, 1988, read with Sections 409/34 of the Indian Penal Code, which corresponds to G.R. Case No.11 of 2012 on the file of learned Special Judge, Vigilance, Berhampur and has been renumbered as G.R. Case No. 104 of 2013 (v) (T.R. No.4 of 2014) pending before the learned Special Judge, Vigilance, Phulbani. While entertaining the matter, this Court vide order dated 16.09.2013 passed interim order directing that final form shall not be submitted by the Vigilance Department till the next date and the said interim order was extended from time to time. More so, the order was passed in presence of learned counsel appearing for the Vigilance Department. While such interim order was in operation, Vigilance Department submitted final form on 20.09.2013. It is contended that the opposite parties have grossly violated the interim order passed by this Court on 16.09.2013 in WPCRL No.1211 of 2013, and as such any action taken subsequent to the interim order passed, is a nullity in the eye of law. More so, the authorities are also liable for contempt of Courts for violation of the interim order passed by this Court. To substantiate his contention, he has relied upon the judgment of the apex Court in *Manohar Lal (dead) by LRs. V. Ugrasen (dead) by LRs.*, (2010) 11 SCC 557.

3. Mr. D.K. Pani, learned Standing counsel for the Vigilance Department, on having received instructions, states that the order dated 16.09.2013 passed in WPCRL No. 1211 of 2013, by which this Court granted interim protection, had never been communicated to the department. Therefore, the final form has been submitted on 20.09.2013 being ignorant of the interim order passed by this Court. As such, there is no intention behind submission of the final form in violation of the interim order passed on 16.09.2013 by this Court.

4. Facts delineated above are not disputed by the parties. When the petitioner approached this Court by filing WPCRL No. 1211 of 2013 seeking for direction to cause investigation into the matter pursuant to the FIR registered as Berhampur Vigilance P.S. Case No. 11 of 2012, in the light of the representation made by him in Annexures-3 to 6, this Court, while entertaining such application, passed interim order on 16.09.2013 that no final form shall be submitted by the Vigilance Department till the next date. Needless to say that the order was passed in presence of the counsel appearing for both the parties, meaning thereby the counsel appearing for the petitioner, as well as the Vigilance Department and, more particularly this Court directed the counsel appearing for the opposite parties to take instructions. Once the order has been passed in presence of the counsel for the opposite parties, it is deemed that the same has been communicated to the opposite parties. The contention raised by the learned counsel appearing for the Vigilance Department, that since the interim order dated 16.09.2013 had not been communicated to the Vigilance Department the final form was submitted on 20.09.2013, is of no consequence, particularly when the interim order evidently was passed in presence of the learned counsel for the Vigilance Department.

5. In *Mulraj v. Murti Raghunathji Maharaj*, AIR 1967 SC 1386, the apex Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal, and subsequent action would be a nullity.

6. In *Surjit Singh v. Harbans Singh*, (1995) 6 SCC 50, the apex Court while dealing with the similar issue held that in defiance of the restraint order, the alienation/assignment was made. If the Court were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise.

7. In *All Bengal Excise Licensees' Assn. v. Raghendra Singh*, (2007) 11 SCC 374, the apex Court held that a party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof.

8. Taking into consideration the aforementioned judgments, the apex Court in *Manohar Lal (dead) by LRs.* (supra) has categorically held that it is

evident that any order passed by any authority in spite of knowledge of interim order of the Court is of no consequence as it remains a nullity.

9. Applying the above mentioned principles to the present context, any steps taken in contravention of the interim order dated 16.09.2013 passed by this Court would be a nullity. Meaning thereby, if the order has been passed in presence of the counsel appearing for the opposite parties, it is within the knowledge of the Vigilance Department itself and knowing fully well that such interim order was operating since the final form was submitted on 20.09.2013 in violation of the said order, the subsequent action would be a nullity.

10. In such view of the matter, this Court is of the considered opinion that any action taken subsequent to interim order dated 16.09.2013 passed by this Court, cannot sustain in the eye of law. Accordingly, the final form submitted on 20.03.2013 in Annexure-7 deserves to be quashed and accordingly the same is hereby quashed in exercise of power under Section 482, Cr.P.C.. Needless to say that the quashing of the final form dated 20.09.2013 does not preclude the authority concerned to proceed further pursuant to the FIR dated 11.01.2013 lodged against the petitioner in accordance with law taking into consideration the representations filed by the petitioner as Annexures-3 to 6 to WPCRL No. 1211 of 2013.

11. Accordingly, both the WPCRL and CRLMC are disposed of with the above observation and directions.

Applications disposed of.

**2018 (I) ILR - CUT- 118**

**DR. B.R. SARANGI, J.**

O.J.C. NO. 9615 OF 1995

**GANESWAR ROUT & ORS.** .....Petitioners

.Vrs.

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

**ODISHA SERVICES ( MEDICAL ATTENDANCE) RULES, 1947 - RULE-7**

**Government employee suffered from chronic renal failure and was in need of kidney transplantation – Inaction of the authorities in releasing timely medical advance – Premature death of the deceased –**

**Claim for compensation by children – State owes an obligation to provide adequate medical facilities to its citizens – Violation of Article 21 of the constitution of India as right to life includes right to health – Held, since there is violation of right to life with dignity, direction issued to the state Government to pay compensation of Rs 2,00,000/- and recover the same from the authority responsible for the delay in releasing medical advance.**  
(Paras 13 to 16)

**Case Laws Referred to :-**

1. AIR 1997 SC 1225 : State of Punjab -V- Mohinder Singh Chawla.
2. (1996) 2 SCC 336 : Surjit Singh -V- State of Punjab.
3. 2000 (3) WLC 585 : Shankerlal -V- State of Rajasthan.
4. AIR 1969 SC 634 : State of Gujarat -V- Shantilal Mangal Das.
5. (2003) 7 SCC 197 : KSRTC -V- Mahadeva Sehetty.

For Petitioner : Mr.S.D.Das, Sr.Adv.,  
A.K. Choudhury, A.K.Nayak, L.Samantray,  
B.N.Udgata, H.S.Satpathy &  
Ms. S.Biswal

For Opp. Party : Mr. A.K.Nayak (Addl. Standing Counsel)

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Date of hearing : 24.11.2017

Date of judgment: 08.12.2017

**JUDGMENT**

***DR. B.R. SARANGI, J.***

The petitioners, being the children of one Lakshmi Narayan Rout, who was serving as Senior Grade Typist in the office of the Revenue Divisional Commissioner, Southern Division, Berhampur, have filed this writ application claiming compensation of Rs.10,00,000/- (rupees ten lakhs) on account of death of their mother, who suffered from chronic renal failure and was in need of kidney transplantation, due to alleged inaction of the authorities concerned in timely sanction of the amount of Rs.90,000/- (rupees ninety thousand) for treatment of their mother,

2. The factual matrix of the case is that the mother of the petitioners was suffering from chronic renal failure and was admitted into M.K.C.G. Medical College and Hospital, Berhampur for treatment in the year 1991. As adequate facilities were not available, either in the said hospital, or in any other hospitals of the State, for investigation and treatment of kidney transplantation, the Professor and Head of the Department of Nephrology,

vide certificate dated 18.06.1992 in Annexure-1, advised for treatment of mother of the petitioners at Apollo Hospital, Hyderabad and estimated the cost of operation to be Rs.90,000/- (rupees ninety thousand), which was countersigned by the Superintendent of the said College and Hospital on 23.06.1992. He also recommended her case to the Director, Medical Education and Training, Orissa, who, vide letter dated 03.07.1992, accorded permission. Then, Under Secretary to the Government in Revenue and Excise Department, vide letter dated 26.09.1992, requested the Secretary, Board of Revenue, Orissa to send recommendation along with a specific re-appropriation proposal for augmentation of funds for the treatment of the mother of the petitioners. But after a long lapse of time, Under Secretary to Government in Revenue and Excise Department, for sanction of the medical advance in favour of mother of the petitioners, sought for certain documents/clarification from the A.F.A.-cum-Under Secretary to Revenue Divisional Commissioner (Southern Division), Berhampur, vide letter dated 22.03.1993, and subsequently, vide letter dated 22.06.1993, he also made a query as to whether the mother of the petitioners, i.e., the wife of Lakshmi Narayan Rout was an employee under State/Central Government or any public sector undertaking and, if so, a joint declaration would be obtained from them. Even though same was complied with, sanction of medical advance was not made in favour of the father of the petitioners for treatment of their mother. Consequentially, the father of the petitioners again approached the authority concerned, in pursuance of which the opposite party no.3 sent a wireless message on 09.03.1994 to opposite party no.2 to sanction Rs.90,000/- (rupees ninety thousand) towards medical advance which was pending in the office of opposite party no.2, since the condition of mother of the petitioners was deteriorating day by day. Despite that, as no action was taken by opposite party no.2, the Revenue Divisional Commissioner wrote a D.O. letter on 02.04.1994 requesting opposite party no.2 to move the Government for sanction of such medical advance in favour of father of the petitioners, as the matter requires special and immediate attention. Thereafter, the Financial Adviser in the office of opposite party no.2 wrote a letter on 19.05.1994 asking the office of opposite party no.3 to submit a fresh proposal along with copies of all necessary documents for recommending the proposal to the Government in Revenue and Excise Department for sanction of medical advance of Rs.90,000/- (rupees ninety thousand) in favour of the father of the petitioners. Though the amount for treatment of the mother of the petitioners was sanctioned in the year 1992, the same was not disbursed till 1994, whereas in the case of one L.C. Das, Sr. Assistant, who is a co-

employee of the petitioners' father, the amount was sanctioned immediately and disbursed to him. Due to inaction of the authorities concerned in releasing the medical advance amount in favour of the father of the petitioners, their mother died due to improper medical treatment. Consequentially, not only the petitioners but also their father suffered a lot and faced with many disadvantageous position causing mental agony and also physical pain. Therefore, the petitioners claim for payment of compensation due to inaction of the authorities concerned.

3. Ms. S. Biswal appearing on behalf of Mr. S.D. Das, learned Senior Counsel for the petitioners strenuously urged that had the amount of Rs.90,000/- (rupees ninety thousand), which was sanctioned on the basis of the recommendation made by the medical authority, been paid to father of the petitioners well within time, the mother of the petitioners could not have succumbed to death due to paucity of funds and also inaction of the authorities. It is contended that the amount towards medical advance, the process for which was initiated in the year 1992, was sanctioned in the year 1994, but the manner of ailment the mother of the petitioners suffered was required an immediate medical advance, which is tell tale from the medical document provided to petitioner no.1 and subsequently submitted to the authority concerned. In view of inaction of the authority in releasing the medical advance for better treatment of the mother of the petitioners, there was complete dislocation in the family life of the petitioners, as a result of which they suffered severe mental agony and untold miseries. Therefore, the petitioners are entitled to get compensation for the negligence of the authorities concerned.

4. Mr. A.K. Nayak-1, learned Addl. Standing Counsel appearing for the State opposite parties argued with vehemence on the maintainability of the writ petition. It is contended that since the father of the petitioners was a Government Employee and the dispute is with regard to delay in disbursal of advance for medical treatment, he should have approached the Orissa State Administrative Tribunal for compensation, and this Court has no jurisdiction to entertain this writ petition. Apart from the same, it is also contended, by referring to the counter affidavits filed by the opposite parties, that the claim of the petitioners is not supported by legal heir certificate and that the death of the mother of the petitioners was not caused due to inaction of the opposite parties. It is further contended that petitioners had never raised any grievance that the death of their mother was due to negligence of the opposite parties. As such, in view of the Finance Department notification circulated vide

Memo No.CS-IV-16-93-17950(255) dated 14.04.1993, the father of the petitioners had to furnish the journey schedule, whereby the patient had to undergo for treatment and in absence of such journey schedule forwarded to the Government or Board of Revenue, the claim for sanction of medical advance cannot sustain in the eye of law. It is further contended that Revenue Divisional Commissioner, Southern Division, Orissa was instructed to make necessary provisions for minimum amount required towards the medical advance and as such, it was not possible to meet the claim of Rs.90,000/- (rupees ninety thousand) towards the said medical advance of the government employee. As the father of the petitioners did not take any step to save the life of his wife, no negligence could be attributed to the opposite parties for delay in sanction and release of the medical advance. If the mother of the petitioners was suffering, it was incumbent upon the father of the petitioners to shift her to Apollo Hospital by arranging money from any other source which could have been recouped after availing reimbursement cost of medicine bills subsequently under Odisha Medical Attendant Rules, 1947. In view of that, it is contended that the opposite parties/State authorities are not liable to pay any compensation for the said purpose.

5. Having heard Miss S. Biswal, learned counsel for the petitioners and Mr. A.K. Nayak-1, learned Additional Standing Counsel for the State opposite parties and perusing the records, since pleadings have been exchanged between the parties, with the consent of learned counsel for the parties the matter is being disposed of finally at the stage of admission.

6. As a matter of fact, it is an old case of the year 1995. The counter affidavit on behalf of opposite party no.1 has been filed only on 08.05.2017 and counter affidavit on behalf of opposite party no.3 was filed on 10.07.2003 and on behalf of opposite party no.2 was filed on 23.05.2001. But no rejoinder affidavit to the counter affidavits has been filed by the petitioners to refute the contentions raised therein.

7. Before adjudicating on the entitlement of the relief sought in the instant case, it is necessary to decide at the outset whether the writ application is maintainable before this Court or not. The contention of Mr. A.K. Nayak-1, learned Additional Standing Counsel is that since the matter relates to grant of medical advance to an employee of the State Government, this Court has no jurisdiction to entertain this application rather it is the Orissa State Administrative Tribunal which has got jurisdiction to entertain the same. No doubt, had the father of the petitioners approached this Court

claiming medical advance, this Court would have no jurisdiction to entertain the writ application. But the petitioners, by means of this writ application, have sought for compensation due to death of their mother on account of inaction on the part of the State authorities in releasing medical advance as claimed by their father, who was a government employee. This fact is clearly borne out from the relief sought in the writ petition where the petitioners have claimed for grant of compensation of Rs.10,00,000/- (rupees ten lakhs) due to death of their mother on account of delay in releasing the medical advance. In such view of the matter, this Court has jurisdiction to entertain the writ petition. Accordingly, the objection raised by learned Addl. Standing Counsel in that regard is overruled.

8. The specific case of the opposite parties, as is evident from the counter affidavit filed by opposite party no.1, is that considering the serious condition of the patient (mother of the petitioners), the father of the petitioners could have shifted her to Apollo Hospital, Hyderabad by arranging money from any other sources which could have been recouped after availing reimbursement cost of medicine bills subsequently under Odisha Services (Medical Attendance) Rules, 1947. As such, due to non-release of advance as claimed, it cannot be said that there was negligence on the part of the State authorities.

In this context, it is pertinent to mention that in exercise of powers conferred by clause (b) of sub-section (2) of Section 241 of the Government of India Act, 1935, the Governor of Orissa, in supersession of all existing rules on the subject, has been pleased to make the rules called "The Odisha Services (Medical Attendance) Rules, 1947". Rule 7 of the Odisha Services (Medical Attendance) Rules, 1947 reads as follows:

*"7(1) A Government servant or a member of his family shall be entitled free of charges-*

*(i) to treatment in such hospital at or near the place where he falls ill as can, in the opinion of the authorised medical attendant, provide the necessary and suitable treatment;*

*(ii) to anti-rabic treatment at the nearest Government hospital in the province providing treatment.*

*(2) Where a Government servant or a member of his family is entitled under Sub-rule (1) free of charge, to treatment or anti-rabic treatment in a hospital any amount paid by him on account of such treatment shall, on*

*production of a certificate in writing by the authorised medical attendant in this behalf, be reimbursed to him by the Provincial Government-*

*(i) the sales tax paid on account of the purchase of the medicines by the Government servants shall on production of a certificate in writing by the authorised medical attendant in this behalf, be reimbursed to him by the State Government;*

*(G.O. No. 2672 (19)-H., dated 18.2.1961)*

*(ii) reimbursement of expenses on medical treatment incurred outside the State on production of a certificate in writing from the authorised medical attendant on this behalf and necessary vouchers;*

*Note- Reimbursement of the actual expenses includes the entire cost of medical treatment such as consultation fees of the doctor, charges for pathological, 'X' Ray examination, etc. Hospital charges if admitted, ambulance charges, special nursing charges etc.*

*(G.O. No. 20504-H, dated 1.12.1962)*

*(G.O. No. 10280 (19)-H., dated 13.06.1961)*

*(iii) blood transfusion charges paid to a Government institution or any other local organisation recognised by Government for the supply of blood to patients and the cost thereof is reimbursable to Government servants. Where such institutions or organisation do not exist or blood of the type required for a Government servant is not available with them, there should be no objection to the purchase of blood plasma from a chemist or to obtaining blood from a private donor and the cost thereof, will also be reimbursed to Government servants on production of a certificate from the authorised medical attendant to the effect that the supply of blood required was not available from a local Government institution or a recognised organisation and that the price paid for the blood was reasonable."*

As would be seen from the above quoted provisions, in Rule 7 of the Odisha Services (Medical Attendance) Rules, 1947 (hereinafter referred to as "1947 Rules") it has been clearly provided that a Government servant or a member of his family shall be entitled free of charges to the treatment in such hospital at or near the place where he falls ill as can, in the opinion of the authorised medical attendant, provide the necessary and suitable treatment. Thereby, the Government owes a responsibility to give free treatment to its employees and members of his family. If the extant rules prescribes that the family members are entitled to get treatment on free of charges, the same should have been adhered to in the letter and spirit specifically in this case in respect of mother

of the petitioners. Therefore, the contention to the contrary raised on behalf of the opposite parties cannot sustain in the eye of law.

9. Apart from the above, Article 21 of the Constitution of India envisages that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life as enshrined under Article 21 of the Constitution of India includes right to health.

10. In *State of Punjab v. Mohinder Singh Chawla*, AIR 1997 SC 1225, the apex Court even held that the employee is entitled to reimbursement of actual room rent charges paid by him and the Government was not entitled to take a stand that the reimbursement could be allowed as per rates charged by All India Institute of Medical Sciences. When the patient was admitted and had taken the treatment in the hospital and had incurred the expenditure towards room charges, inevitably the consequential rent paid for the room during his stay is integral part of his expenditure incurred for the treatment. It is further held that the patient having referred to AIIMS for specialized treatment where he was admitted, necessarily, the expenses incurred towards room rent for stay in the hospital as an inpatient are an integral part of the expenses incurred for the said treatment. It is settled law that right to health is an integral part of right to life. Government has constitutional obligation to provide the health facilities. If the Government servant has suffered an ailment which requires treatment at a specialized approved hospital and on reference whereat the Government servant had undergone such treatment therein, it is but the duty of the State to bear the expenditure incurred by the Government servant. Having had the constitutional obligation to bear the expenses for the Government servant, while in service or after retirement from service, as per the policy of the Government, the Government is required to fulfil the constitutional obligation. Necessarily the State has to bear the expenses incurred in that behalf. No doubt failure on the part of the Government to provide timely medical treatment to a patient amounts to violation of right to life. Since the mother of the petitioners was suffering from chronic renal failure and she was under treatment of the Professor of Nephrology, MKCG Medical College and Hospital, Berhampur, who recommended her case for better treatment and for that purpose also requested for sanction of the amount and because of the bureaucratic movement of file inaction has been caused by the State authorities in releasing the amount in favour of the father of the petitioner, as a consequence of which the mother of the petitioners succumbed to death,

which caused great dislocation in the family set up and the minor children suffered untold miseries.

11. In *Surjit Singh v. State of Punjab*, (1996) 2 SCC 336, the apex Court held that self-preservation of one's life is the necessary concomitant of the right to life enshrined in Article 21 of the Constitution of India, fundamental in nature, sacred, precious and inviolable. The importance and validity of the duty and right to self-preservation has a species in the right of self-defence in criminal law. Because of non-sanction of medical advance, as due and admissible in view of the provisions of the 1947 Rules, in favour of the father of the petitioners who was a government employee, if death of the mother of the petitioners has been caused, that certainly amounts to inaction/negligence on the part of the State authorities.

12. In *Shankerlal v. State of Rajasthan*, 2000 (3) WLC 585 a Division Bench of Rajasthan High Court held that denial of reimbursement of expenses incurred on medical attendance and treatment bonafide and genuinely by the public servant for availing treatment for himself or any member of his family at recognized hospital/institution in the circumstances like the present case on such technical grounds shall be clearly arbitrary, unreasonable and unjust.

13. In view of the factual matrix of the case in hand as well as the law decided by the apex Court, as discussed above, there is no iota of doubt that the mother of the petitioners has been deprived of better treatment due to non-sanction and non-release of medical advance as recommended and suggested by the professor who was treating her. Though the compliance has been made from the side of the petitioners, as well as by the office of the Revenue Divisional Commissioner from time to time, the reason best known to the authority such medical advance was not released in time for treatment of the mother of the petitioners. In view of premature death of their mother, though the petitioners have approached this Court well within time and in the meantime time 22 years have passed, it appears that the State has filed counter affidavit only in the year 2017, which clearly indicates that it has not changed its attitude with the passage of time and with the advent of technology. In the said affidavit, by taking some plea or other, it has tried to circumvent the claim of the petitioners, which they are otherwise entitled to, and a plea has been taken that had the father of the petitioners given proper treatment to his wife by arranging money from other sources, the same could have been reimbursed to him. Such a stand taken on behalf of the State

authorities manifests that they were quite oblivious of the mental condition of the father of the petitioners having three minor children and an ailing wife, being bedridden was crying for treatment, and due to lack of funds he was undone and moving from pillar to post for grant of medical advance, which has virtually been denied to him causing death of his wife. Penury of this nature of a person cannot be compensated in terms of money. It is trite that no person should be deprived of treatment for deliberate laches on the part of the authority and the Constitution of India has also clearly mandated that minimum facilities, which required under law, should be provided to save the life of a citizen. Therefore, the State owes an obligation to provide adequate medical facilities to its citizens. If the State is unable to provide such facilities, then it is liable to reimburse the cost incurred for the purpose to its citizens to live with dignity. If this minimum infrastructure and benefit has not been extended, it amounts to violation of Article 21 of the Constitution of India. Thus, due to non-release of medical advance in time for better treatment, the case in hand clearly falls within the fold of violation of right to live with dignity, as a consequence of which the petitioners are entitled to get compensation.

14. In *State of Gujarat v. Shantilal Mangal Das*, AIR 1969 SC 634, the apex Court held that compensation means anything given to make things equivalent, a thing given to or to make amends for loss, recompense, remuneration or pay. Similar view has also been taken in *KSRTC v. Mahadeva Shetty*, (2003) 7 SCC 197.

15. It is true that in the present case the loss, which has been caused to the petitioners due to death of their mother, cannot be compensated in terms of money. The loss of life of the mother of the petitioners is a loss for all times to come that cannot be compensated in shape of money. Similarly, the mental agony, which the father of the petitioners has suffered and through which the minor children have passed, cannot be weighed or measured in terms of money. But, however, due to inaction/negligence on the part of any authority of the State if such sufferings are found to have been occurred, then the person sustaining the loss has to be compensated by the State, which may ultimately recover the amount from the person responsible for such miseries.

16. In view of such position, this Court is of the considered view that in the facts and circumstances of the case it would be just and proper to grant a sum of Rs.2,00,000/- (rupees two lakhs) as compensation to the petitioners, which shall be paid to them by opposite party no. 1 within a period of three

months from the date of communication of this order. Needless to say that with regard to delay in sanction and release of the medical advance to the father of the petitioners, the State Government may cause an enquiry and, if any authority is found responsible for the same, the compensation amount as has been directed to be paid to the petitioners, shall be recovered from him/her/them in accordance with law.

17. The writ petition is accordingly allowed. No order as to cost.

Writ petition allowed.

**2018 (I) ILR - CUT- 128**

**DR. B.R. SARANGI, J.**

OJC NO. 1859 OF 2002

**REGIONL PROVIDENT FUND COMMISSIONER,** .....Petitioner  
**ROURKELA**

.Vrs.

**SUNDERGARH MINING LABOUR** .....Opp. Parties  
**CONTRACT CO-OPERATIVE SOCIETY LTD. & ANR.**

**EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS  
ACT, 1952 – S.14-B**

**Employer-O.P.No.1 defaulted in depositing Provident Fund Contribution of its employees as well as its own share from March, 1993 to Feb. 1997 – Petitioner-Authority imposed penal damages as fixed under Para-32A of the EPF Scheme, 1952 – Order challenged before the EPF Appellate-Tribunal – Tribunal set aside the order and remitted back the matter to the petitioner-Authority for re-assessing the damages at the rate of 5% in addition to the interest accrued on account of penalty for the period of default – Hence the writ petition.**

**Held, it is well within the competency of the Petitioner-Authority to impose penal damages U/s. 14-B of the Act – Rates of damages are to be imposed as specified in Para-32-A of the EPF Scheme, 1952 and the same cannot be modified or altered – Direction of the Appellate-Authority being contrary to law is set aside.** (Para 17)

**Case Laws Referred to :-**

1. AIR 1997 SC 3645 : Regional P.F. Commissioner -V- S.D. College, Hoshiarpur
2. AIR 1998 SC 688 : M/s.Hindustan Times Ltd. -V- Union of India & Ors.
3. AIR 2006 SC 2287 : Chairman, SEBI -V- Shriram Mutual Fund
4. AIR 1979 SC 1803 : Organo Chemical Industries & Anr. -V- Union of India & Ors.

For Petitioner : M/s.S.K.Pattnaik, Sr. Adv,  
Mr.U.C.Mohanty & M.K.Pati

For Opp. Parties : Mr. P.K.Mohanty & S.K.Nayak

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Date of judgment : 26.07.2017

**JUDGMENT*****DR. B.R. SARANGI, J.***

The petitioner, which is an authority under the provisions of Employees' Provident Funds and Miscellaneous Provisions Act, 1952, has filed this application challenging the order dated 27.01.2000 in Annexure-3 passed by Employees' Provident Fund Appellate Tribunal in Appeal Case No. ATA-10 (15) 99 setting aside the order dated 04.08.1999 passed under Section 14-A imposing penal damages and remitting the matter back to the petitioner for reassessment of the damages in the light of the observation made therein.

2. The factual matrix of the case is that opposite party no.1-Sundergarh Mining Labour Contract Cooperative Society Ltd. is an establishment covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "EPF and MP Act, 1952") and carries on business of mining limestone at Purunapani. As per Para-38 of the Employees' Provident Funds Scheme, 1952 (for short "EPF Scheme, 1952"), provident fund contributions are to be paid within 15 days of the claim of every month by deducting the employees' contribution realized from the wages paid along with employer share. If the employer makes any default in payment of contribution, he is liable to pay penal damages under Section 14B of the EPF and MP Act, 1952. Para-32A of the EPF Scheme, 1952, which was introduced in 1991, envisages the rate of penal damages to be imposed for different period of delay. The rate has been so fixed in Para-32A in order to curb the imposition of 100% damages in all cases irrespective of the period of delay and this provision also left no discretion with the Regional Provident

Fund Commissioner to go below the rates, which are fixed for imposition of penalty on an employer, who recovers from employees' share but does not deposit the same within time specified.

2.1 Opposite party no.1, having defaulted and caused substantial delay in depositing the amount of contribution for the period from March, 1993 to February, 1997, was noticed on 08.10.1998 to file explanation and also appear before the petitioner on 18.11.1998 for personal hearing. In response thereto, opposite party no.1 filed reply on 23.10.1998 admitting the delay in each month and took a stand that deposit of EPF contribution was delayed due to non-payment of bills by the purchasers of limestone. The petitioner, being the acting authority under Section 14B of the EPF and MP Act, 1952, after considering the contention raised by opposite party no.1 for delay in payment of contribution, imposed penal damages at the graded scale fixed under Para-32A of the EPF Scheme, 1952 and demanded Rs.3,58,935/- towards penal damages. Against such demand, opposite party no.1, pending disposal of the review application filed by it on 13.08.1999, preferred OJC No.10603 of 1999 and this Court, by order dated 27.08.1999, declined to entertain the writ petition and directed opposite party no.1 to file appeal before the appellate tribunal. In compliance of the same, opposite party no.1 filed appeal under Section 7-I of the EPF and MP Act, 1952 and the appellate authority, by order dated 27.01.2000, set aside the order imposing penalty under Section 14B of the Act and remitted the matter back to the petitioner for reassessing the damages in the light of the observation made therein, hence this application.

3. Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. N.C. Mohanty, learned counsel for the petitioner vehemently contended that the rate of penal damages to be imposed in exercise of power under Section 14B of the EPF and MP Act, 1952 as per Para-32A of the EPF Scheme, 1952 and, as such, neither the Regional Provident Fund Commissioner nor the appellate tribunal has any discretion to vary the said rates fixed by the Central Government. When the appellate tribunal held that the employer is liable to pay the damages for delayed payment of the contribution, the direction to confine the rate of penal damages to 5% in addition to the interest accrued on the amount of default, without realizing the period of delay in depositing the contribution, is contrary to the provisions contained in Para-32A of the EPF Scheme, 1952. As such, the plea, that there was delay in payment of bills by the purchasers of limestone from opposite party no.1, should not have been accepted in absence of any proof. Thus, the conclusion

arrived at by the tribunal cannot sustain in the eye of law and, as such, the order impugned passed by the appellate tribunal is liable to be quashed. In order to substantiate his contention, he has relied upon the judgments of the apex Court in *Regional Provident Fund Commissioner v. S.D. College, Hoshiarpur*, AIR 1997 SC 3645; *M/s Hindustan Times Ltd. v. Union of India and others*, AIR 1998 SC 688; and *Chairman, SEBI v. Shriram Mutual Fund*, AIR 2006 SC 2287.

4. Mr. P.K. Mohanty, learned counsel for opposite party no.1, per contra, justified the order passed by the appellate tribunal and stated that the same is wholly and fully justified and does not warrant any interference by this Court.

5. As it appears, notice issued to opposite party no.2 was returned with valid service, but none has entered appearance on its behalf. More so, opposite party no.2 being an authority and the dispute involved in this case is confined to the petitioner vis-à-vis opposite party no.1, this Court, instead of awaiting any further for appearance of opposite party no.2, proceeded with the matter, as it is an old case of the year 2002. Further, despite sufficient opportunity being given no counter affidavit has been filed and this being a certiorari proceeding, on the basis of materials available on record, it is being disposed of finally upon hearing learned counsel for the petitioner and opposite party no.1.

6. There is no dispute with regard to the factual matrix as delineated above. Admittedly, opposite party no.1 is the employer, who caused delay in depositing the provident fund contribution of its workers, which had been deducted from their wages, and also employer share before the petitioner authority. As per the provisions contained in Para-38 of the EPF Scheme, 1952, the employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage, and shall deposit the same within 15 days of close of every month to the provident fund by separate bank drafts or cheques on account of contribution and administrative charge. The employer shall also forward to the Commissioner, within twenty-five days of close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the

month. Thereby, duty has been cast on the employer to deposit the employee's share as well as employer's share of dues towards the provident fund contribution which the employer obliged to do under the provisions of EPF Scheme, 1952 within the time specified therein. In the event the amount is not deposited by the employer, the Commissioner has power to recovery the damages as per the provisions contained under Section 14B of the EPF and MP Act, 1952. In order to avoid arbitrary imposition of penalty, rate of damages has been envisaged in Para-32A of the EPF Scheme, 1952 (which was introduced w.e.f. 16.08.1991) for recovery of damages for default in payment of any contribution, which reads thus:

<u>"Period of Default</u>	<u>Rate of Damages</u>
1. <i>Less than two months</i>	<i>17%</i>
2. <i>Two months and above but less than 4 months</i>	<i>22%</i>
3. <i>4 months and above, but less than 6 months</i>	<i>27%</i>
4. <i>6 months and above</i>	<i>37%"</i>

7. The rate was so fixed to curb the imposition of 100% damages in all cases irrespective of the period of delay and this provision also left no discretion with the Regional Provident Fund Commissioner to go below the rates, which are fixed for imposition of penalty on an employer, who recovers from employees' share but does not deposit the same within time specified, and the authority also recovers the interest accrued in the account of beneficiary irrespective of actual date of receipt of the amount of contribution. The interest is credited to the account of each member as per Section 6 of the EPF and MP Act, 1952 and Para-60 of the EPF Scheme, 1952. Apart from the contribution, the employer is liable to pay the other dues like administrative charges, as well as delay in payment of contribution loss, financial loss to the Govt. of India as well.

8. In the instant case, as opposite party no.1 defaulted in depositing the amount of contribution and caused substantial delay in paying the contribution for the period from March, 1993 to February, 1997, notice dated 08.10.1998 was issued to file explanation and to attend the office of the petitioner on 18.11.1998 for personal hearing. In response to the same, opposite party no.1 filed reply and appeared before the Commissioner. Its contention was that due to delay in receipt of payment from the purchasers of the limestone, delay was caused in depositing the provident fund

contribution, but no materials were produced before the authority concerned to substantiate such contention. Consequentially, the petitioner imposed penalty under Section 14-B of the EPF and MP Act, 1952 demanding a sum of Rs.3,58,935/- towards penal damages by order dated 04.08.1999. Against the said order, opposite party no.1 filed review application and simultaneously approached this Court by filing OJC No.10603 of 1999. But this Court, by order dated 27.08.1999, declined to entertain the writ application and directed opposite party no.1 to prefer appeal. Consequentially, opposite party no.1 preferred appeal under Section 7-I of the EPF and MP Act, 1952. The appellate authority, by order dated 27.01.2000, held as follows:

*“To my mind, the liability to deposit provident fund dues arrear when payment of salary/wages is made to the workers. If the interest of the justice penalty should be imposed in such a way always that interest portion is recovered so that employee may not suffer. There should be some penal portion also to deter the employer from making default. Penal portion should not be very exorbitant and source of the additional income to the organization. In the present case by the 14B authority it is to be seen when the wages were distributed to the employees and delay should be computed from that date while assessing damages. Penal portion may be confined to 5% in addition to interest accrued on the amount of default for the period of default.”*

9. The reasons assigned by the appellate authority, in the considered view of this Court, clearly runs contrary to the statutory provisions, more particularly Para-32A of the EPF Scheme, 1952, wherein the Central Govt. by way of notification fixed the rates of damages to be calculated for delay in depositing the contribution. The same cannot be altered/ modified or reduced in any manner. As such, the appellate authority has committed grave error in confining the rate of penal damages to 5% in addition to the interest accrued on the amount of default for the period of default.

10. In ***Organo Chemical Industries and another v. Union of India and others***, AIR 1979 SC 1803, the apex Court has considered the provisions of Section 14-B of EPF and MP Act, 1952 liberally and held that imposition of damages under Section 14-B serves both the purposes. It is meant to penalize defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them.

11. The word 'damage' in Section 14-B is related to the word 'default'. The words used in Section 14-B are 'default in the payment of contribution' and, therefore, the word 'default' must be construed in the light of Para 38 of the Scheme which provides that the payment of contribution has got to be made by the 15<sup>th</sup> of the following month and, therefore, the word 'default' in Section 14-B must mean 'failure in performance' or 'failure of act'. At the same time, the imposition of damages under Section 14-B is to provide reparation for the amount of loss suffered by the employees.

12. In view of the aforesaid analysis, it is made clear that power conferred under Section 14-B on provident Fund Commissioner to impose damage on an employer defaulting in payment of contributions to the provident fund is not unguided nor arbitrary and, hence, its not violative of Article 14 of the Constitution.

13. Having regard to the punitive nature of the power exercisable under Section 14-B and the consequences that ensue therefrom, an order under Section 14-B must be a 'speaking order' containing the reasons in support of it. The guidelines are provided in the EPF & MP Act, 1952 and its various provisions, particularly in the word 'damages' the liability for which in Section 14-B arises on the 'making of default'. While fixing the amount of damages, the Regional Provident Fund Commissioner usually takes into consideration various factors viz. the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The word 'damages' in Section 14-B lays down sufficient guidelines for the Regional Provident Fund Commissioner to levy damages.

14. Similar view has also been taken by the apex Court in **Regional Provident Fund Commissioner** (supra), wherein it has been held that the employer is under a statutory obligation to deposit the amount to the credit of the Fund every month. In the event of any default committed in that behalf, Section 14B steps in and calls upon the employer to pay damages by way of penalty, the maximum of which is the accumulated arrears.

15. In **Hindustan Times Ltd.** (supra), the apex Court in paragraph-28 held as follows:

*“From the aforesaid decisions, the following principles can be summarised. The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity*

*of being heard; the Regional PROVIDENT Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damage under Section 14-B.”*

16. In **Chairman, SEBI** (supra), considering the provisions contained in Securities and exchange Board of India Act, 1992, the apex Court held that penalty is *sine qua non* of the violation, *mens rea* is not essential element for imposing penalty for breach of civil obligation. In paragraph-35 of the said judgment, it has been stated as follows:

*“In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15(D)(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.”*

17. In view of the law laid down by the apex Court, as discussed above, imposition of penal damages as contemplated under Section 14B of the EPF and MP Act, 1952 by the authority is well within its competency. As such, the rates of damages are to be imposed, as has been specified in Para-32A of the EPF Scheme, 1952, and the same cannot be modified or altered. Therefore, the direction issued by the appellate authority to recalculate the penal damages at the rate of 5%, in addition to the interest accrued on account of penalty for the period of default, is contrary to the provisions of law. Accordingly, the order dated 27.01.2000 in Annexure-3 passed by the appellate tribunal, being contrary to the provisions of law, is required to be set aside and accordingly the same is hereby set aside. The matter is remitted back to the Employees Provident Fund Appellate Tribunal-opposite party

no.2 to rehear the appeal and pass appropriate order in conformity with the provisions of law by affording opportunity of hearing to the parties in compliance of the principles of natural justice.

18. The writ petition is allowed to the extent indicated above. No order to cost.

Writ petition allowed.

**2018 (I) ILR - CUT-136**

**D. DASH, J.**

DSREF NO. 02 OF 2014 & JCRLA 51 OF 2014

**STATE OF ORISSA**

.....Appellant

. Vrs.

**BANABIHAR BEHERA @ HARIA**

.....Respondent

**CRIMINAL PROCEDURE CODE, 1973 – Ss. 370, 392**

Hon'ble Judges of the Division Bench became unanimous to convict the appellant U/s. 302 I.P.C. but divided in their opinion on the question of sentence i.e. death or life imprisonment – Hence the matter before this Bench.

Normal rule is that the offence of murder shall be punished with the sentence of life imprisonment – However, the court can impose death sentence only if there are special reasons.

In this case, extreme fascination of the appellant towards the deceased and the failure on his part to win over her heart appears to have been the cause of frustration and the appellant being disturbed both emotionally and psychologically used the sharp cutting weapon of small size, inflicted blows but not attempted to harm the chastity of the deceased – The prosecution has not proved that the murder was executed after previous planning and the brutality was so high that imposition of life imprisonment would be altogether inadequate – There is also no material with the prosecution that the appellant would remain as continuous threat for the society and he cannot be reformed in future – There is also no adverse report from the jail authorities regarding his conduct during the period he was in jail – Held, the case in hand does not fall within the category of “rarest of rare” case – Hence the sentence of death awarded to the appellant be commuted to imprisonment for life.

(Paras 24, 25, 26)

**Case Laws Referred to**

1. (2017) 6 SCC 1 : Mukesh vrs State (NCT) of Delhi)
2. AIR 1983 SC 957 : Machhi Singh v. State of Punjab.
3. (1994) 2 SCC 220 : Dhananjoy Chatterjee vrs. State of West Bengal.
4. (2009)5 SCC 740 : Rameshbhai Chandubhai Rathod vrs. State of Gujrat.
5. 1994 SCC (Cri) 656 : Laxman Naik v. State of Orissa.
6. (1996) 6 SCC 250 : Kamta Tiwari vrs. State of M.P.
7. (2012) 4 SCC 37 : Rajendra Pralhadrao Wasnik v. State of Maharashtra.
8. AIR 1980 SC 898 : Bachan Singh vrs. State of Punjab.

For Appellant : Mr. P.Panda, Addl.Govt.Adv.

For Respondent : Mr. D.P.Das

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Date of hearing : 01.12.2017

Date of judgment: 07.12.2017

**JUDGMENT*****D. DASH, J.***

The appellant- Banabihari Behera @ Haria faced the trial in the Court of Additional Sessions Judge, Jajpur in C.T. Case No. 315 of 2013 standing charged for commission of offence under section 302 IPC. The trial court has found the appellant guilty of murder under section 302 IPC. Having thus for been convicted for the offence of causing murder of the sixteen years daughter of the informant who was then a student of Ist Year of Intermediate in Science, the appellant has been sentenced to death. In view of the infliction of the capital punishment upon the appellant, for its confirmation, reference has been made under section 366(1) of the Code of Criminal Procedure, 1973 (for short, the Code').

The appellant being aggrieved by the said order of conviction and the order of sentence has also filed an appeal from inside the jail.

2. The reference as well as the appeal had been heard by the Hon'ble Judges constituting the Division Bench. The Bench delivered two judgments on 19.11.2015. While two Hon'ble Judges are of the unanimous opinion that the finding of guilt recorded by the trial court is based on just and proper appreciation of evidence on record keeping in view the settled position of law warranting no interference and accordingly have held that the conviction of the appellant has to be maintained, the difference of opinion arises as to the sentence to be awarded. The Hon'ble Judge presiding the Bench when observed that the case falls within the category of 'rarest of rare' cases as it is

a case of brutal murder of a young adolescent damsel aged about sixteen years by infliction of twelve numbers of injuries on her person by means of a sharp cutting weapon and thus the death sentence is only adequate one; the other Hon'ble Judge however has differed on this aspect of sentence that the appellant has to be visited with. The Hon'ble Judge having said that mitigating circumstances, particularly the young age of the appellant without any criminal track record and in the absence of any such material that he is a menace to the society and as such remaining with the continuous threat from the society and the possibility of his being reformed and rehabilitated not ruled out has opined that imposition of sentence of death is not called for and it is a case where sentence of imprisonment for life be awarded, further taking note of the fact that when the motive behind the crime has neither been so pinpointedly projected nor established. This is how, the matter has thus been laid before me as provided under section 370 read with section 392 of the Code.

3. The facts having been comprehensively given in the judgment of the Hon'ble Judge presiding the Bench, I would only refer to such facts as are necessary for disposal of the matter in hand which has been laid before me.

Suffice it to say that the appellant-accused Banabihari Behera also called as Haria in the locality and the deceased belong to the same village and particularly their houses are not far apart. The appellant was then working as the driver in a truck and earning his livelihood when deceased was prosecuting her studies as a student of Ist Year of Intermediate in Science.

4(a). On 26.04.2013 at about 7.30 a.m. the deceased who was the only daughter of the informant (P.W.2) and aged about 16 years had been to attend the call of nature with her mother, P.W.3 to the nearby canal running little away on the back side of their house. The appellant, a co-villager of the informant who had then concealed his presence near the bushes, suddenly came out and started dragging the deceased towards the ridge, holding her hands. The mother of the deceased i.e. P.W.3 though tried to resist the attempt of the appellant and rescue the deceased, it was all in vain. So she rushed to the house and informed her family members to appropriately respond forthwith. The father of the deceased (P.W.2) and others thereafter rushing near the spot, saw the appellant dealing successive blows by means of a 'Kata' ( a type of small dagger, a billhook) on the deceased who was lying in a naked condition. Seeing the arrival of P.W.2 and others, the appellant fled away from the spot carrying the weapon. P.W.2 and others through chased him returned empty handed. The father of the deceased suspected that the murder was committed

in execution of a prior plan hatched by the appellant and the members of his family particularly i.e., his elder brothers Hrusikesh Behera, Babaji Behera and sister-in-laws, namely Lipi Behera and Tiki Behera who playing their respective role therein. It was also suspected that the deceased had been subjected to sexual assault soon before her death caused by the appellant by infliction of fatal injuries all over the body.

(b). Father of the deceased, P.W.2 on that day around 9 a.m. presented a written report to the Inspector-in-Charge of Tomka Police Station.

(c). On receipt of the written report, Inspector-in-Charge of Tomka Police Station (P.W.17), registered Tomka P.S. Case No. 28 of 2013 under section 302/376 read with section 34 of the Indian Penal Code not only against the appellant but also against his family members namely Hrusikesh Behera, Babaji Behera, Lipi Behera and Tiki Behera.

He (P.W.17) then directed Parao Tudi (P.W.19), S.I. of Police, Tomka Police Station to investigate into the case. During course of investigation, the witnesses were examined the Investigating Officer visited the spot and prepared spot map (Ext.12). He also seized blood stained earth, sample earth, aluminum 'lota', a pair of slipper of Paragaon make, head hair, ear rings of the deceased lying at the spot under seizure list (Ext.2/1). Inquest over the dead body was conducted at the spot on 26.04.2013 during noon hours in presence of the witnesses vide inquest report (Ext.4). The dead body was then sent to C.H.C., Danagadi for post mortem examination and after that the wearing apparels of the deceased were seized under seizure list, Ext.5.

P.W.14 Dr. Ramesh Kumar Sahoo, Medical Officer, Danagadi C.H.C. conducted post mortem examination over the dead body of the deceased on 26.04.2013 and submitted the post mortem report vide Ext.6. His evidence in consonance with the report is that he had noticed most importantly one chop wound on the neck completely transecting the spinal cord and vertebra at 6-7 level size of the size of 20x15x10 cm, transecting the great vessels of the neck besides two other chopped wounds on face, incised wound on deltoid muscle, incised wounds on right fore-arm on back side, left fore-arm cutting bones of radius and ulna.

The appellant was arrested on 28.04.2013 at 5.00 a.m. at village Tomka and was taken to the Police Station. The appellant while in police custody is said to have confessed his guilt in the presence of the witnesses and further stating to have concealed the 'Kata' near bushes has accordingly, led

the police party to the place of concealment in giving recovery of the 'Kata' which was seized under seizure list (Ext.11). After receipt of the post mortem examination report, on 30.04.2013, that 'Kata' being sent to the doctor (P.W.14) for his opinion to connect its user with the injuries found on the person of the deceased, the opinion vide Ext.8, has been in the affirmative that the injuries sustained by the deceased are possible by that 'Kata'. On 02.05.2013 the material objects were sent to S.F.S.L., Rasulgarh, Bhubaneswar following due procedure and on completion of investigation finally the appellant alone was charge sheeted.

(d). The prosecution in order to prove its case has examined in total twenty one witnesses besides proving the supporting documents marked as Exts. 1 to 18 and seventeen material objects, M.O. I to XVII, when two witnesses have been examined from the side of the defence.

5. Both the Hon'ble Judges are of the view that the finding of guilt against the appellant as has been returned by the trial court is in order, having unanimously arrived at the conclusion that the appellant is liable to be convicted for commission of offence under section 302 IPC.

In view of the fact that the Hon'ble Judges are divided in their opinion in the matter of award of sentence upon the appellant whose conviction has been found to be in order, the matter has been laid before me in terms of the provision of section 370 and 392 of the Code centering round the question of sentence. Both the Hon'ble Judges have relied on a numbers of cases decided by the Apex Court in the matter of infliction of death sentence in support of their respective view point.

6. Now, therefore, I shall proceed to the sentencing.

7. Mr. D.P.Das, learned Advocate/Amicus Curiae submitted that the sentence passed by the trial court ought to be set aside and the learned trial judge in awarding the death sentence has failed to keep in view those aggravating as well as mitigating circumstances which have bearing on the question of sentence, especially in the case of imposition of death penalty. He submitted that the learned trial judge has pronounced the sentence in a routine manner for which it is vitiated. Criticizing the sentence, he placed reliance of *Banchan Singh v. State of Punjab; AIR 1980 SC 898* and submitted that the trial court has committed error by not properly appreciating the said authoritative pronouncement in as much as the position that the court in *Banchan Singh* (supra) has categorically held that the

extreme penalty can be inflicted only in gravest cases of extreme culpability and that in making the choice of sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also have not been properly viewed and appreciated.

8. Mr. Das further contended that in the present case, the decision in *Banchan Singh* was completely disregarded and the trial court, while sentencing the accused, only placed emphasis on the brutal and heinous nature of the crime and the mitigating factors including the possibility of reform and rehabilitation of the appellant were ruled out on the basis of the nature of the crime and not on its own merits.

9. Mr. Das further submitted that the trial court failed to pay due regard to the mitigating factors; that the court has committed the mistake of rejecting the mitigating factors by reasoning that it may not be sufficient for awarding life sentence; and that the courts have not considered all the mitigating factors cumulatively in order to arrive at the conclusion whether the case fell within the category of 'rarest of rare' cases. According to him, the young age is a mitigating factor which has been taken note of by the Apex court in several cases. He urged that the crime when is not premeditated, the same stands as the mitigating factor and that has to be given its due place for being taken into account. He further submitted that when the criminal antecedents of the appellant are lacking, the prosecution has not been able to say that the appellant deserves imposition of lesser sentence. He also submitted that considerable weightage must be given to the concept of reformation and rehabilitation. According to him, the present case easily passes all the laid down tests so as to stand as a fit one for commutation of the death sentence to life imprisonment. According to him, the young age as the mitigating factor has to be taken note of along with the presence of mother and other family members of the appellant standing as his dependants with there is absence of any continuing threat to the collective. It is submitted that testing the present case in the touch stone of the principles propounded in the decisions of the Apex Court, the case does not fall within the 'rarest of the rare' cases category and therefore the norm is for awarding life sentence and not the death penalty which is exception.

10. Learned counsel for the State submitted that the trial judge has appositely sentenced the appellant to death after drawing up the balance sheet of the mitigating and aggravating circumstances and striking a just balance and has rightly found that here is a case where the sentence of death is

adequate. He also submitted that the mitigating circumstances are required to be considered in the light of the offence and not alone on the back drop of age and family back ground.

11. Let me proceed to analyze the aforesaid aspects. In the case of *Bachan Singh vs. State of Punjab*; AIR 1980 SC 898 the Apex court has held that:-

“164.....(a). The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b). While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence”.

“202.....‘Aggravating circumstances. - A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty ; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.”

“203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other”.

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“206.....‘Mitigating circumstances.-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person.
- (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.”

“207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.”

“209..... It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”

12. In the case of **Machhi Singh v. State of Punjab**; AIR 1983 SC 957, it has been held that:-

“32. The reasons why the community as a whole does not endorse the humanistic approach reflected in “death sentence –in-no-case” doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of “reverence for life” principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly,

it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection.”

13. The court next has adverted to the aspects of the feeling of the community and its desire for self-preservation and opined that the community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing:-

“32.....But the community will not do so in every case. It may do so “in the rarest of rare cases” when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.”

14. It is apt to state here that in *Machhi Singh* case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, antisocial or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder. After so enumerating, the propositions that emerged from *Bachan Singh*, were culled out which are of as follows:-

“The following propositions emerge from Banchan Singh case.

‘(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the “offender” also require to be taken into consideration along with the circumstances of the “crime”.

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

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

15. It has been further opined in *Machhi Singh*'s case that to apply the said guidelines, the following questions are required to be answered:

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

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

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

16. The Apex Court in the case of *Haresh Mohandas Rajput v. State of Maharashtra* (2011) 12 SCC 5, while dealing with the situation where the death sentence is warranted, referred to the guidelines laid down in *Banchan Singh* and the principles culled out in *Machhi Singh* and opined as follows:-

“19. In *Machhi Singh v. State of Punjab*, this Court expanded the “rarest of rare” formulation beyond the aggravating factors listed in *Banchan Singh* to cases where the “collective conscience” of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating the mitigating circumstances.”

The Court then ruled that :-

“20. The rarest of the rare case” comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of “the rarest of the rare case”. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the- moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case

the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded.”

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

“15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.”

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

In fact in case of ‘*Rameshbhai Chandubhai Rathod vrs. State of Gujrat*’; (2009)5 SCC 740 which was a case of rape and/or murder of girl of tender age, a student of IV Standard in the school by the appellant employed as a watchman in the Apartment who was married having wife and children,

their Lordships agreed for the conviction to sustain. The difference of opinion arose on the question of sentence; when the Hon'ble Judge, presiding the Bench confirmed the death sentence, the other Hon'ble Judge held that life sentence be given. The appeal in view of difference of opinion on the imposition of sentence had been referred to a three Judges Bench. The decision as reported in (2011) 2 SCC 764 has been that the case was not in the category of 'rarest of rare' cases. Accordingly, the death sentence being commuted to life, it was however directed that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reason.

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

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

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

“The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her

confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.”

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

“28 .....The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code.”

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

“8. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances- but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him “Tiwari Uncle”. Obviously her closeness with the appellant encouraged her to go to his shop, which was near the salon where she had gone for a haircut with her father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder- as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of

extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a “rarest of rare” cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society’s abhorrence of such crimes.”

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

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

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

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

“364. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons viz. the assault on the informant, P.W. 1 with iron rod and

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

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

mindset of the appellants to commit a crime which can summon with immediacy a “tsunami” of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.”

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

23. Mr. D.P.Das, learned Advocate/Amicus Curiae for the appellant argued that keeping in view the ratio laid down in the aforesaid decisions by going through the facts and circumstances of the case, it cannot be said that the case is falling within the category ‘rarest of rare’ cases as by balancing the aggravating and mitigating circumstances upon consideration of the totality of the case, the case in hand cannot be taken to be one where imposition of life imprisonment would be wholly inadequate and thus would not meet the ends of justice. He while concluding submitted that the imposition of death penalty here would be extremely harsh and totally unwarranted in as much as the case at hand does not fall in the category of the ‘rarest of rare’ cases.

Learned counsel for the State argues that on the totality of the facts and circumstances of the case, in this incident of brutal murder of a young girl of sixteen years old who was then a student of Ist Year of Intermediate Science and with the mitigating circumstance such as the young age of the appellant who is having his mother and other family members; absence of criminal track record, the scope of reformation and rehabilitation being viewed cumulatively, do not outweigh the aggravating circumstance.

24. Keeping in view the authoritative pronouncements, and the rival submission, coming to examine the facts and circumstances relevant for the purpose, it appears to be a case that the appellant was infatuated and thereby obsessed with the physical charm of the deceased and was under the extreme emotional and psychological disturbance due to passiveness of the deceased towards his infatuation.

Given anxious consideration to the evidence let in during trial especially as regards the trailer to the main picture i.e. the incident of infliction of injuries on the deceased, it plainly strikes to mind as if some matters concerning the relationship between the two are not being placed by the witnesses for the reasons known to them or thinking for a moment that in so far as the trial is concerned, those are of no relevance. The extreme fascination of the appellant towards the deceased and the failure on his part to win over her heart appears to have been the cause of frustration and that again being expressed in the last meet closing the chapter for ever is seen to have led the appellant to be greatly disturbed emotionally and psychologically to a degree beyond the range of human thermo stat. The evidence would go to show that the appellant had not started the assault no sooner he appeared. He first of all dragged her and that he ventured to do in presence of mother of victim (P.W.3). Then however, there is lack of evidence on the score as to what it transpired between the appellant and the deceased after the mother of the deceased (P.W.3) left the spot. The possibility of altercation or tussle between them in the fact situation of the case is not altogether ruled out. The appellant has used "Kata", the sharp cutting weapon of small size in inflicting the blows, but has not attempted in any way to harm the chastity of the deceased which is fortified from the report of the doctor who has not noticed any injury on the genitals or breasts of the deceased. The clothings of the deceased were intact as has been noticed during inquest at the spot. The initial allegation that the deceased was ravished prior to the infliction of the blows on her person leading to her death, in course of investigation has been found to have not derived any support from any such material and thus has proven untrue. The appellant, a bachelor was by avocation a driver of the truck, having the members of the family needing his support and he has no such criminal track record to his credit. The crime as committed does not appear to be premeditated which is again a mitigating factor.

25. The appellant is an able bodied young man of 35 years old as has been observed by the trial court. It has not been shown by the prosecution that the appellant is menace to the society, as such there remains continuous threat from the side of the society. The prosecution has not submitted any material to show that the possibility of reform of the appellant stands totally ruled out and that he cannot be reformed and rehabilitated at any time in future. At the same time, no adverse report is forthcoming from the jail authority and placed by the prosecution as regards the conduct of the appellant during all these period spent by him in jail.

The appellant's conduct in course of investigation has not been in the light of destroying the evidence or avoiding the process of law and rather, it is seen that since his arrest, he fully co-operated with the investigation.

26. True it is that the manner in which the incident has taken place and the way the appellant has committed the offence, the age of the victim and her helplessness at that point of time when seen with the number of injuries inflicted upon her, visualizing for a moment their force and impact from the detail narration of those injuries, go to show the brutality of the crime committed which however is not the sole criteria for judging the case to be within the category of "rarest of rare" cases; it has to be one of extreme brutality and exceptional depravity so as to avoid the criticism that the death penalty has been taken as the norm and not the exception.

In the above way, cautiously and anxiously weighing the aggravating and mitigating circumstances, I am led to record my opinion that the aggravating circumstances as projected are not ought weighing the mitigating circumstances. Consequent upon the above, I conclude that the case in hand does not fall within the category of "rarest of rare" cases so as to say that only adequate penalty for the offence committed by the appellant is death and therefore, be hanged by the neck until he be dead.

27. For all the aforesaid, in my considered opinion, the sentence of death awarded to the appellant be commuted to imprisonment for life.

Reference answered.

**2018 (I) ILR - CUT- 153**

**BISWANATH RATH, J.**

W.P.(C) NO. 22458 OF 2016

**JAYA CHANDRA MISHRA**

.....Petitioner

. Vrs.

**UNION OF INDIA & ORS.**

.....Opp. Parties

**PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES,  
PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995 – Ss.  
47, 62**

**Petitioner-employee while in duty sustained 65% Locomotors disability – He remained absent for further treatment with permission of**

**the competent authority – Departmental proceeding initiated against him treating him as unauthorized absent – Disciplinary authority dismissed him from service, which was confirmed by the Appellate, Revisional as well as Reviewing Authorities – Petitioner filed complaint petition before the Commissioner for persons with disabilities – Complaint petition rejected – Hence the writ petition.**

**Held, the commissioner is competent to consider the complaint relating to deprivation of rights of the person with disability and if necessary may suo-motu inquire into the matter upon hearing the parties concerned and can set aside the order of dismissal.**

**Since the State Commissioner has the jurisdiction to deal with the matter, this court declined to interfere with the order passed by the disciplinary authority and other authorities and while setting aside the order passed by the State Commissioner, remanded the matter to him to re-look the complaint and to take a lawful decision after hearing all the parties concerned.** (Paras 14,15)

**Case Law Relied on :-**

1. (2013) 7 SCC 182 : Geetaben Ratilal Patel -V- District Primary Education Officer

**Case Laws Referred to :-**

1. AIR 1964 S.C. 1272 : Buckingham and Carnatic Co. Ltd. vrs. Venkatiah & Anr.
2. AIR 1998 S.C. 2722 : Union of India & Ors. vrs. Dinanath Shantaram Karekar & Ors.
3. (2007) 7 SCC 257 : Union of India and another vrs. S.S. Ahluwalia.
4. (2011) 4 SCC 589 : Union of India & Ors. vrs. S.K. Kapoor.
5. (2013) 7 SCC 243 : Anil Kumar Mahajan vrs. Union of India through Secretary, ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi & Ors.

For Petitioner : In Person

For Opp. Parties : Mr. Anindya Mishra

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Date of Hearing : 20.12.2017

Date of Judgment: 03.01.2018

**JUDGMENT**

**BISWANATH RATH, J.**

Filing this writ petition the petitioner has sought for the following reliefs :-

“Under the aforesaid facts and circumstances, it is humbly prayed that this Hon’ble Court most graciously be pleased to issue notices to the opposite parties and upon hearing the parties be pleased to issue writ/writs in the nature of writ of certiorari in;

(I) quashing the inquiry proceedings conducted behind the back of the petitioner during his medical sick including ex-parte inquiry report not communicated yet to the petitioner as well as the orders of Disciplinary Authority, Appellate Authority, Revisional Authority and Reviewing Authority and orders arising out of Disciplinary Proceedings under Annexures-14, 12, 18, 21, 25, 28 & 30, since those emanated from the illegal charge memorandum, faulty and without authority inquiry report, as well as against the spirit of Railway Rate Tribunal’s advice without authority of law;

(II) direct the medical authorities, O.P. No.1, 4 and 5 to certify railway medical fitness of the petitioner pending since 01.11.2012 and early reimbursement of the cost of treatment required for replacement of his artificial limb (B.K. Prosthesis), sanction of Hospital leave and;

(III) to quash the order of commissioner of Disability under Annexure-30 who failed to exercise its jurisdiction.

(IV) be further pleased to direct the Opposite parties at Srl. Nos.3, 6 and 7 to regularize the period from 22.08.2012 to 01.11.2012, as Hospital leave in the light of rule provision under Annexure-2 series and from 02.11.2012 till the date of resumption of duty as duty for all purposes in the light of Railway rules attributable to delay in certification of fitness by Railway Medical authorities after certification of fitness by referral hospital;

And pass such other order(s)/ direction(s) as this Hon’ble Court may deem fit and proper in the bonafide interest of justice;”

**2.** Short background involved in this case is; petitioner is a physically challenged Railway employee with 65% locomotor disability which he acquired in course of his employment in Railways. Petitioner was initially appointed in Indian Railways as Assistant Station Master in the year 1984, promoted to the post of Station Master in the year 1987 and Deputy Station Master in the year 1999. It is averred that while the petitioner was working as

Deputy Station Superintendent on 09.12.1999 met with an accident while travelling on duty in a train and lost his right leg. Consequently, he was medically de-categorized as a permanent physical locomotor disability to the extent of 65% and capable of movement only with the help of an artificial limb. After becoming a physically disabled he was alternatively appointed as Office Superintendent, Grade-II in the Office of Senior Divisional Operations Manager, East Coast Railway, Sambalpur in October, 2000. He was next promoted to the post of Office Superintendent Grade-I in 2003 which post was subsequently re-designated as Chief Office Superintendent in the year 2010. It is alleged that in spite of his working in the Office with utmost sincerity and satisfactory to the Railway Authorities he was transferred to Titilagarh vide order dated 28.03.2008 in the same capacity which transfer being intervened by the Central Administrative Tribunal, Cuttack and subsequently by this Court, he was allowed to continue at Sambalpur. But, the Railway Authority keeping grudge did not assign him any official duty even though his salary and other drawings are not affected till August, 2012. When he proceeded to Swami Vivekananda National Institute of Rehabilitation Training and Research (for short "SVNIRTAR") for replacement of his artificial limb, but to the ill-luck of the petitioner, the Authority refused to sanction the C.L. and Leave resulting loss of pay on occasions. The petitioner claimed that artificial limb has the limited use and on getting damaged he is being referred by the Competent Railway Medical Authority for its replacement and the whole period required for such purpose has to be treated as Hospital leave following the Railways Rules. While working as Ch.OS in the office of Sr.DOM/SBP petitioner was referred by the Chief Medical Superintendent, East Coast Railway, Sambalpur (CMS/ECOR/SBP) on 21.08.2012 to 'SVNIRTAR' for replacement of his artificial limb. Consequently, he was also kept under Railway Medical Certificate Sick list by the Authorized Medical Officer of the Divisional Railway Hospital, Sambalpur. It is stated that the petitioner was under the treatment of 'SVNIRTAR' from 23.08.2012 to 30.10.2012 and was discharged from 'SVNIRTAR' on 30.10.2012 with a new artificial limb (B.K. Prosthesis) for his safe movement with issuance of Medical Certificate of fitness on the same date itself. The petitioner returned to Sambalpur on 31.10.2012 and reported before the AMO at DRH/SBP on 01.11.2012 for certification of his medical fitness by Railway Medical Authority in order to resume his duty as he was declared unfit to perform duty with effect from 21.08.2012. It is alleged that the Senior Divisional Medical Officer, who kept the petitioner under sick list, did not entertain him on the premises that he has

already discharged him from sick list vide discharge memo dated 26.09.2012 due to his absence at Sambalpur. It is stated that declaring him discharged is contrary to the own record of the Railway Authority which had already referred the petitioner to outstation for requisite treatment and replacement. There was no intimation in any manner to the petitioner regarding his such discharge from the Railway Medical sick list compelling the petitioner to make a representation to the CMS/SBP dated 02.11.2012 enclosing therein the medical certificate of treatment issued by 'SVNIRTAR' and all supporting documents requesting therein the AMO to intervene in the matter. Finding no response, petitioner made a representation to the next higher medical authority, i.e., Chief Medical Director vide letter dated 02.12.2012 for his intervention. There has been subsequent representations to the other higher authorities also. Referring to support communications from the Railway Authority, the petitioner alleged that the Railway Authority knowing fully well that the petitioner is a disabled person did not obey the conditions through the several communications / circulars protecting the rights of such persons despite the premises that the petitioner had proceeded for replacement to the 'SVNIRTAR' with approval of the competent Railway authority. Actions involving the petitioner alleged to have been not only contrary to their own guidelines but also aimed with victimizing the petitioner. There has been also specific guideline to deal with the Disciplinary proceeding involving such delinquents. It is alleged, Railway Authority has bypassed all such guidelines by concluding the disciplinary enquiry ex-parte. Petitioner's approach to the appellate authority for setting aside the enquiry proceedings concluded behind his back, but the appellate authority construing the same to be as a separate appeal against punishment upheld the punishment of removal from service as imposed by the Divisional Authority vide their letter dated 04.01.2013. Even though by that time, there was no punishment notice ever served on the petitioner the appellate authority directed the petitioner to prefer revision. Petitioner preferred revision on 23.11.2012. While preferring the revision the petitioner also requested to refer the matter to Railway Rates Tribunal, Chennai (for short "RRT") for their advice. Consequently, the revision was referred to RRT. The RRT in their advice while criticizing the role of the IO, DA & AA for their improper handling of the Disciplinary proceeding also observed that CL is not a recorded leave and a Railway servant on CL is not to be treated as absent from duty. It finally concluded the advice with observation that "For the said reasons we are of the considered view that the punishment of removal from service is not valid in law". It is alleged that the General

Manager on failure of his accepting the advice of the RRT, in partial modification of the order of punishment, reduced the order of punishment of removal of service to that of compulsory retirement from service in exercise of its revisional power. The petitioner alleged that for clear advice of the RRT, the DA should have entered into revising the charges against the petitioner and concluding the proceeding after providing natural justice to the petitioner. Petitioner's attempt for review under Rule 25(A) of RS (D&A) Rules, 1968 was rejected on the premises that there being no material of evidence for review of the punishment order. Being satisfied with the Authority, even including that of the Health Department of the Railway, the petitioner approached the State Commissioner for Persons with Disabilities, Orissa, Bhubaneswar under Section 62 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the "PWD Act"). The complaint of the petitioner was registered as Case no.SCPD-246/2015 and the proceeding was concluded with an order of rejection of the complaint of the petitioner on the ground of maintainability, but however permitting the petitioner to approach the competent authority.

**3.** Referring to the provisions contained in the PWD Act and some decisions of the Hon'ble Apex Court, petitioner appearing in person advanced his argument and contended that for provisions contained in the PWD Act and for the directives of the Hon'ble apex Court in the decisions referred to by him, petitioner appearing in person claimed that the order of the State Commissioner, Orissa, Bhubaneswar involving the PWD Act is illegal and thus approaching this Court by way of this writ petition the petitioner sought for the reliefs already reproduced hereinabove in the first paragraph itself.

**4.** On their appearance, opposite party nos.3, 6 and 7 filed a detail counter affidavit.

**5.** Shri A.K. Mishra, learned counsel appearing for the above opposite parties while disputing each of the allegations of the petitioner strenuously urged that there is no violation of any provisions of the Service Rules covering the petitioner or any other persons referred to by him. It is contended that the matter has been not only examined at the Disciplinary Authority level but the matter has even gone upto the Review Board and depending on the advice of the Review Board, the punishment imposed as against the petitioner has been reduced. Shri Mishra, learned counsel for opposite party nos.3, 6 and 7 questioning the maintainability of the writ

petition justifying the validity of the order of the State Commissioner, Orissa, Bhubaneswar contended that for clear provision under the Central Administrative Tribunal Act, 1985 the petitioner has the only remedy to approach the Central Administrative Tribunal concerned and no case is maintainable before the State Commissioner under the PWD Act and, as such, the writ petition is also not entertainable. Shri Mishra, learned counsel further taking this Court to the several documents filed by opposite party nos.3, 6 and 7, contended that there being sufficient materials available and for providing of opportunities to the petitioner-delinquent involving disciplinary proceeding and for the observance of all procedures by the appellate authority as well as the revisional authority and also the reviewing authority, the petitioner has no case made out for interference of this Court. It is under the circumstances, Shri Mishra, learned counsel also contended that since no proceeding before the State Commissioner, Orissa, Bhubaneswar was maintainable under the provisions of the PWD Act, there remained nothing to be decided in this writ petition leaving it open to the petitioner to approach the competent authority.

**6.** The petitioner filing a rejoinder while challenging the allegations made by the Railway Authority involving the petitioner by bringing further materials attempted to establish his case in the matter of challenge to the punishment imposed by the Disciplinary Authority.

**7.** Considering the rival contentions of the parties, this Court finds, though the writ petition involves order of the Disciplinary Authority, the Appellate Authority, the Reviewing Authority and also at other higher level subsequent to the disposal of the revision and review, but for the petitioner's approach against the order of punishment and reduction and confirmation thereof by the higher authorities to the State Commissioner, Orissa, Bhubaneswar under the provisions of the PWD Act referred to hereinabove and the decision of the State Commissioner, Orissa, Bhubaneswar at Annexure-30, this Court finds, there is no adjudication of the proceeding involving the petitioner as of now by any competent authority except the State Commissioner deciding that the proceeding initiated involving the Disciplinary proceeding concerning the petitioner was not maintainable before the State Commissioner under the PWD Act and leaving it open to the petitioner to approach the competent authority, the question needs here to be decided is "whether the petitioner for the involvements of the particular issue had a remedy to approach the State Commissioner under the PWD Act, 1995?"

8. The fact disclosed that the petitioner for his disability used to take permission from the competent authority to leave the Headquarters for further treatment or replacement of the artificial limb and as available on record, the Disciplinary proceeding is an off suit to the petitioner's proceeding for replacement of the artificial limb and as alleged not joining back at appropriate time. Consequently, the Department treating him as unauthorized absent. The undisputed fact remains, the petitioner is admittedly a disabled person for his being suffering from locomotor disability following provisions containing Section 2(i)(v) of the PWD Act, 1995. Following the provision at sub-section (k) of Section 2 of the above Act, 'establishment' means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government. Therefore, there also remain no doubt that the Railway Authority is an Establishment under this Act.

9. Now, coming to examine other provisions of the PWD Act, this Court finds, Section 47 of the PWD Act, 1995 reads as follows :-

“47. **Non-discrimination in Government employment.** – (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

Reading of the aforesaid provision, this Court finds the whole reading of the same makes out a case for non-discrimination of such employees in Government employment, such as, not to dispense with, not to reduce in rank, adjustment in other postings in case not suitable to hold the post, not to adjust such employees against any post even creating a supernumerary

post until a suitable post is available and not to deny promotion to such person.

**10.** Now, coming to read Sections 60, 61 and 62 of the PWD Act, which reads as hereunder :-

**“60. Appointment of Commissioners for persons with disabilities.-**

(1) Every State Government may, by notification, appoint a Commissioner for persons with disabilities for the purposes of this Act.

(2) A person shall not be qualified for appointment as a Commissioner unless he has special knowledge or practical experience in respect of matters relating to rehabilitation.

(3) The salary and allowances payable to and other terms and conditions of service (including pension, gratuity and other retirement benefits) of the Commissioner shall be such as may be prescribed by the State Government.

(4) The State Government shall determine the nature and categories of officers and other employees required to assist the Commissioner in the discharge of his functions and provide the Commissioner with such officers and other employees as it thinks fit.

(5) The officers and employees provided to the Commissioner shall discharge their functions under the general superintendence of the Commissioner.

(6) The salaries and allowances and other conditions of service of officers and employees provided to the Commissioner shall be such as may be prescribed by the State Government.

**61. Powers of the Commissioner.-** The Commissioner within the State shall –

(a) co-ordinate with the departments of the State Government for the programmes and schemes for the benefit of persons with disabilities;

(b) monitor the utilization of funds disbursed by the State Government;

(c) take steps to safeguard the rights and facilities made available to persons with disabilities ;

(d) submit reports to the State Government on the implementation of the Act at such intervals as that Government may prescribe and forward a copy thereof to the Chief Commissioner.

62. **Commissioner to look into complaints with respect to matters relating to deprivation of rights of persons with disabilities.** – Without prejudice to the provisions of section 61, the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to –

(a) deprivation of rights of persons with disabilities;

(b) non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Government and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with the appropriate authorities.”

Section 60 deals with appointment of Commissioner for Persons with Disability, whereas Section 61 deals with the powers of the Commissioner includes satisfaction to safeguard the rights and facilities made available to the persons with disabilities and Section 62 empowers the Commissioner to look into complaints with respect to matters relating to deprivation of rights of persons with disabilities. Reading of all the aforesaid provisions, this Court finds, there is no doubt that the Commissioner empowered under the PWD Act in respect of matters relating to deprivation of rights of persons with disabilities, non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of right of persons with disabilities and to take up such matters with appropriate authorities. The provisions at Sections 60, 61 and 62 of the PWD Act must be aimed with protection of rights of such persons provided under Chapter-VIII of the Act, 1995.

11. Now, coming to claim of the petitioner with regard to imposition of punishment by the Disciplinary Authority that too for non-observance of Rules and Regulation governing Railway Authority involving a disabled person being a matter of consideration by the State Commissioner under the PWD Act this Court takes into consideration the decisions of the Hon'ble Apex Court cited by the petitioner in the cases of *Buckingham and Carnatic Co. Ltd. vrs. Venkatiah and another*, reported in AIR 1964 S.C. 1272, *Union of India and others vrs. Dinanath Shantaram Karekar and others*, reported in AIR 1998 S.C. 2722, *Union of India and another vrs. S.S. Ahluwalia*, reported in (2007) 7 SCC 257 and *Union of India and others vrs. S.K. Kapoor*, reported in (2011) 4 SCC 589. For the decisions not dealing

with the propositions advanced by the petitioner as to whether under the contingency the petitioner will be required to move the State Commissioner under the PWD Act or the Central Administrative Tribunal, none of these decisions have any application to the case at hand.

**12.** Now, coming to the other decision cited at Bar in the case of *Anil Kumar Mahajan vs. Union of India through Secretary, ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi and others*, reported in (2013) 7 SCC 243, wherein the question involved before the Hon'ble Apex Court was "whether the punishment imposed therein was in terms of the provision contained in Section 47 of the PWD Act ?" and there involved no question as to "whether the petitioner under the circumstance should approach the State Commissioner under the PWD Act or not ?" On the other hand, reading of the aforesaid decision, this Court observes, the matter involved there involving disposal of an original application before the Central Administrative Tribunal, therefore, this case has also no application to the case at hand.

**13.** In the case of *Geetaben Ratilal Patel vs. District Primary Education Officer*, reported in (2013) 7 SCC 182. This case involved the competency of the Commissioner in the matter of declaration of the dismissal involving the petitioner therein. The Hon'ble Apex Court while considering the jurisdiction of the Commissioner to set-aside the order of dismissal, in paragraphs-15 and 20 held as follows :-

"15. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act was enacted in 1995 to meet the following object and reasons:

- (i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;
- (ii) to create a barrier-free environment for persons with disabilities;
- (iii) to remove any discrimination against persons with disabilities in the sharing of development benefits vis-à-vis non-disabled persons;
- (iv) to counteract any situation of abuse and the exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) to make special provision for the integration of persons with disabilities into the social mainstream.

20. The provisions of Sections 47 and 62 of the Act, when read together, empower the Commissioner to look into the complaint with respect to the matters relating to deprivation of rights of persons with disabilities and non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions issued by the appropriate Governments or local authorities and to take up the matter with the appropriate authorities for the welfare and protection of rights of persons with disabilities including matters relating to dispensation with service or reduction in rank. The power of the Commissioner “to look into the complaints with respect to the matters relating to deprivation of rights” as provided under Section 62 of the Act is not an empty formality and the Commissioner is required to apply his mind on the question raised by the complainant to find out the truth behind the complaint. If so necessary, the Commissioner may suo motu inquire into the matter and/or after giving notice, hearing the parties concerned and going through the records may decide the complaint. If it comes to the notice of the Commissioner that a person with disability has been deprived of his rights or that the authorities have flouted any law, rule, guideline, instruction, etc. issued by the appropriate Government or local authorities, the Commissioner is required to take up the matter with the appropriate authority to ensure restoration of rights of such disabled person and/or to implement the law, rule, guideline, instruction if not followed. A complaint may be made by any disabled person himself or any person on behalf of disabled persons or by any person in the interest of disabled persons. Thus the issue as involved is decided affirmatively in favour of the appellant and against the respondent.”

**14.** Reading of the aforesaid decision, this Court finds, the Hon’ble Apex Court taking into account the provisions at Section 47 of the PWD Act as well as Section 62 of the PWD Act clearly observed that the Commissioner is competent to take a decision on the order of dismissal or otherwise. This Court finds, the petitioner has the support of this decision of the Hon’ble Apex Court.

**15.** For the observations made hereinabove and for this Court finding the petitioner has the support of the decision of the Hon’ble Apex Court in the case of *Geetaben Ratilal Patel (supra)*, this Court while declining to interfere

in the order of the Disciplinary Authority, the Appellate Authority, the Revisional Authority and the Reviewing Authority for the requirement of consideration of the same by the competent authority, but however while observing that the State Commissioner has the jurisdiction to deal with the aspects involved herein following the decision of the Hon'ble Apex Court in the case of *Geetaben Ratilal Patel (supra)*, interfering in the order of the State Commissioner for Persons with Disabilities dated 20.09.2016 available at Annexure-30, setting aside the order at Annexure-30 this Court remands the matter back to the State Commissioner for Persons with Disabilities, Orissa, Bhubaneswar to have a re-look to the complaint raised by the petitioner and take a lawful decision involving the issues therein and giving opportunity of the material evidence as well as hearing to all the parties concerned. Let the entire exercise, indicated herein above, be concluded by the State Commissioner within a period of six months from the date of production / communication of this order by the petitioner.

**16.** This writ petition stands disposed of with the aforesaid observation and direction. There shall be no order as to costs.

Writ petition disposed of.

**2018 (I) ILR - CUT-165**

**BISWANATH RATH, J.**

C.M.P. NO. 1375 OF 2016

**DURGAMADHAB DAS**

.....Petitioner

. Vrs.

**BHIKARI CHARAN DAS & ORS.**

.....Opp. Parties

**CIVIL PROCEDURE CODE, 1908 – Ss. 10, 151**

**Stay of suit – Prayer U/s. 10 C.P.C. was rejected as whole of the subject matter in two suits are not identical – Hence the CMP – Section 10 C.P.C. has no application to the case at hand – Since the decision in the earlier suit has a relevancy on the decision in the latter suit and this Court, finds that the decision in**

**the appeal i.e. RFA No. 8 of 2015 will have an influencing factor on the subsequent suit, has exercised its inherent power U/s. 151 C.P.C. and directed for stay of the subsequent suit vide C.S. No. 93 of 2013 till disposal of RFA No. 8 of 2015.**

(Para 12)

**Case Law Relied on :-**

1. ILR (1991) 2 Cut.353
2. 2007 (II) OLR 459

**Case Laws Referred to :-**

1. AIR 2005 SC 242 : National Institute of Mental Health & Neuro Sciences, -V- C. Parameshwara
2. AIR (1977) S.C. 392 : Y.B. Patil and others, -V- Y.L. Patil.
3. AIR 1962 (S.C.) 527 : Manohar Lal Chopra-V- Rai Bahadur Rao Raja Seth Hiralal.
4. AIR 1984 (Orissa) 205 : Sudhansu Mishrani & Ors. -V- Subal Mishra
5. 2005 (I) OLR 408 : Suresh Kumar Singhi & Ors. -V- Kirit Kotecha & Anr.
6. 76 (1993) C.L.T 517 : Sambhu Prasad -V- Kailash Chandra Das & Ors.
7. AIR 1962 (S.C.) 527 : Manohar Lal Chopra -V- Rai Bahadur Rao Raja Seth Hiralal.
8. AIR 2005 SC 242 : National Institute of Mental Health & Neuro Sciences - V- C. Parameshwara.

For Petitioner : Mr. Susanta Ku. Dash  
M/s.Swetlana Das & D.Mohanty

For Opp. Parties : M/s.Soubhagya Sundar Das, R.Sahoo,  
K.C.Mohapatra & S.Dash

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Date of hearing : 12. 12. 2017  
Date of Judgment: 02.01. 2018

**JUDGMENT**

***BISWANATH RATH, J.***

This Civil Miscellaneous Petition has been filed challenging the order passed by the learned Civil Judge (Jr. Divn.), Jajpur in C.S. No.93 of 2013 involving an application under Section 10 of the Code of Civil Procedure being moved by the plaintiffs as find place at Annexure-7 of the civil miscellaneous petition.

2. Short background involved in the case is that the petitioner as the plaintiff along with the other co-sharers filed title suit vide T.S. No.113 of

1997 on the file of learned Civil Judge (Jr. Divn.), Jajpur for declaring the gift deeds as void since the defendant no.2 Sudhansu Mohan Das is not the adopted son of late Satyendra and further, the possession of the defendants 1 & therein over the disputed property in favour of the plaintiff and also for permanent injunction restraining the defendant nos.1 & 2 from claiming any interest over the suit land. Plaintiff-petitioner has lost his attempt in the above suit vide R.F.A. No.8 of 2015, which is presently pending disposal. It is while the matter stood as above, the petitioner again filed C.S. No.93 of 2013 before the learned Civil Judge (Jr. Divn.), Jajpur for permanently restraining the defendants from forcibly attempted to take possession of the disputed property. Taking into consideration the pendency of the R.F.A. No.8 of 2015, it appears, the result therein has a bearing on the result of the subsequent suit. The plaintiff-petitioner filed an application under Section 10 of the C.P.C. which matter was rejected by the order of the trial court on 16.7.2014 on the premises that the present defendants are not the parties to the suit vide T.S. No.113 of 1997. After gap of two years, the petitioner plaintiff filed another application under Section 10 of C.P.C. on the self same ground requesting therein for stay of further proceeding of the later suit till disposal of the R.F.A. No.8 of 2015. On the premises that the opposite parties-the present defendants for not being party to the title suit vide T.S. No.113 of 1997, the trial court held that the petition is not maintainable and consequently, rejected the same. Thus, the present civil miscellaneous petition.

3. Shri Sushanta Kumar Dash, learned counsel for the petitioner taking this Court to the provisions contained in Section 10 of the C.P.C. and also to the dispute involved in both the suits contended that for the interest of justice and to avoid any inconsistent view in the later suit, the later suit should be stayed till final outcome in the R.F.A. No.8 of 2015. Consequently, learned counsel for the petitioner prayed for interference of this Court in the impugned order, thereby setting aside the same and allowing the application under Section 10 of C.P.C.

4. Shri S.S. Das, learned counsel for the opposite parties defendants on the other hand, taking this Court to the nature of the suits involved herein, particularly the disputes and the parties required to be considered involving both the suits and further for the rejection of the earlier application under Section 10 of the C.P.C. at the instance of the plaintiff-petitioner itself by the very same court contended that there is right decision by the trial court involving the issue and thus, there is no scope for this Court for interfering in

such orders in exercise of power under Article 227 of the Constitution of India.

5. Shri Das, learned counsel for the opposite parties also taking this Court to the decisions of different Court particularly the decision of Hon'ble Apex Court in the case of *National Institute of Mental Health & Neuro Sciences, appellant versus C. Parameshwara, respondent* as reported in *AIR 2005 Supreme Court 242*, in the case of *Y.B. Patil and others, Appellants versus Y.L. Patil, Respondents* as reported in *AIR (1977) S.C. 392*, in the case of *Manohar Lal Chopra, Appellant versus Rai Bahadur Rao Raja Seth Hiralal, Respondent* as reported in *AIR 1962 (S.C.) 527*, in the case of *Sudhansu Mishrani and others, Petitioners versus Subal Mishra, opposite party* as reported in *AIR 1984 (Orissa) 205*, in the case of *Sambhu Prasad versus Kailash Chandra Das and others* as reported in *76 (1993) C.L.T 517* and in the case of *Suresh Kumar Singhi and others versus Kirit Kotecha and another* as reported in *2005 (I) OLR 408* submitted that for the support of the decisions referred to herein to the case of the defendants, there is otherwise also no scope for interfering with the impugned order.

6. Considering the rival contentions of the parties, this Court finds, admittedly there are two suits involved and admittedly the present opposite parties-defendants are no way involved in the first suit. Taking into consideration both the plaints involving the T.S. No.113 of 1997 and C.S. No.93 of 2013, this Court finds, the Title Suit vide T.S. No.113 of 1997 involves the following parties :

- “1. Nabin Chandra Das aged 50 years.
  2. Durgamadhab Das, aged 45 years,
  3. Hariballav Das, aged 35 years,
  4. Ram Ch. Das, aged 27 years.
- S/o-late Nirod Kumar Das  
Village-Rangas, P.O.-Chhatrapada,  
P.S. Mangalpur, Dist.-Jajpur

Plaintiffs

-Vrs.-

1. Bholanath Das, aged 55 yrs., S/o- Balaram Das
2. Sudhansu Mohan Das, aged 28 yrs. S/o- Bolanath Das
3. Pranabananda Das, aged 45 years, (Dead)
4. Debi Prasad Das, aged 65 years. (Dead)
- 4.(a) Kumuda Das, aged 48 years, wife of late Debi Prasad Das,
- 4.(b) Debasis Das, aged 23 years, S/o- late Debi Prasad Das.  
Both are now staying at Vill./P.O.-Binod Bihari Das.

Vill./P.O. Bara-Damodarpur, P.S./Dist.-Kendrapara.  
Bibhu Prasad Das, aged 30 years.  
S/o- Sarat Kumar Das,  
Vill.-Rangas, P.O.-Chhatrapada, P.S. Mangalpur,  
Dt.-Jajpur

Defendants”

Similarly, the properties mentioned at page 17 involving T.S. No.113 of 1997 of the brief makes it clear involving the properties in the subsequent suit. This suit has also the following prayer :

“The plaintiffs therefore pray that:-

- a) A decree be passed declaring deft no.2 as not the adopted son of late Satyendra.
- b) A decree be passed declaring the gift deeds No.1173 and 2172 dt.16.4.76 and no.7747 dt.17.12.75 as void.
- c) For a declaration that possession defendant nos.1 & 2 over plaintiffs’ properties if any is on behalf of the plaintiff only as gumasta.
- d) For permanent injunction restraining defendants no.1 & 2 from claiming any interest on the basis of the above three gift deeds over the case lands as described in schedule ‘A’ and from creating any trouble in possession of plaintiffs;
- e) For costs and for any other relief or reliefs which the plaintiff are entitled to;”

7. Now coming to study the plaint averments involving the C.S. No.93 of 2013, this Court from Annexure-4 finds, this suit has the following parties:

“Durgamadhab Das, aged about 53 years,  
S/o-Late Nirod Kumar Das,  
Village-Rangas, P.O.-Chhatrapada, P.S. Mangalpur,  
Dist.-Jajpur  
Plaintiff

-vrs-

1. Bhikari Charan Das, aged about 50 years,  
S/o.-Late Sankar Das,
2. Kamalini Das, aged about 45 years,  
Wife of Bhikari Das,
3. Maheswar Das, aged about 45 years,  
S/o- Gagan Bihari Das,
4. Bibhu Prasad Das, aged about years,  
S/o- Late Sarat Kumar Das.  
All are of Village-Rangas, P.O. Chhatrapada,  
P.S. Mangalpur, Dist.Jajpur,

Defendants”

8. This suit involves undoubtedly a part of the property involved in the earlier suit being purchased by the defendants involving C.S. No.93 of 2013 from the defendants involving the earlier suit. The prayer involved in this suit reads as hereunder:

“10. That the plaintiff is therefore prayed that a decree be passed.

- a) Permanently restraining the defendants to come over the suit land and to create type of disturbance in his smooth and peaceful possession over the case land.
- b) For cost.
- c) For any other relief/reliefs for which the plaintiff is entitled to;”

9. Reading of both the plaints and the particulars available in the plaint vide Annexures-1 & 4, there remains no doubt that there is a clear distinction involving the parties therein and the *lis*. is also completely different. Now coming to the provisions contained in Section 10 of the C.P.C. for determining as to whether under the circumstance, Section 10 of the C.P.C. has any application to the case or not? Reading of the provisions makes it clear that the same restricts a court from proceeding with trial of any suit, in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between the parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court. This Court observes, the mandate of the provision is not only to see the issue is directly and substantially involved in the previously instituted suit but it also required to see whether both the suits involve the same party or between the parties under whom they or any of them litigating under the same title. Taking into consideration the plaint averments and both the suits and the dispute involved herein involving both the suits, this Court though not finds, the issue involved in both the suits either directly or substantially in issue but for the relief in the subsequent suit being dependant on the ultimate outcome in R.F.A. No.8 of 2015 particularly keeping in view the defendants involving the subsequent suit are the purchaser of the property involved in the earlier suit being purchased from the defendants in the earlier suit, so to say the defendants in the subsequent suit have stepped into the shoes of the defendants in the earlier suit. Therefore, there remains no doubt that the result in the earlier suit now pending in first appeal is very much dependant on the ultimate outcome in the earlier suit.

10. Now coming to consider the citation cited at Bar by the learned counsel for the opposite parties in the case of *Manohar Lal Chopra*,

***Appellant versus Rai Bahadur Rao Raja Seth Hiralal, Respondent as reported in AIR 1962 (S.C.) 527***, this Court finds, the Hon'ble Apex Court in paragraph no.39 held as follows:

“(39) The suit at Indore which had been instituted later, could be stayed in view of S.10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers under S. 151 is not justified. The provisions of S. 10 do not become inapplicable on a Court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract. It does not appear correct to say as has been said in *Ram bahadur Thakur and Co. v. Debidayal (Sales) Ltd.*, ILR (1954) Bom. 334 :(AIR 1954 Bom 176), that the Legislature did not contemplate the provisions of S.10 to apply when the previously instituted suit be held to be instituted in those circumstances. The provisions of S. 35 A indicate that the Legislature was aware of false or vexatious claims or defences being made, in suits, and accordingly provided for compensatory costs. The Legislature could have therefore provided for the nonapplication of the provisions of S.10 in those circumstances, but it did not. Further, S. 22 of the Code provides for the transfer of a suit to another Court when a suit which could be instituted in any one of two or more Courts is instituted in one of such Courts. In view of the provisions of this section, it was open to the respondent to apply for the transfer of the suit at Asansol to the Indore Court and, if the suit had been transferred to the Indore Court, the two suits could have been tried together. It is clear, therefore, that the Legislature had contemplated the contingency of two suits with respect to similar reliefs being instituted and of the institution of a suit in one Court when it could also be instituted in another Court and it be preferable, for certain reasons, that the suit be tried in that other Courts.”

Reading of the above decisions of the Hon'ble Apex Court this Court finds, consideration before the Hon'ble Apex Court was, as to when there is a special provisions in the Code of Civil Procedure, recourse to inherent power of Section 151 of C.P.C, is justified or not? Answering the same, the Hon'ble Apex Court held that for the clear provisions contained in Section 10 of the Code of Civil Procedure, recourse to Section 151 was not justified. Taking into consideration the decision in the case of *Y.B. Patil and others, Appellants versus Y.L. Patil, Respondents* as reported in AIR (1977) S.C. 392, it appears, this decision dealt with Section 11 of C.P.C. and is only confined with the objection of the petitioner as to when a Section 10 application has already been rejected, whether a subsequent application under Section 10 of C.P.C. was maintainable or not?

11. In paragraph nos.8 & 12 of the judgment in the case of *National Institute of Mental Health & Neuro Sciences, appellant versus C. Parameshwara, respondent* as reported in *AIR 2005 Supreme Court 242*, the Hon'ble Apex Court held as follows:

“8. The object underlying section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying section 10 is to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of section 10 suggests that it is referable to a suit instituted in the civil Court and it cannot apply to proceedings of other nature instituted under any other statute. The object of section 10 is to prevent Courts of current jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract section 10 is, whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in section 10 are “the matter in issue is directly and substantially in issue” in the previous instituted suit. The words “directly and substantially in issue” are used in contra-distinction to the words “incidentally or collaterally in issue”. Therefore, section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical.

12. In the case of *Manohar Lal Chopra versus Rai Bahadur Rao Raja Seth Hiralal* as reported in (*AIR 1962 SC 527*), it has been held that inherent jurisdiction of the Court to make orders *ex debito justitiae* is undoubtedly affirmed by section 151, CPC, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, section 10, CPC has not application and consequently, it was not open to the High Court to bypass section 10, CPC by invoking section 151, CPC.” 12. Considering the rival contentions of the parties and after taking into consideration the nature of the dispute involved in both the suits and finding that the decision in the earlier suit has a relevancy on the decision in the later suit involved herein, even though, for the clear provisions contained in Section 10 of the C.P.C. and as there is support of the contentions of the opposite parties by the decisions of the Hon'ble Apex Court referred to hereinabove, this Court finds, Section 10 has no application to the case at hand. But for this Court's finding that the decisions in the appeal has an influencing factor on the subsequent suit, this Court applying the provisions contained in Section 151 of C.P.C. interferes

with the impugned orders and consequently, directs for stay of the subsequent suit vide C.S. No.93 of 2013 till final outcome in R.F.A. No.8 of 2015. While parting away with the case at hand, this Court also directs the petitioner herein to approach the first appellate court dealing with R.F.A. No.8 of 2015 for expeditious disposal of the same. As a result, this Court interfering with the impugned order vide Annexure-7 sets aside the same and applying two decisions of this Court vide *I.L.R. (1991) 2 Cut. 353 and 2007 (II) O.L.R. 459*, applying the inherent powers, in exercise of power under Section 151 of C.P.C., this Court while interfering in the impugned order at Annexure-7 allows the application of the petitioner for staying the further proceeding involving C.S. No.93 of 2013 till disposal of the R.F.A. No.8 of 2015.

13. The civil miscellaneous petition stands allowed. No cost.

Petition allowed.

2018 (I) ILR - CUT- 173

S. K. SAHOO, J.

CRLA NO. 264 OF 2017

**ROSE VELLEYS HOTELS AND  
ENTERINMENTS LTD. & ORS**

.....Appellants

. Vrs.

**STATE OF ORISSA**

.....Respondent

**EVIDENCE ACT, 1872 – Ss. 137, 138, 146**

R/w Section 151 C.P.C.

**Examination-in-Chief of P.W.1 was conducted after the appellants set exparte – At a later stage on the same day appellants filed one petition to set aside the exparte order and another petition to recall P.W.1 for cross-examination – Learned Court below set aside the exparte order but rejected the application to recall P.W.1 by considering its power under order 18, Rule 17 C.P.C. – Hence this appeal.**

**P.W.1 is a relevant witness – No oral testimony can be considered valid or satisfactory unless tested by cross-examination – So the right of the defence to cross-examine the plaintiff's witness can be looked upon not as a part of its own strategy of defence but as a**

**requirement without which the plaintiff's evidence can not be acted upon – When the designated Court set aside the ex parte order, could have allowed the other petition for recall of P.W.1 for cross-examination, by applying its inherent power U/s. 151 C.P.C., in exercise of its judicial discretion as the applicant has some genuine grounds – Held, the impugned order is set aside – Direction issued to the designated Court to permit the appellants to cross examine P.W.1.**

**Case Laws Referred to :-**

1. 2014 (Supp-II)OLR 839 : Bairagi Moharana & Anr. -V- The Collector
2. AIR 1989 SC 162 : Modula India -V- Kamakshya Singh Deo
3. (2011) 11 SCC 275 : K.K.Velusamy -V- N.Palanisamy
4. 2009 (4) SCC 410 : Vadiraj Naggappa Vernekar -V- Sharadchandra Prabhakar Gogate

For Appellants : Mrs. Shiv Shankar Mohanty,  
D.Panda, S.R.Pati

For Respondent : Mr. Bibekananda Bhuyan, A.G.A.

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Date of Hearing : 27.11.2017

Date of Judgment: 27.11.2017

**JUDGMENT**

***S. K. SAHOO, J.***

This is an appeal under section 13 of the Odisha Protection of Interests of Depositors (In Financial Establishments) Act, 2011 (hereafter 'OPID Act') filed by the appellants challenging the impugned order dated 21.03.2017 passed by the learned Presiding Officer, Designated Court (OPID Act), Cuttack in Interim Application No.03 of 2016 in rejecting the petition dated 27.12.2016 filed by the appellants to recall P.W.1 Bibhuti Bhusan Das for cross-examination.

It appears that the appellants are the opp. parties in the Interim Application No. 03 of 2016 in which State of Odisha represented through Additional District Magistrate –cum- Competent Authority, Cuttack is the applicant/petitioner. On 17.12.2016 P.W.1 Bibhuti Bhusan Das was present in the Designated Court to give his evidence on behalf of the applicant/petitioner State of Orissa and since the appellants could not take any steps at that point of time, they were set ex-parte. P.W.1 was examined in chief and some exhibits were also marked on behalf of the applicant and the case was adjourned to another date for hearing. Subsequently at a later stage

on the same day, the advocate for the appellants filed appearance memo and a petition to set aside the ex-parte order and to permit the appellants to cross examine P.W.1. It is stated in the petition that on the relevant date i.e. on 17.12.2016 due to traffic jam in the National High way in between Bhubaneswar to Cuttack, the counsel for the appellants appeared in Court at about 12.15 p.m. Another petition was filed by the appellants on 27.12.2016 to recall P.W.1 for cross-examination.

The petition dated 17.12.2016 was taken up for orders on 18.01.2017 and the ex-parte order was set aside.

The petition dated 27.12.2016 filed by the appellants was taken up for orders on 21.03.2017. It was contended on behalf of the appellants that non-cross-examination of P.W.1 was neither deliberate nor intentional and since ad-interim order of attachment has been passed by the State Government, irreparable loss would be caused if opportunity of cross- examination of P.W.1 is not provided to the appellants. The learned Designated Court held that the power to recall a witness is vested under order XVIII Rule 17 of C.P.C., which is discretionary and should be sparingly used in appropriate cases to enable the Court to clarify any doubt it may have in regard to the evidence led by the parties and not intended to be used to fill up omissions in the evidence of a witness, who has already been examined as was held in the case of **Bairagi Moharana & another -Vrs.- The Collector reported in 2014 (Supp.-II) Orissa Law Reviews 839** and accordingly, rejected the petition filed by the appellants.

Mr. Shib Shankar Mohanty, learned counsel for the appellants contended that there is no dearth of power with the Court to recall a witness in exercise of the inherent power under 151 of C.P.C. for cross-examination in the interest of justice and without appreciating the contentions raised by the learned counsel for the appellants and the consequences likely to follow in the event of non-recall of P.W.1, the petition was rejected in a mechanical manner. It is further contended that the appellants will suffer immense prejudice in the event they are not afforded chance of cross-examination of P.W.1.

Mr. Bibekananda Bhuyan, learned Addl. Government Advocate on the other hand contended that the power of the Court to recall a witness cannot be routinely invoked and it is discretionary in nature. It is further contended that when due to the negligent attitude of the appellants, the

learned Designated Court thought it not proper to exercise its discretion to recall P.W.1 for cross-examination, it cannot be said that there is any illegality or perversity in the impugned order and therefore, the appeal should be dismissed.

Adverting to the contentions raised by the learned counsel for the respective parties, there is no dispute that the P.W.1 Bhubuti Bhusan Das is a relevant witness examined on behalf of the Applicant and he has been examined in chief but not cross examined at all.

A right to cross examine a witness, apart from being a natural right is a statutory right. It is to test the veracity of the witness and to arrive at truth. Section 137 of the Indian Evidence Act deals with examination-in-chief, cross-examination and re-examination of a witness. Section 138 of the Indian Evidence Act which deals with the order of the examinations confers a valuable right of cross-examining the witness tendered in evidence by the other side. The scope of that provision is enlarged by section 146 of the Evidence Act by allowing a witness to be questioned on different aspects as mentioned under that section.

Law is well settled that the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiff's case by the cross-examination of his witnesses, it would be equally correct to say that the cross-examination of the plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiffs witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. (Ref:- **Modula India -Vrs.- Kamakshya Singh Deo, A.I.R. 1989 S.C. 162**).

In case of **K.K. Velusamy -Vrs.- N. Palanisamy reported in (2011) 11 Supreme Court cases 275**, it is held as follows:-

“9. Order 18 Rule 17 of the Code enables the Court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised

by the Court either on its own motion or on an application filed by any of the parties to the suit requesting the Court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the Court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide **Vadiraj Naggappa Vernekar –Vrs.- Sharadchandra Prabhakar Gogate: 2009 (4) SCC 410**].

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the Court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the Court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

11. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the Court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the Court is not affected by the express power conferred upon the Court under Order 18 Rule 17 of the Code to recall any witness to enable the Court to put such question to elicit any clarifications.

12. The Respondent contended that Section 151 cannot be used for re-opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses.”

Therefore, the inherent power under section 151 of C.P.C. can be exercised by the Court suo motu and also at the instance of either party to recall a witness. Whether a prayer to recall a witness would be accepted or

not would depend on facts and circumstances of each case and no straitjacket formula can be laid down for such purpose. The Court by invoking the inherent power can recall a witness and allow cross-examination of such witness at any stage of a suit by the other side. The recall application has to be dealt with carefully and not in a mechanical and casual manner and it cannot be dismissed without assigning cogent reasons. The judicial discretion of the Court should be aimed in giving full opportunities to the parties to present their case. If an application is filed by any of the parties assigning good and genuine reasons to recall a witness for cross-examination and showing as to why the witness could not be cross-examined on the date fixed or to put some relevant questions which have been inadvertently left out during cross-examination, the Court should apply its mind to the averments taken in such application and decide as to whether the application has been filed just to linger the case or it has some genuine grounds. If the Court feels that such an application is a bonafide one and recall of the witness for the purpose mentioned in the application is necessary in the interest of justice, the Court should exercise its judicial discretion to allow such petition otherwise there will be perversity of justice.

In my humble view, when the petition to set aside the ex-parte order was filed on the very day when such order was passed and the learned Designated Court set aside the ex-parte order, non-allowing the petition filed for recall of P.W.1 for cross-examination which was filed on same grounds is not proper and justified. The learned Designated Court has not considered its power under section 151 of C.P.C. but only considered the provision under Order XVIII Rule 17. The factual aspects of the decision relied upon by the learned Designated Court is different inasmuch as it was a case of recall of the plaintiff further cross-examination who has been cross-examined at length and discharged. In **Natural Resources Allocation, In Re, Special Reference No. 1 of 2012 reported in (2012) 10 Supreme Court Cases 1**, it is held as follows:-

“70. Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedential value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it, the ratio decidendi. In the matter of applying precedents, the erudite Justice Benjamin Cardozo in *The Nature of a Judicial Process*, had said that "if the judge is to pronounce it wisely, some principles of selection there must be

to guide him along all the potential judgments that compete for recognition" and "almost invariably his first step is to examine and compare them;" "it is a process of search, comparison and little more" and ought not to be akin to matching "the colors of the case at hand against the colors of many sample cases" because in that case "the man who had the best card index of the cases would also be the wisest judge". Warning against comparing precedents with matching colours of one case with another, he summarized the process, in case the colours don't match, in the following wise words:

“It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the Judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow.”

In view of the foregoing discussions, the impugned order dated 21.03.2017 passed by the learned Presiding Officer, Designated Court is not sustainable in the eye of law and the same is hereby set aside.

Learned counsel appearing for the State shall instruct P.W.1 Bibhuti Bhusan Swain to appear before the Designated Court on 8<sup>th</sup> December, 2017 which has been agreed upon by both the parties and on that day, the Designated Court shall permit the appellants to cross-examine the witness. It is made clear that no adjournment shall be granted to the counsel for the appellants to cross-examine the witness. With the aforesaid observation, the Criminal Appeal is allowed. A free copy of the judgment be handed over to the learned counsel for the State.

Appeal allowed.

**2018 (I) ILR - CUT- 179**

**S. K. SAHOO, J.**

CRLMC NO. 395 OF 2005

**BABAJI CHARAN NAYAK**

.....Petitioner

.Vrs.

**ORISSA MACHINERY & SANITARY**

.....Opp. Party

**NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss. 138, 142**

**Dishonour of cheque – On 20.06.2002 complainant got intimation from the bank – Complainant served personal notice to the petitioner on 04.07.2002 – Due to non-payment of the cheque dues he issued second notice by post on 26.10.2002 to which petitioner refused to receive – Complaint petition filed on 21.12.2002 and Magistrate took cognizance on 25.02.2003 which is now under challenge.**

**No provision in the N.I. Act to serve a second notice – Personal notice served on 04.07.2002 was a valid notice and since the petitioner failed to make payment of the cheque amount within 15 days of receipt of such notice cause of action arose to file complaint within one month – In this case, the complaint petition filed on 21.12.2002 was beyond the prescribed period as provided U/s. 142(1)(b) of the Act and the learned Magistrate had not condoned the delay being satisfied with sufficient cause shown by the complainant – Held, the impugned order taking cognizance of the offences against the petitioner is quashed.**

**Case Laws Referred to :-**

1. (2014)59 OCR (SC)577 :Yogendra Pratap Singh -V-Savitri Pandey & Anr.
2. (1998)15 OCR (SC)372 :Sadanandan Bhadran -V-Madhavan Sunil Kumar.
3. (2009)42OCR (SC)303 : S.L.Constyruction & Anr.-V-Alapati Srinivasa Rao & Anr.

For Petitioner : Mr. Samvit Mohanty, B.Mohanty,  
S.Pattnaik & B.Moharana

For Opp. Party : None

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Date of Hearing : 09.10.2017

Date of Judgment: 09.10.2017

**JUDGMENT**

**S. K. SAHOO, J.**

Heard Mr. Samvit Mohanty, learned counsel for the petitioner.

None appears on behalf of the opp.party.

The petitioner Babaji Charan Nayak in this application under section 482 Cr.P.C. has challenged the impugned order dated 25.02.2003 passed by

the learned S.D.J.M., Jagatsinghpur in I.C.C. Case No. 127 of 2002 in taking cognizance of the offence under section 138 of the Negotiable Instruments Act, 1881 (hereafter 'N.I. Act') read with section 420 of the Indian Penal Code and issuance of process against him.

The opposite party is the complainant and the petitioner is the accused in the complaint petition.

The relevant dates for the adjudication of the issue involved in this application which are mentioned in the complaint petition are as follows:-

The cheque in question which was for an amount of Rs.17,511/- (rupees seventeen thousand five hundred eleven) was issued by the petitioner in favour of the complainant Orissa Machinery & Sanitary on 20.12.2001 bearing no.233903 drawn on the Cuttack Central Co-operative Bank Ltd. at Kujanga Branch towards the cost of the purchased articles. The cheque was presented by the complainant in Syndicate Bank, Jagatsinghpur Branch on 12.06.2002 for collection of dues. The cheque was dishonored on 17.06.2002 by the Cuttack Central Cooperative Bank, Ltd. Kujang Branch on the ground of insufficient funds in the account of the petitioner. The Syndicate Bank, Jagatsinghpur accordingly intimated about such dishonour to the complainant on 20.06.2002. The complainant personally approached the petitioner on 04.07.2002 and served notice for payment of dues within the stipulated period of fifteen days. The petitioner requested the complainant for one month time for payment of the outstanding dues. On 26.10.2002 the complainant issued a legal notice to the petitioner by registered post with A.D. for payment of the dues within fifteen days from the date of receipt of the notice. On 04.12.2002 the complainant received back the legal notice with endorsement of the postal department that the addressee refused to receive the registered letter. The complaint petition was filed on 21.12.2002.

Learned counsel for the petitioner relying upon the dates which are mentioned in the complaint petition contended that the taking of cognizance by the learned S.D.J.M., Jagatsinghpur is barred by limitation in view of the provision under section 142 of the N.I. Act. Learned counsel further contended that though the proviso to section 142(1)(b) of the N.I. Act stipulates that cognizance of a complaint can be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period but the impugned order does not reflect any such satisfaction by the learned Magistrate. It is further

contended that clause (b) of the proviso to section 138 of the N.I. Act prescribes that the payee or the holder in due course of the cheque, as the case may be, shall make a demand for the payment of the cheque amount by giving a notice in writing to the drawer of the cheque within fifteen days (substituted as 'within thirty days' w.e.f. 06.02.2003) of the receipt of information by him from the bank regarding the return of the cheque as unpaid. It is further contended that clause (c) of the proviso to section 138 of the N.I. Act prescribes that if the drawer of the cheque fails to make payment of the cheque amount to the payee or to the holder of the cheque as the case may be, within fifteen days of the receipt of the notice as contemplated under clause (b), cause of action would arise and then the complaint petition has to be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138 of the N.I. Act as per the clause (b) to section 142(1) of the N.I. Act. It is further contended that in the case in hand, the bank intimated the complainant regarding dishonour of the cheque on 20.06.2002 and the personal notice was served on the petitioner on 04.07.2002 by the complainant stipulating fifteen days for payment of the dues. If the payment was not made within the stipulated period and the cause of action arose then the complaint petition should have been filed within one month from such date as per the clause (b) to section 142(1) of the N.I. Act which has not been done inasmuch as the complaint petition was filed on 21.12.2002. It is further contended that after service of the first notice on the petitioner on 04.07.2002, there is no provision under the N.I. Act to serve a second notice by registered post on 26.10.2002 as was done in this case. The second notice dated 26.10.2002 is obviously much beyond the period of fifteen days as prescribed under clause (b) of the proviso to section 138 of the N.I. Act. It is further contended that the cause of action would arise on the basis of first valid notice, if the drawer of the cheque fails to make payment of the cheque amount to the payee or to the holder of the cheque as the case may be, within fifteen days of the receipt of the notice and not on the basis of second notice.

Learned counsel for the petitioner placed reliance in case of **Yogendra Pratap Singh -Vrs.- Savitri Pandey and another reported in (2014) 59 Orissa Criminal Reports (SC) 577** wherein it is held as follows:-

“31. Section 138 of the NI Act comprises of the main provision which defines the ingredients of the offence and the punishment that would follow in the event of such an offence having been committed. Appended to this Section is also a proviso which has three clauses, viz., (a), (b) and (c). The

offence under Section 138 is made effective only on fulfillment of the eventualities contained in clauses (a), (b) and (c) of the proviso. For completion of an offence under Section 138 of the NI Act, not only the satisfaction of the ingredients of offence set out in the main part of the provision is necessary but it is also imperative that all the three eventualities mentioned in clauses (a), (b) and (c) of the proviso are satisfied. Mere issuance of a cheque and dishonour thereof would not constitute an offence by itself under Section 138.

32. Section 138 of the NI Act has been analysed by this Court in **M/s. Kusum Ingots & Alloys Ltd. -Vrs.- Pennar Peterson Securities Ltd. and Ors. etc. etc.** [AIR 2000 SC 954 : (2000) 2 SCC 745] wherein this Court said that the following ingredients are required to be satisfied for making out a case under Section 138 of the NI Act:

(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 for the discharge of any debt or other liability;

(ii) 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;

(iii) that cheque is returned by the bank unpaid, either because 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;

(iv) 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;

(v) 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.

33. We are in agreement with the above analysis.

34. In **K.R. Indira -Vrs.- Dr. G. Adinarayana** [AIR 2003 SC 4789 : (2003) 8 SCC 300], a two-Judge Bench of this Court observed that the offence under Section 138 of the NI Act could be completed if all the above components are satisfied.

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42. Section 142 of the NI Act prescribes the mode and so also the time within which a complaint for an offence under Section 138 of the NI Act can be filed. A complaint made under Section 138 by the payee or the holder in due course of the cheque has to be in writing and needs to be made within one month from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. The period of one month under Section 142(b) begins from the date on which the cause of action has arisen under clause (c) of the proviso to Section 138. However, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within the prescribed period of one month, a complaint may be taken by the Court after the prescribed period.....”

The complainant approached the petitioner on 04.07.2002 and personally served the notice on him within the statutory period of fifteen days after receipt of intimation from the Syndicate Bank, Jagatsinghpur regarding the dishonour of cheque on 20.06.2002. This is a valid notice as contemplated under clause (b) of the proviso to section 138. Since the petitioner failed to make the payment of the cheque amount to the complainant within fifteen days of the receipt of the said notice, the cause of action arose on the completion of fifteen days. The complaint petition should have been made within one month of the date on which the cause of action arose which has not been done in this case. Therefore, the complaint petition filed in this case is beyond the period as prescribed under section 142(1)(b) of the N.I. Act. In that eventuality, the order of cognizance which was otherwise barred by limitation could have been taken had the learned Magistrate condoned the delay in filing complaint petition after being satisfied with the explanation furnished by the complainant that the later had sufficient cause for not making the complaint within the prescribed period.

In case of **Sadanandan Bhadran -Vrs.- Madhavan Sunil Kumar reported in (1998) 15 Orissa Criminal Reports (SC) 372**, it is held as follows:-

“6.....From a plain reading of the above Section it is manifest that a competent Court can take cognizance of a written complaint of an offence under Section 138 if it is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138. (emphasis supplied)

7. In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) 'cause of action' means every fact which it is necessary to establish to support a right or obtain a judgment. Viewed in that context, the

following facts are required to be proved to successfully prosecute the drawer for an offence under Section 138 of the Act:

- (a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;
- (b) that the cheque was presented within the prescribed period;
- (c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and
- (d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

If we were to proceed on the basis of the generic meaning of the term 'cause of action' certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that Clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under Clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises and can arise only once.

8. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action there are other formidable impediments which negates the concept of successive causes of action. One of them is that for dishonour of one cheque there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with Clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

9. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under Clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes the Court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that the every part should have effect the above conclusion cannot be drawn for, that will make the provision for limiting the period of making the complaint nugatory.

10. Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour a fresh right and not cause of action accrues in his favour. He may, therefore, without taking peremptory action in exercise of his such right under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. *But, once he gives a notice under Clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for the offence and the cause of action for filing the complaint will arise.* Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires.

11. For the foregoing discussion, this appeal stands dismissed as the appellant had earlier taken recourse to Clause (b) of Section 138 of the Act but did not avail of the cause of action that arose in his favour Under Section 142(b) of the Act.”

In case of **S.L. Construction and Anr. -Vrs.- Alapati Srinivasa Rao and Anr. reported in (2009) 42 Orissa Criminal Reports (SC) 303**, it is held as follows:-

32. As the issuance of cheque, non-payment thereof on presentation, issuance of a valid notice calling upon the drawer of the cheque to pay the amount in question and the appellants' failure to pay to the

complainant the amount in question within a period of 15 days from the date of receipt of a copy of the said notice upon them, a cause of action arose for filing a complaint petition, in our opinion, the High Court cannot be said to have committed any error in passing the impugned judgment.

33. In view of the findings aforementioned, we have no hesitation to hold that the cause of action for filing a complaint arose only once and not more than once as contented by by Mrs. Desai, learned Counsel.”

Therefore, since the complaint petition has been filed beyond the prescribed period of one month and the learned Magistrate has not condoned the delay after being satisfied with the sufficient cause shown by the complainant for not making the complaint within such prescribed period, on a careful consideration of the submission made at the Bar and the ratio laid down in the decisions referred to above, I am of the view that impugned order dated 25.02.2003 passed by the learned S.D.J.M., Jagatsinghpur in I.C.C. Case No. 127 of 2002 in taking cognizance of offences punishable under section 138 of the N.I. Act read with section 420 of the Indian Penal Code is not sustainable in the eye of law and accordingly, the same stands quashed. I would have granted certain time to the complainant-opposite party to approach the learned Magistrate and permitted him to file appropriate application in the complaint petition for condoning the delay in filing the complaint petition showing sufficient cause but since the amount of the cheque is not that high and about fifteen years is going to be passed since the date of institution of the complaint petition, I refrained from passing any such order in favour of the complainant-opposite party. Accordingly, the CRLMC application is allowed.

Application allowed.

2018 (I) ILR - CUT-188

S. K. SAHOO, J.

BLAPL NO. 1654 OF 2017

RAMA CHANDRA HANSDAH

.....Petitioner

. Vrs.

REPUBLIC OF INDIA (C.B.I.)

.....Opp. Party

**CRIMINAL PROCEDURE CODE, 1973 – S.439**

**Bail – Offence U/ss. 120-B, 409, 420 I.P.C. and sections 4, 5 & 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 – Petitioner is an elected member of the Lok Sabha – Eighteen witnesses, who have implicated him have yet to be examined – Apprehension of the prosecution is reasonable that once the petitioner is released on bail by virtue of his influence may tamper with evidence and manipulate witnesses – Further there is no substantial change of circumstances or fresh grounds after rejection his earlier bail applications.**

**Interestingly people, even holding high positions have failed to learn the lesson from the replies given by the family members of Dasyu Ratnakar when he enquired from them if they would receive some portions of his vice which he had done for their maintenance – They also fail to recollect the last wishes of the great Greek King Alexander to put his hands outside the coffin to let people understand that he came to this world in empty hands and he will leave this world also in empty hands.**

**So in this case considering misappropriation of huge amount of public money, gravity of the accusation, nature of supporting evidence and its serious adverse impact on the fabric of the society and the severity of punishment in case of conviction, this Court is not inclined to reconsider the prayer to release the petitioner on bail – However, the petitioner may renew his prayer for bail before the learned trial court after examination of eighteen witnesses.** (Para 6)

**Case Laws Referred to :-**

1. (2005) 8 SCC 21 : State of U.P -V- Amarmani Tripathy
2. 2004 CLJ 1796 : Kalyan Ch. Sarkar -V- Rajesh Ranjan

For Petitioner : Mr. Manas Mohapatra, Sr. Adv.

For Opp. Party : Mr. Kali Charan Mishra (for C.B.I.)

Date of hearing : 27.07.2017

Date of judgment: 31.07.2017

### **JUDGMENT**

**S. K. SAHOO, J.**

This is the fourth journey of the petitioner to this Court apart from two unsuccessful journeys to the Hon'ble Supreme Court of India seeking for bail in connection with RC. 50/S/2014-SCB/Kol. dated 26.6.2014 corresponding to SPE Case No.45 of 2014 pending in the Court of learned Special C.J.M., CBI, Bhubaneswar in which charge sheet has been submitted on 19.02.2015 under sections 120-B, 409 and 420 of Indian Penal Code and sections 4, 5 and 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

The petitioner is an elected member to the 16<sup>th</sup> Lok Sabha from Mayurbhanj Constituency in Odisha who was taken into custody in connection with the case on 04.11.2014 and forwarded to Court on 5.11.2014. He moved an application for bail before the learned Sessions Judge, Khurda at Bhubaneswar in Bail Application No.182 of 2017 which was rejected vide order dated 02.03.2017.

2. The case was instituted on 27.05.2014 on the basis of the first information report submitted by one Binaya Bhusan Das before the Inspector-in-charge, Nayapalli Police Station vide Nayapalli P.S. Case No.146 of 2014 registered under section 420 of Indian Penal Code and sections 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

It is alleged in the F.I.R. that the informant was allured by the false promises made by the five Directors of Nava Diganta Capital Services Limited, Bhubaneswar to return double the invested money on completion of one year in the event of deposit of money in their Company and that the informant on good faith deposited a sum of Rs.60,000/- in the said company and was issued with a bond by the Company in that regard but even after the completion of the maturity period of the bond, the Company did not return his money and the accused persons closed their office at Bhubaneswar. It is stated that the Company and its Directors have cheated more than five crores from the informant and other depositors by making false promises.

3. As per the order dated 9.5.2014 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No.401 of 2013 filed by Sri Subrata Chatteraj and Writ Petition (Civil) No.413 of 2013 filed by Alok Jena, F.I.R. in Nayapalli P.S. Case No.146 dated 27.05.2014 was treated as the original FIR in RC. 50/S/2014-Kol. which was registered by Superintendent of Police, CBI, SPE, SIT/SCB, Kolkata under section 420 of Indian Penal Code and sections 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

During course of investigation, prima facie case was found against the petitioner and other co-accused persons to have entered into criminal conspiracy with each other and in pursuance thereof they collected money from public with dishonest and fraudulent intention alluring of higher returns by violating the norms of R.B.I. and the Companies Act through the companies namely, Nava Diganta Capital Services Ltd. and Nava Diganta Agro Industries Ltd. and they cheated the public to the tune of Rs.8,39,01,580/- and they had also misappropriated the said amount. Accordingly, charge-sheet was submitted on 19.02.2015 under sections 120-B, 420, 409 of Indian Penal Code and sections 4, 5 and 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 against the petitioner and other co-accused persons along with Nava Diganta Capital Services Ltd. and Nava Diganta Agro Industries Ltd. The investigation was kept open as per the provisions under section 173(8) of Cr.P.C. to look into the larger criminal conspiracy, money trail and role of regulatory agencies like ROC, SEBI and RBI.

4. The petitioner for the first time moved an application for bail in BLAPL No.2600 of 2015 before this Court which was rejected vide order dated 14.08.2015 taking into account, inter alia, the fact that further investigation of the case was under progress to unearth further evidence and other aspects of criminal conspiracy and money trailing and also considering that the offence involved misappropriation of huge amount of public money.

The petitioner moved the Hon'ble Supreme Court against the aforesaid order vide S.L.P. (Crl.) No.7882 of 2015 which was withdrawn on 24.09.2015 to file a fresh application for grant of bail after the Trial Court frames charges in the case. The Hon'ble Supreme Court directed the Trial Court to make an endeavour to expedite framing of charges in accordance with law.

The petitioner again approached this Court for the second time in BLAPL No.7111 of 2015 for interim bail on the ground to attend the Seventh Session of Sixteenth Lok Sabha which had already commenced and to prepare and submit statements of his assets under the relevant rules applicable to the Members of Parliament before the Lok Sabha Secretariat and to utilize the MPLAD Scheme fund which was allotted to him for the benefit of the people of his constituency and for his treatment as he was suffering from cervical spondylitis and for the treatment of his wife who was suffering from dysfunction of uterine bleeding. The bail application was rejected vide order dated 28.03.2016 holding that the charges have not yet been framed by the Trial Court and the grounds taken for grant of interim bail are not satisfactory and also taking into account the nature and seriousness of the economic offence alleged against the petitioner and the larger interest of public and State.

The petitioner moved the Hon'ble Supreme Court against the aforesaid order vide S.L.P. (Crl.) No.3119 of 2016 which was dismissed vide order dated 25.04.2016.

The petitioner again approached this Court for the third time in BLAPL No.4447 of 2016 which was withdrawn on 22.11.2016 to approach the A.C.J.M., Bhubaneswar.

5. Mr. Manas Mohapatra, learned Senior Advocate appearing for the petitioner contended that after about one year and four months of the order passed by the Hon'ble Supreme Court in S.L.P. (Crl.) No.7882 of 2015 directing the learned Trial Court to expedite framing of charges, charge was framed by the Special C.J.M., C.B.I., Bhubaneswar on 17.01.2017 under sections 120-B, 420, 409 of the Indian Penal Code read with sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. It was contended that the petitioner has remained in jail custody for more than two years and eight months and in the meantime trial has already commenced since 06.04.2017 and seventeen witnesses have been examined till 17.07.2017 and none of the witnesses examined before the learned Trial Court has whispered anything against the petitioner. He further submitted that the petitioner was the director of the company in between 2011 to 2013 for record purpose and he had not actively participated in the affairs of the companies. It was further contended that two of the co-accused persons namely Anjan Kumar Baliarsingh and Kartikeya Parida pleaded guilty before the learned Trial Court and accordingly, they were convicted in view of the

provision under section 241 of Cr.P.C. and sentenced to undergo rigorous imprisonment for three years with a fine of Rs.10,000/-. It was further contended that one of the co-accused namely Pradip Kumar Pattnaik is on bail since 13.07.2015 and there is no allegation of any influence or tampering with the evidence against any of the accused persons. It was further contended that the MPLAD Scheme fund of the petitioner could not be utilized due to his detention which has affected mostly the tribal people and therefore, the bail application may be favourably considered. Learned counsel for the petitioner relied upon the bail orders passed by the Hon'ble Supreme Court in case of Dr. Tirupati Panigrahi, Preeti Bhatia, Indu Dewan and Pravat Kumar Das in similar cases and also by this Court in similar cases in favour of some of the accused persons.

Mr. Kali Charan Mishra, learned counsel appearing for the C.B.I. contended that the further investigation of the case in respect of certain vital aspect is at the concluding stage and out of 116 nos. of charge sheet witnesses, only seventeen have been examined and many more relevant witnesses are there in the case who have stated about the complicity of the petitioner in the crime and if at this stage, the petitioner is enlarged on bail, there is every likelihood of tampering with the evidence as the petitioner is a very politically influential person. It is further contended that there is no change in the circumstances except the fact that trial has commenced and some witnesses have been examined and therefore, successive bail application should not be entertained. Learned counsel for the C.B.I. filed the statements of nineteen witnesses namely Chandan Kumar Das, Gypsy Bhuyan, Manas Dash, Sanjay Kumar Mahapatra, B.N. Mishra, Chittaranjan Bihari, Santosh Kumar Mishra, Golaka Charan Martha, Prasanta Kumar Pradhan, Manas Ranjan Tripathy, Duryodhan Sahoo, Nishat Anjum, Raja Kishore Jena, Biraja Kanta Khandayatarya, Bishnu Prasad Dash, Sabita Dash, Ganesh Dash, Urbashi Dash and Rakesh Kumar Jha who have implicated the petitioner.

6. Considering the submissions made by the learned counsels for the respective parties, it is apparent that even though the Hon'ble Supreme Court directed the learned Trial Court to make an endeavour to expedite framing of charges as per the order dated 24.09.2015 in S.L.P. (Crl.) No.7882 of 2015 but charge was framed only on 17.01.2017. The order sheet of the learned Trial Court would go to show that the police papers were made ready on 16.11.2015 and those were supplied to the petitioner and other co-accused

persons. When the case was ready for framing of charge, one of the co-accused filed a petition for time to file a discharge petition and some of the co-accused persons filed petitions to supply some deficit police papers and accordingly, direction was issued to the prosecution to supply the deficit police papers. The charge could not be framed at an earliest since the Presiding Officer had already been superannuated since 31.01.2016. However, the Judicial Officer in charge of the learned Trial Court passed orders from time to time directing supply of required documents by different accused persons. The prayer made by the petitioner to use his M.P. letter pad for the interest of his constituency was allowed as per order dated 06.09.2016. After joining of the Presiding Officer in December 2016, the petitions filed by the two accused persons namely Subarna Nayak and Pradip Pattnaik for discharge were considered and rejected vide order dated 07.01.2017 and on the next date, i.e. on 17.01.2017 the learned Trial Court framed charges against the petitioner and other co-accused persons under sections 120-B, 420, 409 of the Indian Penal Code read with sections 4, 5, 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. On a conspectus reading of the order, it appears that the charge could not be framed earlier mainly due to preparation of police papers and the fact that the Presiding Officer was superannuated since 31.01.2016 and the in charge Judicial Officer could not have taken up the trial of the case. However, the petitions filed by different accused persons from time to time for supply the deficit police papers were entertained and those were supplied and ultimately after joining of the Presiding Officer in December 2016, the discharge petitions filed by some of the co-accused persons were dealt with and thereafter, charge was framed on 17.01.2017. Therefore, in the aforesaid scenario, merely because delay was caused for framing of charge, the same cannot be a ground to enlarge the petitioner on bail.

Even though out of the list of nineteen witnesses furnished by the learned counsel for the C.B.I., one witness namely Manas Ranjan Tripathy has already been examined as P.W.13 before the learned Trial Court and he has not stated anything against the petitioner but on going through the statements of the other eighteen witnesses who are yet to be examined in the learned Trial Court, I find that they have implicated the petitioner. The statements of those eighteen witnesses are very much relevant so far as the prosecution case relating to the petitioner is concerned and the reasonable apprehension of the prosecution that in the event of release of the petitioner on bail, the chance of tampering with the evidence of those witnesses cannot

be ruled out, has got sufficient force particularly when the petitioner is the Member of Parliament and highly politically influential person. What would be the evidentiary value of those witnesses, if examined during trial has to be decided by the learned trial Court. It cannot be lost sight of that twice the petitioner has become unsuccessful in getting bail before the Hon'ble Supreme Court and as submitted by the learned counsel for the C.B.I., further investigation on some vital aspect of the case is at the concluding stage. Pleading of guilt by the co-accused persons and passing order of conviction on such plea and imposing sentence by the learned trial Court is not a positive factor for the petitioner for grant of bail. Release of accused persons in similar cases cannot be a factor for grant of bail inasmuch as each case must be settled on its own facts and it would not be appropriate to lay down any general rule. Even the release of a co-accused in the same case is not a factor to grant bail to an accused on the ground of parity where the order granting bail to the co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well settled principle of law and ignores to take into consideration the relevant facts essential for granting bail.

In the case of **State of U.P. -Vrs.- Amarmani Tripathi reported in (2005) 8 Supreme Court Cases 21**, it is held as follows:-

“15. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.”

In the case of **Kalyan Chandra Sarkar -Vrs.- Rajesh Ranjan reported in 2004 Criminal Law Journal 1796**, it is held that the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe.

Law is well settled that an accused has a right to make successive applications for grant of bail but successive bail applications are permissible under the changed circumstances. The change of circumstances must be substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Without the change in the circumstances, the subsequent bail application would be deemed to be seeking review of the earlier rejection order which is not permissible under criminal law. While entertaining such subsequent bail applications, the Court has a duty to consider the reasons and grounds on which the earlier bail applications were rejected and what are the fresh grounds which persuade it warranting the evaluation and consideration of the bail application afresh and to take a view different from the one taken in the earlier applications. There must be change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which the application for bail of an accused that has been rejected earlier can be reconsidered.

Considering the nature and gravity of the accusation, the nature of supporting evidence, its serious adverse impact on the fabric of the society, misappropriation of huge amount of public money, the severity of punishment in case of conviction, the reasonable apprehension of the prosecution relating to the magnitude of influence the petitioner is likely to cause once he is released from jail custody by taking over the task of tampering with the evidence and manipulating witnesses and the fact that eighteen witnesses who have implicated the petitioner as per the list supplied by the learned counsel for C.B.I. are yet to be examined in the trial Court and absence of any substantial change of circumstances or fresh grounds after the rejection of the earlier two bail applications by this Court, I am not inclined to reconsider the prayer for bail and release the petitioner on bail.

The petitioner may renew his prayer for bail before the learned Trial Court after the examination of the eighteen witnesses as per the list submitted by the C.B.I. Since the petitioner has remained in custody for more than two years and eight months, the learned Trial Court shall do well to expedite the trial and conduct the trial on day-to-day basis and make every endeavour to conclude the trial by end of December 2017. The prosecution should be asked specifically by the learned trial Court as to which witnesses they intend to examine from the left out witnesses as per the charge sheet and in that respect a memo should be filed by the prosecution within a week from the next date of posting the case for trial.

Before parting, I would humbly say that corruption is such a contagious disease that it may affect any person and at any point of time. It requires a lot of mental strength, sacrifice, detachment and continuous effort to avoid such disease. Like an unending thirst for human blood by a tiger, a corrupted person is never satisfied with the wealth he has amassed. He becomes blind to all kinds of ethics, rule of law, societal obligation and becomes self-centric. He fails to learn the lesson from the replies given by the family members of Dasyu Ratnakar when he enquired from them if they would receive some portions of his vice which he had done for their maintenance. He fails to remember the last wishes of the great Greek King Alexander to put his hands outside the coffin to let people understand that he came to this world in empty hands and he will leave this world also in empty hands. A man having clean mind and strong character can fight corruption. Accordingly, the bail application sans merit and hence stands rejected.

Application rejected.

**2018 (I) ILR - CUT- 196**

**S. K. SAHOO, J.**

CRLA NO. 595 OF 2016

**SANGRAM KESHARI NAYAK & ORS.** .....Appellants

.Vrs.

**STATE OF ODISHA (G.A. DEPTT.)** .....Opp. Party

**ODISHA SPECIAL COURTS ACT, 2006 – S.19**

**Release of Savings Certificates etc. seized during house search of the accused – Due to the death of the accused trial abated – Legal heirs of the deceased are the appellants – Question is who is the authority competent to release those documents ? – Held, the Authorised officer is the only authority competent to release the documents.**

**Case Law Referred to :-**

1. 2016 (II) OLR 1107 : Renubala Das -V- State of Odisha (Vigilance)

For Appellants : Mr. Deba Prasad Das & S.Behera

For Opp. Party : Mr. Sanjay Ku. Das, Standing Counsel(Vig.)

Date of Hearing : 21.08.2017

Date of Judgment:21.08.2017

**JUDGMENT*****S. K. SAHOO, J.***

Heard Mr. Deba Prasad Das, learned counsel for the appellants and Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department.

This appeal has been filed under section 17 of the Orissa Special Courts Act, 2006 (hereafter '2006 Act') by the appellants Sangram Keshari Nayak, Prasant Kumar Nayak, Susant Kumar Nayak, Bikram Keshari Nayak, Ranjurani Mandal and Sanjukta Charchy who are the legal heirs of late Biswanath Nayak who was an accused in Bhubaneswar Vigilance P.S. Case No.09 of 1990 in which charge sheet was submitted for commission of offence under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act which corresponds to T.R. No.2/35 of 2009/1992 from the file of learned Special Judge, Special Court (Vigilance), Bhubaneswar.

The appellants have challenged the impugned order dated 24.09.2016 passed by the learned Authorized Officer, Bhubaneswar in Confiscation Case No.03 of 2012 in rejecting the petition dated 18.07.2016 filed by them for release of the seized documents like National Saving Certificates, Indira Vikas Patra, fixed deposits in banks, pass books, sale deed and cash seized during house search of late Biswanath Nayak.

It is not disputed at the Bar that the said accused Biswanath Nayak died during pendency of the proceeding on 10.09.2013. Consequent upon his death, the trial stood abetted and the learned Trial Court passed an order on 05.11.2013 in that respect. However, the learned Trial Court did not pass any order regarding disposal of the properties under seizure. The confiscation proceeding which was initiated under the provisions under section 13 of the 2006 Act was also dropped due to the same reason. The present appellants being the legal heirs of the deceased first moved an application for release of the seized documents and cash in their favour before the learned Special Judge, Special Court (Vigilance), Bhubaneswar which was rejected vide order dated 06.06.2016 on the ground of lack of jurisdiction as there was a separate provision and forum in the 2006 Act for the said purpose. Then the appellants filed an application before the learned Authorized Officer, Special

Court, Bhubaneswar in Confiscation Case No.03 of 2012 for release of various deposits in banks, post offices and financial institutions and cash under seizure. The learned Authorized Officer vide impugned order dated 24.09.2016 has been pleased to observe as follows:-

“The learned Special Judge, Special Court, Bhubaneswar on dated 06.06.2016 passed an order rejecting similar petition for release of the seized documents on the ground of lack of jurisdiction in view of special provisions under Chapter-III of Special Courts Act, 2006 notwithstanding the fact that the confiscation proceeding has already been dropped in the mean time. There is no specific provision for release of the seized documents in Chapter-III of the Special Courts Act more specifically in Section 19 of the said Act by the authorized officer before confiscation. Accordingly, the submission of learned counsel appearing for the Opposite Parties bears no merit and the petition filed for release of the seized documents stands rejected.”

Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department placed the Division Bench decision of this Court in case of **Renubala Das -Vrs.- State of Odisha (Vigilance) reported in 2016 (II) Orissa Law Reviews 1107** wherein in identical facts and situation, the learned Division Bench has held that the Authorized Officer is the only competent authority to deal with an application for release of the money and/or property involved in a confiscation proceeding in case of demise of an accused and that the Special Court has rightly passed the impugned order rejecting the application for return of money and property of the person affected.

Mr. Deba Prasad Das, learned counsel for the appellants contended that the impugned order which has been passed by the learned Authorized Officer is against the principle decided by the Division Bench of this Court in case of **Renubala Das and others** (supra) and therefore, the learned Authorized Officer should deal with the petition dated 18.07.2016 filed by the appellants afresh on merits.

Learned Standing Counsel for the Vigilance Department has no serious objection to such prayer

Accordingly, the impugned order dated 24.09.2016 passed by the learned Authorized Officer is set aside and the matter is remanded back to the Authorized Officer, Special Court, Bhubaneswar who shall, keeping in

view the ratio laid down in the case of **Renubala Das and others** (supra) dispose of the petition dated 18.07.2016 filed by the appellants afresh in accordance with law on merits.

It is made clear that this Court has not expressed any opinion on the merits of the petition which has been filed for release of the fixed deposits, cash and other documents.

With the aforesaid observation, the CRLA petition is disposed of. A free copy of this judgment be supplied to the learned Standing counsel for the Vigilance Department.

Appeal disposed of.

**2018 (I) ILR - CUT- 199**

**S. N. PRASAD, J.**

W.P.(C) NO. 2376 OF 2008

**BICHITRANANDA PANDA**

.....Petitioner

.Vrs.

**ORISSA POWER GENERATION  
CORPORATION LTD. & ORS.**

.....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – ART.311(2)**

**Compulsory retirement – Action challenged on the ground of non-supply of adverse entries made in the ACR and on the ground of jurisdiction of the authority who passed the order – This is the policy decision of the authority in public interest, having no stigma or punitive action to attract the provision under Article 311(2) of the Constitution of India – Moreover, the opposite parties have shown their bonafide by granting one year time from the date of final decision and during that period also the petitioner could not be able to improve his performance rather his overall rating during such period was “poor” – Held, since the petitioner became a dead wood and has failed to make out a case for interference of this Court, the writ petition is liable to be dismissed.**

(Paras 7, 8)

**Case Laws Referred to :-**

1. 2013 10 SCC 551 : Rajasthan State Road Transport Corporation and Ors. Vrs. Babulal Jangir.
2. (1992) 2 SCC 299) : Baikuntha Nath Das Vrs. District Medical Officer.
3. (2001) 3 SCC 314 : State of Gujarat Vrs. Umedbhai M. Patel.
4. (2010) 10 SCC 693 : Pyare Mohan Lal Vrs. State of Jharkhand and Ors.
5. 17 AIR 2015 SC 2426 : Punjab State Power Corporation Ltd. & Ors. vrs. Hari Kishan Verma.

For Petitioner : M/s. S.P.Mishra, S.Mishra, B.Mohanty,  
S.Modi, D.Priyanka & Ekta Agrawal

For Opp. Parties : M/s. D.P.Nanda, P.K.Mohapatra, M.K.Pati,  
R.Kanungo & S.Rath

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Date of hearing : 29.11. 2017

Date of judgment: 29.11.2017

**JUDGMENT**

***S. N. PRASAD, J.***

This writ petition is under Article 226 and 227 of the Constitution of India wherein the order dtd.04.01.2008 passed by the authority on behalf of the competent authority designated as Sr. General Manager (P & A) I/c is under challenge whereby and where under the premature retirement of the petitioner passed by virtue of order No.1390 dtd.15.4.2006 has been affirmed.

2. The brief fact of the case of the petitioner is that he was appointed as Senior Manager (Finance) on 4.6.1992, promoted to the post of Grade E-5 but his case was not considered for promotion to the post of Grade E-6 for which he is entitled, rather the opposite party no.3 has insisted him to submit application for voluntary retirement, being aggrieved with the said action of the authorities, he filed writ petition before this Court being W.P.(C) No.10702 of 2003 which is pending for disposal.

In the meanwhile opposite party no.5 has withdrawn the facilities of reimbursement of the residential telephone expenses w.e.f.23.6.2005, challenging the said action, he preferred a writ petition being W.P.(C) No.8214 of 2005.

Some of the co-employees have filed writ petition being O.J.C. No.16539 of 1997 being aggrieved with the decision of the authority in granting promotional benefits to the officers of the Corporation in which the

petitioner has filed an intervention petition. This court, vide order dtd.4.12.1997 directed that any regularization made shall be subject to the result of the writ petition. Again vide order dtd.15.12.1997, this court directed that the interim order dtd.4.12.1997 shall also apply to any post upgraded. Thereafter opposite party no.2, vide order dtd.1.1.1998, promoted one Sri Nilamani Mohapatra, Deputy General manager (Finance) to the post of General Manager (Finance) on ad hoc basis which was extended vide order dtd.8.9.1998 and subsequently vide order dtd.16.4.1999 the Management regularized the said ad hoc promotion of Sri Nilamani Mohapatra, thus the 3 petitioner has been discriminated by ignoring his case for consideration for higher post.

In the meanwhile, opposite party no.3 has notified a new Rule known as 'Premature Retirement Rules' to eliminate officers above 50 years who could not otherwise be terminated under OPGC's conduct / discipline / appeal rules. Accordingly the petitioner has also been decided to be prematurely retired and accordingly he has been retired compulsorily vide order No.1390 dtd.15.4.2006, however the Management has given one year further time for assessment of his performance but subsequently the Management has given its opinion that the petitioner could not be able to improve his performance, as such the decision taken by them vide order No.1390 dtd.15.4.2006 has been given effect to.

The order of pre-mature retirement has subsequently been confirmed vide communication dtd.4.1.2008 which is impugned in this writ petition on the following grounds:-

- (i) As per the procedure for premature retirement, the decision to retire the petitioner from service has been taken by the Managing Director while he is not the competent authority to take such decision, rather the competent authority to take decision is the Chairman since he is in Grade E-5 post, as such the decision taken by them for premature retirement is without jurisdiction.
- (ii) Remarks given by the opposite parties in the annual confidential report have not been supplied.
- (iii) The petitioner is the only employee who has been retired compulsorily in between the period from 2005 to 2017, as such it is the malicious decision of the opposite parties, hence not sustainable.

- (iv) The authorities, after taking decision to compulsorily retire the petitioner vide order dtd.15.4.2006, he has been allowed to continue in service for a period of one year for assessing his performance, as such, after completion of the period of one year, the order dtd.15.4.2006 has been given effect to, but before giving effect to the said order, the authorities ought to have given an opportunity of being heard to the petitioner, as such there is violation of principle of natural justice, hence the entire action of the opposite parties is not sustainable on this ground alone.

3. Opposite parties have appeared and filed detail counter affidavit. Learned counsel appearing for the opposite parties has submitted that the contention raised by the petitioner that the decision taken against him for compulsory retirement is without jurisdiction since it ought to have been passed by the Chairman instead of passing the said order by the decision of the competent authority, has got no substance in view of the fact that the decision for compulsory retirement has been taken against the petitioner in view of the decision taken by the authority under the procedure for premature retirement which contains a provision to take decision for premature retirement conferring the said power upon the committee consisting of the Managing Director, Director (Operation) and Director (Finance), who has been held to be the competent authority, as such the said committee has assessed the performance of the petitioner and on being subjectively satisfied, the decision has been taken by the competent authority.

He submits that so far as the question of having power upon the Chairman, that is with respect to disciplinary action and if there is no dispute that the Chairman is the appointing authority of the petitioner, as such the Chairman will act by way of an disciplinary authority, but that is only for the purpose of taking disciplinary action but the compulsory retirement cannot be said to be a punishment and is not a punishment rather it is the decision taken in the public interest and it is on the basis of a policy decision taken by the authorities wherein the power has been conferred upon the committee consisting of members, as such it cannot be said that the committee has got no jurisdiction.

He further submits that since the petitioner has compulsorily been retired under the policy decision wherein the committee is the competent authority to take such decision, as such the petitioner ought to have challenged the same questioning the jurisdiction of the committee but the said

policy decision has never been challenged by him at any time or even in this writ petition, as such this point is not available to him for questioning the decision taken by the competent authority under the policy decision.

So far as the contention raised by the petitioner regarding the single case of the petitioner which according to him has been taken under the policy decision, same is absolutely incorrect in view of the fact that 12 more employees of the Executive Cadres have been decided to be compulsorily retired who had attained the age of 50 years which is evident from the order dtd.15.04.2006, as such this argument of the petitioner is having no foundation.

Learned counsel for the opposite party, rebutting the argument advanced on behalf of the petitioner that after extension of time for a period of one year to assess his performance, notice ought to have been given, but according to him, this argument is not sustainable in view of the fact that the decision has been taken by the authority in public interest and that was on the basis of their subjective satisfaction, since the decision is for public interest having no punitive effect or stigmatic decision, hence there is no requirement to give opportunity of being heard to the petitioner.

4. Heard the learned counsels for the parties and on appreciation of their rival submission it is evident that the petitioner has challenged in the writ petition the confirmation of premature retirement dtd.4.1.2008. This confirmation is of the decision take communicated by way of counter affidavit, even then efforts has not been taken by the petitioner to challenge it by filing any amendment application.

Be that as it may, the question fell for consideration regarding legality and propriety of the decision taken by the authority in prematurely retiring the petitioner from service on the grounds taken by the petitioner as stated hereinabove.

This court has thought it proper before going into the question of legality and propriety of the decision taken by the authority to deal with the power of the appointing authority in retiring a government servant prematurely in the public interest.

The settled proposition with respect to interference by court of law in the matter of compulsory retirement is that the order of compulsory retirement is neither punitive nor stigmatic, it is based on subjective

satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of nonapplication of mind, mala fide, perverse, or arbitrary or if there is noncompliance of statutory duty by the statutory authority. Power to retire compulsorily the government servant in terms of service rule is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest.

It is also settled that for the purpose of considering compulsory retirement it is permissible for the employer to take into consideration the adverse entries which were either not communicated to the employee concerned or if communicated, representations made against those entries were still pending. The authorities in such circumstances need to examine the overall performance on the basis of the entire service record to come to the conclusion as to whether the employee concerned has become a deadwood and it is in public interest to retire him compulsorily. The authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory performance, the authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee rendered himself a liability to the institution, there is no occasion for the court to interfere in the exercise of its limited power of judicial review (*Rajsthan State Road Transport Corporation and Others Vrs. Babulal Jangir, reported in 2013 10 SCC 551, Baikuntha Nath Das Vrs. District Medical Officer, reported in (1992) 2 SCC 299*)

In view of such settled proposition, the fact of the instant case needs to be examined.

It is the position of this case that the petitioner has joined his service as a Senior Manager (Finance) and subsequently he was promoted to 9 the post of Executive Grade E-5, he has been denied promotion to Grade E-6. The authorities, in the meanwhile, have come out with a procedure for premature retirement which covers employees in Executive cadre who have attained 50 years on the ground of his / her being inefficient and if he / she is found medically unfit, irrespective of his / her age. Two grounds have been incorporated therein to prematurely retire the Executive Cadre; one is on medical unfitness and second is inefficiency.

The fact of this case pertains to inefficiency, as such this court is taking into consideration the procedure for the purpose of taking decision of compulsory retirement under the category of inefficient employee, which provides as follows:-

“2.2 Inefficiency:

a) An employee who has secured ‘Fair’ or ‘Poor’ ratings in his / her appraisal twice

Or

Who has secured ‘Fair’ or ‘Poor’ ratings in last four years;

Or

Who has been considered but not recommended for promotion on four consecutive years;

Or

Who has been awarded minor penalty / Advisory letters on three occasions or major penalty on two occasions in entire service career;

Or

An employee who is 55 years of age and his last Appraisal Report has been ‘Fair’ or ‘Poor’, may be considered as a fit case for pre-mature retirement.

b) The committee deciding Premature Retirement:

The committee consisting of the Managing Director, Director (Operation) and Director (Finance) shall be the ‘Competent Authority’ under this procedure and they shall have the absolute right to retire prematurely an employee in the executive cadre who has attained the age of 50 years on the ground of his / her being inefficient or if he / she is found medically unfit, irrespective of his / her age, by giving him 1 month’s basic pay and allowances under the 10 c) While taking the decision of premature retirement of any employee, the Committee will go through the complete records relating to performance of the persons as per Clause 2 on the basis of his / her records / documents / feedback from his / her Head of the Department as also the Performance Appraisal Reports.”

It is evident from the aforesaid provision that under this category of employees assessment have been decided to be made, i.e. based upon the performance of one or the other employees belonging to the Executive Cadre. The decision is decided to be taken by the committee consisting of the Managing Director, Director (Operation) and Director (Finance) who have been declared to be the competent authority, while taking decision of premature retirement of any employee, the committee will go through the complete records relating to performance of the person as per Clause 2 on the

basis of his / her records / documents/ feedback from his / her Head of the Department as also the Performance Appraisal Reports. The provision of appeal has also been made to be preferred before the Board within period of 15 days from issuance of such order.

It is evident from the material available on record that the petitioner has attained the age of 50 years and decided to be separated from service on the ground of inefficiency, that decision was taken upon review of complete service record and in course thereof, the competent authority has found that the petitioner was issued with more than three Advisory besides two caution / warning letter between 1995 till 2006. Further upon review of the performance appraisal of the petitioner, it was found by the competent authority that the overall rating of the petitioner for the appraisal year 2002-03, 2003-04 and 2004-05 was poor, fair and fair respectively. Accordingly the committee, while taking decision has taken into consideration the review of progress of work of the petitioner and in course of assessment, the General Manager (Finance) has reported lack of responsibility and sincerity on the part of the petitioner, the fortnight report as per the office order vide memo no.1173 dtd.4.5.2002 has not been sent even though it was due to be sent before the competent authority. The authorities have also come across the fact that the petitioner was on leave on health ground from 16.10.1995 to 21.10.1995 and during which the AG auditors conducted the review and audited Head Office and discussed the same with the Deputy General Manager (Finance) but the audit team was not duly been monitored by him, hence coupled with the annual performance, two advisory notes with all the incidents, decision was taken by the authority on 15.4.2006 to compulsorily retire him from service, i.e. under Annexure-D to the counter affidavit. It is evident from the said order that apart from the petitioner 11 other executives who have attained the age of 50 years have also been assessed.

It is evident from the decision taken by the authority dtd.15.4.2006 that the committee has taken into consideration the details of advisory / caution letter which are as follows:-

“1. Advised to attend the office in time and take permission while leaving office vide Memo No.8 dtd.27.10.1995 by DGM (Finance) for his late coming and leaving office without permission on 25.10.1995.

2. Warned for insubordination by the managing Director vide memo No.57/Con. Dtd.03.11.1995.

3. Advisory Memo issued for misbehavior with staff and for other matters by the General Manager In-charge vide No.4945 dtd.4.6.1998.
4. Advisory letter issued for non submission of fortnightly report by the General Manager (Finance) vide letter No.1487 dtd.12.6.2002.
5. Advisory letter issued for lack of responsibility and sincerity by the General Manager (Finance) vide Memo No.17 dtd.20.09.2003.
6. The opinion of the Chairman, OPGC Ltd.'s comment that the performance of Sri Panda is not up to the mark was communicated along with a caution vide letter No.07 dtd.25.5.2005 by the Sr. General Manager (Finance)
7. Cautioned for lapses by the Sr. General Manager (Finance) vide Memo No.04 dtd.25.03.2006.”

It is further evident that in addition to the above, the Competent Authority taken into consideration the Performance Appraisal Report of the petitioner and found the followings:-

Sl. No.	Appraisal Year	Overall Rating	Remarks of the Reviewer / Countersigning Authority.
1	2004-05	Fair (8)	<b>Reviewing Authority:</b> The Self Appraisal Has Been Very Defensive. Particularly, In A, The Officer Tried To Defend His Action In A Negative Manner. In B He Had Tried To Criticize His Work Assignment. <b>Countersigning Authority:</b> I Generally Agree With The Views Of The Reviewing Officer As Well As Reporting Officer. Mr. Panda, Being Such A Senior Officer Of The Company never conducted himself in a manner that would give him the respect of his colleagues and his own staff. His commitment to the Company not there and his conduct required attention of the senior Management as it was adversal. I am strongly of the view that on overall basis Mr. Panda was counter-productive to the interest of the Company.
2	2003-04	Fair (8)	<b>Reviewing Authority:</b> Shri Panda has very poor inter personal relation with others and cannot be a team leader which is required for a Senior Manager. <b>Countersigning Authority:</b> I agree with the Reviewing Officer's assessment.
3	2002-03	Poor	<b>Reviewing Authority:</b> I would grade him as 'Poor'. As a Senior officer, Sh. B. N. Panda should handle jobs of responsibility but unfortunately I would not give such jobs as he was not capable of handling jobs with responsibilities.

According to the petitioner the said order has not been communicated to him, as such the same has not been challenged, however in the meanwhile he was allowed to continue in service for a further period of one year in order to review his performance by keeping in abeyance the order of premature retirement dtd.15.4.2006 but even after completion of said 13 period of one year, when his performance was reviewed, he could not show any improvement in his performance and got overall rating of 'poor'.

Subsequently the order of compulsory retirement has been confirmed vide order dtd.4.1.2008 which is challenged in this writ petition.

5. The petitioner has assailed the same on the ground of jurisdiction, violation of principle of natural justice, SCR not supplied and he has been singled out.

This court, after considering the policy decision taken by the authority under the procedure for premature retirement, has found that the authorities have taken a decision by formulating the said policy decision to dispense with the services of such executive cadres who have attained the age of 50 years in public interest on the ground of inefficiency or medical unfitness. The committee has been decided to be formulated consisting of the Managing Director, Director (Operation) and Director (Finance). The said committee has taken decision regarding review of the appraisal of performance of the petitioner and it is on the basis of their analysis of the said committee, decision has been taken.

So far as the contention that the petitioner since was in E-5 cadre, hence Chairman being the appointing authority can only take decision for premature retirement and to substantiate his argument, he has demonstrated this fact by way of a chat given at paragraph 49 of the rejoinder affidavit. There should not be any confusion that appointing authority will only be the disciplinary authority. It is also not in dispute that the compulsory retirement in public interest is no way related with the disciplinary action since it carries no stigma or any punishment, rather it is in the public interest to be taken on the subjective satisfaction of the authority on appraisal of the entire service career, as such the contention raised by the petitioner that the Chairman will be the competent authority is not sustainable in view of the fact that it is not a case of disciplinary action since the decision of compulsory retirement has not been taken as a punishment rather it is in public interest in view of the power conferred upon the authority by virtue of a policy decision wherein the committee has been formed to decide the case of one or the other employees working under the opposite parties for premature retirement and decision to retire the petitioner has been taken by the said committee.

The policy decision has never been assailed by the petitioner, as such this point is not available to him at this juncture to assail the decision of the committee questioning its jurisdiction, moreover as stated herein above that

the compulsory retirement herein is not in any way related to the disciplinary action, hence the concept of the 'appointing authority' will be the disciplinary authority will not be applicable in such situation.

6. The second contention raised by the petitioner that the annual confidential report since has not been supplied, hence the decision taken by the authority is not tenable, but this argument is also having no substance in view of the fact that it is available to the government or the competent 15 authority to take into consideration the adverse entries which were either not communicated to the employee concerned or if communicated, representations made against those entries were still pending, this aspect has been dealt with in the case of Rajasthan State Road Transport Corporation and Others Vrs. Babulal Jangir (supra) that even communicated or not communicated or even the promotion having been granted to such employee the adverse entry made cannot be ignored for the purpose of arriving at a conclusion to dispense with the service of the employee under the said provision that is in the public interest as because the Hon'ble Apex Court therein has been pleased to hold that since such an assessment is based on entire service record, there is no question of not taking into consideration the earlier old age adverse entries or record of the old period, rather such a record can be taken into consideration, at the same time, the service record of immediate past period will have to be given credence and weightage.

A three-Judge Bench of Hon'ble Apex Court in the case of State of Orissa Vrs. Ram Chandra Das reported in (1996) 5 SCC 331 has been pleased to emphatically hold that object behind compulsory retirement is public interest and, therefore, even if an employee has been subsequently promoted, the previous entries do not melt into insignificance. To quote:-

“7. xxxxx Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension.”

In the judgment rendered in the case of *State of Gujarat Vrs. Umedbhai M. Patel reported in (2001) 3 SCC 314*, *Pyare Mohan Lal Vrs. State of Jharkhand and Others reported in (2010) 10 SCC 693* the Hon'ble Apex Court, after discussing a number of authorities, have held thus:-

“22. It clearly follows from the above that the clarification given by a two-Judge Bench judgment in *Badrinath V. State of Tamil Nadu*, reported in (2000) 8 SCC 395 is not correct and the observations of this Court in *State of Punjab Vrs. Gurdas Singh*, reported in (1998) 4 SCC 92 to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.

23. The principle of law which is clarified and stands crystallized after the judgment in *Pyare Mohan Lal Vrs. State of Jharkhand (supra)* is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped off when the case of the government employee is to be considered for further promotion. However, this “washed-off theory” will have no application when the case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on “entire service record”, there is no question of not taking into consideration the earlier old adverse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time, the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant.”

Even recently in the judgment rendered in the case of *Punjab State Power Corporation Ltd. & Ors. vrs. Hari Kishan Verma reported in 17 AIR 2015 SC 2426* the Hon'ble Apex Court has been pleased to hold that the entire service period is to be seen for the purpose of taking such decision.

On the basis of these legal propositions, the argument advanced on behalf of the petitioner regarding non-supply of adverse entries made in the Annual Confidential Report is not tenable, hence rejected.

7. So far as the argument advanced on behalf of the petitioner regarding issuance of notice after extension of period of one year is also not sustainable in view of the fact that since the decision to compulsory retire the petitioner has been taken in the public interest having no stigma or punitive action, hence the same will not come under the purview of Article 311(2) of the Constitution of India, as such there is no requirement to follow the principle of natural justice rather the principle to dispense with the service in the public interest is the subjective satisfaction of the employer that is to be taken on the basis of review of entire service record of the concerned employee, hence in such situation the principle of natural justice is not required to be followed.

Moreover, here in the instant case, the opposite parties have shown their bona fide by granting one year time from the date of final decision, i.e. from 15.4.2006 but even during such extension period the petitioner could not be able to improve his performance rather rating for the said period was 'Poor'.

In view of such a situation and the legal proposition settled as stated above, the argument advanced on behalf of the petitioner is not sustainable.

8. So far as the argument of the petitioner that he has been singled out and from the date of implementation of the said policy till the year 2017 only the petitioner has been compulsorily retired in the public interest, but that is contrary to the factual situation since in the order dtd.15.4.2006 the performance of 12 employees under the executive cadre including the petitioner, who have attained the age of 50 years, have been assessed, as such this cannot be said to be the correct fact.

In view of entirety of facts and circumstances and on the basis of legal position settled as stated herein above, this court finds that the petitioner has failed to make out a case, accordingly writ petition fails and it is dismissed.

Writ petition dismissed.

2018 (I) ILR - CUT- 212

**DR. D.P. CHOUDHURY, J.**

JCRLA NO. 1 OF 2016

**SANATAN MUNDA**

.....Appellant

. Vrs.

**STATE OF ORISSA**

.....Respondent

**CRIMINAL TRIAL – Appreciation of evidence – Appellant was convicted U/s. 304-Part I, I.P.C., basing on the evidence of P.Ws. 1, 5 and 19 – Though P.W.1 stated to have heard the incident from P.W.5 but P.W.5 has not deposed that she narrated the incident to P.W.1 – On the other hand P.W.5 though claimed to be an eye witness, she clearly stated in her evidence that she had not seen the occurrence and she had also not stated anything about that before the police – Moreover the evidence of the I.O. (P.W.19) relating to extra judicial confession and leading to discovery not supported by other prosecution witnesses – Held, since prosecution failed to prove chain of circumstances beyond all shadow of doubt, the appellant is entitled to benefit of doubt – Impugned judgment of conviction and sentence are set aside.**

(Paras 15 to 18)

**Case Law Referred to :-**

1. AIR 2003 SC 854 : Lallu Manjhi & Anr. -V- State of Jharkhand
2. AIR 1957 SC 614 : Vadivelu Thevar etc. -V- State of Madras

For Appellant : Mrs. Jyostna Rani Tripathy, Amicus Curiae  
 For Respondent : Mr. B. Senapati, A.G.A.

Date of hearing :16.12. 2017

Date of judgment:16.12.2017

**JUDGMENT*****DR. D.P. CHOUDHURY, J.***

The appellant assails the judgment of conviction and order of sentence passed by the learned Addl. Sessions Judge, Keonjhar in S.T. Case No. 32/121 of 2014 in convicting him under section 304 Part-I of I.P.C. and sentencing him to undergo R.I. for ten years and to pay a fine of Rs.5000/- in default thereof to undergo R.I. for one year.

2. The factual matrix leading to the case of the prosecution is that on 15.5.2014 at about 11 a.m. Sanatan Munda, his first wife Kuntala Munda,

second wife Pramila Munda, son Rajesh Munda and minor daughter had been to Simamundi Nala to rear fish. There Sanatan Munda told Kuntala Munda to make a ridge and to drain water for rearing fish. Kuntala Munda refused to do so and quarreled with Sanatan Munda. Being enraged, Sanatan Munda dealt blows by the blunt side of a spade on the head of Kuntala Munda causing profuse bleeding injuries. Kuntala Munda succumbed to injuries. Thereafter the Ward Member arrived at the spot. F.I.R. was lodged. During investigation the police made inquest over the dead body of Kuntala and made autopsy of the dead body. Police also examined the witnesses. During investigation the appellant led the police and gave recovery of the weapon of offence from the Simamundi Nala and consequently the same was seized. After completion of investigation charge sheet was submitted under sections 302 and 201 I.P.C.

3. The plea of the appellant as revealed from the statement recorded under section 313 of Cr.P.C. and the suggestion given during cross-examination to the prosecution witnesses, is squarely denial to the occurrence and he pleads innocence.

4. The prosecution in order to prove the charge examined 19 witnesses against the appellant whereas the defence examined himself as a single defence witness. The trial court after analyzing the evidence of witnesses has found the appellant guilty under section 304 Part-I I.P.C. and sentenced him to undergo R.I. for ten years and to pay fine of Rs.5000/- in default to undergo further R.I. for one year.

#### **SUBMISSIONS:**

5. Learned counsel for the appellant submitted that the judgment of conviction is illegal and improper because the learned trial court relied on the evidence which is not admissible. She further submitted that the evidence of most of the P.Ws. having hostile to the prosecution have not supported to the prosecution case. The learned trial court has based the conviction mainly on the extrajudicial confession made by the appellant before P.W.1, but on going through the said evidence it would appear that he has not supported the prosecution case. Learned trial court has also relied on the evidence of leading to discovery made by the appellant, but there is no independent witness to corroborate the leading to discovery. The evidence of the I.O. cannot be trusted one to prove the leading to discovery. There is no direct or circumstantial evidence to find the appellant guilty, but he has been convicted by the learned trial court basing on the inadmissible evidence. So, she

submitted to set aside the judgment of conviction and order of sentence against the appellant.

6. Learned Addl. Government Advocate submitted that the evidence of P.W.5 should be taken into consideration as she is the second wife of the appellant and has witnessed the occurrence. Although the prosecution has cross-examined her, but during such cross-examination she admitted before police to have witnessed the occurrence of assault made by the appellant by means of a spade to the head of the deceased. He further submitted that in view of the clear admission of P.W.5, her evidence also proved the overt act of the appellant. Apart from this, he submitted that the blood stain Gamuchha of the accused has been seized and the same had been found to have contained human blood. In addition to the evidence of the eye witnesses and the circumstantial evidence as detailed by the trial court the appellant should be convicted under section 304 Part-I I.P.C. and sentenced thereunder.

### **DISCUSSION:**

7. It is well settled in law that prosecution has to prove the case beyond all sorts of doubt. It is reported in **A.I.R. 2003 SC 854; Lallu Manjhi and another v. State of Jharkhand** where Their Lordships at paragraph-10 observed as follows:-

“The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. (See **Vadivelu Thevar etc. v. State of Madras, AIR 1957 SC 614**).”

8. It is also trite in law that evidence of witnesses should be assessed to weigh same for discerning truth. The Court is required to separate grain from chaff while appreciating the evidence. Apart from this it is well settled in law that conviction can be maintained basing on the sole evidence of a single witness if his evidence is cogent, clear, consistent and above the reproach.

9. It is also settled in law that evidence of hostile witness cannot be rejected, but should be read as a whole to find out the ring of truth to the extent supporting the prosecution case. The appellate Court has duty to re-

appreciate the evidence on record to find out whether the conclusion arrived at by the trial court is correct or not. Keeping in mind of this principle the evidence on record should be assessed.

**10.** It is revealed from the evidence of P.W.1 that after hearing about the occurrence he went to the spot and found the dead body of Kuntala Munda. In his presence inquest was made over the dead body vide Ext.2. The evidence of P.W.2 also shows that he is a witness to the inquest. The evidence of P.Ws.3 and 4 also revealed that in their presence the police made inquest over the dead body. The evidence of P.W.17 shows that he has made the post-mortem examination on the dead body of Kuntala. He found the following features as follows:-

“External features:-

It is a female dead body aged about 35 years of average body built. The dead body was swollen. Abdomen was swollen. Eyes and mouth closed. Rigormortis present over all extremities.

External injuries:-

- (i) Lacerated injury of size ½” x ½” x ½” over right fronto parietal region of scalp.
- (ii) There was swelling of size 1” X 1”X 1” over left froto-parietal region of scalp.

Internal Features:-

On dissection I found clotting of blood of size 3” X 2” inside the membrane of brain below injury No.(ii). Old clot of blood was present below injury No.(i). All other organs were normal.”

**11.** According to him the cause of death is due to injury on her vital organ like brain and it was homicidal in nature. He proved the report vide Ext.12. From the aforesaid material it is clear that the deceased Kuntala has met a homicidal death.

**12.** The evidence of P.W.5 who claimed to be an occurrence witness should be assessed at first. In her examination-in-chief she admitted that she had not seen the occurrence. She was cross-examined by the prosecution. During cross-examination she admitted to have stated before the police that in the morning there was quarrel between the deceased and the appellant and the appellant being enraged gave a blow by means of a spade. Although she had stated in the examination-in-chief to have not seen the occurrence, but only admitted in cross-examination by the prosecution that before the police she has stated so. But her evidence does not end there. During cross-examination by the defence she admitted in paragraph-4 that she came to know from the

villagers that Kuntala Munda is lying dead near the Nala, whereafter she went to the Ward Member and told him about the death. The evidence of P.W.5 after reading as a whole cannot be taken as a gospel truth to have witnessed the occurrence. Even if she admitted in cross-examination that she has stated about quarrel between the parties and overt act of the appellant, but actually she clearly stated that she had not seen the occurrence. It had not been explained by the prosecution as to why she did not express about the occurrence during examination-in-chief.

**13.** Now in order to explain the doubt about the credibility of the witness the Court took steps where she had clearly stated at paragraph-5 that she had falsely stated accused Sanatan Munda has committed murder of Kuntala and she has not stated anything to police. In view of such, evidence of P.W.5 cannot be trusted in any manner when varying the statement from time to time and particularly admitted that she has not stated anything about the occurrence before the police. Be that as it may, the evidence of P.W.5 is not clear and cogent to rely her as an eye witness, but she is a post-occurrence witness.

**14.** The evidence of P.W.1 is also requires discussion. He came to know from Pramila Munda (P.W.5) about the occurrence and then he rushed to the spot and found Kuntala Munda lying dead. There is no evidence of P.W.5 that she has narrated the occurrence to P.W.1, for which the evidence of P.W.1 is not admissible being not corroborated by P.W.5. The peculiarity of the case is that after cross-examination by the defence the witness was again cross-examined by the prosecution. In further cross-examination by prosecution, he only admitted to have mentioned in the F.I.R. that Sanatan Munda assaulted his wife Kuntala and Kuntala became dead. When this evidence has not come out in chief, but in the cross-examination by the prosecution putting leading questions and on further cross-examination by defence he stated that nobody was there when Sanatan disclosed the fact, the evidence of P.W.1 cannot be trusted solely to prove the extrajudicial confession by appellant. There is no other witness examined corroborating the evidence of P.W.1 to prove the extrajudicial confession made by the appellant. It is true that the extrajudicial confession if proved can be the basis of conviction, but the evidence must be clear and cogent to prove this circumstance against the accused.

**15.** The I.O. (P.W.19) in paragraph-6 stated that after arrest during interrogation the appellant disclosed before him in presence of witnesses

voluntarily to have committed murder of his wife Kuntala by a spade and has kept the spade concealed inside the water of Simamundi rivulet.

Accordingly he prepared the statement vide Ext.3/2. According to him the appellant led the police and other witnesses to the spot and brought out the spade from inside the water of Nala vide Ext.4/1. He proved the spade vide M.O.I. It appears that the other witnesses have not supported the I.O. about the extrajudicial confession and leading to discovery. On going through Ext.3/2 it appears that the disclosure statement is to be admissible but not rest of the confessional statement as settled in law. The seizure list shows that the spade has been seized, but all the witnesses to the seizure stated that the police seized the spade from the Nala, but has not been brought out by the accused. There is nothing to disbelieve the other witnesses. Therefore, the evidence of leading to discovery including the disclosure statement is proved to be clear and cogent evidence. So, this link of chain of circumstance is not proved beyond all shadow of doubts.

**16.** It is revealed from the evidence of the I.O. and other witnesses that the police seized the wearing apparel of the deceased and blood stain wearing apparel of the appellant. On going through Ext.17, the Chemical Examination report, saree and Saya of the deceased which contain human blood group "A". The napkin seized from the appellant although contains human blood, but it has no opinion whether it contains blood group "A" or not. When there is no evidence to show that the blood group of the deceased in the wearing apparel is of the appellant, one of the link of chain of circumstance against the appellant also remained as not proved other clinching material against the appellant.

**17.** It is true that the chain of circumstance must be linked together unerringly pointing out the guilt of the accused and each of the circumstance must be proved by cogent and consistent evidence beyond all shadow of doubts. Since direct evidence or circumstantial evidence as discussed above have not been proved by the prosecution by creditworthy and consistent evidence, the appellant is entitled to benefit of doubt.

**18.** The learned trial court has discussed the materials, but not with proper perspective. Hence, the conclusion arrived at by the learned trial court is not agreed with. In terms of the above discussion, the conviction and sentence against the appellant are hereby set aside. The appellant is found not guilty of the charge under section 304 Part-I of the I.P.C. and as such he is acquitted of the said offence. In the result, the Jail Criminal Appeal is allowed and the appellant be set at liberty forthwith if not detained in any other case. The L.C.R. be returned forthwith.

Appeal allowed.