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NOMINAL INDEX

ACTS & RULES

Acts &No.

1961-25	Advocates Act, 1961
1996-26	Arbitration and Conciliation Act, 1996
1908-5	Code of Civil Procedure, 1908
1974 - 2	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
1984-66	Family Courts Acts, 1984
1994-32	Finance Act, 1994
1987-10	General Clauses Act, 1897
1955-25	Hindu Marriage Act, 1955
1956-30	Hindu Succession Act, 1956
1872-01	Indian Evidence Act, 1872
1860-45	Indian Penal Code, 1860
1978-14	Interest Act, 1978
2016-02	Juvenile Justice(Care & Protection of Children) Act, 2015
1988-59	Motor Vehicles Act, 1988
1881-26	Negotiable Instruments Act, 1881
2002-55	Negotiable Instruments (Amendments and Miscellaneous Provisions) Act, 2002
1963-2	Odisha Co-operative Societies Act, 1962
1965-1	Orissa Grama Panchayats Act, 1964
1960-7	Odisha Panchayat Samiti Act, 1959
1988-49	Prevention of Corruption Act, 1988
2005-43	Protection of Women from Domestic Violence Act, 2005
1963-47	Specific Relief Act, 1963
1882-4	Transfer of Property Act, 1882
1962-58	Warehousing Corporations Act, 1962
1972-53	Wildlife (Protection) Act, 1972

RULES

1. Central Motor Vehicles Rules, 1989
2. High Court of Orissa (Designation of Senior Advocate) Rules, 2019
3. The Staff Service Rules of the Urban Co-operative Bank Ltd., 2003
4. Orissa High Court Rules, 1948
5. Odisha Police Manual Rules, 1940
6. Protection of Women from Domestic Violence Rules, 2006
7. Wildlife (Protection) (Odisha) Amendment Rule 2014

REGULATIONS

ORDER

SCHEMES

TOPICAL INDEX

S U B J E C T I N D E X

CIVIL PROCEDURE CODE, 1908 – Section 47 – Plaintiff/Opp. Party filed execution case pursuant to Judgment dated 24.12.2011 passed by the 2nd Additional Senior Civil Judge, Cuttack – The petitioner/defendant/Judgement debtor filed petition U/s. 47 of the Code before the Executing Court with a prayer to drop the execution proceeding – Whether there is any scope for the Judgment debtor/ petitioner to challenge the decree before the Executing Court.

Held: No – In absence of any challenge to the decree, no objection can be raised in execution proceeding – When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of the Act.

Orissa State Financial Corporation, Cuttack V. Jyoti Prakash Das
2024 (III) ILR-Cut…… 1206

CIVIL PROCEDURE CODE, 1908 ─ Section 80 ─ The plaintiff is a private construction company ─ No notice under Section 80(1) of C.P.C. was served upon the defendants/Govt. Authorities by the plaintiff before filing of the suit ─ The defendants have not raised any objection challenging the maintainability of the suit of the plaintiff on the ground of non-service of notice under Section 80(1) of C.P.C. prior to filing of the suit ─ Whether the suit of the plaintiff is liable to be rejected on the ground of non-service of the notice.

Held: No ─ If the defendants do not raise any objection about the non-service of the notice in their written statement and no issue is framed on the said point, it will be deemed as per law that defendant/s have waived their right on such point.

State of Orissa & Anr. V. M/s. B. Engineers and Builders Private Ltd.
2024 (III) ILR-Cut…… 1306

CIVIL PROCEDURE CODE, 1908 – Order IX, Rule 13 – Setting aside of *ex parte* decree – The petitioner had appeared in the final decree through his lawyer – The proceeding was subsequently transferred to the Court of learned Civil Judge (Sr. Division) – Petitioner did not appear – Paper publication made as per the provision under Order V, Rule 20 of C.P.C. – Learned trial Court held that service of notice on the petitioner/defendant is sufficient and it was set *ex parte* on 12.01.2012 – The petitioner filed Petition U/o. IX, Rule 13 to set aside the ex parte decree with a plea that its lawyer left the profession

without intimation for which it could not take step – Whether the reason stated above to be regarded as sufficient enough to set aside the *ex parte* decree.

Held : No – Non-appearance of learned counsel in the Final Decree Proceeding or any misdemeanor on his part in not informing the Defendant-Petitioner about the proceeding cannot be construed as sufficient cause for setting aside an *ex parte* decree.

M/s. Magma Fincorp Ltd., Khurda V. Rajeswari Mohanty & Anr.
2024 (III) ILR-Cut…… 1068

CIVIL PROCEDURE CODE, 1908 – Order XLI, Rule 23, 23-A, 24, 25 – Remand of case by Appellate Court – Scope and limitation – Plaintiffs have claimed for partition of 41 plots, but separate note of possession was reflected in respect of 6 plots only – The learned First Appellate Court has not differed with the findings of the learned trial court to the extent of land possessed by the predecessor-in-interest of the plaintiffs – The learned First Appellate Court having held that all six plots are liable for petition has not proceeded further to determine the share of the parties and has not discussed anything of the evidence on record to find out the share of parties – Whether the remand order of the First Appellate Court is sustainable.

Held: No – The impugned Judgment of the learned First Appellate Court is erroneous because it has not come to any finding that the conclusion so arrived by the learned Trial Court on different issues are wrong and it is unable to pronounce Judgment for want of evidence and it has not at all assigned any reason to remit the matter back to the learned Trial Court for fresh disposal.

Raina Malik & Ors. V. Kailash Malik & Ors.
2024 (III) ILR-Cut…… 1269

COMPENSATION – Resolution No. 22086 dated 4th August 2020 issued by Finance Department – Husband of petitioner was serving as Constable in Odisha Police Service – While continuing in his service he was tested as COVID positive and admitted in the Government Hospital – The Medical Officer declared him dead – The petitioner being widow applied for ex-gratia as well as special family pension as per the finance department resolution – The Government rejected the claim of petitioner – Whether the petitioner is entitled to ex-gratia of ₹ 50 lakh and special pension as per the finance department resolution.

Held: Yes – The case of the husband of the Petitioner satisfies the requirements of Clause 3(iii) of the resolution, as he was active line of duty dealing with service records of the staff and officers of the office which was controlling the COVID management duty and was not on leave when he was diagnosed as infected in COVID-19 – He might not be discharging duty in the field, but dealing with service records and related works of the said staff and officers and other related works of the COVID management – The said duty made him vulnerable to COVID infection and ultimately took his life.

Bharati Satpathy V. State Of Odisha & Ors.
2024 (III) ILR-Cut…… 1072

CONSTITUTION OF INDIA, 1950 – Articles 12, 14 r/w Clause G(2) and NB of Guidelines for counseling and admission of candidates for Post Graduate (Medical) and Post-MBBS NBEMS Diploma Courses in Government and Private Medical Colleges of the State 2024-2025 – Whether by virtue of 'NB' under Clause G(2) of the Guidelines, it is obligatory for the State to change the cut-off date for determination of eligibility of in-service candidates.

Held: Even if a change is permissible under the extant Rules, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness.

Sibasish Kumar Jena & Anr. V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 929

CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of Writ Petition – Whether Writ Petition is maintainable against the Co-Operative Bank.

Held: Yes – When the claim is a constitutional right of a retired employee being protected under Article 300-A of the Constitution of India as a right to property, Writ Petition is maintainable confining the scope of interference only with respect to claim of the petitioner to retirement benefit such as encashment of unutilized salary.

Nilakantha Dash V. Registrar of Cooperative Societies, Odisha & Ors.
2024 (III) ILR-Cut…… 1155

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 r/w Govt. Notification No. 5266/8F (WL) (6/2011/F&E) dt. 23.03.2011 in exercise of power conferred U/s. 64 of the Wildlife (Protection) Act, 1972 **–** Permanent disablement due to attack of wild animal (Elephant) – Claim of compensation with regard to survival/treatment – Maintainability of such claim.

Held: It is reasonable to assert that if wild animals, being the property of the government, cause harm to any citizen or farmers, it is the Government's duty to take responsibility for the loss – Citizens are entitled to claim compensation for any damage caused by wild animals, whether or not such claims are specifically mentioned in existing Govt. orders, schemes or provisions.

Dillip Kumar Behera V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 1086

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Judicial Review – Power of the Writ Court – Decision of the selection committee – When can be interfered?

Held: It is the settled position of law that the decision of the experts in a selection committee should not be ordinarily reviewed by the court assuming power as if it is an appellate authority but it is also trite that exception to such proposition is there when the very process of assessment is vitiated either on the ground of bias, malafides, arbitrariness or unreasonableness in the decision making process.

Sangram Keshari Swain V. Union of India & Ors.
2024 (III) ILR-Cut…… 996

CRIMINAL PROCEDURE CODE, 1973 – Section 102(1) – The petitioner's bank account remains frozen due to a contested transaction arising from the alleged misplacement of a cheque by Opp. Party No. 2 – The account containing a sum of Rs. 9.75 lakhs has been subjected to this restrictive measure to safeguard the ongoing investigation – Whether the account could remain frozen indefinitely due to the ongoing investigation.

Held: No – Prolonged restrictions on access to funds can severely disrupt an individual's ability to meet routine expenses, such as housing, healthcare, and other basic needs, thereby affecting their livelihood

and financial stability – Therefore, while investigative actions may necessitate temporary account restrictions, these measures should be strictly time-bound and proportionate, ensuring that they do not impose undue hardship beyond what is reasonably necessary for the investigation's objectives.

Suresh Chandra Mohapatra V. The Branch Manager, SBI, DNKL & Anr.

2024 (III) ILR-Cut…… 1097

CRIMINAL PROCEDURE CODE, 1973 – Sections 357 & 401 – Petitioner has been found guilty for commission of offence punishable U/ss. 341, 323, 34 of IPC – Even though the independent witnesses have not supported the prosecution case, there are other materials on record which clearly establish the guilt of the present petitioner – The petitioner was on bail all throughout during trial as well as during pendency of the appeal before the Appellate Court – Whether remanding the petitioner to jail custody after expiry of three decades would be justified.

Held: No – While upholding the conviction of petitioner, the sentences modified to the extent that the simple imprisonment awarded by the learned Court below is hereby set aside – In lieu thereof the petitioner shall pay fine of Rs. 5,000/- – Further in exercise of power U/s. 357 of the Cr.P.C. it is directed that aforesaid fine amount be paid to the victim as compensation.

Biranchi Nayak V. State of Orissa

2024 (III) ILR-Cut…… 1148

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Criminal proceeding initiated against the petitioner for the offences punishable under section 354-A of the I.P.C. r/w Section 10 of the POCSO Act – During pendency of the case there is a settlement between the parties – The petitioner and the Opposite Party No. 2 jointly prayed for quashing of the criminal prosecution initiated against the petitioner on the ground of settlement – Whether the criminal proceeding can be quashed in view of settlement between the parties.

Held: Yes – Both the parties prayed for quashing of the criminal prosecution – Hence, this is a fit case, where this Court should exercise the inherent jurisdiction contemplated U/s. 482 Cr.P.C. subject to deposit of cost of ₹ 1,00.000/- in the name of the victim girl.

CRIMINAL TRIAL – Offence U/s. 7 of the Prevention of Corruption Act, 1988 – Trap Case – Acceptance/recovery of illegal gratification – Presumption – Accused failed to discharge the burden of proof that he has accepted the tainted money as legal remuneration – But the prosecution failed to prove the demand of bribe – Order of conviction challenged – Whether mere acceptance of bribe is sufficient to fasten the guilt on the accused.

Held: No – In a trap case, mere receipt of bribe money by the accused is not sufficient to fasten guilt on the accused, in the absence of any other evidence with regard to the demand of the illegal gratification.

Dr. Subhanarayan Mohapatra V. State of Orissa
2024 (III) ILR-Cut…… 1288

CRIMINAL TRIAL – Offence Under Section 302 of IPC – There is no eye witness – The case is based on circumstantial evidence – The conclusive nature of the evidence, including ante-mortem injuries inconsistent with his rescue claim – The appellant's minor injuries inconsistent with his rescue claim and immediately called to the police instead of seeking medical help collectively negates any hypothesis of innocence – Whether the circumstances collectively proved the appellant's guilt. Held: Yes.

Ramamurty Gamango V. State of Odisha
2024 (III) ILR-Cut…… 1031

CRIMINAL TRIAL – The appellant found guilty U/ss. 302/364/201 of I.P.C. – The case is based on circumstantial evidence – Absence of motive when fatal to the case of prosecution.

Held: In a case which is based on circumstantial evidence motive holds a greater importance – In the instant case, the prosecution case is solely based on circumstantial evidence and failure on the part of prosecution to put forward even any probable motive for commission of ghastly crime, certainly weakens its stance and leaves a hollow in the chain of incriminatory circumstances.

Samara Mahakud V. State of Odisha
2024 (III) ILR-Cut…… 1054

EDUCATION – Admission of candidates for Post Graduate (Medical) and Post-MBBS NBEMS Diploma Courses in Government and Private

Medical Colleges of the State – When changing the cut-off date for determination of eligibility of an in-service candidate will not amount to change in the rule of the game after game had started/ been played?

Held: If a statutory rule, a policy or guidelines of the State within the meaning of Article 12 of the Constitution of India permits change mid-way through the recruitment process, it can be done, depending on the nature of such provision under the rules, policy and guidelines.

Sibasish Kumar Jena & Anr. V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 929

FAMILY COURTS ACT, 1984 ─ Section 19(4) r/w Section 401 of Cr.P.C. ─ Quantum of maintenance ─ Interference of Court ─ The petitioner/father challenges the order of learned Judge, Family Court, Puri where the learned Court directed to pay a sum of ₹ 10,000/- per month to Opp. Party child towards monthly maintenance ─ Whether ₹ 10,000/- is exorbitant for maintenance of child of two years and such order of maintenance should be interfered with.

Held: No ─ Children are to be maintained as per the standard of their parents ─ The father is not absolved of his duty to maintain his son, but when the father and mother both are earning, the expenses of the child has to be borne by both of them – The learned Judge, Family Court has assessed the monthly requirement of the child at ₹ 25,000/- per month and since mother is getting more salary than father, learned Judge, Family Court accordingly calculated the share of the father at ₹ 10,000/-, which does not appear to be erroneous or arbitrary or illegal.

Pravat Kumar Mohapatra V. Pradyut Priyadarshan Mohapatra
2024 (III) ILR-Cut…… 1276

FERTILIZER (INORGANIC, ORGANIC OR MIXED) CONTROL ORDER, 1985 – Clauses 19, 31 & 32-A – Petitioner is a proprietorship at Biragobindapur, Sakhigopal, Puri – The Firm being an authorized licensee/dealer under the Order, is engaged in the process of manufacturing of organic fertilizers and supplies the same to the Department of Agriculture & Farmers' Empowerment – In the present case petitioner challenges the action of the Authority cancelling the Letter of Authorization and confirmation of the same by the Appellate Authority – The petitioner pleaded that the fertilizer inspector on 11.09.2022 all of a sudden visited the factory & collected two samples for testing – Thereafter the entire premises consisting of the factory,

laboratory, godown etc was sealed on the ground of mixing of charcoal & chemicals in the manufacturing of organic fertilizers – The action of the authority challenged on the ground that without waiting the result of test report, the authority cannot seal the firm only mere on assumption of adulteration – On the other hand the test report does not indicate any kind of adulteration – Contentions of the parties considered – Whether the cancellation of Letter of Authorization and the confirmation of the same by the Appellate Authority is valid as per the Control Order, 1985.

Held: No – The Notified Authority has acted contrary to the provisions under the Control Order, which was erroneously confirmed by the Appellate Authority, as the test report does not indicate use of charcoal powders and chemicals as raw materials – Hence, both the orders passed by the Notified Authority so also by the Appellate Authority are set aside and quashed.

Ansupriya Satapathy V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 1258

FINANCE ACT, 1994 – Section 120, 125(1) of Chapter V r/w Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 – Section 120 introduces the Scheme – Section 125(1) provides for eligible persons to make a declaration under the Scheme – The petitioner applied under the Scheme indicating payment of entire demand by way of adjustment of the Input Tax Credit (ITC) – There is no dispute regarding eligibility of petitioner to apply under the Scheme – The Revenue disputed the payment/deposit and issued show cause notice while objecting the issuance of discharge certificate – Whether the petitioner is entitled to receive discharge certificate.

Held : Yes – Reason indicated with reference to case laws.

M/s. Orissa Stevedores Ltd. V. Designated Committee, Central GST & Customs, Bhubaneswar & Ors.
2024 (III) ILR-Cut…… 993

GENERAL CLAUSES ACT, 1897 – Section 27 – Effective date –The accused received the information from the postal authority on 23.04.2013 – The signature of postal authority below the endorsement with date is 30.04.2013 – Which is the effective date for presumption as to service of demand notice for calculation of limitation of fifteen days?

Held: The demand notice was presumed to be served on the respondent/ accused on 30.04.2013 by invoking Section 27 of the General Clauses Act, 1897.

Dillar Mohallik V. Pramila Das

2024 (III) ILR-Cut…… 1279

HIGH COURT OF ORISSA (DESIGNATION OF SENIOR ADVOCATE) RULES, 2019 – Rules 6 (5), 6 (6) – The petitioner, who is a practicing advocate of the High Court of Orissa, seeks a direction that the Permanent Committee be directed to submit his name along with a comprehensive assessment to the Full Court for consideration for designation as Senior Advocate – The petitioner applied for consideration for designation as a Senior Advocate under the 2011 notification notified on 13.06.2011 – While his application was pending, the Court formulated 2019 Rules as per the directive of Hon'ble Supreme Court of India in *Indira Jaising-Vrs.-Supreme Court of India through Secretary General and Others*, reported in (2017) 9 SCC 766 – Consequently, Advertisement No.1 dated 22.04.2019 was issued for Designation of Senior Advocates – Petitioner was requested to resubmit his application in the prescribed format – Accordingly, the petitioner submitted his application on 22.05.2019 – Defects found in his application – Notice issued on 02.07.2019 for compliance – The Permanent Committee recommended the names of O.Ps.4 to 8 to be designated as Senior Advocates on 08.08.2019 – On 09.08.2019 a notice was issued by the Court soliciting suggestions and views regarding the petitioner and other applicant-advocates (45 numbers) with a deadline of 08.09.2019 – Before the deadline expires, Advertisement No.2 dtd. 04.09.2019 was issued for designation of Senior Advocates – In the meantime O.P. Nos. 4 to 8 were declared Senior Advocates as per notification dtd. 19.08.2019 – Petitioner filed W.P.(C) No. 17009 of 2019 to annul the designation of O.P. Nos. 4 to 8 as Senior Advocates - O.P. Nos.9 and three other advocates filed W.P.(C) No. 17110 of 2019 for similar relief – Both the Writs were disposed of by a Division Bench in a common Judgment and Order dtd. 10.05.2021 by declaring sub-rule(9) of Rule 6 of 2019 Rules as *ultra vires* – Direction issued that the Full Court would render a new decision on the designation of Senior Advocates and to conclude the process by July 2021 – Is the Permanent Committee's decision not to forward the name of the petitioner for consideration, despite his appearance before the Committee for interaction/interview and to withhold his name, asserted to be entirely without jurisdiction?

Held: The Permanent Committee's role is confined to making an assessment and submitting a comprehensive assessment report to the Hon'ble Full Court for consideration – It does not have the authority to make final decisions on designation or exclude candidates from consideration based on its recommendations – The Permanent Committee is required to perform its overall assessment based on the point-based format outlined in APPENDIX-B after reviewing the materials provided by the Secretariat and, if necessary, interacting with the concerned Advocates – The Permanent Committee does not possess the discretion to withhold, eliminate, or defer the name of any advocate at this stage – The Full Court has the authority to review any advocate's case based on their overall merits, position of eminence at the Bar, seniority, legal acumen, and ethical standards, independent of the points assigned by the Permanent Committee – Directions issued to the Permanent Committee to conduct an overall assessment of the application of the petitioner filed afresh and to submit the petitioner's name to the Hon'ble Full Court along with its assessment report.

Banshidhar Baug V. Orissa High Court & Ors.
2024 (III) ILR-Cut…… 1009

HINDU MARRIAGE ACT, 1955 – Section 13(1) i-a and i-b – Mental Cruelty – Respondent wife alleged physical assault and had complained to police – Case was registered – Appellant and his family members were entangled as accused – Petition for anticipatory bail was filed and allowed by the Hon'ble Court and the same was challenged by the respondent before Hon'ble Supreme Court in Special Leave Petition but was unsuccessful – As a result, petitioner husband was not taken into custody – The respondent made allegation against brother of Appellant/husband which was not proved – The respondent further alleged that Appellant/husband physically assaulted respondent's father, broke his cell phone and tried to drag him to the car – But these allegations were not put to appellant in cross-examination though it was a case made out in the written statement – Whether making bald allegations in pleadings amounts to cruelty.

Held: Yes – The respondent was cruel to appellant and had deserted him.

Pramod Kumar Rout V. Puspita Rout
2024 (III) ILR-Cut…… 983

HINDU SUCCESSION ACT, 1956 – Section 22 – The preferential right to acquire property – The property in question is ancestral joint family property of the plaintiff and defendant Nos. 2 to 5 – The property continues to be jointly held – There is no cogent proof of partition of the disputed property among the co-sharers prior to execution of the sale deed dated 21.11.2008 – Whether the provision U/s. 22 of 1956 Act is applicable only to a proposed sale and not to a sale already executed.

Held: No – It would be immaterial whether the sale has been already effected or not – In other words, only because the property in question has already been sold cannot take away the valuable right of pre-emption of the other co-sharers as any other interpretation would serve to nullify the provision itself – The intention of the legislature is clear and unequivocal i.e. to prevent a stranger to a family from purchasing a joint family property without obtaining prior permission of the co-heirs.

Uttam Kumar Das V. Biswambar Das & Ors.
2024 (III) ILR-Cut…… 1139

INDIAN EVIDENCE ACT, 1872 ─ Section 106 – Burden of proof – The appellant who was present in the house stated that his wife has committed suicide and already died, without any attempt for medical intervention or verifying her condition with professional assistance – The actions reflect a deliberate choice not to seek immediate help, despite the possibility that his wife could have survived with medical care – The appellant failed to act appropriately as he was present at home when the incident took place – Effect of – In absence of any reasonable explanation under section 106 of the Act, significantly weakens his evidence and supports the prosecution's case of foul play rather than suicide.

Ramamurty Gamango V. State of Odisha
2024 (III) ILR-Cut…… 1031

INDIAN EVIDENCE ACT, 1872 – Section 106 – Principle of last seen theory – The dead body was found almost fifteen hours after the so called last seen of the appellant with the deceased – Whether the appellant is liable to discharge the burden U/s. 106 of the Act.

Held: No – There is no rigid proof as to whether the appellant knew the whereabouts of the deceased, especially when the time gap between the last seen and discovery of corpse of the deceased is a substantial one.

INTERPRETATION OF STATUTES :

(i) **Principle of Estoppel and Waiver** – Discussed and enumerated with reference to case laws.
(ii) **Doctrine of Merger** – Explained and case laws discussed.

Orissa State Financial Corporation, Cuttack V. Jyoti Prakash Das
2024 (III) ILR-Cut…… 1206

JUDICIAL DISCIPLINE – Whether Court's judgment/decision of one State or Jurisdiction will give effect to the laws and judicial decisions of another State or Jurisdiction.

Held: Yes – Judicial comity is recognized as an integral part of judicial discipline and judicial discipline is the corner stone of the judicial integrity – So every High Court must give due deference to the enunciation of law made by another High Court, even though it is free to charter a divergent direction.

Siba Prasad Dubey V. Union of India & Ors.
2024 (III) ILR-Cut…… 939

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 – Section 12 – Bail – Learned Special Judge (POCSO)-cum-Additional Sessions Judge refused bail of the Appellant on the grounds that the allegations are grave and serious in nature and in case of release of the CICL on bail, there is likelihood of his fleeing away from justice and chances of his interference with the witnesses, when the social investigation report as stated above does not reveal that the appellant was subjected to any form of abuse or was a victim of any incident earlier at any point of time – Whether the rejection of bail without considering the social investigation report is sustainable.

Held: No – The reasons assigned by the learned Special Judge (POCSO)-cum-Additional Sessions Judge are not fulfilling any of the criteria of the proviso to Sub-section (1) of Section 12 of the J.J.(CPC) Act, 2015 and when the mother guardian of the CICL is available in the house to look after him for the betterment of his future and when the bail has been refused without taking into the social investigation report and when there are inherent fundamental defects in the refusal order of bail of the appellant passed by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, the same cannot be sustained under law.

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 ─ Section 102 r/w Sections 10 and 12 ─ The Additional Juvenile Justice Board, Rourkela rejected the bail application ─ The Appellate Court also confirmed the order of rejection – Both the Courts assigned the reasons for such rejection – Whether bail can be granted to the petitioner.

Held: Yes ─ When opinion of social investigation report is not supported by any substantive materials/reasons, only on the basis of presumptions surmises/influences and guess works, the rejection of bail cannot be sustained under law.

MOTOR VEHICLES ACT, 1988 – Section 65, 211 r/w Central Motor Vehicles Rules, 1989 – Rule 81 r/w Rule 3 of 2 Amendment Rule 2021 – The Government of India, Ministry of Road Transport and Highways amended the Rule 81 of 1989 Rules by incorporating provision by way of substitution, for levying additional fees in case of delay in applying for renewal of certificate of registration and delay after expiry of certificate of fitness of a vehicle – Whether the Union of India have the competence to impose additional fees once the State Government have already framed Rules for processing delay application for renewal of fitness certificate by way of delegation of power U/s. 65 of Act.

Held: Yes – Section 211 of the Act vests power with the Central Government to make Rules.

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 r/w proviso of sub section (b) to Section 142 – The learned JMFC acquitted the accused from the charge U/s. 138 of Act clearly on the ground of delay in presenting the complaint before the concerned court without delay being condoned – Whether the acquittal is sustainable.

Held: No – In order to overcome the technicality of limitation period, the proviso has been inserted in the Act which came into force on 06.02.2003 by the legislature – It would, therefore, definitely be the duty of the Court to examine the issue of limitation in a proceeding under N.I. Act pragmatically in the interest of justice in-as-much as people approach the Court with a hope and trust to get justice and the Court is not there to perpetuate illegality committed by one or other party on the basis of technicality and that too, when special provision is there.

Dillar Mohallik V. Pramila Das

2024 (III) ILR-Cut…… 1279

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 142 proviso to sub-section (b) – Limitation – Whether a complaint is maintainable after the prescribed period of limitation of 30 days.

Held: Yes – The Court is not powerless to condone the delay in view of proviso appended to Section 142(b) of the Act, which prescribe that cognizance of a complain may be taken by the Court after the prescribed period of limitation of 30 days, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

Dillar Mohallik V. Pramila Das

2024 (III) ILR-Cut…… 1279

ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 R/W RULE 39(E) R/W 48 OF THE STAFF SERVICE RULES OF THE URBAN CO-OPERATIVE BANK LTD., 2003 – Whether the Bank can withhold the retirement benefit like encashment of leave salary on the ground of non-settlement of dues.

Held: No – It is settled law that leave encashment is a legal right of an employee akin to salary and cannot be denied in absence of any legal provision justifying such denial.

Nilakantha Dash V. Registrar of Cooperative Societies, Odisha & Ors.

2024 (III) ILR-Cut…… 1155

ORISSA GRAMA PANCHAYATS ACT, 1964 – Section 24(2)(a) and (c) – The petitioner was made aware of the vote of no-confidence to

be held on 8th November 2024 and that apart, effort was made to ensure service of notice on 23rd, 24th, 25th, October – The notice was issued on 19th October, the date on which it was dispatched – Whether any prejudiced is established against the petitioner.

Held: No – As the notice was signed on 19th October, 2024 and immediately dispatched on the same day, the notice as per section 24(2)(a) and (c) has been complied and no prejudiced has been established.

Kusum Deep V. State of Odisha & Anr.
2024 (III) ILR-Cut…… 1124

ODISHA HIGH COURT ORDER, 1948 – Article 4 r/w Clause 10 of the Letters Patent constituting the High Court of Judicature at Patna and Rule 6 of Chapter 111 and Rule 2 of Chapter VIII of High Court of Orissa Rules, 1948 – As per the Rule, the intra-court Appeal should be filed within thirty days from the date of Judgment – Whether 450 days delay should be condoned.

Held : In the event of the appeal is not preferred within the said stipulated period, it is the Bench which is empowered to use its discretion to grant further time, subject to appreciation of good cause.

State of Odisha & Anr. V. Pradipta Kumar Mohanty
2024 (III) ILR-Cut…… 949

ORISSA HIGHCOURT RULES, 1948 – Chapter VI, Rule 27(A) r/w Section 362 of Code of Criminal Procedure – Interim application has been filed with a prayer to recall/modify the Judgment passed in Criminal Revision – Whether the Court is empowered to modify on recall its Judgment passed U/s. 401 r/w 397 of Cr.P.C., though there is bar U/s. 362 of the Code.

Held: No – After an Order or Judgement in a criminal case filed U/s. 401 r/w 397 of the code is signed, the Court becomes *functus officio* and cannot alter or review the Judgement in view of the provision U/s. 362 of the Cr.P.C. – There is no provision for modification of the Judgement – The court is not inclined to modify on recall Judgement dated 15.05.2024 in Criminal Revision No. 133 of 2006, other than correcting the typographical error by deleting the words “in default” to rigorous imprisonment for a period of nine months” as no fine has been imposed.

Balgopal Satpathy V. State of Orissa

2024 (III) ILR-Cut…… 1102

ODISHA PANCHAYAT SAMITI ACT, 1959 – Section 44-A r/w Odisha Panchayat Samiti Election Rules, 1991 – Rule 46 r/w Art. 243(O) of the Constitution of India – Casual vacancies arose in the office of Chairman/Vice-Chairman in one Panchayat Samiti of the District Kalahandi & one Panchayat Samiti of the District of Ganjam due to resignation and death – Fill up of such vacancies – Notification on 12.08.2024 issued by the Election Commission to fill up Chairman only, not for the post of Samiti Member – Challenging such notification Writ Petitions filed & the Hon'ble Court while issuing notice in the matter passed an interim order on 21.08.2024 restraining the Commission to hold the election of the Chairman – The petitioners pleaded that as per the provision contained under Rule-46, the Commission should have taken step to fill up both the posts of Samiti Member along with the post of Chairman – It also contended that in view of the interim order dated 21.08.2024, the notification with regard to schedule of bye-election has lost its force – So there is no impediment on the part of the Commission to issue fresh notification simultaneously while filling up the vacancy of Samiti Member as well as the Chairman – On the other hand on behalf of the Commission it is contended that as per Section 44-A of the Act r/w Art. 243(O) of the Constitution, the Writ Petition is not maintainable – Only election petition is maintainable – Contentions of both the parties considered.

Held : In view of the interim order passed by this Court on 21.08.2024, the schedule of election prescribed in the Notification dated 12.08.2024 has lapsed and in order to conduct the election, a fresh Notification is required to be issued by the Commission by prescribing the schedule of election once again, placing reliance on the provisions contained under Rule-46 of the Rules, this Court while disposing all the 3 (three) Writ Petitions, direct the Commission to take step to fill up the vacancy arising out of the resignation and death of the Samiti Members of both the Panchayat Samiti in question as well as the casual vacancy to the post of Chairman.

Durga Prasad Mohanty V. State Election Commission Odisha, BBSR & Ors.

2024 (III) ILR-Cut…… 1173

ODISHA POLICE MANUAL RULES, 1940 – Rule 828 – Disciplinary Proceeding – Punishment of dismissal from service – Appointment of second enquiry officer – No reason was assigned while appointing the second Enquiry Officer – Re-assessment of facts and evidences brought in course of enquiry by the second Enquiry Officer – Appointment of second Enquiry Officer and procedure of the same questioned.

Held: Re-assessment of the facts and evidences brought in course of enquiry by the first Enquiry Officer is impermissible by appointing second Enquiry Officer only to give a separate finding – When the disciplinary authority disagreed with the enquiry report of the Enquiry Officer, the right procedure open for him was to record the reasons of his disagreement either for conducting further enquiry on specific suggested points or to proceed himself in accordance with law with reasons to be recorded – Therefore, as it is seen, the procedure adopted by the authorities in punishing the Petitioner for dismissal from the service is found completely illegal & unsustainable in the eye of law – For such violation of the procedure against the delinquent, the entire order of punishment is liable to be set aside.

Dhananjaya Dutta V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 1081

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 23 – Interim Maintenance – Affidavit disclosing asset & liability – Affidavit was filed by the wife but the same was not filed by the husband – Whether the affidavit of the wife is to be accepted straightaway at its face value without any exercise to ascertain the income of the Husband by the Court.

Held: It is reiterated that directly accepting the disclosure affidavit of the wife could unlikely to serve the purpose, as any such maintenance, even if interim, may not be realized, with an amount determined, which may go on the higher side, with the husband having no real means to comply and honour it – For a just decision, it would rather be a proper course for a Court to have a pragmatic approach to consider the materials made available by the wife and if not sufficient, on a subjective satisfaction reached at, to determine the quantum of maintenance even by undertaking an exercise demanding the employer and such other institutions including Bank to furnish relevant papers on the income and assets besides liabilities of the employee husband.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 23 – Interim Maintenance – Claim – Whether a wife can claim maintenance under this section independently even she is getting maintenance by virtue of order passed in other laws.

Held: Yes – Independent reliefs may be granted to an aggrieved wife under the D.V. Act besides other laws – There is no bar with necessary adjustment made with a set off, if there is an earlier order by any of the Courts – The only requirement while considering quantum of maintenance is that the latter Court allowing such maintenance under any law to direct set off to reconcile any such earlier orders, otherwise, it would result in granting the relief more than once causing severe prejudice to the husband.

SERVICE JURISPRUDENCE – Appointment – The State Selection Board issued Advertisement for the post of Lecturers in various discipline prescribing the qualification of 55% of mark in Master degree, in terms of the resolution issued by the government in the erstwhile Education and Youth Services Department on 25.07.1989 – The qualification prescribed by the Board is in contravention to the notification issued by University Grants Commission which has been accepted by the State Government vide resolution dated 31.12.1999 – Whether the process of selection in contravention to notification issued by U.G.C. is sustainable.

Held: No – In view of the resolution issued by the Department on 31.12.1999, the prescribed qualification for the post of Lecturer is not the qualification prescribed in the impugned advertisement – The process of selection initiated by the Board with the qualification so prescribed is not legal and justified.

SERVICE JURISPRUDENCE – Back wages – The petitioner was dismissed from service on account of conviction in criminal case –

Pursuant to his acquittal in appeal the petitioner was reinstated in service and discharged his duty as usual – The petitioner prayed for back wages for the period, which he was in absence of duty, the same was rejected by the competent authority – Whether the petitioner would be entitled to salary and other financial benefits upon his acquittal by the Appellate Court.

Held: No – When the petitioner has been reinstated in service pursuant to the order of acquittal passed by the Appellate Court, it was not the fault of the employer to dismiss him and therefore, the direction of the authority not to pay the financial benefits for his period of absence in duty resulting dismissal from service can't be faulted with.

Artabandhu Behera V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 1076

SERVICE LAW – Petitioner being an OAS officer challenges the action of the selection committee not giving promotion to the cadre of IAS pursuant to vacancy arose in the year 2018, as per IAS Recruitment Rules, 1954 r/w IAS (Appointment by Promotion) Regulations, 1955 on the ground that he is unfit due to imposition of minor punishment like Censure & Recovery and such punishment runs to the year 2018 as the recovery ended on 24.05.2018 vide departmental proceeding initiated in the year 2005 and culminated on 23.05.2012 – The action/order of the selection committee was challenged before the Tribunal but the Tribunal dismissed the application on the ground that the Tribunal cannot act as the appellate authority to the order passed by the competent authority/selection committee – On the other hand petitioner pleaded that the order passed in the year 2012 cannot be extended/run to the year 2018 whereas the authority pleaded that as the punishment was in force till the recovery amount paid by the petitioner i.e. in the year 2018, the decision of selection committee, not selecting the petitioner cannot be faulted – Pleadings of the parties considered by the Court.

Held: The currency of punishment cannot be stretched as per desire and interpretation of the selection committee making it dependent upon the last amount deposited by the petitioner **–** There are other defined penalties in the OCS (C.C & A) Rules, 1962 where the authority has to indicate the number of years to remain effect of such penalty and in such cases the currency of punishment shall have a cascading effect **–** In the present case the nature of penalty being recovery under no circumstances it can be till a future date depending upon the execution of the order as per discretion and whims of the authority in recovering

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2024 (III)-ILR-CUT-929

SIBASISH KUMAR JENA & ANR.
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 26430 & 27118 OF 2024]

22 NOVEMBER 2024

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

Issue for Consideration

Whether the eligibility criteria can be changed in the mid-way through the recruitment process.

Headnotes

(A) EDUCATION – Admission of candidates for Post Graduate (Medical) and Post-MBBS NBEMS Diploma Courses in Government and Private Medical Colleges of the State – When changing the cut-off date for determination of eligibility of an in-service candidate will not amount to change in the rule of the game after game had started/ been played?

Held: If a statutory rule, a policy or guidelines of the State within the meaning of Article 12 of the Constitution of India permits change mid-way through the recruitment process, it can be done, depending on the nature of such provision under the rules, policy and guidelines. (Para 18)

(B) CONSTITUTION OF INDIA, 1950 – Articles 12, 14 r/w Clause G(2) and NB of Guidelines for counseling and admission of candidates for Post Graduate (Medical) and Post-MBBS NBEMS Diploma Courses in Government and Private Medical Colleges of the State 2024-2025 – Whether by virtue of 'NB' under Clause G(2) of the Guidelines, it is obligatory for the State to change the cut-off date for determination of eligibility of in-service candidates.

Held: Even if a change is permissible under the extant Rules, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness. (Para 21)

(C) WORDS & PHRASES – Definition of the expression 'Subject to' – The expression 'subject to' means 'liable', 'subordinate', 'subservient', 'inferior', 'obedient', 'governed or affected by', 'provided that', 'provided', 'answerable for'. Reference is made to Ashok Leyland v. State of Tamil Nadu, **2004 (3) SCC 1**. (Para 21)

Citation Reference

Commissioner of Central Excise, Bhavnagar v. Saurashtra Chemicals Ltd., **2007 (10) SCC 352**; Christian Medical College Vellore Association v. Union of

India & Ors., **2020 (8) SCC 705 (Paragraph 34)**; B.S. Minhas v. Indian Statistical Institute & Ors., **1983 (4) SCC 582**; State of Jharkhand & Ors. v. Brahmputra Metallics Limited, Ranchi & Anr., **2023 (10) SCC 634**; Dr. Manisha Vidyabhasini & Anr. v. State of Odisha & Ors., **W.P.(C) No. 16772 of 2022**; Shikhar & Anr. v. National Board of Examination & Ors., **2022 SCC OnLine SC 425**; Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors., **2024 SCC OnLine SC 3184**; Secretary, Andhra Pradesh Public Service Commission Vs. B. Swapna & Ors., **(2005) 4 SCC 154;** K. Manjushree Vs. State of Andhra Pradesh & Ors.**, (2008) 3 SCC 512**; Saurashtra Chemicals Ltd. (supra) & Ashok Leyland v. State of Tamil Nadu, **2004 (3) SCC 1**- **referred to.**

List of Acts

Constitution of India, 1950

Keywords

Recruitment process, Change in the rule, Permissibility, Cut off date, Rule, Policy, Guidelines, Eligibility, In-service candidates, *Nota bene*.

Appearances for Parties

For Petitioners : Mr. Budhadev Routray, Sr. Adv., Mr. S.Sekhar,
Mr. Gautam Misra, Sr. Adv.
For Opp.Parties : Mr. K.C.Kar, Govt. Adv. [For State],
Mr. R.C.Mohanty [For DMET],
Mr. Devasis Panda, Mr. T.Meher, Mr. B.B.Choudhury,
Mr. P.K.Nayak [For Interveners]

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, C.J.

The State of Odisha in the Department of Health and Family Welfare has framed Post-Graduate (PG) (Medical) Selection Odisha "Guidelines for counseling and admission of candidates for Post-Graduate (Medical) & Post-MBBS NBEMS Diploma Courses in Government and private Medical Colleges of the State 2024-25" (the Guidelines for short). As manifest from its nomenclature, the Guidelines lay down the procedure for counselling and admission of candidates for PG (Medical) Courses in various Medical Colleges in the State of Odisha. Since Clauses-F, G and H of the said Guidelines are at the core of the controversy, it is deemed fit to reproduce them at the very outset:

> "**F. ELIGIBILITY**
>
> To be eligible a candidate must have passed MBBS from any MCl/NMC recognized institution / equivalent and must have the following criteria:
>
> 1. A candidate must be a permanent resident of Odisha.
>
> OR

A candidate of outside state but passed MBBS from any Govt Medical College of Odisha, who was admitted under 15 % All India Quota seats.

2. Must have qualified in NEET PG of current year, securing the qualifying marks as prescribed by MCI/NMC

3. Must have completed one year of Compulsory Rotatory Internship/Houseman ship by 15th August of current year of admission or as may be notified by MCC for the current year.

4. Must have registered himself/ herself under State/ Central Council of Medical Registration.

5. Candidates who are undergoing P.G.(Medical) Course in any subject and wants to take fresh admission she/ he has to comply the terms and conditions of bond and deposit appropriate monetary penalty at the time of admission.

G. CATEGORY OF CANDIDATES:

1. A Direct Candidate is one who at the time of application:

Is either unemployed or under employment of Government of Odisha/ Govt. of Odisha Public Sector Undertakings/ Govt. of India Public Sector Undertakings located in Odisha/ Defence services located in Odisha but not completed 3 years of service which includes all categories of employment like contractual/ temporary/ adhoc/regular by 31st March of the current year of admission.

2. An In-service candidate is one who at the time of application:

Is under employment in Government of Odisha/Govt. of Odisha Public Sector Undertakings/Govt. of India Public Sector Undertakings located in Odisha/ Defence service in Odisha and has completed a length of 3 years of service including all categories of employment like contractual/temporary/adhoc/regular by 31st March of the current year of admission excluding at-a stretch leave of any kind of 30 days or more. However, the maternity leave is exempted from this exclusion and shall be counted towards the length of three years of service.

3. Candidates under employment in regular service at the time of application in Government of Odisha/Govt. of Odisha Public Sector Undertakings/Govt. of India Public Sector Undertakings located in Odisha/Defence service located in Odisha shall be eligible to apply for the state quota diploma course.

NB: The cut off date of 31st March mentioned above is subject to change, as per any change in schedule of NEET PG and or All India Counseling which will be notified. (Highlights for emphasis)

H. ADDITIONAL WEIGHTAGE:

1. The additional weightage will be awarded to in-service category candidates vide section G.2. supra and shall be calculated for the number of days actually worked in institutions in remote/vulnerable areas till the 31st March of the current year of admission at the following rates subject to maximum of 30% of marks secured to be added to the NEET-PG score of the candidate while determining the merit.

a. Candidates who are working prior to dt. 21.03.2016 shall be awarded additional weightage @ 10% marks per year as per provisions of Govt. vide Notification No. ME-II-M-02/2015-5750/H/ dt.21.03.2016 vide Annexure A (enclosed)

b. Candidates who have joined service after dt. 21.03.2016 shall be awarded additional weightage @ 2.5%, 5%, 7.5% & 10% marks per year in VI, V2, V3 & V4 areas respectively vide Annexure B (enclosed).

2. Maternity leave period availed if any shall be eligible for calculation of additional weightage

3. Candidates applying for Diploma course shall not be awarded any additional weightage while drawing their merit list."

2. Based on 31st March of the current year i.e. 2024 as the cut-off date for determination of eligibility to be considered as In-service candidates under Clause-G(2) of the Guidelines as noted above, the petitioners do not qualify for the advantage of the additional weightage under Clause-H of the said Guidelines. The entire case of the petitioners is based on the 'NB' under Clause-G of the Guidelines as quoted and highlighted above, which stipulates that cut-off date of 31st March mentioned in Clause-G is subject to change, as per any change in the schedule of NEET PG and/or All India Counselling, which will be notified.

3. It is the petitioners' case that there have been changes in the schedule of NEET PG and, therefore, the cut-off date of 31st March 2024 being subject to change as per the Guidelines, ought to have been suitably altered by way of notification. The petitioners are accordingly seeking a direction to the opposite parties to alter the said cut-off date.

4. It is an admitted fact that the NEET PG was initially notified to be tentatively held on 03.03.2024. Later, through notice dated 09.01.2024 issued by National Board of Examinations in Medical Sciences, New Delhi (NBEMS), the tentative date of examination of NEET PG 2024 was rescheduled and declared to be held on 07.07.2024. Further, the NBEMS subsequently came out with another notice dated 16.04.2024 inviting applications for National Eligibility-cum-Entrance Test, NEET PG 2024 whereby the date of examination was declared as 23.06.2024. The examination was, however, postponed indefinitely by a notice dated 22.06.2024. On 05.07.2024, the date of examination was rescheduled, to be held on 11.08.2024, on which date the examination was held.

5. As both the writ applications are based on identical legal issues and factual matrix, they have been heard together and are being disposed of by the present common judgment and order.

6. It is the petitioners' case that since the date of NEET PG 2024 which was notified to be held on 03.03.2024, was re-scheduled to 07.07.2024 and subsequently preponed to 23.06.2024, and finally held on 11.08.2024, applying the aforesaid NB under Clause-G of the Guidelines, the cut-off date for determination of in-service candidates within the meaning of Sub-Clause-2 ought to have been suitably altered. The petitioners are falling short by few months to avail the advantage of getting weightage as in-service candidates under Clause-G (2). According to them, the NB under Clause-G makes it obligatory for the State Government to alter the cut-off date i.e. 31.03.2024, consequent upon the change in the schedule since the said cut-off date is subject to change in the schedule of NEET PG.

7. In the present case, intervention applications i.e. I.A. Nos.15074, 15076, 15173 and 15349 of 2024 [arising out of W.P.(C) No. 26430 of 2024] have been filed

on behalf such aspirants for admission to PG/Diploma courses based on NEET PG 2024 who qualify as in-service candidates in terms of Clause-G (2). They have opposed the relief sought in the present writ application on the ground that it will adversely affect the prospect of their admission into PG Courses because of inclusion of the candidates, who do not qualify as in-service candidates, strictly in terms of the aforesaid Clause-G (2).

8. We have heard at length Mr. Budhadev Routray, learned Senior Counsel and Mr. Gautam Misra, learned Senior Counsel appearing for respective petitioners; Mr. K.C. Kar, learned Government Advocate for the State-opposite parties; Mr. R.C. Mohanty, learned counsel appearing for the opposite party-DMET and Mr. Devasis Panda, learned counsel, Mr. T Meher, learned counsel, Mr. B.B. Choudhury, learned counsel and Mr. P.K. Nayak, learned counsel for respective interveners.

9. Mr. Budhadev Routray, learned Senior Counsel appearing on behalf of the petitioners in W.P.(C) No.26430 of 2024 has vehemently argued that it is obligatory for the State to change the cut-off date prescribed under Clause-G (2), by way of notification as the said cut-off date is subject to change in the schedule for NEET PG. He has argued that by not taking any decision, the State Government has ignored its own policy as disclosed in the NB under Clause-G of the guidelines. He has argued that it will cause serious prejudice to otherwise eligible candidates like the petitioners to get the advantage of Clause-G (2) read with Clause-H of the Guidelines because of the inaction on the part of the State Government in duly addressing re-fixation of cut-off date in terms of the said NB under Clause-G of the Guidelines.

10. Mr. Gautam Misra, learned Senior Counsel appearing on behalf of the petitioners in W.P.(C) No.27118 of 2024 has argued that the 'NB' under Clause-G enjoins a duty upon the State Government to extend the cut-off date as per the changes in the Schedule of NEET PG and/or All India Counselling. At the time of submission of application, though the candidates could not have known with certainty that they would be considered as in-service candidates, but they certainly had a legitimate expectation of being considered as in-service candidates as per Clause-G of the Guidelines. He has argued that if the cut-off date is extended as per the 'NB' of Clause-G of the Guidelines, no prejudice will be done to the State Government. Further, extension of cut-off dates would increase the talent pool of in-service doctors, which would foster further competition. He has lastly submitted that the petitioners may not have a vested right, but if extension is given in public interest, it would considerably help in recruitment of better doctors. He has argued that the annotation 'NB' stands for *nota bene* which means 'note well' and is normally used to indicate that something is important and the reader should take note of it. He has emphasized on the significance of the expression "subject to", and has relied on the Supreme Court's decision in case of ***Commissioner of Central Excise, Bhavnagar v. Saurashtra Chemicals Ltd., 2007 (10) SCC 352***, paragraph-13 of which reads as under:

"13. A beneficent statute may have to be considered liberally but where a statute does not admit of more than one interpretation, literal interpretation must be resorted to. The provision allows taking of credit but the same is circumscribed by the condition as is apparent from the use of the words "subject to" and is limited to an amount not exceeding 50% of the duty paid on such capital goods. The term "subject to" in the context assumes some importance. In Ashok Leyland Ltd. v. State of T.N. [(2004) 3 SCC 1] this Court held: (SCC p. 36, para 79)

" 79. ...'Subject to' is an expression whereby limitation is expressed. The order is conclusive for all purposes."

This Court further noticed the dictionary meaning of "subject to" stating: (SCC p. 38, paras 92-93)

"92. Furthermore, the expression 'subject to' must be given effect to.

93. In Black's Law Dictionary, 5th Edn. at p. 1278, the expression 'subject to' has been defined as under:

'Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for. Homan v. Employers Reinsurance Corpn. [345 Mo 650 : 136 SW 2d 289, 302] ' "

(See also S.N. Chandrashekar v. State of Karnataka [(2006) 3 SCC 208].)"

10.1. He has argued that it is obligatory for the State to give effect to the expression "subject to" which has been defined in the Black's Law Dictionary (5th Edition) Page-1278 to 'mean liable', 'subordinate', 'subservient', 'inferior', 'obedient to', 'governed or affected by', 'provided that', 'provided', 'answerable for'. Emphasizing his submission that merits should be given primacy in the matter of selection for admission to PG Courses, he has relied on the Supreme Court's decisions in case of ***Christian Medical College Vellore Association v. Union of India and others, 2020 (8) SCC 705*** (Paragraph 34) and ***B.S. Minhas v. Indian Statistical Institute and others, 1983 (4) SCC 582.***

10.2. Relying on the Supreme Court's decision in case of ***State of Jharkhand and others v. Brahmputra Metallics Limited, Ranchi and another, 2023 (10) SCC 634***, he has argued that the petitioners had a legitimate expectation, in view of disclosure made in the Guidelines, that the cut-off date stipulated in Clause-G (2) being subject to change in the date of examination, would be altered as the date of examination was initially rescheduled, postponed, preponed and, thereafter, finally held on 11.08.2024. He has argued that in the said background, the State Government ought to have taken decision on the point of re-determination of the cut-off date under Clause-G (2).

11. A counter affidavit has been filed in W.P.(C) No.26430 of 2024 on behalf of opposite parties No.2 and 4. A plea has been taken that at no point of time, the petitioners and similar candidates had raised any objection as regards a stipulation made in Clause-G of the Guidelines fixing 31st of March of the current year as the cut-off date. The State of Odisha has heavily relied on a decision rendered by a co-ordinate Bench of this Court dated 30.08.2022 passed in W.P.(C) No.16772 of 2022 (***Dr. Manisha Vidyabhasini and another v. State of Odisha and others***) in relation

to NEET PG 2022. In the said case, a corrigendum notice for PG Guidelines 2022-23 pertaining to the cut-off date for in-service category and completion of one year compulsory rotating internship/housemanship for direct candidates for counselling and admission of candidates for PG (Medical) Courses was under challenge. In that case, the cut-off date for completion internship was fixed to 31.05.2022 which was 31st March for every year. A Division Bench of this Court quashed the change in cut-off date relating to eligibility criteria on the reasoning that the conditions stipulated under Sub-Clause-2 of Clause-G of the Guidelines could not be changed as that would amount to changing the rule of the game after the game had been played.

Mr. R.C. Mohanty, learned counsel appearing on behalf of the opposite party-DMET has also placed reliance on the Supreme Court's decision in the case of ***Shikhar and another v. National Board of Examination and others***, ***2022 SCC OnLine SC 425*** wherein the Supreme Court declined to disturb the schedule as that would have affected other students who fulfilled the requirement as per the cut-off date of 31st July, 2021 for completion of internship. He has submitted that this Court may not interfere in the matter of fixation of the cut-off date for determination of eligibility condition for qualification as in-service candidates.

12. Learned counsel appearing on behalf of the intervenors have heavily relied on the decisions in case of ***Dr. Manisha Vidyabhasini*** (*supra*) and ***Shikhar v. National Board of Examination*** (*supra*) and have submitted that any change in the cut-off date for determination of eligibility against the seats meant for in-service candidates will amount to changing the game after the game has started. Reliance has also been placed on a recent constitution Bench decision (5-Judge) of the Supreme Court dated 07.11.2024 in Civil Appeal No.2634 of 2013 in case of ***Tej Prakash Pathak & others v. Rajasthan High Court & others*** reported in ***2024 SCC OnLine SC 3184*** to bolster the said legal submission.

13. In reply, Mr. Routray, learned Senior Counsel appearing on behalf of the petitioners has submitted that the decision in case of ***Dr. Manisha Vidyabhasini*** (*supra*) has no application since in the NB under Clause-G of the present guidelines, there is specific stipulation based on conscious decision of the State Government that the cut-off date of 31st March for determining the eligibility criteria for in-service candidates is subject to change depending on change in the date of examination. The said clause requires the competent authority to take a decision if there is any change in the date of NEET PG-2024, he contends.

14. Based on the pleadings on record and rival submissions advanced on behalf of the parties as noted above, the following questions have emerged for this Court to consider for due adjudication of the claim raised by the petitioners:-

> ***(i)*** Whether the relief sought for by the petitioners for changing the cut-off date for determination of eligibility of an in-service candidate deserves to be declined in the light of a co-ordinate Bench decision in case of ***Dr. Manisha Vidyabhasini*** *(supra) ?*
>
> ***(ii)*** Whether any change in the cut-off date for determination of eligibility of in-service candidates applying the 'NB' under Clause G of the guidelines will amount to change of

the rule of the game after the game had started/been played, and, therefore, impermissible, applying the principle reiterated in various decisions of the Supreme Court, recently reiterated by the Constitution Bench in case of ***Tej Prakash Pathak*** *(supra) ?.*

(iii) Whether by virtue of 'NB' under Clause G(2) of the guidelines, it is obligatory for the State to change the cut-off date of 31st March for determination of eligibility of in-service candidates consequent upon the change of date for NEET P.G. 2024. ?

15. Needless to reiterate that the entire controversy in the present case revolves around application of the 'NB' under Clause G of the guidelines. On a deeper scrutiny and analysis of Clause G of the guidelines, it can be easily discerned that the cut-off date for determination of the in-service candidates i.e. 31st March is subject to change because of the 'NB' which states in no uncertain terms that the said cut-off date is subject to change, as per any change in the schedule of NEET P.G. and/or All India Counselling, which will be notified. The decision rendered in the case of ***Dr. Manisha Vidyabhasini*** *(supra)* by this Court related to NEET PG 2022 wherein similar cut-off date of 31st March was prescribed to determine eligibility of in-service candidates. NEET P.G. 2022 was rescheduled by NBEMS which was earlier fixed. After publication of the result, a corrigendum was issued enhancing the cut-off date from 31.03.2022 to 31.05.2022, which was under challenge in the case of ***Dr. Manisha Vidyabhasini*** *(supra)* on the ground, *inter alia*, that after publication of result, in the midst of the selection process, issuance of the said corrigendum changing the cut-off date from 31.03.2022 to 31.05.2022 amounted to changing the rules of the game after the game was played, which was impermissible. Clause G of the guidelines issued for NEET P.G. 2022 has been quoted in the decision in the case of ***Dr. Manisha Vidyabhasini*** *(supra).* It appears from paragraph 10 of the decision in the case of ***Dr. Manisha Vidyabhasini*** *(supra)* that there was no stipulation akin to the 'NB' under Clause-G of the Guidelines for NEET P.G. 2022. In the said circumstance, after having noticed the Supreme Court's decisions in the cases of ***Secretary, Andhra Pradesh Public Service Commission Vs. B. Swapna and Others*** in *(2005) 4 SCC 154*; ***K. Manjushree Vs. State of Andhra Pradesh and Others*** reported in *(2008) 3 SCC 512*, this Court concluded that the issuance of the corrigendum changing the cut-off date for determination of the eligibility of in-service candidates was not legally sustainable. The Division Bench, in the case of ***Dr. Manisha Vidyabhasini*** *(supra)* had had no occasion to deal with the stipulation in the nature of 'NB' under Clause G of the guidelines.

16. We are, accordingly, of the opinion that the decision rendered in the case of ***Dr. Manisha Vidyabhasini*** *(supra)* is not applicable in the present case on the point of competence of the State Government to alter the cut-off date for determination of eligibility condition of in-service candidates, since the NB under Clause-G of the Guidelines permits the State to change the cut-off date by notification at appropriate stage, if there is any change in the schedule of NEET PG or All-India Counselling.

We answer the first question accordingly.

17. Moving on to the second question, whether if any change is made in the cutoff date fixed in Clause-G(2) of the guidelines by applying the 'NB' as noted above, that will amount to changing the game after the game had already started, applying the law laid down in the latest decision of the Supreme Court in the case of ***Tej Prakash Pathak and Others Vs. Rajastahan High Court and Others*** reported in ***2024 SCC OnLine SC 3184,*** it would apt to reproduce paragraph 42 of the said decision, which contains the conclusions and lays down the law in clear terms as under:-

> **"42.** We, therefore, answer the reference in the following terms:
>
> (1) Recruitment process commences from the issuance of the advertisement calling for applications and ends with filling up of vacancies;
>
> ***(2) Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness;***
>
> (3) The decision in ***K. Manjusree*** (supra) lays down good law and is not in conflict with the decision in ***Subash Chander Marwaha*** (supra). ***Subash Chander Marwaha*** *(supra)* deals with the right to be appointed from the Select List whereas ***K. Manjusree*** *(supra)* deals with the right to be placed in the Select List. The two cases therefore deal with altogether different issues;
>
> (4) Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/non-arbitrary and has a rational nexus to the object sought to be achieved.
>
> (5) Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the Rules are non-existent, or silent, administrative instructions may fill in the gaps;
>
> (6) Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list."
>
> (Highlights for emphasis)

18. The Supreme Court has ruled in the case of ***Tej Prakash Pathak*** *(supra)* that the eligibility criteria cannot be changed mid-way through the recruitment process "unless the extant rules so permits", or the advertisement, which is not contrary to the extant rules, so permits. It can be easily culled out, therefore, that if as statutory rule, a policy or guidelines of the State within the meaning of Article 12 of the Constitution of India permits change mid-way through the recruitment process, it can be done, depending on the nature of such provision under the rules, policy and guidelines.

19. The Supreme Court in the case of ***Tej Prakash Pathak*** *(supra),* has, however, added that even if such change is permissible under the extant rules or the

advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness. As has been noticed in the present case, the policy of the Government as disclosed in the guidelines makes the cut-off date, subject to change by way of notification, as per change in the schedule of NEET PG or All-India Counselling. We, therefore, negative the contention raised on behalf of the interveners that no change is permissible at all, in any circumstances, in the cut-off date for determination of eligibility of in-service candidates on the principle of impermissibility of change in the rule of game after the game begins. Such contention will make the 'NB' under Clause G of these said guidelines completely redundant and nugatory.

The second question stands answered accordingly.

20. We now move on to the last question framed by us hereinabove, i.e., whether it is mandatory for the competent authority to change the said cut-off date, that being subject to change as per any change in the schedule of NEET PG or All-India Counselling, if there is any change in schedule of NEET P.G. 2024.

21. As has been noted above, Mr. Gautam Misra, learned Senior Advocate has attempted to convince the Court that the cut-off date of 31st March being subject to change in the schedule of NEET PG, once the NEET PG, 2024 was re-scheduled, it was obligatory for the competent authority to alter the said date by notification. He has taken us to the definition of the expression 'subject to' as noticed in the case of ***Saurashtra Chemicals Ltd***. *(supra)* and ***Ashok Leyland v. State of Tamil Nadu***, reported in ***2004 (3) SCC 1***. The expression 'subject to' as held by the Supreme Court in ***Ashok Leyland*** (supra) means 'liable', 'subordinate', 'subservient', 'inferior', 'obedient to'; 'governed or affected by'; 'provided that'; 'provided'; 'answerable for'. He submits that if the correct meaning of the expression 'subject to' is applied in the 'NB' of Clause-G, it would be mandatory for the competent authority to alter the cutoff date. The said submission, though at first blush appears to be forceful but deserve to be rejected for the reason that if the said submission is to be accepted, any change in the date of any nature will impact the cut-off date under Clause G (2) of the guidelines. In our opinion, the said expression 'subject to' will have to be read in the context in which the same has been used under Clause G (2). An answer lies directly in the Constitution Bench decision in the case of ***Tej Prakash Pathak*** *(supra),* wherein the Supreme Court has laid down that even if a change is permissible under the extant Rules, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness.

22. Situated thus, on contextual interpretation of the 'NB', in our opinion, the said cut-off date in Clause G (2) of the guidelines is subject to change, as may be notified by the State Government, consequent upon any change in the schedule of NEET P.G. or All India Counselling. In our considered view, though it is not obligatory for the competent authority to change the cut-off date, with every change in the schedule of NEET P.G., in view of the facts and circumstances of the present case and various changes in the dates of NEET P.G. 2024, the State Government ought

to have taken a decision whether any change in the cut-off date under Clause G (2) of the guidelines was required or not.

23. Accordingly, we dispose of the writ applications with the following directions and observations:

> "(i) The Director of Medical Education and Training (DMET), Odisha, Bhubaneswar is directed to take a decision in the light of the NB below Clause G (2) of the Post Graduate (Medical Selection), Odisha guidelines for counselling and admission of candidates for Post Graduate/Diploma (Medical Course) in Medical Colleges of Odisha for 2024-25. As has been noticed, 31st March of current year of admission was prescribed as the cut-off date for considering the eligibility criteria of in-service candidates.
>
> (ii) The DMET is required to take a decision accordingly, as stipulated in the NB below Clause G (2), that the said cut-off date of 31st March is subject to change, to be notified, as per any change in the schedule of NEET P.G. and/or All India Council.
>
> (iii) We make it clear that this order shall not be construed as a direction to the DMET, Odisha to change the cut-off date of 31st March. The decision must be taken by 25.11.2024."

24. All interlocutory applications stand disposed of.

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

Result of the case :
Writ applications and interlocutory applications disposed of.

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2024 (III) ILR-CUT-939

SIBA PRASAD DUBEY
V.
UNION OF INDIA & ORS.

[W.P(C) NO. 23387 OF 2022 & BATCH]

26 NOVEMBER 2024

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

Issue/s for Consideration

Whether the Union Govt. have the competence to impose additional fees once the State Govt. have already framed Rules under the Motor Vehicles Act & the Rules thereunder.

Headnotes

(A) MOTOR VEHICLES ACT, 1988 – Section 65, 211 r/w Central Motor Vehicles Rules, 1989 – Rule 81 r/w Rule 3 of 2 Amendment Rule 2021 – The Government of India, Ministry of Road Transport and Highways amended the Rule 81 of 1989 Rules by incorporating provision by way

of substitution, for levying additional fees in case of delay in applying for renewal of certificate of registration and delay after expiry of certificate of fitness of a vehicle – Whether the Union of India have the competence to impose additional fees once the State Government have already framed Rules for processing delay application for renewal of fitness certificate by way of delegation of power U/s. 65 of Act.

Held: Yes – Section 211 of the Act vests power with the Central Government to make Rules. (Para 18)

(B) JUDICIAL DISCIPLINE – Whether Court's judgment/decision of one State or Jurisdiction will give effect to the laws and judicial decisions of another State or Jurisdiction.

Held: Yes – Judicial comity is recognized as an integral part of judicial discipline and judicial discipline is the corner stone of the judicial integrity – So every High Court must give due deference to the enunciation of law made by another High Court, even though it is free to charter a divergent direction. (Para 19)

Citation Reference

Chennai City Auto Ootunargal Sangam Vs. The Secretary, Ministry of Road Transport and Highways, **2017 SCC OnLine Mad. 1550**; Dinabandhu Sahoo v. Union of India, **AIR 2019 Orissa 110**; 'K' Savakash Auto Rickshaw Sangha v. Union of India, **2024 SCC OnLine Bom. 970**; Jalkal Vibhag Nagar Nigam Vs. Pradeshiya Industrial & Investment Corporation, **(2021) SCC OnLine SC 960**; Sona Chandi Oal Committee and others Vs. State of Maharashtra, **(2005) 2 SCC 345**; Neon Laboratories Vs. Medical Technologies Limited, **(2016) 2 SCC 672** – **referred to.**

List of Acts

The Motor Vehicles Act, 1988, The Central Motor Vehicles Rules, 1989

Keywords

Competence of the Union Govt, Framing of the Rule, Judicial discipline, Judicial Comity.

Case Arising From

Challenging the validity of Central Motor Vehicles (23rd Amendment) Rules, 2021 issued by a notification dated 04.10.2021 by the Ministry of Road Transport and Highways, Govt. of India to the extent Rule 81 of the Central Motor Vehicles Rules, 1989 has been amended.

Appearances for Parties

For Petitioner : Mr. Subash Ch. Pani, Mr. B.M. Sarangi
For Opp.Parties : Mr. P.K. Parhi, Deputy Solicitor General,
Mr. D.R. Bhokta, CGC,
Mr. P.P. Behera, CGC, Mr. Manoj Ku. Pati, CGC,
Mr. J. Naik,CGC, Mr. B.K. Pardhi, CGC,
Ms. Babita Sahu, CGC, Ms. J. Sahoo, CGC,
Mr. B. Maharana, CGC, Mr. B.S. Rayaguru, CGC,
Mr. D. Gochhayat, CGC,
Mr. Pravakar Behera, SC (Transport)

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, C.J.

1. Since all these writ applications involve identical question of law and facts, with the consent of the parties, they have been heard together and are being disposed of by the present common judgment and order.

2. The petitioners have put to challenge, in the present batch of writ applications, the validity of Central Motor Vehicles (Twenty Third Amendment) Rules, 2021 (the Amendment Rules, 2021 for short) issued by a notification dated 04.10.2021 by the Ministry of Road Transport and Highways, Government of India to the extent Rule 81 of the Central Motor Vehicles Rules, 1989 (in short, 'CMV Rules) has been amended by incorporating provision by way of substitution, for levying additional fee in case of delay in applying for renewal of certificate of registration (Sl. No.4 Note 2) and delay after expiry of certificate of fitness of a vehicle (Note under Sl. No.11A) of the Table. Rule 3 of the Amendment Rules, 2021 is being reproduced hereinbelow:-

"3. In the said rules, in rule 81, -

(i) after the proviso, the following proviso shall be inserted, namely: -

"Provided further that, in case the vehicle is registered on submission of ''Certificate of Deposit', the fee for issue of certificate of registration shall not be levied.";

(ii) in the TABLE,-

(a) For serial number (4) and the entries relating thereto, the following shall be substituted, namely:-

Sr. No.	*Purpose*	*Amount*	*Rule*	*Section*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
"4.	*Issue of certificates of registration and assignment of new registration mark or renewal of certificate of registration.-*		*47(1) 52(1) 54(1) 76(1) 78(1)*	
	(a) Invalid carriage	*Fifty rupees*		

	(b) Motor cycle: *(1) New registration* *(2) Renewal of registration*	 *(1)Three hundred rupees* *(2)One thousand rupees*		
	(c) Three wheeler/ Quadricycle: *(1) New registration* *(2) Renewal of registration*	 *(1) Six hundred rupees* *(2) Two thousand five hundred rupees*		
	(d) Light motor vehicle: *(1) New registration* *(2) Renewal of registration*	 *(1) Six hundred rupees* *(2) Five thousand rupees*		
	(e) Medium Goods/ Passenger vehicle.	*One thousand rupees*		
	(f) Heavy Goods/ Passenger vehicle. -	*One thousand five hundred rupees*		
	(g) Imported motor vehicle (Two/Three wheeled): *(1) New registration* *(2) Renewal of registration*	 *(1) Two thousand five hundred rupees* *(2) Ten thousand rupees*		
	(h) Imported motor vehicle (Four or more wheeled): *(1) New registration* *(2)Renewal of registration*	 *(1) Five thousand rupees* *(2) Forty thousand rupees*		
	(i) Any other vehicle not mentioned above *(1) New registration* *(2) Renewal of registration*	 *(1) Three thousand rupees* *(2) Six thousand rupees*		
	Note 1: Additional fee of two hundred rupees shall be levied if the certificate of registration is a smart card type issued or renewed in Form 23A. ***Note 2: In case of delay in applying for renewal of certificate of registration, an additional fee of three hundred rupees for delay of every month or part thereof in respect of motor cycles and five hundred rupees for delay of every month or part thereof in respect of other classes of non- transport vehicles shall be levied.'';***			
(b) after serial number (10) and entries relating thereto, the following shall be inserted, namely: -				

"10A.	*Conducting test of a vehicle for grant and renewal of certificate of fitness for motor vehicles older than 15 years:*		*62(2)*	
	(a) Motorcycle	*(i) Manual: Four hundred rupees (ii) Automated: Five hundred rupees*		
	(b) Three wheeled or light motor vehicle or quadricycle	*(i) Manual: Eight hundred rupees (ii) Automated: One thousand rupees*		
	(c) Medium goods / passenger motor vehicle	*(i) Manual: Eight hundred rupees (ii)Automated: One thousand three hundred rupees*		
	(d) Heavy goods or passenger motor vehicle	*(i) Manual: One thousand rupees (ii) Automated: One thousand five hundred rupees.";*		
(c) after serial number (11) and the entries relating thereto, the following shall be inserted, namely: -				
"11A.	*Grant or renewal of certificate of fitness for motor vehicles (transport) older than 15 years:*		*62(2)*	
	(a) Motorcycle	*One thousand rupees*		
	(b) Three wheeled or quadricycle	*Three thousand five hundred rupees*		
	(c) light motor vehicle	*Seven thousand five hundred rupees*		
	(d) Medium goods or passenger motor vehicle	*Ten Thousand rupees*		
	(e) Heavy goods or passenger motor vehicle	*Twelve thousand five hundred rupees*		
Note: Additional fee of fifty rupees for each day of delay after expiry of certificate of fitness shall be levied."				

(Highlighted for emphasis)

2.1. The amendment Rules, 2021 have come into force with effect from 01.04.2022, by operation of sub-rule 2 of Rule 1 thereof.

3. Rule 81 of the CMV Rules prescribes the fees leviable under the provisions of Chapter-III (Registration of Motor Vehicles), as specified in the table contained therein.

4. It is evident that the following amendment has been made to levy additional fee in case of delay in applying for renewal of certificate of registration:-

> *"(i) Sl. No.4-Note 2: In case of delay in applying for renewal of certificate of registration, an additional fee of three husband rupees for delay of every month or part thereof in respect of motor cycles and five hundred rupees for delay of every month or part thereof in respect of other classes on non-transport vehicles shall be levied."*

5. In relation to grant or renewal of certificate of fitness of motor vehicles (transport) older than 15 years, a provision has been made for additional fee of fifty rupees for each day of delay after expiry of certificate of fitness. The amended Serial No.11A reads thus:-

> *"(ii) Sl No. 11A- Grant or renewal of certificate of fitness for motor vehicles (transport) older than 15 years- Note- Additional fee of fifty rupees for each day of delay after expiry of certificate of fitness shall be levied."*

6. The petitioners in W.P.(C) No.27960 of 2023 and 27962 of 2023 are aggrieved by imposition of additional fee under Sl. No.4 Note-2 in case of delay in renewal of registration certificate. The imposition of additional fee in the case of renewal of fitness certificate under Sl. No.11A-Note is under challenge in the rest of the cases.

7. We have heard Mr. Subash Chandra Pani and Mr. B.M. Sarangi, learned counsel appearing for the petitioners, Mr. P.K. Parhi, learned Deputy Solicitor General of India (DSGI) for the Union of India and Mr. P. Behera, learned Standing Counsel for the Transport Department and Mr. D.R. Bhokta, Mr. P.P. Behera, Mr. Manoj Kumar Pati, Mr. J. Naik, Mr. B.K. Pardhi, Ms. B. Sahoo, Ms. J. Sahoo, Mr. B. Maharana, Mr. B.S. Rayguru and Mr. D. Gochhayat, learned Central Government Counsel appearing for the respective opposite parties.

8. It is the common case of the petitioners that prior to issuance of the impugned notification, a notification was issued by the Government of India in 2016 revising the fee structure by imposing additional fee, which notification was challenged before the Madras High Court. A Division Bench of Madras High Court, by a judgment rendered on 03.04.2017 in ***W.P. No.1598 of 2017 (Chennai City Auto Ootunargal Sangam Vs. The Secretary, Ministry of Road Transport and Highways),*** reported in ***2017 SCC OnLine Mad. 1550*** and batch of cases had struck down the said 2016 notification to the extent, it had sought to impose additional fee. A challenge to the judgment of Madras High Court is pending adjudication by the Supreme Court. It is further case of the petitioners that in the light of the Madras High Court decision in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra)*, this High Court had quashed the said notification in the case of ***Dinabandhu Sahoo v. Union of India (AIR 2019 Orissa 110)***. Other High Courts had also quashed the notification as was done by the Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** (supra).

9. Referring to various provisions of the MV Act and the CMV Rules, he has submitted that in exercise of powers conferred under Sections 28, 65, 96, 111 and 138

of the MV Act, the State of Odisha has already made Odisha Motor Vehicle Rules, 1993 (in short, 'OMV Rules'), Chapter III of which deals with registration of motor vehicles. He has submitted that Rule 22 (6) of the OMV Rules prescribes that an application for renewal of the certificate of fitness shall be made in Form-II not less than thirty days before the date of expiry of the certificate and the owner or the person in control of the vehicle shall cause the vehicle to be produced for inspection on such date and at such time and place as appointed under Sub-rule (4) thereof. Sub-rule (7) of Rule 22 of the OMV Rules further lays down that if the owner or the person in control of the vehicle fails to make an application under sub-rule (6) of the said Rules, he shall be liable to pay a penalty of Rs.500/- in addition to the fees prescribed for renewal of fitness certificate and inspection of motor vehicle. The proviso to sub-rule (7) empowers the Registering Authority to condone the delay in making the application, if it is satisfied that the owner or the person in control of the vehicle was prevented to make such application within the stipulated period on medical grounds.

10. Rule 34(1) of the OMV Rules prescribes "charges for delayed registration or renewal. The said Rule reads as under:

> *"**34. Charges for delayed registration or renewal**.*
>
> *(1) If the owner of a vehicle fails to make an application for registration under Sub-section (1) or for renewal of certificate of registration under Sub-section (8) of section 41, within the period prescribed under Rules 47 and 52 respectively of the Central Motor Vehicles Rules, 1989, the registering authority may having regard to the circumstances of the case, require the owner to pay, in lieu of any action that may be taken against him under section 177, an amount of rupees twenty-five for the delay extending up to thirty days, rupees fifty for the delay for any period exceeding thirty days up to ninety days and rupees one hundred for the delay for any period exceeding ninety days."*

He has, accordingly, submitted that since Rules have already been framed under OMV Rules for processing delayed application for renewal of fitness certificate and renewal of registration certificate by way of delegation of power under Section 65 of the MV Act to the State Government, in absence of any amendment in the MV Act, the Union of India does not have the competence to impose additional fee and, therefore, the said notification is liable to be struck down.

11. Referring to the decision in the case of Madras High Court in ***Chennai City Auto Ootunargal Sangam*** *(supra)*, he has submitted that it has been clearly held, dealing with the earlier 2016 notification, that the provisions of the MV Act do not provide for levy of fines in the above circumstances. Contrary to the law laid down by the Madras High Court in ***Chennai City Auto Ootunargal Sangam*** *(supra)*, the Union of India has issued the impugned notification without any amendment in the MV Act.

12. It may, however, be noted at this juncture that in a recent decision dated April 2, 2024 in Public Interest Litigation No.130 of 2022 ***('K' Savakash Auto Rickshaw Sangha v. Union of India)***, reported in *2024 SCC OnLine Bom. 970*, a

Division Bench of the Bombay High Court has interpreted Section 211 of the MV Act and has held that the said provision vests power with the Central Government to make Rules providing for levy of additional fee for processing delayed applications for certain purposes, such as, for seeking renewal of driving license, renewal of registration certificate of a vehicle, change of residence and transfer of ownership of vehicle. The Bombay High Court has, accordingly, held that levy of additional fees in this case, is in no manner a penalty, either directly or in disguise. The Bombay High Court, for reaching the said conclusion, has relied on the Supreme Court's decisions in the case ***Jalkal Vibhag Nagar Nigam Vs. Pradeshiya Industrial & Investment Corporation,*** reported in ***(2021) SCC OnLine SC 960*** and ***Sona Chandi Oal Committee and others Vs. State of Maharashtra,*** reported in ***(2005) 2 SCC 345*** and has concluded that levy of additional fee as prescribed under the provisions of 1980 Rules cannot be said to be any kind of deterrence rather, by making the provision for consideration of delayed application for renewal of driving license, registration of certificate of vehicle etc., the CMV Rules provide a facility to the vehicle owners' or drivers to seek renewal of registration of motor vehicle or driving license beyond the time limit prescribed for such purpose. The Bombay High Court has held in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* that charge of additional fee is not a penalty.

13. Mr. Pani, learned counsel has submitted that said decision of Bombay High Court in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* lays down an incorrect law by misinterpreting Section 211 of the MV Act. He has argued that when there is no ambiguity or absurdity in the language of the statute, there is no question of interpretation. Section 211 of the MV Act has no application to the present case as the notification in question has been issued under Section 64 of the MV Act and, therefore, the decision rendered by the Bombay High Court does not lay down the correct law. He has submitted that the decision of Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra)* has been followed by this Court in the case of ***Dinabandhu Sahu*** *(supra)* and, therefore, applying the legal reasoning adopted by the Division Bench of Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra)* this Court should declare the impugned provisions under the Amendment Rules as illegal and beyond jurisdiction.

14. Mr. P.K. Parhi, learned Deputy Solicitor General of India has submitted that the view taken by the Bombay High Court in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* is the legally correct view. This Court in the present batch of writ applications may not take a different view than what has been taken by the Bombay High Court in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* while interpreting the same set of Central Legislation which apply across thecountry. He has, accordingly, submitted that these applications should be disposed of in terms of the law laid down by the Bombay High Court.

15. The only question which has arisen in the present batch of writ applications, in the light of the aforementioned circumstances is, whether we should follow the

view taken by the Madras High Court in ***Chennai City Auto Ootunargal Sangam*** *(supra)* based on which a Division Bench of this Court had disposed of batch of writ applications in ***Dinabandhu Sahu*** *(supra)* or, should decline to entertain the challenge to Amendment Rules considering the fact that a Division Bench of Bombay High Court in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* has upheld the validity of the said Amendment Rules of 2021.

16. The Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** (supra), had the occasion to consider the question of the competence of fixing new fees structure by amending Rules 32 and 81 of the CMV Rules to the extent the same related to levy of additional fees, as the core issue. It appears from this Court's decision in the case of ***Dinabandhu Sahu*** *(supra)* that the petitioners in that case relied on the Madras High Court's decision in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra)* on the simple reasoning that unless the provisions in question were struck down, there would be different applications of the same provision in the State of Tamil Nadu and the State of Odisha, which is impermissible in view of Article 226(2) of the Constitution of India. Accepting the said contention, this Court in ***Dinabandhu Sahu*** *(supra)* held in paragraphs 11 and 12 as under:

> *"11. In view of the fact stated above, the impugned Notification No.1183 (E) dated 29/12/2016, more particularly, entry at Sl.No.11, Column No.3 of the table to Rule 81, which has been issued by the Central Government, is travelling beyond the scope of Act and the same is without authority of law. Therefore, the contentions of the petitioners are required to be accepted and the same is accepted in view of the fact that the notification has already been quashed and set aside by the Madras High Court. In view of operation of law the same is applicable to the State of Odisha also.*
>
> *Further, in view the observations made by the Madras High Court in its order/judgment delivered in Textile Technical Tradesmen Association (supra) and Chennai City Auto Ootunargal Sangam (supra), the notification is required to be quashed and set aside, therefore, the same is quashed and set aside.*
>
> *12. The parties are directed to abide by the decision of the Hon'ble Supreme Court. Since the Central Government has already challenged the impugned judgment of Madras High Court, they are not required to challenge this order. However, if the petitioners want to intervene in the application pending before the Hon'ble Supreme Court, it is open to the petitioners to intervene and prefer appropriate application to plead the case before the Supreme Court."*

17. However, after having discussed the provisions under Sections 110 and 211 of the MV Act, the Bombay High Court in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* held in paragraphs 15 and 17 as under:

> *"15. The Motor Vehicles Act has been enacted to take into account and provide for road transport technology, pattern of passenger and freight movements, development of road net work in the country and improved techniques in motor vehicle management. The power extended to Government in terms of sec.211 of the Act is for the levy of a fee as a quid pro quo for services offered by officers or authorities under the Act. The fee prescribed is thus designed to be commensurate to the service rendered by the authority. We fail to see any justification for the levy of an additional fee in the nature of the penalty when there is no change in the nature of service rendered by the authority under*

the Act particularly in the absence of any statutory backing for the same. The purpose, as is apparent from the recommendation of the committee is the fond hope that such levy would act as a deterrent for non-compliance of various provisions. Such non-compliance is however, a matter to be addressed using such powers as have been extended to the authorities. The Motor Vehicles Act and the Central Motor Vehicles Rules at present, only contain a provision authorizing the levy of a fee and nothing more. In this connection, we may refer to the judgement of the Supreme Court in re. State of U.P. and others Vs. Vam Organic Chemicals Ltd and others (AIR 2003 Supreme Court 4650) wherein there was a challenge to the levy of a fee on denaturalisation of alcohol. The Bench, quashing the levy, states as follows:

44. The question is (to borrow the language in Synthetics) whether in the garb of regulations a legislation, which is in pith and substance, as we look upon the instant legislation, a fee or levy which has no connection with the cost or expenses administering the regulation, can be imposed purely as a regulatory measure, Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures.

xxx xxx xxx

17. In view of the foregoing discussion, we find that the levy of additional fee under various heads as per the impugned notification is without authority and such levy of additional fee is, therefore, liable to be struck down."

18. The Bombay High Court in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* has considered the Madras High Court's decision rendered in ***Chennai City Auto Ootunargal Sangam*** *(supra)* and has held in paragraph 24 as under:

"24. With all respect at our command to the judgment of the Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra), we may observe that the said judgment does not attempt to interpret Section 211 of the parent Act, specially, the interpretation which can be ascribed to Section 211 on account of occurrence of the phrases (a) "notwithstanding the absence of any express provision to that effect" and (b) "and for any other purpose or matter involving the rendering of any services".*

After noticing the law laid down by the Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra), the* Bombay High Court in a recent decision in the case of ***K' Savakash Auto Rickshaw Sangha*** *(supra)* has conclusively held that Section 211 of the MV Act vests power with the Central Government to make Rules providing for levy of additional fee for processing delayed applications for certain purposes such as seeking renewal of driving licence, renewal of registration certificate of a vehicle, change of residence and transfer of ownership of a vehicle. Taking a different view than what was taken by the Madras High Court in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra),* the Bombay High Court has held that levy of additional fee is in no manner a penalty, either directly or in disguise.

19. The principle of comity requires that the Courts of one State or jurisdiction will give effect to the laws and judicial decisions of another State or jurisdiction, not as a matter of obligation but out of deference and mutual respect. In ***Neon Laboratories Vs. Medical Technologies Limited,*** *reported in* ***(2016) 2 SCC 672***, the

Supreme has reiterated that every High Court must give due deference to the enunciation of law made by another High Court, even though it is free to charter a divergent direction. Judicial comity is recognized as an integral part of judicial discipline and judicial discipline is the corner stone of the judicial integrity.

20. In the present case, since the Bombay High Court has already taken view on the competence of the Central Government to impose additional fees under Rules 32 and 81 of the CMV Rules, we decline to entertain the challenge to the impugned notification on the ground of incompetence of the Central Government to impose additional tax, in the aforesaid background.

21. All these writ applications are, accordingly, dismissed.

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

—— o ——

2024 (III) ILR-CUT-949

STATE OF ODISHA & ANR.
V.
PRADIPTA KUMAR MOHANTY

(I.A. NO. 2585 OF 2023 in W.A. NO. 1003 OF 2023)

11 DECEMBER 2024

[CHAKRADHARI SHARAN SINGH, C.J. & MURAHARI SRI RAMAN, J.]

Issue for Consideration

Whether 450 days delay can be condoned while admitting Letter Patent Appeal.

Headnotes

(A) ORISSA HIGH COURT ORDER, 1948 – Article 4 r/w Clause 10 of the Letters Patent constituting the High Court of Judicature at Patna and Rule 6 of Chapter 111 and Rule 2 of Chapter VIII of High Court of Orissa Rules, 1948 – As per the Rule, the intra-court Appeal should be filed within thirty days from the date of Judgment – Whether 450 days delay should be condoned.

Held : In the event of the appeal is not preferred within the said stipulated period, it is the Bench which is empowered to use its discretion to grant further time, subject to appreciation of good cause. (Para 7)

(B) WORDS & PHRASES :–

(i) Discretion – Discussed.,
(ii) Good cause, Sufficient cause – Connotation discussed with reference to case laws. (Paras 7.3 to 7.14)

(C) INTERPRETATION OF STATUTES – Principles for consideration of condonation of delay – Discussed with reference to case laws.
(Paras 7.15-9.10)

Citation Reference

Dr. Sushama Barik Vrs. State of Odisha, **W.P.(C) No. 21795 of 2021, disposed of vide Order dated 03.08.2021;** Union of India Vrs. K.V. Jankiraman, **(1991) 4 SCC 409;** State of Odisha Vrs. Surama Manjari Das, **W.P.(C) No.15763 of 2021, dismissed on 16.07.2021 inasmuch as leave to appeal being S.L.P.(C) Dy. No.9259 of 2023;** Pathupati Subba Reddy Vrs. Special Deputy Collector, **(2024) 4 SCR 241;** Union of India Vrs. Jahangir Byramji Jeejeebhoi, **(2024) 4 SCR 76 on 09.05.2024;** Collector, Land Acquisition, Anantnag Vrs. Mst. Katiji, **(1987) 2 SCC 107;** G. Ramegowda, Major Vrs. Special Land Acquisition Officer**, (1988) 2 SCC 142;** State of Haryana Vrs. Chandra Mani, **(1996) 3 SCC 132;** Sheo Raj Singh Vrs. Union of India, **(2023) 10 SCC 531;** Bhubaneswar Development Authority, **(2023) 6 SCR 590;** State of Odisha & Anr. Vs. Jopseph Barik, **2023 (II) ILR-CUT 361;** Union of India Vrs. K.V. Janaki Raman, **(1991) 4 SCC 109;** State of Punjab Vrs. Chamanlal Goel, **(1995) 2 SCC 570;** State of Odisha Vrs. Somanath Sahoo, **the judgment of this Court dated 5th October, 2016 in W.P.(C) No.19909 of 2015;** State of Odisha Vrs. Anil Kumar Sethi, **the judgment dated 26th April, 2017 in W.P.(C) No.22393 of 2015;** The Principal Secretary, Panchayat Raj Department, Government of Odisha Vrs. Debi Prasad Nanda, **W.A. No. 16 of 2024;** Kunhayammed Vrs. State of Kerala, **AIR 2000 SC 2587 = (2000) 6 SCC 359;** State of Odisha Vrs. Ratikanta Tripathy, **Special Leave Petition (Civil) Diary No.33245 of 2028;** State of Odisha Vrs. Chakradhar Prasad Gantayat, **W.A No.321 of 2022, vide Judgment dated 20.03.2024;** State of Madhya Pradesh Vrs. Bherulal, **2020 SCC OnLine SC 849;** Chief Post Master General Vrs. Living Media India Ltd., **(2012) 3 SCC 563;** Kumaon Mandal Vikas Nigam Ltd. Vrs. Girja Shankar Pant, **(2001) 1 SCC 182;** Arjun Singh Vrs. Mohindra Kumar, **(1964) 5 SCR 946;** Basawaraj Vrs. Special Land Acquisition Officer, **(2013) 14 SCC 81;** Ramlal, Motilal and Chhotelal Vrs. Rewa Coalfields Ltd., **AIR 1962 SC 361 = (1962) 2 SCR 762;** Lonard Grampanchayat Vrs. Ramgiri Gosavi, **AIR 1968 SC 222;** Surinder Singh Sibia Vrs. Vijay Kumar Sood, **(1992) 1 SCC 70;** Orinental Aroma Chemical Industries Ltd. Vrs. Gujarat Industrial Development Corporation, **(2010) 5 SCC 459;** Parimal Vrs. Veena, **(2011) 3 SCC 545;** Sudarshan Sareen Vrs. National Small Industries Corporation Ltd., **2013 SCC OnLine Del 4412;** State of Bihar Vrs. Kameshwar Prasad Singh, **(2000) 9 SCC 94;** Madanlal Vrs. Shyamlal, **(2002) 1 SCC 535;**

Davinder Pal Sehgal Vrs. Partap Steel Rolling Mills (P) Ltd., **(2002) 3 SCC 156;** Ram Nath Sao Vrs. Gobardhan Sao, **(2002) 3 SCC 195;** Kaushalya Devi Vrs. Prem Chand, **(2005) 10 SCC 127;** Srei International Finance Ltd. Vrs. Fairgrowth Financial Services Ltd., **(2005) 13 SCC 95;** Reena Sadh Vrs. Aniana Enterprises, **(2008) 12 SCC 589;** G.P. Srivastava Vrs. R.K. Raizada, **(2000) 3 SCC 54;** A. Murugesan Vrs. Jamuna Rani, **(2019) 20 SCC 803;** Hira Sweets & Confectionary Pvt. Ltd. Vrs. Hira Confectioners, **2021 SCC OnLine Del 1823;** Balwant Singh Vrs. Jagdish Singh, **(2010) 8 SCR 597;** P.K. Ramachandran Vrs. State of Kerala, **(1997) 7 SCC 556;** Katari Suryanarayana Vrs. Koppisetti Subba Rao, **AIR 2009 SC 2907;** Perumon Bhagvathy Devaswom Vrs. Bhargavi Amma, **(2008) 8 SCC 321;** Pundlik Jalam Patil Vrs. Executive Engineer, Jalgaon Medium Project, **(2008) 17 SCC 448;** National Bank of Wales Ltd., **LR 1899 2 Ch. 629 @ 673;** N. Balakrishnan Vrs. M. Krishnamurty, **(1998) 7 SCC 123;** Shakuntala Devi Jain Vrs. Kuntal Kumari, **AIR 1969 SC 575 = (1969) 1 SCR 1006**; State of West Bengal Vrs. The Administrator, Howrah Municipality, **AIR 1972 SC 749 = (1972) 1 SCC 366;** Sheo Raj Singh (deceased) through Legal Representatives Vrs. Union of India, **(2023) 10 SCC 531;** Tehsildar (LA) Vrs. K.V. Ayisumma, **(1996) 10 SCC 634;** State of Nagaland Vrs. Lipok AO, **(2005) 3 SCC 752;** State of M.P. Vrs. Bherulal, **(2020) 10 SCC 654;** University of Delhi Vrs. Union of India, **(2020) 13 SCC 745;** State of Manipur Vrs. Koting Lamkang, **(2019) 10 SCC 408;** Esha Bhattacharjee Vrs. Managing Committee of Raghunathpur Nafar Academy, **(2013) 9 SCR 782;** Amalendu Kumar Bera Vrs. State of West Bengal, **(2013) 4 SCC 52;** Union of India Vrs. Nripen Sarma, **(2013) 4 SCC 57 = AIR 2011 SC 1237;** State of M.P. Vrs. Pradeep Kumar, **(2000) 7 SCC 372;** S.V. Matha Prasad Vrs. Lalchand Meghraj, **(2007) 14 SCC 722;** O.P. Kathpalia Vrs. Lakhmir Singh, **AIR 1984 SC 1744;** State of Himachal Pradesh Vrs. Gorkha Ram, Special Leave Petition **(Criminal) Diary No. 27426 of 2020, vide Order dated 23.08.2021;** Supreme Court of India in State of Madhya Pradesh Vrs. Bherulal, **(2020) 10 SCC 654;** State of Odisha Vrs. Sunanda Mahakuda, **(2021) 11 SCC 560;** State of Gujarat Vrs. Tushar Jagdish Chandra Vyas, **2021 SCC OnLine SC 3517;** State of U.P. Vrs. Sabha Narain, **(2022) 9 SCC 266;** Union of India Vrs. Central Tibetan Schools Admin, **2021 SCC OnLine SC 119;** Union of India Vrs. Vishnu Aroma Pouching Pvt. Ltd., **(2022) 9 SCC 263;** Commissioner of Public Instruction Vrs. Shamshuddin, **2021 SCC OnLine SC 3518;** Joseph Barik and Others (supra), **W.A. No.805 of 2021 and batch of writ appeals;** Vedabai @ Vaijayanatabai Baburao Patil Vrs. Shantaram Baburao Patil, **AIR 2001 SC 2582;** Maniben Devraj Shah Vrs. Municipal Corporation of Brihan Mumbai, **(2012) 5 SCC 157;** Bhubaneswar Development Authority Vrs. Madhumita Das, **2023 SCC OnLine SC 977- referred to.**

List of Order

Odisha High Court Order, 1948

Keywords

Delay, Condonation, Letter patent appeal, Intra-Court Appeal, Discretion, Good cause, Sufficient cause.

Case Arising From

Order dated 20.01.2022 passed in W.P.(C) No.1239 of 2022.

Appearances for Parties

For Appellants : Mr. Ashok Kumar Parija, A.G. &
Mr. Manoj Ku. Khuntia, AGA.
For Respondent : M/s. Swapnil Roy & Subhasish Satapathy.

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

THE QUESTION FOR CONSIDERATION IN THE INTERLOCUTORY APPLICATION FILED PRAYING THEREIN TO CONDONE THE DELAY IN FILING THE INTRA-COURT APPEAL:

Whether this intra-Court of appeal is liable to be entertained by condoning delay of 450 days in filing the writ appeal by the functionaries of the Government of Odisha, being aggrieved by Order dated 20.01.2022 passed in W.P.(C) No.1239 of 2022, whereby and whereunder allowing the writ petition invoking power under Articles 226 and 227 of the Constitution of India a learned Single Judge of this Court directed the appellants herein (the opposite parties in the writ proceeding), to accord promotion to the respondent-writ petitioner to the rank of Forest Ranger with effect from 23.12.2016, *i.e*. the date his juniors and batch-mates got such promotions, on the ground that Vigilance Proceeding instituted in the year 2014 and Disciplinary Proceeding initiated in the year 2015 are yet to be concluded, is the question that falls for consideration of this Court.

THE FACTS:

2. As emanated from pleadings contained in the writ appeal as also the writ petition, the facts necessary for the present purpose of answering the question posed above are culled out hereinafter.

2.1. The respondent, appointed as the Village Forest Worker on 14.01.1985, got promotion to the post of the Forester in the Forest Department on 01.03.2009. Subsequently, he was promoted to the rank of the Deputy Ranger *vide* Office Order No.43/2F-62/2014, dated 16.05.2014 issued from the Office of the Regional Chief Conservator of Forests, Sambalpur in pursuance of the Office Order No.611/2F (NG) 110/2013, dated 15.05.2014 of Principal Chief Conservator of Forests, Odisha, Bhubaneswar. Accordingly, the respondent joined on 21.05.2021 in the promotional

post as in-Charge of Padampur Range as directed *vide* communication in Memo No.1704/2F-2014, dated 17.05.2014 issued from the Office of the Divisional Forest Officer, Bargarh Forest Division, Bargarh.

2.2. Tentative Gradation-*cum*-Disposition List of Deputy Ranger as on 01.08.2016 issued *vide* Memo No.14559/2F (NG) 39/2015, dated 30.07.2016 circulated by the Odisha State Forest Headquarters, Office of the Principal Chief Conservator of Forests, Bhubaneswar reflected the name of the respondent at Serial No.103 with the remark that "Vigilance Case Pending".

2.3. It is the case of the respondent before the writ Court (Single Bench) that as no charge-sheet had been served on him, objection was raised before the authority concerned against such Tentative Gradation List for modification. He put forth his grievance in the writ petition in the light of the fact that pending Vigilance Proceeding in Sambalpur Vigilance P.S. Case No.84, dated 15.11.2014 and a Departmental Proceeding initiated *vide* Memorandum No.2840/2F-05/2015, dated 05.10.2015 on identical allegation, the name of the petitioner was not recommended for promotion to the rank of the Forest Ranger; nonetheless, the names of persons found place at Serial Nos. 154, 157, 158, 161, 163 and 164 of the Tentative Gradation List were given the promotion to the said rank *vide* Order dated 23.12.2016.

2.4. By filing writ petition on 12.01.2022 before this Court, the respondent sought to urge that while no charge had been framed in the Vigilance Proceeding by then and though the Enquiry Officer was appointed, no progress could be perceived in the Departmental Proceeding drawn up under Rule 15 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962, he was not considered for the promotional post and he was due to get retired from service on 28.02.2022 on attaining the age of superannuation.

2.5. Citing parity with those of similarly circumstanced persons who got promotion pending Vigilance Case and/or Departmental Proceeding, to illustrate the case of *Dr. Sushama Barik Vrs. State of Odisha, W.P.(C) No. 21795 of 2021, disposed of vide Order dated 03.08.2021* by this Court, on the ground of no likelihood of disposal of such proceedings in the near future, the respondent-writ petitioner made prayer for a direction to accord promotion in the rank of the Forest Ranger.

2.6. The learned Single Judge of this Court, having heard counsel for both the sides, considering length of pendency of the Vigilance Case since 2014 and the Disciplinary Proceeding since 2015, and the result of consideration for promotion of the respondent-writ petitioner being kept in sealed cover since 2016, held *vide* Order dated 20.01.2022 that the respondent cannot be made to suffer and consequently, directed to accord promotion which is, of course, made subject to outcome of aforesaid proceedings. Following are the concluding observations and directions of the learned Single Judge in the impugned Order:

*"6. *** It is also not known when the Vigilance Proceeding initiated in the year 2014 will come to end. It is keeping in this view, this Court in disposal of the writ petition directs the Principal Secretary to Government of Odisha, Forest and Environment Department, Bhubaneswar-O.P. No.1 and Principal Chief Conservator of Forests, Odisha, opposite party No.2 to give promotions to the petitioner to the rank of Forest Ranger from 23.12.2016, i.e. from the date of his juniors and batchmates got such promotions. However the promotions of the petitioner as per direction of this Court shall be subject to the ultimate outcome in the Vigilance Proceeding and Disciplinary Proceeding. Further it is also clarified that the promotions given to the petitioner to different ranks shall not confer equity in the event, he will ultimately lose the Vigilance Proceeding and Disciplinary Proceeding. Entire exercise shall be completed within four weeks from the date of communication of this direction. It is also clarified that upon promotions, petitioner shall also be entitled to all consequential benefits.*

7. With the above observation and directions, the writ petition thus stands disposed of."

2.7. Aggrieved, the functionaries of the State of Odisha approached by way of filing the intra-Court appeal on appraising that cognizance of offence has been taken since 01.09.2015, and took plea that giving promotion at this stage to the respondent would tantamount to granting reward, which runs counter to the view expressed in *Union of India Vrs. K.V. Jankiraman, (1991) 4 SCC 409.*

2.8. It has been pointed out by the Registry of this Court that having presented the writ appeal on 15.05.2023, there occurred delay of 450 days from the date of impugned Order, *i.e.*, 20.01.2022 excluding the period of limitation of 30 days as stipulated under Rule 2 of Chapter VIII of the Rules of the High Court of Orissa, 1948. Along with presentation of the writ appeal, the respondent filed an application, being I.A. No.2585 of 2023.

2.9. The respondent, upon being served with a notice on the point of limitation issued by this Court pursuant to Order dated 09.04.2024, appeared through counsel and filed objection to the petition for condonation of delay by contending that inordinate delay in preferring writ appeal deserves to be dismissed *in limine* in view of principles laid down by this Court in *State of Odisha Vrs. Surama Manjari Das, W.P.(C) No.15763 of 2021, dismissed on 16.07.2021* inasmuch as leave to appeal being S.L.P.(C) Dy. No.9259 of 2023 filed at the behest of the State of Odisha got dismissed by the Supreme Court *vide* Order dated 05.04.2023.

HEARING OF THE INTERLOCUTORY APPLICATION FILED IN THE WRIT APPEAL BY THE APPELLANTS FOR CONDONATION OF DELAY:

3. This matter was taken up for hearing on the point of limitation on 08.05.2024. Heard Sri Ashok Kumar Parija, learned Advocate General assisted by Sri Manoj Kumar Khuntia, learned Additional Government Advocate for the appellants and Sri Swapnil Roy, learned Advocate for the respondent.

3.1. On conclusion of hearing, permission being sought for and granted, Sri Swapnil Roy, learned Advocate for the respondent furnished copies of Judgments rendered by the Hon'ble Supreme Court of India in the cases of *Pathupati Subba Reddy Vrs. Special Deputy Collector, (2024) 4 SCR 241* and *Union of India Vrs.*

Jahangir Byramji Jeejeebhoi, (2024) 4 SCR 76 on 09.05.2024 to buttress his argument that length of delay is a relevant factor for consideration of application under Section 5 of the Limitation Act, inasmuch as there ought to be end to a litigation and, thereby he sought to counter the submissions made by the learned Advocate General that inordinate days of delay in filing appeal by the State can be condoned on the principles laid down in *Collector, Land Acquisition, Anantnag Vrs. Mst. Katiji, (1987) 2 SCC 107; G. Ramegowda, Major Vrs. Special Land Acquisition Officer, (1988) 2 SCC 142; State of Haryana Vrs. Chandra Mani, (1996) 3 SCC 132; Sheo Raj Singh Vrs. Union of India, (2023) 10 SCC 531;* and *Bhubaneswar Development Authority, (2023) 6 SCR 590.*

THE RIVAL CONTENTIONS AND SUBMISSIONS:

4. Sri Ashok Kumar Parija, learned Advocate General made his submission that learned Single Judge has directed to grant promotion to the respondent notwithstanding the fact that both the Vigilance Case as also the Disciplinary Proceeding are pending against him. As such direction runs contrary to Judgments of this Court delivered by a Division Bench in *Joseph Barik, 2023 (II) ILR-CUT 361*, this intra-Court appeal has been preferred, wherein the following is the observation:

> *"1. In all these writ appeals by the State of Odisha against the corresponding orders of the learned Single Judge, a common question arises for consideration viz. whether during the pendency of a criminal case against the Government servant in the Court of the Special Judge (Vigilance), and notwithstanding exoneration of the said employee in the departmental proceedings, could the learned Single Judge have ordered grant of either ad hoc or regular promotion to the government servant subject to the outcome of the criminal proceedings?*
>
> ***
>
> *9. Further in terms of the law explained by the Supreme Court in Union of India Vrs. K.V. Janaki Raman (1991) 4 SCC 109, State of Punjab Vrs. Chamanlal Goel (1995) 2 SCC 570, the judgment of this Court dated 5th October, 2016 in W.P.(C) No.19909 of 2015 (State of Odisha Vrs. Somanath Sahoo) and the judgment dated 26th April, 2017 in W.P.(C) No.22393 of 2015 (State of Odisha Vrs. Anil Kumar Sethi), there is no right of the government servant to be considered for promotion during the pendency of either departmental proceedings or criminal proceedings or both against such Government servant.*
>
> *10. The plea of the learned counsel appearing for the Respondents that they should be granted at least one 'ad hoc promotion' is also without any legal basis in light of the above OMs and the settled position in law.*
>
> *11. It is clarified that as and when the criminal proceedings end in favour of the government servant by way of an acquittal and such Government servant also stands exonerated from the departmental proceedings then notwithstanding the superannuation of such Government servant, the notional benefits attaching to the promotion that is due to the government servant would be calculated and the pension fixed accordingly.*
>
> *12. In the light of the above orders of the Government, it is not possible for this Court to sustain the impugned orders of the learned Single Judge in the present cases directing the Appellants to grant regular promotion to the Respondents even with the caveat that*

such promotion would be subject to the outcome of the criminal case against such government servant. The said impugned orders of the learned Single Judge are accordingly hereby set aside."

4.1. It is submitted that identical question also fell for consideration before a Division Bench of this Court in a writ appeal being *The Principal Secretary, Panchayat Raj Department, Government of Odisha Vrs. Debi Prasad Nanda, W.A. No. 16 of 2024*, wherein by condoning the delay of 100 days in filing of appeal preferred by the Government of Odisha, an Order has been passed with the following observation on 06.03.2024:

"9. From this Court's judgment in case of State of Odisha & another Vrs. Joseph Barik (supra), we find that the coordinate Bench decisions of this Court in case of State of Odisha Vrs. Anil Kumar Sethi (supra) and State of Odisha Vrs. Somanath Sahoo (supra) have been taken note of and considered before reaching a conclusion that a government servant did not have any right to be considered for promotion during the pendency, either of department proceeding or a criminal proceeding.

10. As the said decisions have been taken into consideration by the division bench, we do not find it to be a case fit for reference to a larger Bench.

11. This appeal is accordingly allowed. The impugned order dated 08.09.2023 of the learned Single Judge is hereby set aside. W.P.(C) No.20344 of 2021 is, hereby, dismissed.

12. It goes without saying that the respondent shall be at liberty to take such steps as may be available to him under law for expediting the trial."

4.2. It is further argued that thus being the answer to the question of law, the present case having resemblance of said proposition of law, the delay caused, may appear to be inordinate in preferring the writ appeal, deserves consideration of this Court for condonation and as a consequence thereof, the decision of learned Single Judge, being inconsistent with the view of the Division Bench, requires intervention.

4.3. Proceeding with his argument further, Sri Ashok Kumar Parija, learned Advocate General being assisted by Sri Manoj Kumar Khuntia, learned Additional Government Advocate, submitted that the decision rendered by this Court in the case of *State of Odisha Vrs. Surama Manjari Das, W.P.(C) No.15763 of 2021, dismissed on 16.07.2021 read with* corrigendum of cause title *vide Order dated 14.10.2022,* as relied on by the respondent in his objection affidavit to the interlocutory application for condonation of delay, would not come to his aid.

4.4. Though said case in *Surama Manjari Das (supra)* proceeded "on the ground of laches" (as distinguished from "delay") on the part of the State Government in approaching this Court by way of filing writ petition on 27.04.2021 challenging the Order dated 26.02.2019 passed by the Odisha Administrative Tribunal, the ratio of said case is to be considered in the peculiar fact and circumstance as it seems from paragraph 1 of said Order:

"The petitioner has challenged the Order dated 26.02.2019 passed by Odisha Administrative Tribunal, Bhubaneswar in O.A. No. 767 of 2019. The present writ

> *application was filed on 27.04.2021, more than two years after the impugned order was passed,* ***yet there is neither an application for condonation of delay nor any explanation for such delay in filing the writ application****."*

4.5. Such being the fact that there was no explanation offered by the Government with respect to delay in invoking writ jurisdiction, said decision in *Surama Manjari Das (supra)* is misplaced, particularly when the respondent in his objection misdirected himself as if said decision has been "confirmed by the Hon'ble Apex Court *vide* Order dated 05.04.2023 passed in S.L.P.(C) Diary No. 9259 of 2023" in view of the legal position settled in *Kunhayammed Vrs. State of Kerala, AIR 2000 SC 2587 = (2000) 6 SCC 359*.

4.6. Therefore, it is urged that, *Surama Manjari Das (supra)* cannot be referred to as precedent in order to decide the present nature of the case. When strong case is made out on merits having glaring question of law which has already been set at rest by this Court in *Joseph Barik (supra)*, reference can be had to the Order dated 22.11.2019 passed by the Hon'ble Supreme Court in the case of *State of Odisha Vrs. Ratikanta Tripathy, Special Leave Petition (Civil) Diary No.33245 of 2028*, wherein the following observation was made even after noticing the fact of delay of 800 days in filing SLP:

> *"Relying on the aforesaid observations, it is submitted that the only right that was saved was to receive the block grant and only in case the grant-in-aid was received on or before the repeal of the Order of 2004. It is further submitted that the decision of the High Court in Loknath Behera was approved by this Court. Exactly contrary situation has now been accepted by the High Court in the orders presently under appeal. We must however state that the matters were disposed of by the High Court as the petition in every case was delayed by at least 800 days. In the circumstances, we pass following order:*
>
> *a) Delay condoned.*
>
> *Subject to the petitioner-State depositing a sum of Rs.50,000/- (Rupees fifty thousand only), to the account of every petition in the Registry of this Court within four weeks from today, let notices be issued to the respondents, returnable on 13.01.2020.*
>
> *Dasti service, in addition, is permitted.*
>
> *b) If the amount is not deposited within the stipulated time, the special leave petitions shall stand dismissed without further reference to the Court.*
>
> *c) Upon deposit, the amount shall be invested in a fixed deposit receipt with a nationalized bank initially for a period of 90 days with auto renewal facility."*

4.7. Having placed reliance on the case laws, Sri Ashok Kumar Parija, learned Advocate General submitted that once the law has been settled by this Court that promotion, being not a matter of right, cannot be granted to an employee who is facing criminal charges before the court of law and the disciplinary proceeding, which are yet to attain logical end. So, in such cases, delay in filing appeal is liberally to be construed and the State Government cannot be made to suffer, as rule of law must prevail at any cost. With the justice oriented approach, the test to be undertaken by the Court is necessarily based on merit and in public interest. The

discretion in condoning the delay, be it inordinate, is to be weighed looking at the merit of the matter to meet the ends of justice. If the scales of balance are not utilized in favour of the State in the present context, it would tantamount to negating the law laid down by the Division Benches of this Court.

4.8. Aggrieved by not affording opportunity to file counter affidavit in the writ proceeding, stemming on Ground (E) of the writ appeal read with paragraph 3 of the petition for condonation of delay, it is submitted that the appellants could not place on record the Office Memorandum bearing No. 3928-SC-/3-2/93-Gen.,dated 18.02.1994; No.14640-Gen., dated 04.07.1995; No. 29699-SC-3-5/97-Gen., dated 01.11.1997; No.1598-SC-3-5/98-Gen.,dtd.15.01.1999 of the General Administration Department dealing with sealed cover procedure in case of promotion during pendency of the criminal case and the disciplinary proceeding. It is, therefore, urged that had these instructions been brought to the notice of the learned Single Judge, the decision would have been otherwise.

4.9. Sri Ashok Kumar Parija submitted that the interest of the respondent is completely protected by the Office Memorandum dated 18.02.1994, which reads as follows:

> *"3. Promotion of officers to the various posts/services.—*
>
> *At the time of consideration of cases of officers for promotion, details of such officers in the zone of consideration falling under the following categories should be specifically brought to the notice of the concerned Screening Committee:*
>
> *(i) Government servants under suspension*
>
> *(ii) Government servants in respect of whom a charge-sheet has been issued and disciplinary proceeding are pending, and*
>
> *(iii) Government servants in respect of whom prosecution for criminal charge is pending*
>
> *****
>
> *4. The Screening Committee shall assess the suitability of the officers coming within the purview of the circumstances mentioned in Para 2 above, along with other eligible candidates without taking into consideration the disciplinary case/criminal prosecution which is pending. The assessment of the Screening Committee including "Unfit for Promotion" and the grading awarded by It will be kept in a sealed cover. The cover will be superscribed 'FINDINGS REGARDING THE SUITABILITY FOR PROMOTION TO THE POST/SERVICE OF _____ IN RESPECT OF SHRI (NAME OF THE OFFICER)'; 'NOT TO BE OPENED TILL THE TERMINATION OF THE DISCIPLINARY CASE/CRIMINAL PROSECUTION AGAINST SHRI _____'. The proceedings of the Screening Committee need only contain the note. 'The findings are contained in the attached sealed cover'.*
>
> *5. The same procedure outlined in Para 3 above will be adopted by the subsequent Screening Committees convened till the disciplinary case/criminal prosecution against the officer concerned is concluded*
>
> *6. On the conclusion of the disciplinary case/ criminal prosecution, the sealed cover or covers shall be opened. In case the officer is completely exonerated, the due date of his promotion will be determined with reference to the findings of the Screening committee kept in the sealed cover/ covers and with reference to the date of promotion of his next junior on the basis of such findings. The Government servant may be promoted, if necessary, by*

reverting the junior-most officiating person. He may be promoted notionally with reference to the date of promotion of his junior.

In cases of complete exoneration, the officer will also be paid arrears of salaries and allowances In other cases, the question of arrears will be decided by the State Government by taking into consideration all the facts and circumstances of the disciplinary/ criminal proceedings, but where the Government denies arrears of salary or a part of it, the reasons for doing so shall be recorded.

7. If any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover/covers shall not be acted upon. His case for promotion may be considered by the next Screening Committee in the normal course and having regard to the penalty imposed on him.

****"*

4.10. It is brought to the notice that in the case of *State of Odisha Vrs. Chakradhar Prasad Gantayat, W.A No.321 of 2022, vide Judgment dated 20.03.2024,* referring to the decisions in *Joseph Barik (supra)* and *The Principal Secretary,* and *Panchayatraj Department, Government of Odisha (supra)* as also taking note of the Office Memorandum dated 04.07.1995, which deals with granting *ad hoc* promotion subject to certain conditions laid down therein during the pendency of protracted criminal and/or disciplinary proceeding, this Court in Division Bench negatived the direction of the learned Single Judge that "Consequentially, this Court direct the opposite party to open the sealed cover and extend the benefit of promotion to the petitioner, if he has otherwise entitled to get the same, with all consequential benefits with effect from the date his immediate junior has been given promotion to the next higher post".

4.11. Thus being the view, it is emphasised that the delay in filing the writ appeal be condoned and the matter is required to be considered on merits in its own perspective.

5. Sri Swapnil Roy, learned Advocate for the respondent with vehemence argued that no plausible explanation has been given by the State of Odisha in its interlocutory application demonstrating "sufficient" and "reasonable" cause. Placing reliance on *Surama Manjari Das (supra)* it is submitted by him that this Court referring to certain decisions of the Hon'ble Supreme Court of India more particularly *State of Madhya Pradesh Vrs. Bherulal, 2020 SCC OnLine SC 849,* wherein *Chief Post Master General Vrs. Living Media India Ltd., (2012) 3 SCC 563* was quoted *in extenso,* held that two years delay in filing writ petition against Order of the Odisha Administrative Tribunal is not liable to be condoned. On the same analogy, in the present case, no sufficient and reasonable cause being shown by the appellants-functionaries of the State of Odisha in the petition for condonation of delay, there is no scope left than to adhere to what has been directed by the learned Single Judge while disposing of the writ petition. It is submitted that the learned Single Judge in the right earnest appreciated the plight of the respondent, who was deprived of promotion, notwithstanding his juniors got promoted to the higher rank. The specious plea of the appellants that pendency of the Vigilance Case and the

Disciplinary Proceeding could restrain them from granting promotion to the respondent is liable to be rejected.

5.1. Sri Swapnil Roy, learned Advocate laying emphasis on the fact of inordinate delay, that too without any explanation in the interlocutory application, submitted that a contempt petition, registered as CONTC No.1898 of 2022, was filed alleging non-compliance of the Order dated 20.01.2022 of the learned Single Judge in W.P.(C) No.1239 of 2022. Said contempt petition was disposed of with the assurance of the counsel for the Government that the direction contained therein would be carried out without delay. However, since nothing could come out successful, the respondent was constrained to approach this Court again by way of another contempt application, registered as CONTC No.317 of 2023.

5.2. It has been submitted that the appellants have not only failed to comply with the direction of the learned Single Judge, but also overstepped the periods stipulated in the impugned Order dated 20.01.2022 passed in W.P.(C) No.1239 of 2022 and also the Order dated 08.04.2022 passed in the first contempt petition being CONTC No.1898 of 2022. As the authorities did not budge an inch even as the respondent got retired on attaining superannuation in the meanwhile, finding no alternative second contempt application was filed, wherein the following Order was passed on 12.05.2023:

> *"As a last chance, list this matter on 30.06.2023 as requested by the learned counsel appearing for the Contemnors for enabling him to take instruction with regard to compliance of order passed by this Court."*

5.3. After such order passed by the learned Single Judge in the contempt proceeding, within three days thereafter, *i.e.,* 15.05.2023, the writ appeal has been filed after 480 days of disposal of the writ petition.

5.4. He, therefore, referring to fact stated at paragraph 5 of the petition for condonation of delay that the appellants "had to obtain opinion and approval from several quarters before filing of the present writ appeal in accordance with Government of Odisha Rules of Business and due to such administrative exigencies", strenuously argued that such plea has no foundation as such averment has been made without providing any material particulars. Such averment being bald, terse and unintelligible is liable to be discarded at the threshold.

5.5. The move of the appellants is only to frustrate the effect of direction contained in the Order dated 20.01.2022 passed in W.P.(C) No.1239 of 2022. It is apparent from the contents of the writ appeal and the averments made in the interlocutory application that the appeal has been preferred only to avoid rigours of contempt under the Contempt of Courts Act, 1971, with full knowledge of the fact that by the time writ appeal gets filed the respondent would have already attained the age of superannuation and retired on 28.02.2022.

5.6. Under such premises, Sri Swapnil Roy, learned Advocate for the respondent has prayed to dismiss the petition for condonation of delay and consequently, urged not to entertain the writ appeal being barred by limitation.

PROVISIONS REGARDING WRIT APPEAL AND THE PROVISIONS FOR LIMITATION:

6. The writ appeal before this Court has been filed invoking provisions of Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna, which stands thus:

> *"Civil Jurisdiction of the High Court*
>
> *9. And We do further ordain that the High Court of Judicature at Patna shall have power to remove and to try and determine, as a Court of extraordinary original Jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.*
>
> *10. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made (on or after the first day of February one thousand nine hundred and twenty nine) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."*

6.1. Article 4 of the Odisha High Court Order, 1948 stands as follows:

> *"The High Court of Orissa shall have, in respect of the territories for the time being included in the Province of Orissa, all such original, appellate and other jurisdiction as under the law in force immediately before the prescribed day is exercisable in respect of the said territories or any part thereof by the High Court in Patna."*

6.2. Rule 6 of Chapter-III and Rule 2 of Chapter-VIII of the Rules of the High Court of Odisha, 1948, are given hereunder:

> *"Chapter-III*
>
> *6. Appeals to the High Court under Article 4 of the Orissa High Court Order, 1948 read with Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna from the Judgment of a Bench confirming the judgment of a lower Court under Section 98 of the Code of Civil Procedure shall be heard by a Bench consisting of at least three Judges including both or either of the Judges of the Bench from whose Judgment the appeal is preferred and, if from the judgment of one Judge or a Bench of two Judges, it shall be heard by a Bench consisting of at least two Judges other than the Judge from whose judgment the appeal is preferred.*

Chapter-VIII

2.(1) Subject to Article 12 of the Orissa High Court Order, 1948 every appeal to the High Court under Article 4 thereof read with Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the High Court or one Judge of any Division Court pursuant to Article 225 of the Constitution, ***shall be presented to the Registrar within thirty days from the date of the judgment appealed from unless a Bench in its discretion, on good cause shown, shall grant further time****. The Registrar shall endorse on the memorandum the date of presentation and after satisfying himself that the appeal is in order and is within time shall cause it to be laid before a Bench for orders at an early date. It shall be accompanied by a certified copy of the judgment appealed from together with a neatly typed second copy thereof.*

(2) Subject to Article 12 of the Orissa High Court Order, 1948 every application for a Certificate under Article 4 thereof read with Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna in the case of a judgment of a Single Judge of the Court deciding a second appeal shall be made orally to the Judge in question immediately after the judgment is delivered. No subsequent application will be entertained unless upon a duly stamped special application supported by affidavit filed within thirty days and not more from the date of the judgment the Judge is satisfied that circumstances existed rendering an immediate application impossible.

(3) If the Judge certifies that the case is a fit one for appeal a duly stamped memorandum of appeal may be presented to the Registrar within a period not exceeding sixty days from the date of the judgment unless the Judge in his discretion on good cause shown shall grant further time for its presentation.

(4) The memorandum of appeal need not be accompanied by a copy of the judgment of decree appealed from."

ANALYSIS:

7. Above provisions would go to indicate that the writ appeal under Article 4 of the Odisha High Court Order, 1948 read with Clause 10 of the Letters Patent constituting the High Court of Judicature at Patna is required to be presented before this Court within thirty days from the date of the judgment appealed from as provided for in Rule 2 of Chapter-VIII of the Rules of the High Court of Orissa, 1948. In the event the appeal is not preferred within the said stipulated period, it is the Bench which is empowered to use its discretion to "grant further time", subject to, of course, appreciation of "good cause".

7.1. Nevertheless, with the contents contained in the petition, bearing I.A. No.2585 of 2023, praying therein to condone "the delay caused in filing the writ appeal", this Court now examines whether with the available material on record as provided by the State of Odisha in said petition "discretion" can be exercised to condone the delay in preferring intra-Court appeal for "good cause" shown by the appellants. Finding good cause shown, this Court by exercising discretion may condone the delay in filing the writ appeal by granting "further time".

7.2. Conspectus of propositions of catena of decisions rendered by different Courts indicates that "discretion" means use of private and independent thought. When anything is left to be done according to one's discretion the law intends it to be done with sound discretion and according to law. Discretion is discerning between right and wrong and one who has power to act at discretion is bound by rule of reason. Discretion must not be arbitrary. The very term itself stands unsupported by circumstances imports the exercise of judgment, wisdom and skill as contra-distinguished from unthinking folly, heady violence or rash injustice. When applied to a Court of Justice or Tribunal or *quasi* judicial body, it means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful but legal and regular. Discretion must be exercised honestly and in the spirit of the statute. It is the power given by a statute to make choice among competing considerations. It implies power to choose between alternative courses of action. It is not unconfined and vagrant. It is canalized within banks that keep it from overflowing. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself. [See, *Kumaon Mandal Vikas Nigam Ltd. Vrs. Girja Shankar Pant, (2001) 1 SCC 182*].

7.3. In this regard, therefore, the interpretation of the expression "sufficient cause" as found in the provisions of Section 5 of the Limitation Act has bearing on the question that is involved in the instant case.

7.4. It needs to be discussed the connotation of "good cause" *vis-à-vis* "sufficient cause". In *Arjun Singh Vrs. Mohindra Kumar, (1964) 5 SCR 946,* these two terms have been considered as follows:

> *"Before proceeding to deal with the arguments addressed to us by Mr. Setalvad—learned counsel for the appellant, it would be convenient to mention a point, not seriously pressed before us, but which at earlier stages was thought to have considerable significance for the decision of this question viz., the difference between the words 'good cause' for non-appearance in Order IX, Rule 7 and 'sufficient cause' for the same purpose in Order IX, Rule 13 as pointing to different criteria of 'goodness' or 'sufficiency' for succeeding in the two proceedings, and as therefore furnishing a ground for the inapplicability of the rule of res judicata. As this ground was not seriously mentioned before us, we need not examine it in any detail, but we might observe that* ***we do not see any material difference between the facts to be established for satisfying the two tests of 'good cause' and 'sufficient cause'. We are unable to conceive of a 'good cause' which is not 'sufficient' as affording an explanation for non-appearance, nor conversely of a 'sufficient cause' which is not a good one and we would add that either of these is not different from 'good and sufficient cause' which is used in this context in other statutes.*** *If, on the other hand, there is any difference between the two it can only be that the requirement of a 'good cause' is complied with on a lesser degree of proof than that of 'sufficient cause' and if so, this cannot help the appellant, since assuming the applicability of the principle of res judicata to the decisions in the two proceedings, if the court finds in the first proceeding, the lighter burden not discharged, it must a fortiori bar the consideration of the same matter in the later, where the standard of proof of that matter is, if anything, higher."*

7.5. In *Basawaraj Vrs. Special Land Acquisition Officer, (2013) 14 SCC 81* the Supreme Court summarised the law on the issue in the following way:

> *"The law on the issue can be summarised to the effect that where a case has been presented in the Court beyond limitation, the applicant has to explain the Court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the Court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the Legislature."*

7.6. The meaning of 'sufficient' is 'adequate' or 'enough', inasmuch as may be necessary to answer the purpose intended. Therefore, word 'sufficient' embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. 'Sufficient cause' means that the party had not acted in a negligent manner or there was a want of *bona fide* on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently' or 'remaining inactive'. However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. While deciding whether there is sufficient cause or not, the Court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the Court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. "Sufficient cause" is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the Court with a reasonable defence. **Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application.** *[Ref.: Ramlal, Motilal and Chhotelal Vrs. Rewa Coalfields Ltd., AIR 1962 SC 361 = (1962) 2 SCR 762; Lonard Grampanchayat Vrs. Ramgiri Gosavi, AIR 1968 SC 222; Surinder Singh Sibia Vrs. Vijay Kumar Sood, (1992) 1 SCC 70; Orinental Aroma Chemical Industries Ltd. Vrs. Gujarat Industrial Development Corporation, (2010) 5 SCC 459; Parimal Vrs. Veena, (2011) 3 SCC 545; Sudarshan Sareen Vrs. National Small Industries Corporation Ltd., 2013 SCC OnLine Del 4412; State of Bihar Vrs. Kameshwar Prasad Singh, (2000) 9 SCC 94; Madanlal Vrs. Shyamlal, (2002) 1 SCC 535; Davinder Pal Sehgal Vrs. Partap Steel Rolling Mills (P) Ltd., (2002) 3 SCC 156; Ram Nath Sao Vrs. Gobardhan Sao, (2002) 3 SCC 195, Kaushalya*

Devi Vrs. Prem Chand, (2005) 10 SCC 127, Srei International Finance Ltd. Vrs. Fairgrowth Financial Services Ltd., (2005) 13 SCC 95; Reena Sadh Vrs. Aniana Enterprises, (2008) 12 SCC 589].

7.7. **"Sufficient cause" has to be construed as an elastic expression for which no hard-and-fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case.** The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when *ex parte* proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not *mala fide* or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the *lis* decided on merits. *[Ref.: G.P. Srivastava Vrs. R.K. Raizada, (2000) 3 SCC 54; A. Murugesan Vrs. Jamuna Rani, (2019) 20 SCC 803]*. The Court, in its discretion, has to consider the 'sufficient cause' in the facts and circumstances of every individual case. Although in interpreting the words 'sufficient cause', the Court has wide discretion but the same has to be exercised in the particular facts of the case. *See, Hira Sweets & Confectionary Pvt. Ltd. Vrs. Hira Confectioners, 2021 SCC OnLine Del 1823.*

7.8. In *Balwant Singh Vrs. Jagdish Singh, (2010) 8 SCR 597* the ingredients of "sufficient cause" for the purpose of condonation of delay has been discussed as follows:

> *"7. *** However, in terms of Section 5, the discretion is vested in the Court to admit an appeal or an application, after the expiry of the prescribed period of limitation, if the appellant shows 'sufficient cause' for not preferring the application within the prescribed time. The expression 'sufficient cause' commonly appears in the provisions of Order 22 Rule 9(2), CPC and Section 5 of the Limitation Act, thus categorically demonstrating that they are to be decided on similar grounds. The decision of such an application has to be guided by similar precepts.*
>
> ***
>
> *8. In the case of P.K. Ramachandran Vrs. State of Kerala, (1997) 7 SCC 556 where there was delay of 565 days in filing the first appeal by the State, and the High Court had observed, 'taking into consideration the averments contained in the affidavit filed in support of the petition to condone the delay, we are inclined to allow the petition". While setting aside this order, this Court found that the explanation rendered for condonation of delay was neither reasonable nor satisfactory and held as under:*
>
> *'3. It would be noticed from a perusal of the impugned order that the court has not recorded any satisfaction that the explanation for delay was either reasonable or satisfactory, which is an essential prerequisite to condonation of delay.*
>
> *4. That apart, we find that in the application filed by the respondent seeking condonation of delay, the thrust in explaining the delay after 12.5.1995 is:*

*'*** at that time the Advocate General's office was fed up with so many arbitration matters (sic) equally important to this case were pending for consideration as per the directions of the Advocate General on 2.9.1995.'*

5. This can hardly be said to be a reasonable, satisfactory or even a proper explanation for seeking condonation of delay. In the reply filed to the application seeking condonation of delay by the appellant in the High Court, it is asserted that after the judgment and decree was pronounced by the learned Sub-Judge, Kollam on 30.10.1993, the scope for filing of the appeal was examined by the District Government Pleader, Special Law Officer, Law Secretary and the Advocate General and in accordance with their opinion, it was decided that there was no scope for filing the appeal but later on, despite the opinion referred to above, the appeal was filed as late as on 18.1.1996 without disclosing why it was being filed. The High Court does not appear to have examined the reply filed by the appellant as reference to the same is conspicuous by its absence from the order. We are not satisfied that in the facts and circumstances of this case, any explanation, much less a reasonable or satisfactory one had been offered by the respondent-State for condonation of the inordinate delay of 565 days.

6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribed and the courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the miscellaneous first appeal shall stand dismissed as barred by time. No costs.'

***

10. Another Bench of this Court in a recent judgment of Katari Suryanarayana Vrs. Koppisetti Subba Rao, AIR 2009 SC 2907 again had an occasion to construe the ambit, scope and application of the expression 'sufficient cause'. The application for setting aside the abatement and bringing the legal heirs of the deceased on record was filed in that case after a considerable delay. The explanation rendered regarding the delay of 2381 days in filing the application for condonation of delay and 2601 days in bringing the legal representatives on record was not found to be satisfactory. Declining the application for condonation of delay, the Court, while discussing the case of Perumon Bhagvathy Devaswom Vrs. Bhargavi Amma, (2008) 8 SCC 321 in its para 9 held as under:

'11. The words 'sufficient cause for not making the application within the period of limitation' should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.'

***

15. We feel that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom Vrs. Bhargavi Amma, (2008) 8 SCC 321. In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order22,CPC along with an application under

Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgment, the Court held as under:

'(i) The words 'sufficient cause for not making the application within the period of limitation' should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona tides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.

*(iv) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal. ****

16. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger benches as well as equibenches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated

ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications."

7.9. In the case of *Pundlik Jalam Patil Vrs. Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448*, it is observed as under:

"The laws of limitation are founded on public policy. Statutes of limitation are sometimes described as "statutes of peace". An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. The principle is based on the maxim "interest reipublicae ut sit finis litium", that is, the interest of the State requires that there should be end to litigation but at the same time laws of limitation are a means to ensure private justice suppressing fraud and perjury, quickening diligence and preventing oppression. The object for fixing time-limit for litigation is based on public policy fixing a lifespan for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his Jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy."

7.10. The Hon'ble Supreme Court of India investigated if "to condone, or not to condone" four days' delay, besides examining as to "whether or not to apply the same standard in applying the 'sufficient cause' test to all the litigants regardless of their personality" in *Collector, Land Acquisition, Anantnag Vrs. Mst. Katiji, (1987) 2 SCC 107 = (1987) 2 SCR 387* and laid down the following dicta:

"The Legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression 'sufficient cause' employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice— that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a step-motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression 'sufficient cause'. So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits."

7.11. Discussing the scope and discretion of the Court in condoning the substantial delay caused in filing appeal by the State in *G. Ramegowda Major Vrs. Special Land Acquisition Officer, (1988) 2 SCC 142* the Hon'ble Supreme Court of India observed as follows:

"15. In litigations to which Government is a party there is yet another aspect which, perhaps, cannot be ignored. ***If appeals brought by Government are lost for such defaults, no person is individually affected; but what, in the ultimate analysis, suffers is public interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals.***

16. ***The law of limitation is, no doubt, the same for a private citizen as for Governmental-authorities. Government, like any other litigant must take responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it.***

17. Therefore, in assessing what, in a particular case, constitutes 'sufficient cause' for purposes of Section 5 it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Governmental decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red-tape in the process of their making. ***A certain amount of latitude is, therefore, not impermissible.*** *It is rightly said that those who bear responsibility of Government must have 'a little play at the joints'. Due recognition of these limitations on Governmental functioning— of course, within a reasonable limits—is necessary if the judicial approach is not rendered unrealistic. It would, perhaps, be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of Governmental functioning is procedural delay incidental to the decision making process. In the opinion of the High Court, the conduct of the law-officers of the Government placed the Government in a predicament and that it was one of these cases where the mala fides of the officers should not be imputed to Government.*

It relied upon and trusted its law-officers. Lindley, M.R., in the In re: National Bank of Wales Ltd., LR 1899 2 Ch. 629 @ 673 observed, though in a different context:

'Business cannot be carried on, upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them.'

In the opinion of the High Court, it took quite sometime for the Government to realise that the law-officers failed that trust.

18. ***While a private person can take instant decision a 'bureaucratic or democratic organ' it is said by a learned Judge 'hesitates and debates, consults and considers, speaks through paper, moves horizontally and vertically till at last it gravitates towards a conclusion, unmindful of time and impersonally.'*** ****"*

7.12. In absence of showing deliberate delay as a dilatory tactic, the manner of use of discretion in favour of condonation of delay in filing appeal by the State machinery with due regard to 'sufficient cause' has been enumerated in *N. Balakrishnan Vrs. M. Krishnamurty, (1998) 7 SCC 123* in the following terms:

"8. The Appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

9. It is axiomatic that condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. ***Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory.*** *Once the Court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammeled by the conclusion of the lower Court.*

10. The reason for such a different stance is thus:

The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. ***Time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause****.*

11. ***Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly.*** *The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek*

legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. ***The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation).*** *Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly.* ***The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.***

12. A Court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. This Court has held that the words 'sufficient cause' under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain Vrs. Kuntal Kumari, AIR 1969 SC 575 = (1969) 1 SCR 1006 and State of West Bengal Vrs. The Administrator, Howrah Municipality, AIR 1972 SC 749 = (1972) 1 SCC 366.

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. ***If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation.*** *While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses.* ***It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss****."*

7.13. While enunciating that pragmatism in justice oriented approach is to be shown by the Court having regard to the impersonal bureaucratic set up involved in red-tapism within reasonable limits of time, the Hon'ble Supreme Court propounded to hold officer concerned personally responsible in the case of *State of Haryana Vrs. Chandra Mani, (1996) 3 SCC 132* and the proposition of legal position stands thus:

"It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court— be it by private party or the State— are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. ***When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community.*** *It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay— intentional or otherwise— is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible.* ***If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is***

> ***public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.*** *The factors which are peculiar to and characteristic of the functioning of the Governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the Courts or whether cases require adjustment and should authorise the officers take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual.* ***The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants.*** *Considered from this perspective, it must be held that the delay of 109 days in this case has been explained and that it is a fit case for condonation of the delay."*

7.14. It is significant to notice the decision of the Hon'ble Supreme Court of India rendered in the case of *Sheo Raj Singh (deceased) through Legal Representatives Vrs. Union of India, (2023) 10 SCC 531* wherein while explaining the term "sufficient cause", the nature of approach of the Court and the methodology in deciding the application for condonation of delay have been discussed with reference to earlier precedents. The said Court in the mentioned reported case held as follows:

> *"30. Considering the aforementioned decisions, there cannot be any quarrel that this Court has stepped in to ensure that substantive rights of private parties and the State are not defeated at the threshold simply due to technical considerations of delay. However, these decisions notwithstanding, we reiterate that* ***condonation of delay being a discretionary power available to Courts, exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the explanation, the length of delay being immaterial.***
>
> *31. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable.* ***Of course, the Courts must distinguish between an 'explanation' and an 'excuse'.*** *An 'explanation' is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault.* ***Care must however be taken to distinguish an 'explanation' from an 'excuse'.*** *Although people tend to see 'explanation' and 'excuse' as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real.*
>
> *32. An 'excuse' is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an 'excuse' would imply that the explanation proffered is believed not to be true.* ***Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of***

delay based on existence or absence of sufficient cause has to be decided on its own facts. *At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher Courts for adjudication.*

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34. The order under challenge in this appeal is dated 21st December 2011. It was rendered at a point of time when the decisions in Mst. Katiji (supra), Ramegowda (supra), Chandra Mani (supra), Tehsildar (LA) Vrs. K.V. Ayisumma, (1996) 10 SCC 634 and State of Nagaland Vrs. Lipok AO, (2005) 3 SCC 752 were holding the field. It is not that the said decisions do not hold the field now, having been overruled by any subsequent decision. Although there have been some decisions in the recent past [State of M.P. Vrs. Bherulal, (2020) 10 SCC 654 is one such decision apart from University of Delhi Vrs. Union of India, (2020) 13 SCC 745] which have not accepted governmental lethargy, tardiness and indolence in presenting appeals within time as sufficient cause for condonation of delay, yet, the exercise of discretion by the High Court has to be tested on the anvil of the liberal and justice oriented approach expounded in the aforesaid decisions which have been referred to above.

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40. We can also profitably refer to State of Manipur Vrs. Koting Lamkang, (2019) 10 SCC 408 … where the same Bench of three Hon'ble Judges of this Court which decided University of Delhi Vrs. Union of India, (2020) 13 SCC 745 was of the view that the impersonal nature of the State's functioning should be given due regard, while ensuring that individual defaults are not nit-picked at the cost of collective interest. The relevant paragraphs read as follows:

'7. But while concluding as above, ***it was necessary for the Court to also be conscious of the bureaucratic delay and the slow pace in reaching a Government decision and the routine way of deciding whether the State should prefer an appeal against a judgment adverse to it.*** *Even while observing that the law of limitation would harshly affect the party, the Court felt that the delay in the appeal filed by the State, should not be condoned.*

8. Regard should be had in similar such circumstances to the impersonal nature of the Government's functioning where individual officers may fail to act responsibly. This in turn, would result in injustice to the institutional interest of the State. If the appeal filed by the State are lost for individual default, those who are at fault, will not usually be individually affected.'

41. Having bestowed serious consideration to the rival contentions, we feel that the High Court's decision to condone the delay on account of the first respondent's inability to present the appeal within time, for the reasons assigned therein, does not suffer from any error warranting interference. ***As the aforementioned judgments have shown, such an exercise of discretion does, at times, call for a liberal and justice-oriented approach by the Courts, where certain leeway could be provided to the State. The hidden forces that are at work in preventing an appeal by the State being presented within the prescribed period of limitation so as not to allow a higher court to pronounce upon the legality and validity of an order of a lower court and thereby secure unholy gains, can hardly be ignored.*** *Impediments in the working of the grand scheme of governmental functions have to be removed by taking a pragmatic view on balancing of the competing interests."*

7.15. In *Pathupati Subba Reddy (died) by Lrs. Vrs. The Special Deputy Collector (LA), (2024) 4 SCR 241 = 2024 INSC 286,* having taken review of relevant earlier decisions, the principles for consideration of condonation of delay have been expounded in the following terms:

> *"6. The moot question before us is whether in the facts and circumstances of the case, the High Court was justified in refusing to condone the delay in filing the proposed appeal and to dismiss it as barred by limitation.*
>
> ***
>
> *9. Section 3 of the Limitation Act in no uncertain terms lays down that no suit, appeal or application instituted, preferred or made after the period prescribed shall be entertained rather dismissed even though limitation has not been set up as a defence subject to the exceptions contained in Sections 4 to 24 (inclusive) of the Limitation Act.*
>
> ***
>
> *12. In view of the above provision, the appeal which is preferred after the expiry of the limitation is liable to be dismissed. The use of the word 'shall' in the aforesaid provision connotes that the dismissal is mandatory subject to the exceptions. Section 3 of the Act is peremptory and had to be given effect to even though no objection regarding limitation is taken by the other side or referred to in the pleadings.* ***In other words, it casts an obligation upon the Court to dismiss an appeal which is presented beyond limitation. This is the general law of limitation. The exceptions are carved out under Sections 4 to 24 (inclusive) of the Limitation Act but we are concerned only with the exception contained in Section 5 which empowers the Courts to admit an appeal even if it is preferred after the prescribed period provided the proposed appellant gives 'sufficient cause' for not preferring the appeal within the period prescribed.*** *In other words, the Courts are conferred with discretionary powers to admit an appeal even after the expiry of the prescribed period provided the proposed appellant is able to establish 'sufficient cause' for not filing it within time.* ***The said power to condone the delay or to admit the appeal preferred after the expiry of time is discretionary in nature and may not be exercised even if sufficient cause is shown based upon host of other factors such as negligence, failure to exercise due diligence etc.***
>
> *13. It is very elementary and well understood that Courts should not adopt an injustice-oriented approach in dealing with the applications for condonation of the delay in filing appeals and rather follow a pragmatic line to advance substantial justice.*
>
> ***
>
> *17. It must always be borne in mind that* ***while construing 'sufficient cause' in deciding application under Section 5 of the Act, that on the expiry of the period of limitation prescribed for filing an appeal, substantive right in favour of a decree-holder accrues and this right ought not to be lightly disturbed.*** *The decree-holder treats the decree to be binding with the lapse of time and may proceed on such assumption creating new rights.*
>
> ***
>
> *26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:*
>
> *(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;*
>
> *(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;*

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the Court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."

7.16. In a recent case, being *Union of India Vrs. Jahangir Byramji Jeejeebhoy (D) through his Lr., (2024) 4 SCR 76 = 2024 INSC 262,* certain observations are made which are given as under with respect to a case where there was inordinate delay in filing appeal:

"24. In the aforesaid circumstances, we made it very clear that ***we are not going to look into the merits of the matter as long as we are not convinced that sufficient cause has been made out for condonation of such a long and inordinate delay.***

25. ***It hardly matters whether a litigant is a private party or a State or Union of India when it comes to condoning the gross delay of more than 12 years. If the litigant chooses to approach the Court long after the lapse of the time prescribed under the relevant provisions of the law, then he cannot turn around and say that no prejudice would be caused to either side by the delay being condoned.*** *****

26. ***The length of the delay is a relevant matter which the Court must take into consideration while considering whether the delay should be condoned or not.*** *From the tenor of the approach of the appellants, it appears that they want to fix their own period of limitation for instituting the proceedings for which law has prescribed a period of limitation. Once it is held that a party has lost his right to have the matter considered on merits because of his own inaction for a long, it cannot be presumed to be non-deliberate delay and in such circumstances of the case, he cannot be heard to plead that the substantial justice deserves to be preferred as against the technical considerations.* ***While considering the plea for condonation of delay, the Court must not start with the merits of the main matter. The Court owes a duty to first ascertain the bona fides of the explanation offered by the party seeking condonation. It is only if the sufficient cause assigned by the litigant and the opposition of the other side is equally balanced that the court may bring into aid the merits of the matter for the purpose of condoning the delay.***

27. We are of the view that the question of limitation is not merely a technical consideration. The rules of limitation are based on the principles of sound public policy

and principles of equity. We should not keep the 'Sword of Damocles' hanging over the head of the respondent for indefinite period of time to be determined at the whims and fancies of the appellants."

7.17. It may be of benefit to have reference to *Esha Bhattacharjee Vrs. Managing Committee of Raghunathpur Nafar Academy, (2013) 9 SCR 782*, wherein the following principles are culled out:

"15. From the aforesaid authorities the principles that can broadly be culled out are:

(i) There should be a liberal, pragmatic, justice- E oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms 'sufficient cause' should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

7.18. In *Amalendu Kumar Bera Vrs. State of West Bengal, (2013) 4 SCC 52* the consideration of "sufficient cause" *qua* official business has been perceived in the following manner:

"There is no dispute that the expression "sufficient cause" should be considered with pragmatism in justice oriented approach rather than the technical detection of "sufficient cause" for explaining every day's delay. However, it is equally well settled that the courts albeit liberally considered the prayer for condonation of delay but in some cases the court may refuse to condone the delay inasmuch as the Government is not accepted to keep watch whether the contesting respondent further put the matter in motion. The delay in official business requires its pedantic approach from public justice perspective. In a recent decision in Union of India Vrs. Nripen Sarma, (2013) 4 SCC 57 = AIR 2011 SC 1237 the matter came up against the order passed by the High Court condoning the delay in filing the appeal by the appellant-Union of India. The High Court refused to condone the delay on the ground that the appellant-Union of India took their own sweet time to reach the conclusion whether the judgment should be appealed or not. The High Court also expressed its anguish and distress with the way the State conducts the cases regularly in filing the appeal after the same became operational and barred by limitation."

7.19. Having thus discussed the gamut of "sufficient cause" *vis-à-vis* "good cause" with reference to the parameters of consideration of germane grounds for condonation of delay in preferring appeal, this Court feels expedient to observe that in *State of M.P. Vrs. Pradeep Kumar, (2000) 7 SCC 372*, the Hon'ble Supreme Court held that if an appeal is time barred, the Court should either return the memorandum of appeal to the appellant to submit it along with an application under Section 5 of the Limitation Act or should provide a chance to file application for condonation of delay. The Court cannot, under such circumstances, dispose of the appeal on merit. In *S.V. Matha Prasad Vrs. Lalchand Meghraj, (2007) 14 SCC 722*, it has been clearly held that while dealing with an application under Section 5 of the Limitation Act, the Court cannot dispose of an appeal on merit and such a course has been disapproved by the Hon'ble Supreme Court of India. However, in *O.P. Kathpalia Vrs. Lakhmir Singh, AIR 1984 SC 1744*, it is held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay.

7.20. In *State of Himachal Pradesh Vrs. Gorkha Ram, Special Leave Petition (Criminal) Diary No. 27426 of 2020, vide Order dated 23.08.2021,* the Hon'ble Supreme Court made the following observation:

> *"The SLP has been filed with a delay of 636 days. On our query as to what is the reason, learned counsel seeks to contend it is because of COVID. The order was passed on 05.12.2018 and thus, we asked the counsel as to which year was the world affected by Covid 2019 or 2020 to which learned counsel's answer initially was 2019, possibly to cover the delay but realizing that it was 2020, he states that the papers were not received by him. To say the least, we are shocked at the conduct of the petitioner-State and the manner of conduct the litigation in such a sensitive matter. There is not even a semblance of explanation for delay.* ***We however, would not like to dismiss the petition on limitation because of the seriousness of the issue involved. But that is no excuse why the State should not be made accountable of such inordinate delay and the persons responsible for the same.*** *We thus, condone the delay but subject to imposition of costs of Rs.25,000/- to be deposited with the Supreme Court Group 'C' (Non-Clerical) Employees Welfare Association within four weeks with a direction to hold the enquiry, fix responsibility and recover the amount from the officers concerned. The certificate of recovery should be filed before this Court within the same period of time. The application for condonation of delay is allowed in the aforesaid terms."*

7.21. The Supreme Court of India in *State of Madhya Pradesh Vrs. Bherulal, (2020) 10 SCC 654,* made it clear that,

> *"5. A preposterous proposition is sought to be propounded that* ***if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.***
>
> *6. We are also of the view that the aforesaid approach is being adopted in what we have categorised earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal.* ***It is to complete this formality and save the skin of officers who may be at default that such a process is followed.*** *We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement.* ***The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the officer concerned responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing.*** *It is presumed that this Court will condone the delay and even in making submissions, straightaway the counsel appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.*
>
> *7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible."*

7.22. Taking note of *State of Madhya Pradesh Vrs. Bherulal, (2020) 10 SCC 654,* in the cases of *State of Odisha Vrs. Sunanda Mahakuda, (2021) 11 SCC 560; State of Gujarat Vrs. Tushar Jagdish Chandra Vyas, 2021 SCC OnLine SC 3517; State of U.P.*

Vrs. Sabha Narain, (2022) 9 SCC 266; Union of India Vrs. Central Tibetan Schools Admin, 2021 SCC OnLine SC 119; Union of India Vrs. Vishnu Aroma Pouching Pvt. Ltd., (2022) 9 SCC 263; Commissioner of Public Instruction Vrs. Shamshuddin, 2021 SCC OnLine SC 3518 identical view has been expressed by the Supreme Court of India.

CONCLUSION & DECISION:

8. The theme and substance of argument of the learned Advocate General seems to be that when the point at issue involved in the main case has been considered in the case of *Joseph Barik (supra)* by a Division Bench of this Court, the decision of the learned Single Judge cannot withstand judicial scrutiny, which would necessitate this Court to consider condonation of delay for adjudication of the instant case on merit.

8.1. Apparently, the decision of this Court in *State of Odisha Vrs. Chakradhar Prasad Gantayat, W.A. No.321 of 2022, vide Order dated 20.03.2024,* may have relevance to appreciate the nature of question of law raised in the present case. Paragraph 4 of said decision reads thus:

> *"4. In case of Joseph Barik (supra), a co-ordinate Bench of this Court has in no uncertain terms held that a government servant does not have a right to be considered for promotion during the pendency of either departmental proceeding or criminal proceeding. The said decision has been followed in a recent decision dated 06.03.2024 rendered in the case of The Principal Secretary, Panchayat Raj Department, Government of Odisha and others, in W.A. No.16 of 2024. The aforesaid Office Page 4 of 6 Memorandum dated 04.07.1995, reliance on which has been placed by the learned counsel for the respondent has been taken note of by this Court in the case of Joseph Barik (supra). It has been pointed out by the learned Additional Government Advocate appearing for the appellant-State that the said office Memorandum dated 04.07.1995 has subsequently been withdrawn vide Notification dated 29.04.2017 (Annexure-6 to the writ appeal)."*

8.2. Glance at the Order dated 20.01.2022 of the learned Single Judge manifests that at the time of disposal of case of the present respondent, the writ appeals preferred by the State of Odisha raising the question "whether during the pendency of a criminal case against the Government servant in the Court of the Special Judge (Vigilance), and notwithstanding exoneration of the said employee in the departmental proceedings, could the learned Single Judge have ordered grant of either *ad hoc* or regular promotion to the Government servant subject to the outcome of the criminal proceedings?" in a batch of matters being *Joseph Barik and Others (supra), W.A. No.805 of 2021 and batch of writ appeals* were pending adjudication. The Judgment of this Court [Division Bench] was rendered on 11.05.2023 in the case of *Joseph Barik and batch (supra).* Therefore, it does arise in the present case whether the learned Single Judge without waiting for adjudication of question of law by the Division Bench could direct for promotion of the respondent to the rank of Forest Ranger from 23.12.2016, *i.e.,* from the date of his juniors and batchmates got such promotions.

8.3. As submitted by learned Advocate General that considerable length of time elapsed due to consultation with the Law Department and there was no lack of *bona fide*. Circumstances prevailing at that relevant period led dilemma in approaching this

Court in writ appeal against the order of the learned Single Judge when the identical question of law involved in the present matter was pending adjudication. Such circumstances being beyond the control of the appellants, this writ appeal deserves to be considered by appreciating sufficiency in cause in approaching this Court with a delay.

9. From the above discussions it is immutable that unless "sufficient cause"/"good cause" is shown, there is little scope for the Court to exercise the discretion in condoning the inordinate delay in filing writ appeal by the Government. In other words, it may be stated that though pragmatic approach has to be adopted, any plea without any plausible or acceptable ground would not possibly lead to apply discretion in favour of condoning the inordinate delay.

9.1. In *Vedabai @ Vaijayanatabai Baburao Patil Vrs. Shantaram Baburao Patil, AIR 2001 SC 2582*, the Hon'ble Court observed that,

> *"A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach.* ***No hard and fast rule can be laid down in this regard. The Court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression 'sufficient cause' the principle of advancing substantial justice is of prime importance.****"*

9.2. With the aforesaid perspective, this Court would scrutinize the explanation proffered by the State of Odisha in its petition, being I.A. No.2585 of 2023, praying therein for condonation of delay in filing writ appeal. For appreciation of explanation contained in the petition, it is beneficial to reproduce relevant portions of the petition:

> *"4. That it is humbly submitted that after receipt of the copy of the impugned order dated 20.01.2022, the file was processed for filing of writ appeal.*
>
> *5. That, the petitioners had to obtain opinion and approval from several quarters before filing of the present writ appeal in accordance with the Government of Odisha Rules of Business and due to such administrative exigencies, the present writ appeal is being filed today.*
>
> *6. That, the process of consultation, arrangement, and preparation of the Writ Appeal took some time and led to this inadvertent delay in the filing of the present petition. That the delay so caused is neither deliberate nor intentional and as such may kindly be condoned in the interest of justice.*
>
> *****
>
> *8. That the Government in Law Department accorded sanction vide Letter dated 16.12.2022 to file writ appeal challenging the order impugned.*
>
> *9. That, the Petitioner No. 1 submitted all the records to the Office of the Advocate General for filing of Writ Appeal vide Letter No.1821/FE&CC dated 31.1.2023 and thereafter, the file was entrusted to the Law Officer on 23.02.2023 and the matter was briefed to him by the departmental authority in the last week after which, the writ appeal was made ready and has been filed today ****
>
> *10. That, the delay caused in filing the writ appeal was neither intentional nor deliberate but due to unavoidable circumstances beyond the reasonable control of the petitioners.*
>
> ****"*

9.3. Glance at the petition revealed that steps were being taken by the Department concerned for obtaining opinion of Law Department. Further fact which is apparent from the record is that the issue involved in the instant case was subject matter in a bunch of cases pending adjudication before the Division Bench of this Court. Such being the circumstance, it cannot be held that there was deliberate laches on the part of the petitioners to file writ appeal.

9.4. In the case of *Maniben Devraj Shah Vrs. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157,* the observation of the Supreme Court of India may deserve to be quoted:

> *"What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."*

9.5. Accepting the Order dated 20.01.2022 of the learned Single Judge would be to land up in conflicting decision on the identical question of law. As conceded by counsel for the petitioner that question of law raised in the present matter has similitude with that of ratio laid down in *Joseph Barik (supra),* but contended that on facts both the matters are dissimilar. Be that as it may, since question of law raised in the present case by the appellants is required to be addressed to on merit of the present matter, the delay in filing writ appeal deserves to be condoned.

9.6. Prima facie, the case of the appellants is stated to be supported by the decision of this Court rendered in the case of *State of Odisha Vrs. Chakradhar Prasad Gantayat, W.A No.321 of 2022, vide Judgment dated 20.03.2024,* referring to the decisions in *Joseph Barik (supra)* and *The Principal Secretary,* and *Panchayatraj Department, Government of Odisha (supra).* As the explanation of the appellants in the petition does not smack of *mala fides* and this Court perceives no dilatory strategy, this Court is of the considered view that the refusal to condone the delay would result in grave miscarriage of justice.

9.7. Since there is reasonable ground to think that the delay was occasioned by the appellants without any deliberate attempt to gain time. Therefore, this Court tilts in favour of acceptance of the explanation exercising discretionary power. As the respondent is stated to have been retired on 28.02.2022, and the consideration of the petitioner for promotion, being not a matter of right, no prejudice would be caused if such consideration is made after culmination of the criminal proceeding as also the Disciplinary Proceeding. The appellants have sought for indulgence of this Court by way of a petition for condonation of inordinate delay of 450 days.

9.8. Unless there is want of *bona fide* of such inaction or negligence as would deprive a party of the protection within ken of the connotation of the term "sufficient cause"/ "good cause", the petition must not be thrown out or any delay

cannot be refused to be condoned. "Sufficient cause"/"good cause" depends on facts and circumstances of each case; no straitjacket formula can be adopted to find out what constitutes "sufficient cause"/"good cause". The parameters adopting which the Court would consider "sufficient cause"/"good cause", preventing the appellants in filing writ appeal within time stipulated, should be pragmatic and not pedantic or dogmatic, depends upon facts and circumstances of each case. As sufficient cause or good cause— which is a question of fact— is manifest, it is the duty of the Court to make enquiry whether delay can be condoned in exercise of discretion, being undefined. In the factual matrix and the circumstances discussed above, it is, therefore, apt to liberally construe "good cause" as the appellants does not appear to be negligent.

9.9. At this juncture the decision of the Hon'ble Supreme Court of India rendered in the case of *Bhubaneswar Development Authority Vrs. Madhumita Das, 2023 SCC OnLine SC 977*, as relied on by Sri Ashok Kumar Parija, learned Advocate General, may be referred to. To buttress his contention that merit of the matter can be looked into at the time of condoning the delay in filing writ appeal, he submitted that the Hon'ble Supreme Court of India in the said reported case had interfered with the refusal of a Division Bench of this Court to entertain writ appeal by declining to condone the delay of 564 days in filing writ appeal. The Hon'ble Supreme Court considered the reasons ascribed for condonation of delay as plausible and at paragraphs 14 and 44 *(SCC OnLine SC)* it has been observed as follows:

> *"14. We have perused the reasons which were placed on the record of the Division Bench for condoning the delay.* ***The State had explained in detail the steps which were taken to take necessary approvals for the purpose of processing the writ appeal. Besides declining to condone the delay in this case would have serious consequences of allowing an imposter to continue having the benefit of a reserved seat.*** *This is not just a matter of detriment to the State but to genuine aspirants to the reserved seat who would be ousted. We are of the considered view that the Division Bench ought to have condoned the delay in the facts of this case.*
>
> ***
>
> *44. We have perused the reasons which were placed on the record of the Division Bench for condoning the delay.* ***The State had explained in detail the steps which were taken to take necessary approvals for the purpose of processing the writ appeal.*** *We are of the considered view that the Division Bench ought to have condoned the delay in the facts of this case."*

9.10. It may be pointed out that compliance of direction contained in the impugned Order dated 20.01.2022 would have serious impact on the State Government and/or larger effect in general.

10. *Vide Judgment dated 20.03.2024* in *State of Odisha Vrs. Chakradhar Prasad Gantayat, W.A No.321 of 2022,* the Division Bench following the Judgment in *Joseph Barik (supra)* held as follows:

> *"5. Be that as it may, in view of the law laid down by the Division Bench of this Court in the case of Joseph Barik (supra), in our opinion, the impugned decision rendered by the learned Single Judge cannot be upheld which requires interference.*

6. Accordingly, the impugned judgment dated 02.12.2021 passed by the learned Single Judge in W.P.(C) No.10919 of 2021 is set aside. This writ appeal is allowed. W.P.(C) No.10919 of 2021 is dismissed."

10.1. In order to maintain parity and consistency in approach, this Court now deems it fit case where the delay in filing the writ appeal is required to be condoned for adjudication of the matter on merits by examining whether the ratio laid down in *Joseph Barik (supra)* is applicable in the present fact-situation.

11. In the wake of aforesaid discussions and reasons ascribed, this Court comes to the conclusion that there was *bona fide* reason for the delay in preferring writ appeal by the appellants. The explanation proffered by the appellants in the petition for condonation of delay in the opinion of this Court being good cause and the appellants could demonstrate *prima facie* merit of the main matter supported by a Division Bench decision of this Court in a bunch of cases, which came to finalized after the impugned Order was passed. These would lead to hold that the cause shown by the appellants is reasonable one. It is only after disposal of batch of cases, being *Joseph Barik (supra),* the intra-Court appeal has been preferred by the appellants. This Court cannot also ignore such fact. The appellants have diligently prosecuting cases, which is one of the reasons for the delay.

12. In consequence of aforesaid observations, discussions made and reasons assigned, having found "good cause" shown by the appellants so as to be persuaded to condone the delay in filing writ appeal, the interlocutory application, being I.A. No.2585 of 2023, is allowed, subject to cost of Rs.25,000/- to be deposited with the High Court Bar Association Advocates' Welfare Fund, Cuttack within four weeks hence.

13. As Sri Swapnil Roy appeared for the opposite party, notice need not be issued. The counsel for the Appellants is requested to serve copy of the writ appeal on him.

14. List the writ appeal before the appropriate Bench for consideration on merit of the matter.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter *I.A is allowed*
(Verified by shri Pravakar Ganthia, Editor- in-Chief)

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2024 (III) ILR-CUT-983

PRAMOD KUMAR ROUT
V.
PUSPITA ROUT

(MATA NO(S). 153 & 170 OF 2023)

07 NOVEMBER 2024

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

Issue for Consideration

Whether making bald allegations in pleadings amounts to cruelty.

Headnotes

HINDU MARRIAGE ACT, 1955 – Section 13(1) i-a and i-b – Mental Cruelty – Respondent wife alleged physical assault and had complained to police – Case was registered – Appellant and his family members were entangled as accused – Petition for anticipatory bail was filed and allowed by the Hon'ble Court and the same was challenged by the respondent before Hon'ble Supreme Court in Special Leave Petition but was unsuccessful – As a result, petitioner husband was not taken into custody – The respondent made allegation against brother of Appellant/husband which was not proved – The respondent further alleged that Appellant/husband physically assaulted respondent's father, broke his cell phone and tried to drag him to the car – But these allegations were not put to appellant in cross-examination though it was a case made out in the written statement – Whether making bald allegations in pleadings amounts to cruelty.

Held: Yes **–** The respondent was cruel to appellant and had deserted him.
(Paras 18-21)

Citation Reference

Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate, **(2003) 6 SCC 334;** A.E.G. Carapiet v. Derderian, **AIR 1961 CAL 359;** Malathi Ravi M.D.v. B.V. Ravi, M.D, **(2014) 7 SCC 640;** Vishwanath Agrawal v. Sarla Vishwanath Agrawal, **(2012) 7 SCC 288;** K. Srinivas Rao v. D.A. Deepa, **(2013) 5 SCC 226;** J.L. Nanda v. Smt. Veena Nanda, **AIR 1988 SC 407;** Manohar v. Smt. Madhani, **II (1992) DMC 395;** Smt. Piyasa Ghosh v. Somnath Ghosh, **AIR 2009 Calcutta 90;** S.Hanumantha Rao v. S. Ramani, **AIR 1999 SC 1318;** Chetan Dass v. Kamla Devi, **AIR 2001 SC 1709;** A. Jayachandra v. Aneel Kaur, **AIR 2005 SC 534;** Bishnu Charan Hota Vrs. Smt. Mukta Manjari Hota**, AIR 2009 Orissa 144;** Gurbux Singh v. Harminder Kaur, **(2010) 14 SCC 301;** Smt. Bipasha Bhowal v. Sri Biplab Bhowal, **2014(4) Civil LJ 780** – **referred to.**

List of Acts

Hindu Marriage Act, 1955

Keywords

Mental cruelty, Bald allegation

Case Arising From

Judgment dated 23rd February, 2023 made by the Family Court.

Appearances for Parties

For the Husband : Ms. Deepali Mohapatra
For the Wife : Mr. Sourya Sundar Das, Sr. Adv. and Ms. S. Modi

Judgment/Order

Order

ARINDAM SINHA, J.

1. Ms. Mohapatra, learned advocate appears on behalf of appellant-husband. She submits, her client is aggrieved by judgment dated 23rd February, 2023 made by the Family Court, dismissing her client's petition for dissolution of the marriage and decreeing the separate civil proceeding filed by respondent-wife, for restitution. Her client has also filed MATA no.170 of 2023 in respect of the direction for restitution.

2. She submits, it was a love marriage. Both parties are service holders in the Government. The parties fell out within two years of marriage. Respondent-wife lodged false complaint against her client and other family members. Her client obtained anticipatory bail, which was unsuccessfully challenged by respondent-wife, right up to the Supreme Court. She relies on the petition of her client, paragraphs 16 to 19, his evidence and evidence of respondent-wife in the divorce case. She draws attention paragraphs 41 to 45 in deposition of cross-examination of respondent. Cruelty and desertion will be evident from evidence adduced by the parties. The judgment be reversed in appeal.

3. Mr. Das, learned senior advocate appears for respondent. He places the petition and submits, irretrievable breakdown of the marriage was stated in the reliefs claimed. He adds, cruelty and desertion were cited as reasons for irretrievable breakdown of the marriage. Such breakdown is not a ground for dissolution of marriage provided under section 13 in Hindu Marriage Act, 1955.

4. He submits, allegations in the petition, when scrutinized, do not amount to allegations of cruelty. He takes us through evidence adduced in the divorce case, by appellant and respondent. On query made he submits, his client's brother (Pintu) did not take the box. Likewise several allegations were made against his client as not having done right with her mother-in-law. The mother-in-law also did not take the box. As such nothing turns on the omissions.

5. For assistance of Court both parties had prepared informal paper books. We record our appreciation. We propose to deal with MATA no.153 of 2023 of the two appeals because controversy between the parties in it is whether or not the marriage should be dissolved. In our view, adjudication of the controversy will likely be basis for answer of the question in the other appeal preferred against impugned judgment, for having had decreed restitution.

6. To begin with we looked at the petition made under section 13(1)(i-a) and (i-b) of Hindu Marriage Act, 1955. In paragraph-1 of the petition appellant had emphatically alleged that after the parties had developed intimacy with each other and after having their selection for appointment to the Odisha Financial Service, respondent had proposed for early marriage saying that her family was pressurizing her to get married. Appellant alleged that his elder brother had not yet married and so their marriage be deferred. However, at insistence of respondent and her father, appellant and his family agreed to early marriage. It was solemnized on 3rd June, 2013 with undue haste because of unreasonable pressurization and insistence. There is no denial in the written statement.

7. The parties are officers in the Government. They must have exhibited academic excellence to have been chosen. There is no dispute that while at training they met and fell for each other. Allegation of appellant was, togetherness lasted for just about two years. The marriage is without issue.

8. While on behalf of respondent it was contended that allegations in the petition do not amount to grounds, either of cruelty or of desertion, on behalf of appellant it was contended that not only was there cruelty, it was perpetrated by respondent and her father to such an extent that it had an impact on his service. Suggestions to that effect were put to respondent in cross-examination. She confirmed that several complaints had been made to work place of appellant and he stood repatriated.

9. It does appear, at the time parties were undergoing training, respondent chose appellant as somebody she could have relation with. After she got married to him the couple were faced with reality, of demands and obligations in a marriage. Obviously they were not up to it and could not cope. Hence, there was entry of others, into the marriage. Those others gave evidence on the respective sides. We have seen the pleadings and evidence. Parties and their witnesses adduced evidence against each other. Relevance and weight of the evidence is to be seen, for reliance thereupon.

10. Respondent alleged physical assault and had complained to the police. Case was registered. Appellant and his family members were accused. Petition was filed for anticipatory bail and allowed by this Court. Respondent filed Special Leave Petition before the Supreme Court but was unsuccessful. Result was, appellant was not taken into custody. After some time and events, there was attempt at compromise. The District Legal Services Authority (DLSA) was in between. Respondent's contention, made from the Bar is that acting on compromise she withdrew her application for cancellation of bail. However, appellant resiled from his obligations in the compromise. That is why there could not be reunion, for parties to resume their married life. On her behalf contention is, any incident or act of cruelty alleged prior to the compromise is deemed to have been waived by appellant. On application of the doctrine of waiver there does not remain any allegation constituting ground, either of cruelty or desertion.

11. There was an incident on 4th April, 2017 as alleged by respondent in her written statement. Appellant's father is said to have asked respondent's father to meet at a park, a public place. According to respondent's father, the meeting was at 8.00 P.M. Also according to him, the meeting did not go well. He was abused by appellant and his father. His cell phone was broken. On shouting for help, he was rescued by respondent's cousin Pintu and others, who happened to be there. He filed written complaint on next day, 5th April, 2017. It is his allegation that appellant, then being a Vigilance Officer, prevented registration of FIR. On reaching out to several authorities, there was direction for and ultimately registration of his complaint as FIR on 19th July, 2017. Another criminal case thus commenced. At this stage, Ms. Mohapatra submits, in the subsequent criminal case too her client and his father successfully petitioned for anticipatory bail. Respondent's father thereafter applied for cancellation but was unsuccessful.

12. Several allegations were made in the petition leading up to separation, undisputedly on 29th July, 2015. Subsequent thereto, the criminal cases and steps taken to get, inter alia, appellant arrested have all been pleaded as foundation for grounds of cruelty and desertion.

13. In defending the divorce case respondent also had made several allegations. One of them was improper conduct of appellant's younger brother. The improper conduct was alleged to have happened prior to 31st May, 2015. She admitted in cross-examination that particulars of it were not given, neither in her written statement nor in her evidence on affidavit. Her father filed evidence on affidavit and took the box in support of it. He too narrated this incident of improper behaviour by younger brother of appellant. He said, she told him. The allegation made by respondent in her written statement is by a sentence in paragraph 14 of it, extracted and reproduced below.

> *"14.... .... The younger brother in law of the respondent took attempts to commit illegal act that is why he pulled and pushed the respondent in her bedroom in absence of her husband."*

On an earlier date we had pointed out to Mr. Das that the Supreme Court had said in **Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate**, reported in **(2003) 6 SCC 334**, paragraphs 6,7 and 8 about making bald allegations in pleadings as may amount to cruelty. Mr. Das submits, in **Vijaykumar Ramchandra Bhate** (supra) the allegation was made by one spouse against the other. As such, the decision is distinguishable on facts.

14. It emerges from evidence adduced and particularly by father of respondent that dowry demand of car was made by appellant's mother, to his younger son. It was specific case made out by respondent's father in his evidence. The son did not come to the box, inspite of suggestion put to the witness (respondent's father). In fact no case was made out in the appeals, on dowry. So we begin to understand why appellant's father had thought there could be some purpose served by talking with respondent's father. The latter appears to be very much involved in the matrimonial dispute. We reproduce paragraph 26 from his evidence-in-chief.

> *"**26.** That un-desirable actions on the part of the petitioner and his family members have crossed the limit of patience of the respondent and as well as mine and thereby my social prestige and dignity have been hampered including the dignity and social prestige of the respondent. That for the above said reason myself and the respondent are mentally shocked and tortured. It is submitted that the petitioner is getting approximately Rs.75,000/- (Rupees Seventy five thousand) only on salary per month and he has also landed properties. On the other hand the respondent is spending her days and passing her life in distressed conditions. The petitioner, therefore, threw the respondent in dark of the seas of sorrows by driving out the respondent on 15/11/2015 from his house. **The actions and activities of the petitioner are dangerous for smooth, conjugal live between the respondent and petitioner.**"* *(Emphasis supplied)*

Above statements weaken respondent's contention of wanting to be reunited with appellant, for the marriage to work. On her part though, Mr. Das laid emphasis that pursuant to the settlement she withdraw her application. On query made, submission is she withdrew her application for cancellation of bail. The case initiated remains pending. There is no pleading nor evidence to that effect.

15. There were several exhibits. On perusal thereof we are satisfied that the Supreme Court by order dated 8th April, 2016 dismissed the Special Leave Petition (SLP no.5791 of 2016) filed by respondent against grant of anticipatory bail. Appellant was repatriated by order dated 19th June, 2017 issued by General Administration (GA) Department, Government of Odisha. We also note, the document of amicable settlement dated 19th November, 2016 was tendered by respondent. In it clause (f) records parties had agreed not to pursue any pending matrimonial dispute/litigation relating to their matrimonial life against each other, their family members and matters arising out of and incidental thereto. The agreement of settlement was filed in CRLMA no.85 of 2016, a criminal case instituted by respondent against appellant.

16. From aforesaid we are able to analyse and cull out the facts. In paragraph-14 of the petition (of appellant) there were allegations made of cruelty and desertion. Respondent, in her written statement had not specifically dealt with the allegations, including of desertion on 29th July, 2015. Respondent had complained to the police of physical assault after she had left the matrimonial home, a rented premises of the parties. A further allegation of impropriety made against brother of appellant remained as an allegation, not proved. This was because the allegation itself was without particulars and the making of it imputed dishonor on appellant's brother, who appears from the evidence, to be dear to appellant. Then there is the incident of 4th April, 2017 taken place in a park, alleged by respondent in her written statement. The allegations were, inter alia, petitioner physically assaulted respondent's father, broke his cell phone and tried to drag him to the car but there was rescue by Pintu (respondent's cousin brother) and others who happened to be there. The case constituting the allegations was not put to appellant in cross-examination though, it was a case made out in the written statement. The Calcutta High Court took view on requirement of parties to put their case to the other in **A.E.G. Carapiet v. Derderian**, reported in **AIR 1961 CAL 359**. Counsels representing their clients at

trial scrupulously follow the requirement put forth in the view. Appellant alleged to have assaulted respondent's father on 4th April, 2017 was not asked a single question in regard thereto, when he was in the box and cross-examined. We need no further enquiry for proof on the allegations but can only say that the making of it lends support to appellant's case of cruelty.

17. We have already noticed from the exhibits that the compromise was filed in the criminal case instituted by respondent. There were reciprocal obligations on the parties to not prosecute. It is a fact the compromise was not given effect to. In the premises, contention on behalf of respondent made from the Bar that she had withdrawn her application seeking cancellation of anticipatory bail after she was earlier unsuccessful, does not impress us.

18. On perusal of the petition, evidence-on-affidavit and cross-examination of appellant along with the written statement of respondent and her deposition in cross-examination in the divorce case, we see that clear case of cruelty and desertion based on aforesaid facts were pleaded and proved. Both the parties being officers in Odisha Financial Service, respondent and her father caused repatriation of appellant, admitted by her as done in connection with several complaints she had made. There is no dispute she deserted appellant without reasonable cause on 29th July, 2015. The facts satisfy declaration of law by the Supreme Court on desertion made in **Malathi Ravi M.D. v. B.V. Ravi, M.D.,** reported in **(2014) 7 SCC 640.**

19. Several decisions were cited at the Bar. Ms. Mohapatra relied on judgments of the Supreme Court as given below.

i) **Vishwanath Agrawal v. Sarla Vishwanath Agrawal**, reported in **(2012) 7 SCC 288**, paragraphs 53 to 55. Paragraph 54 is reproduced below.

"54. Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. ***The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty****. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womanizer and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."*

(Emphasis supplied)

ii) **K. Srinivas Rao v. D.A. Deepa**, reported in **(2013) 5 SCC 226**. Reliance was, inter alia, on opinion expressed in paragraph 29, of the High Court having wrongly held that because appellant-husband and respondent-wife did not stay together, there is no question of the parties causing cruelty to each other. This reliance because respondent after having left the matrimonial home made police complaint and did everything she could to get appellant arrested. There was alleged incident in the park with allegation of appellant having physically assaulted her father, omitted to be put as a case to him in cross-examination. The alleged incident was cause for filing yet another criminal proceeding, pursuant to which respondent's father tried

to have appellant arrested. All these were incidents pleaded and amounts to cruelty at a time after respondent had left the matrimonial home, deserting him. Such conduct on her part would be at variance with plea not made, of cause to have left. The petition was presented after two years of the desertion.

iii) **Malathi Ravi M.D.** (supra). Reproduced below is paragraph 42 from the judgment.

"42. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be mental cruelty in the life of two individuals belonging to a particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. ***The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances****."* (Emphasis supplied)

20. Several views of High Courts and judgments of the Supreme Court were relied upon on behalf of respondent. They are tabulated below with reference to dates of the judgments.

i) **J.L. Nanda v. Smt. Veena Nanda**, reported in **AIR 1988 SC 407**, paragraphs 5 to 7. The Supreme Court maintained judgment of the High Court on finding facts to be that the wife's behaviour may have forced appellant to shift to a Government allotted quarter and live separately, away from other members of the family. The Supreme Court though said, it is no doubt an unfortunate state of affairs but same could not be held to be that the wife was behaving with appellant in a manner, which could be termed as cruelty. In the present case parties lived in a rented house, by themselves. On behalf of appellant no case was argued on shifting. The judgment does not apply on facts.

ii) View taken by a learned single Judge of Madhya Pradesh High Court in **Manohar v. Smt. Madhani**, reported in **II (1992) DMC 395**. It was that where appellant-husband himself was carrying on with affairs, he had made respondent-wife to consent to his second marriage and thereafter seeking to obtain dissolution of marriage. In doing so he was trying to take advantage of his own wrong. We are unable to see how the judgment can be of aid to respondent.

iii) **Smt. Piyasa Ghosh v. Somnath Ghosh**, reported in **AIR 2009 Calcutta 90**. A Division Bench of said Court took view, where it had been established from the evidence that the husband took money from widowed mother of the wife to construct additional room in his father's house and thereafter sent summons for suit of divorce on ground of desertion and cruelty, there is nothing wrong on the part of the wife to lodge complaint before the police. It cannot be said that making of the complaint amounted to cruelty. In this case, appellant had specifically pleaded of pressure for early marriage at instance of respondent, not denied. Respondent admitted in cross-examination that appellant had never asked for dowry. There was a substantial period of courtship but she alleged she knew family members of appellant were greedy and that they had asked for dowry. Such allegations, not

proved, cannot be seen in light of the view taken, to overlook persistent endeavour of respondent to have appellant taken into custody.

iv) **S. Hanumantha Rao v. S. Ramani**, reported in **AIR 1999 SC 1318**. Paragraph-11 is reproduced below.

"11. The last act of the respondent, which according to the learned counsel for the appellant, amounts to mental cruelty is that she lodged a complaint with the Women Protection Cell, through her uncle and as a result of which the appellant and the members of his family had to seek anticipatory bail. ***The respondent in her evidence stated*** *that she had never lodged any complaint against the appellant or any members of his family with the Women Protection Cell. However, she stated* ***that her parents sought help from Women Protection Cell for reconciliation through one of her relative who, at one time, happened to be the Superintendent of Police****. It is on the record that one of the functions of the Women Protection Cell is to bring about reconciliation between the estranged spouses. There is no evidence on record to show that either the appellant or any member of his family were harassed by the Cell. The Cell only made efforts to bring about reconciliation between the parties but failed. Out of panic if the appellant and members of his family sought anticipatory bail, the respondent cannot be blamed for that. Thus, we are of the opinion, that representation made by the parents of the respondent to the Cell for reconciliation of the estranged spouses does not amount to mental cruelty caused to the appellant." (Emphasis supplied)*

v) **Chetan Dass v. Kamla Devi**, reported in **AIR 2001 SC 1709**. The Supreme Court found facts to be that the husband was carrying on with another woman, being cause for the wife to have left him. However, even then the wife was prepared to live, at the stage of her life, with the husband but rightly on condition that he dissociates himself from the other woman. In those facts the Supreme Court found the husband was not entitled to dissolution of the marriage as that would be taking advantage of his own wrong. The judgment is not applicable to facts in this case.

vi) **A. Jayachandra v. Aneel Kaur**, reported in AIR 2005 SC 534, paragraphs 11 to 14. Said paragraphs give interpretation of what can amount to cruelty. Reproduced below is a passage from paragraph 13.

"13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. ... ..."

vii) **Bishnu Charan Hota v. Smt. Mukta Manjari Hota**, reported in **AIR 2009 Orissa 144**. Facts found were, the husband alleged the wife suffered from filaria, suppressed from him. Reproduced below is a passage from paragraph-8.

"8. After perusal of the pleadings of the parties and the evidence on record, we are not at all impressed by the aforesaid submission in as much as ***appellant took the plea of ill-treatment, cruelty and desertion*** *by the respondent in furtherance of a decree of divorce* ***and in that respect he has tendered no adequate evidence and particularly the***

evidence of the doctor that the respondent is suffering from filarial *or that mental cruelty was caused to him in any particular manner. Institution of criminal proceeding by the respondent. Under the given facts and circumstances, cannot be regarded as an act of cruelty by the respondent on the appellant, in as much as she wanted legal remedy for the ill-treatment and cruelty as alleged by her against her husband. ……. "*
(Emphasis supplied)

The husband was found to have failed to prove his allegation of the wife suffering from filaria. On the other hand she was found to have been justified in seeking legal remedy for his ill-treatment. Her seeking remedy was said to not amount to cruelty. In this case we have not found any baseless allegation made by appellant against respondent but to the contrary.

viii) **Gurbux Singh v. Harminder Kaur**, reported in **(2010) 14 SCC 301**. In this judgment the Supreme Court interpreted 'cruelty' on the word not given meaning in the Act. The decision does not apply on facts as will stand demonstrated on reproducing below paragraph-8 therefrom.

"8. Section 13 of the Act specifies the grounds on which a decree for divorce may be obtained by either party to the marriage. Though in the divorce petition filed before the Additional District Judge, Amritsar in HMA No. 19 of 2003, the appellant had sought divorce merely mentioning Section 13 of the Act for dissolution of marriage by decree of divorce, and did not specify the grounds on which he is entitled to decree of divorce. ***In the petition, the appellant has highlighted only one aspect, namely, that after the marriage, in the month of January 1998, on first festival of Lohri, when they were enjoying the festival, the respondent-wife abused his mother and the father in the presence of relatives and neighbours."*** *(Emphasis supplied)*

ix) **Smt. Bipasha Bhowal v. Sri Biplab Bhowal**, reported in **2014(4) Civil LJ 780**. The husband had filed for divorce on imputing cruelty by the wife for alleging he was having unethical and immoral relationship with another woman. The wife had filed written statement and amended written statement tendering explanation. View taken was, the wife had met a person from whom she came to know. Her explanation by the averments in the written statement as amended was simply that the person had reported to her about the unethical and immoral relationship. Furthermore, the husband could not substantiate by any independent or reliable witness, his allegations of cruelty. Our analysis on facts of this case has already been stated above. We are convinced respondent was cruel to appellant and had deserted him.

21. Impugned common judgment is reversed. The marriage solemnized on 3rd June, 2013 is dissolved. As a consequence C.P. no.83 of 2018 is allowed and C.P. no.1073 of 2018, dismissed. Both the appeals are allowed and disposed of. We are not called upon to exercise discretion on permanent alimony as the parties are employed as Government servants and can maintain themselves.

22. The appeals are accordingly disposed of.

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

Result of the case :
Appeals disposed of

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2024 (III) ILR-CUT-993

M/s. ORISSA STEVEDORES LTD.
V.
DESIGNATED COMMITTEE, CENTRAL GST & CUSTOMS, BHUBANESWAR & ORS.

[W.P.(C) NO. 26408 OF 2020]

11 NOVEMBER 2024

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

Issue for Consideration

Whether the petitioner is entitled to receive discharge certificate.

Headnotes

FINANCE ACT, 1994 – Section 120, 125(I) of Chapter V r/w Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 – Section 120 introduces the Scheme – Section 125(I) provides for eligible persons to make a declaration under the Scheme – The petitioner applied under the Scheme indicating payment of entire demand by way of adjustment of the Input Tax Credit (ITC) – There is no dispute regarding eligibility of petitioner to apply under the Scheme – The Revenue disputed the payment/deposit and issued show cause notice while objecting the issuance of discharge certificate – Whether the petitioner is entitled to receive discharge certificate.

Held : Yes **–** Reason indicated with reference to case laws. (Paras 8-9)

Citation Reference

Commissioner of Central Excise and Service tax, Rohtak v. Merino Panel Product Limited: **(2023) 2 SCC 597**– **referred to.**

List of Acts & Schemes

Finance Act, 1994, Sabka Vishwas (Legacy Dispute Resolution) Scheme 2019.

Keywords

Demand of Tax, Input Tax Credit, Eligibility, Discharge certificates.

Case Arising from

Show cause notice dated 15th October, 2015 in the Department of Central GST & Customs.

Appearances for Parties

For Petitioner : Mr. J. Sahoo, Sr. Adv.
For Respondent : Mr. T.K. Satapathy, Sr.S.C.

Judgment/Order

Judgment

ARINDAM SINHA, J.

1. Mr. Sahoo, learned senior advocate appears on behalf of petitioner and submits, his client seeks mandamus commanding revenue to issue SVLDRS-4 (discharge certificate) in favour of his client. He submits, there stood issued show cause notice (SCN) dated 15th October, 2015 demanding ₹5,19,28,080/- as wrongly availed Input Tax Credit (ITC) during financial years 2010-11 to 2013-14. Adjudication pursuant to the SCN remained pending, when there was enactment by Parliament introducing Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 by Finance (no.2) Act, 2019. His client applied under the scheme on prescribed form SVLDRS-1. In so applying his client indicated payment of entire demand by adjustment of the ITC, disputed by revenue under said SCN. On query made he submits, his client did not opt to claim any part of the ITC as relief under the scheme. It being for purpose of resolution and amnesty, the adjustment must be acknowledged and discharge certificate issued. That will put paid to subsequent adjudication and reiteration of, inter alia, the demand. He submits, circulars issued by revenue are binding on it. He relies on judgment of the Supreme Court in Commissioner of Central Excise and Service Tax**, Rohtak v. Merino Panel Product Limited** reported in **(2023) 2 SCC 597** for the proposition.

2. On query made he submits further, there is no dispute regarding his client having paid tax on the input services. When his client sought to avail the accumulated credit of ITC against output services, revenue disputed by saying that in some cases the output services were entirely ineligible for adjustment and others, partially. So therefore, revenue is in receipt of the tax on the input service, which payment benefit his client was sought to be prevented from utilizing. Revenue's case of ineligibility amounted to demand of tax. His client had applied under the scheme. He seeks interference.

3. Mr. Satapathy, learned advocate, Senior Standing Counsel appears on behalf of revenue and submits, petitioner wrongly availed the ITC. Having had done so, it is not entitled to benefit of the scheme. There has been no deposit of tax as could be claimed to have been made under the scheme. To that effect SVLDRS-2 and 3 were duly issued. He relies on paragraph-7 in the counter to submit it is clear, where CENVAT matters are under dispute, same can be settled by paying applicable post-relief duty. In instant case, availing of ITC at ₹5,19,28,080/- has been questioned by the Department and hence, the SCN was issued. Petitioner did not deposit the tax. The matter was pending for adjudication. Petitioner opted for relief under SVLDR Scheme, 2019, in category of 'Litigation' and was therefore required to pay 50% of the litigated amount. Petitioner's claim that it paid the entire disputed amount is a blatant lie. In the meantime adjudication order dated 19th August, 2024 has been passed confirming the demand, imposing interest and penalty. No interference is warranted. The writ petition be dismissed.

4. We have perused relevant sections in chapter-V of the Finance Act. Section 120 introduced the scheme. It was duly notified to come into force. Pursuant thereto by circular dated 27th August, 2019, Central Board of Indirect Taxes and Customs elaborated on it. Petitioner relies on declaration of law made by the Supreme Court in **Merino Panel** (supra) that circulars issued by revenue are binding on it.

5. The circular says, dispute resolution and amnesty are the two components of the scheme. It is aimed at liquidating the legacy cases locked up in litigation at various forums, whereas the amnesty component gives an opportunity to those who have failed to correctly discharge their tax liability, to pay the tax dues. The circular also says, it may be appreciated that ambit of the scheme is very wide.

6. Section 125(1) in the Finance Act provides for eligibility of persons to make a declaration under the scheme. There has been no submission made to effect petitioner was or is ineligible to have applied under the scheme. The allegation against petitioner is, it did not make the deposit. That is the effect of forms SVLDRS-2 and 3. So in considering petitioner's contention, of application of the scheme to it and liquidation of the legacy tax demand in the prior period by adjustment of its ITC, we have to adjudicate whether it is entitled to issuance of discharge certificate SVLDRS-4.

7. For application of the scheme to petitioner, on its behalf there was reliance on clause(c) in paragraph-10 of the circular. The clause is reproduced below.

> *"(c) This Scheme provides for adjustment of any amount paid as pre-deposit during appellate proceedings* ***or as deposit during enquiry****, investigation or audit [Sections 124(2) and 130(2) refer].* ***In certain matters, tax may have been paid by utilizing the input credit, and the matter is under dispute. In such cases, the tax already paid through input credit shall be adjusted by the Designated*** *Committee at the time of determination of the final amount payable under the Scheme." (Emphasis supplied)*

8. As there is no dispute regarding eligibility of petitioner to have applied under the scheme and the application was in respect of the demand under the SCN, petitioner opted to indicate payment of the entire demand by adjustment and not claim any amnesty. Above reproduced clause in the circular mandates adjustment by the designated committee at the time of determination of the final amount payable under the scheme. There has been demonstration that the exact amount demanded under the SCN, petitioner claimed to have paid by adjustment of the ITC. Contention of revenue is omission of required deposit of the wrongly availed ITC, as had been intimated by issuance of SVLDRS-2 and 3. Only then can there be determination of final amount payable under the scheme.

9. There is no dispute that petitioner was entitled to the accumulated credit. Application of it for utilisation to pay tax on outward services was disputed by revenue as ineligible or partially so. Going by clause(c) in said circular dated 27th August, 2019, petitioner's contention fits as a certain matter, where tax was paid by utilizing input credit and the matter is under dispute. The circular requires that in such cases, the tax already paid shall be adjusted by the designated committee at the

time of determination of the final amount payable under the scheme. In the circumstances revenue is bound to cause the adjustment, which will leave balance tax to be paid, under the scheme, as nil.

10. The writ petition is allowed. Opposite Party No.1 is directed to issue SVLDRS-4 within four weeks of communication of certified copy of this judgment.

11. The writ petition is disposed of.

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

Result of the case :
Writ Petition disposed of.

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2024 (III) ILR-CUT-996

SANGRAM KESHARI SWAIN
V.
UNION OF INDIA & ORS.

(WPC NO. 26063 OF 2022)

09 OCTOBER 2024

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

Issues for Consideration

(1) Whether the punishment order passed in the year 2012 can be extended/run to the year 2018.

(2) Whether the Writ Court by exercising the power under Judicial Review can intervene the order of Selection Committee.

Headnotes

(A) SERVICE LAW – Petitioner being an OAS officer challenges the action of the selection committee not giving promotion to the cadre of IAS pursuant to vacancy arose in the year 2018, as per IAS Recruitment Rules, 1954 r/w IAS (Appointment by Promotion) Regulations, 1955 on the ground that he is unfit due to imposition of minor punishment like Censure & Recovery and such punishment runs to the year 2018 as the recovery ended on 24.05.2018 vide departmental proceeding initiated in the year 2005 and culminated on 23.05.2012 – The action/order of the selection committee was challenged before the Tribunal but the Tribunal dismissed the application on the ground that the Tribunal cannot act as the appellate authority to the order passed by the competent authority/selection committee – On the other hand petitioner pleaded that the order passed in the year 2012 cannot be extended/run to the year 2018 whereas the authority pleaded that as the

punishment was in force till the recovery amount paid by the petitioner i.e. in the year 2018, the decision of selection committee, not selecting the petitioner cannot be faulted – Pleadings of the parties considered by the Court .

Held: The currency of punishment cannot be stretched as per desire and interpretation of the selection committee making it dependent upon the last amount deposited by the petitioner **–** There are other defined penalties in the OCS (C.C & A) Rules, 1962 where the authority has to indicate the number of years to remain effect of such penalty and in such cases the currency of punishment shall have a cascading effect **–** In the present case the nature of penalty being recovery under no circumstances it can be till a future date depending upon the execution of the order as per discretion and whims of the authority in recovering the last pie **–** The currency of both the punishments i.e. censure as much as recovery ought to be construed to be co-terminus on the date on which it is imposed **–** On account of the finding that the currency of the punishment is limited to the year of its imposition i.e. 2012, the same cannot have any impact on the Assessment Matrix 2014-15 to 2018-19 for the select list of 2019 **–** As such the view expressed by the selection committee with respect to the petitioner as unfit for his promotion and its acceptance by the Union Govt. and State Govt. is not sustainable.

(Para 26-36)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Judicial Review – Power of the Writ Court – Decision of the selection committee – When can be interfered?

Held: It is the settled position of law that the decision of the experts in a selection committee should not be ordinarily reviewed by the court assuming power as if it is an appellate authority but it is also trite that exception to such proposition is there when the very process of assessment is vitiated either on the ground of bias, malafides, arbitrariness or unreasonableness in the decision making process. (Para 29)

Citation Reference

Union of India etc. etc. vrs. Jankiraman etc. etc., **AIR 1991 SC 2010** - **referred to.**

List of Rules/Regulations

Constitution of India, 1950; Indian Administrative Service Recruitment Rules, 1954; Indian Administrative Service (Appointment by Promotion) Regulations, 1955; Odisha Civil Services (Classification, Control and Appeal) Rules, 1962.

Keywords

Promotion, Selection Committee, Punishment, Department proceeding, Extension of punishment, Judicial Review, Principle of relate back, Decision of the Selection Committee, Interference of the Writ Court.

Case Arising from

Order dated 21.06.2022 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 260/260 of 2021.

Appearances for Parties

For Appellant : Mr. K.C. Kanungo
For Respondent : Mr. Md. Ziaul Haque, (O.P.2),
Mr. S.N. Das, ASC (O.P.3)

Judgment/Order

Judgment

V. NARASINGH, J.

The Petitioner invoking the jurisdiction of this Court under Article 226 and 227 of the Constitution of India assails the order dated 21.06.2022 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A No. 260/00260 of 2021 at Annexure-1 by which the claim of the Petitioner for non-selection to the cadre of Indian Administrative Service (IAS) was rejected.

2. For convenience of reference the reliefs sought in the writ petition is extracted hereunder:

> "…….Writ of Mandamus and/or Writ of Certiorari or any other appropriate Writ(s) or direction calling upon the Opposite Parties to show cause as to why Annexure-1 shall not be quashed in so far as the order at Anneuxre-1 in view of the facts and law pleaded above and in the event opposite Parties fail to show cause or show insufficient cause the said Rule be made absolute for the ends of justice.
>
> AND
>
> Be further pleased to hold that the imposition of punishment lost its stint/ effect after january,2010 and therefore the currency period shall not flow to the Assessment Matrix (five years from 2014-15 to 2018-19) for which the select list of 2019 for selection to the post of IAS was finalized for the ends of justice.
>
> AND
>
> Be further pleased to quash the communication made by the O.P. No. 1 vide Notification No. 14015/17/2020-AIS(1)-B dt.26.03.2021 (part of Annexure-2) and also Notification No.10032 dt. 26.03.2021 (part of Annexure-2) issued by the O.P.No.3, wherein promotion was granted in favour of the private Opposite Parties No. 4 to 22 ignoring the admitted seniority of the Petitioner for the ends of justice.
>
> AND
>
> Be further pleased to direct the O.P. No.1 to 3 to issue fresh selection list, declaring and treating the Petitioner to have been promoted to the post of Indian Administrative Service cadre with all consequential benefits and arrears thereof for the ends of justice.
>
> xxx xxx xxx"

3. The Petitioner an Odisha Administrative Service Cadre Officer (OAS) approached the learned Central Administrative Tribunal Cuttack Bench, Cuttack

(hereinafter referred to as "the Tribunal") as an Applicant being aggrieved by his non-selection to Indian Administrative Service (IAS) in consonance with the Indian Administrative Service Recruitment Rules 1954 read with Indian Administrative Service (Appointment by Promotion) Regulations, 1955 questioning the same to be outcome of total non application of mind on account of erroneous appreciation of the order of minor punishment vide order dated 23.05.2012, imposing punishment of 'Censure' and 'Recovery' on account of a disciplinary proceedings initiated against him as per memorandum dated 13.06.2005.

3-A. It is apt to note that admittedly on 04.08.2012 the Petitioner was promoted to the post of OAS Group-A (Sr. Branch) w.e.f. 09.05.2011 and, thereafter, promoted to the post of OAS (Supertime) in terms of the Notification dated 20.11.2012. On 23.12.2016, he was promoted to OAS (Super Administrative Cadre) w.e.f. 01.01.2017 and, on 09.10.2018, he was promoted to OAS (Special Secretary Cadre) w.e.f. 10.10.2018.

3-B. It is the case of the Petitioner that the State of Odisha recommended names of 27 Officers for appointment by way of promotion to IAS Cadre against 2018 vacancy, in which, his name was at Sl. No.12 whereas 8 OAS Officers including one of his Juniors in the seniority list, were appointed /promoted to IAS Cadre but his case was not recommended.

3-C. On 30.04.2020, the State of Odisha forwarded names of 67 OAS Officers for consideration for appointment/ promotion to IAS in terms of **IAS (APPOINTMENT BY PROMOTION) REGULATIONS, 1955** (herein after referred as "Promotion Regulation") against vacancy of 2019 wherein his name was at Sl. No.3.

3-D. On 26.03.2021, 19 OAS Officers were appointed/promoted to IAS Cadre including his Junior but he could not be promoted and, according to him, gross injustice was caused to him in the decision making process in the matter of his non promotion to the cadre of IAS against the vacancies of 2019.

3-E Therefore, he approached the Tribunal in O.A No.260/2021 with a prayer to quash the Notification No.14015/17/2020AIS(1)-B dated 26.03.2021 vide Annexure-A/8 and also Notification No.10032 dated 26.03.2021 issued by the Respondent No.3 vide Annexure-A/9 to the Original Application, wherein promotion was granted to the Respondents 4 to 22 ignoring the undisputed seniority of the applicant.

3-F. The said Notifications are at Page-115 and 117 of the writ petition being part of Annexure-2.

He had also prayed for a direction to the Respondent Nos.l to 3 to issue fresh selection list, declaring and reflecting his name to have been promoted to the post of IAS Cadre, taking into consideration his position at Sl. No.3 of the list vide Annexure-A/7 to the said original application. (At page-112 of the present writ petition).

3-G. Learned Tribunal while dismissing the original application by the impugned order dated 21.06.2022 at Annexure-1 had specifically observed that the Selection Committee rightly took note of the punishment imposed on the Petitioner-applicant to find him unsuitable notwithstanding the outstanding grading given by his reporting/reviewing/accepting authority in the State Service Cadre.

3-H. In addition to that, learned Tribunal arrived at the finding, after perusing the minutes of the Selection Committee, that the Selection Committee was duly constituted and their decision is not justiciable and held that it is not the function of the Tribunal to sit in appeal over the decision of the Selection Committee, in as much as whether a candidate is fit for a particular post or not is to be decided by a duly constituted Selection Committee having expertise.

3-I. Learned Tribunal further observing that in absence of any allegation of malafide or arbitrariness against the experts constituting the Selection Committee and that there was no illegality in the matter of selection of the private respondents and non-selection of the Petitioner-applicant, dismissed the original application.

4. It is submitted by the learned counsel for the Petitioner, Mr. K.C. Kanungo, that the crux of the matter revolves round the decision reached by the learned Tribunal rejecting the claim of the Petitioner on the ground of competency to interfere with the decision of Selection Committee although the grievance of the Petitioner primarily relates to the process of reasoning adopted by the Selection Committee in adjudging the Petitioner as unsuitable.

4-A. Therefore, the stand of the Petitioner in the present writ petition impugning the order passed by the learned Tribunal is the outcome of vnon-application of mind by the learned Tribunal in not properly applying the principle decided by the Apex Court in plethora of cases prescribing the contours relating to interference with the findings of the Selection Committee.

4-B. It is urged that the learned Tribunal misdirected its focus relating to the grievance of the Petitioner with respect to illegality and impropriety of the Selection Committee vis-à-vis the decision making process.

4-C. The moot point as advanced by the Petitioner is that the Selection Committee ought not to have declared him unfit on account of erroneous reasoning adopted by the Selection Committee in taking into consideration a minor penalty imposed against him in the nature of ‘Censure’ and ‘Recovery’ way back in the year 2012 while concluding a disciplinary proceeding initiated against him in the year 2005 and utilizing such punishment adverse to the Petitioner’s interest as against the vacancy for the year 2018 & 2019 respectively.

4-D. It is contended by the learned counsel for the Petitioner that the disciplinary authority framed definite charges against the Petitioner by initiating a proceeding in the year 2005 and the authority took their own time to conclude such proceeding without attributing any such role to the Petitioner in causing delay in disposal of such

disciplinary proceeding keeping the proceeding pending for seven years and concluding such proceeding imposing the minor penalty as per order dated 23.03.2012. As such the effect of such minor penalty should not play any role in the decision making process while considering the promotion to the cadre of IAS against 2019 quota taking into consideration the assessment matrix from the year 2014-15 to 2018-19.

4-E. It is urged with vehemence that the allegations with respect to alleged misconduct against the Petitioner were of the year 2005 or prior to that for which the employer initiated the disciplinary proceeding in the year 2005. There is no allegation of any wrongful action or inaction against the Petitioner thereafter.

4-F. On the contrary the Petitioner was found suitable and got promotion in his own cadre to different posts more particularly taking into consideration the conclusion of the proceeding drawn against him and imposition of minor penalty.

5. At this stage the relevant question required to be answered is that if a particular action or inaction or irregularity of an employee gives scope for initiation of a disciplinary proceeding against him then on subsequent culmination of such proceeding with penalty, irrespective of the nature i.e major or minor, whether currency to be counted from the date of imposition of penalty or from the date when the consequence of punishment runs its course.

6. The Petitioner contends the date of imposition of penalty should be the basis to determine the currency of punishment and more so when the punishment is minor (censure) and not the selective date of final recovery as stipulated, as per the whims of the disciplinary authority.

7. In the present case it is apposite to take note that the authority decided to impose the penalty of Censure and Recover an amount of Rs.39,675.95 paisa that too in 20 installments.

8. The Petitioner contends that the decision to conclude the proceeding after a period of seven years and to divide the amount of recovery in 20 installments are all unilateral decisions of the authorities without any role played by the Petitioner and in such way the authority cannot exercise their own discretion to utilize and to define the currency of punishment to be prejudice of the Petitioner.

9. Therefore, the impugned decision at Annexure-1 of the learned Tribunal restricting itself to scrutiny of the decision of the selection process fallaciously relying upon the settled position of law not to interfere with the selection acting as an appellate authority over such decision is nothing but an erroneous conclusion tainted with malice in law as the learned Tribunal failed to appreciate that there is gross irregularity in the decision making process adopted by the Selection Committee which is the outcome of arbitrariness, improper application of mind and completely ignoring the effect of the delay committed at the level of the disciplinary authority in effecting recovery and in the process depriving him of further service benefits ignoring his continuous outstanding service career in terms of the merit and

ability to hold higher post. And, consequentially allowing his juniors to steal a mach over his legitimate claim(s).

10. It is further submitted by the Petitioner that the learned Tribunal has miserably failed to appreciate that the currency of penalty dated 23.03.2012 which was due to expire by January 2014 cannot in any way affect the assessment matrix involving the year 2014-15 to 2018-19, on the premises that the authority could not recover the desired installment due to their own laches without any complicity of the Petitioner and as such whether such failure to recover entails continuance of the currency of penalty to remain in force till the Petitioner deposited the entire amount on 24.05.2018.

11. Learned counsel for the Petitioner relied upon various decisions with respect to "relate back theory" so far as the expiry of punishment is concerned, in absence of any lapse or fault on his part and contended that it is the duty and responsibility of the competent authority to enforce recovery in terms of the penalty.

12. It is submitted that the Selection Committee was required to go through the service record of each of the eligible officer with special reference to the performance of the officer during last five years including the vacancy year.

13. In the present case the reckonable years in the assessable matrix were 2014-15 to 2018-19. The guideline clearly states that the effect of punishment ought not to have any relation to any of the years in the assessment matrix.

14. Out of the two-punishments imposed on the Petitioner the punishment of 'Censure' did not fall in any of the year of assessment matrix having been implemented immediately. So far the recovery of amount is concerned it is the decision of the authority to divide the same into 20 installments which would have been over by January, 2014 as such the same is also not falling in any of the year of assessment.

15. However, the decision of the Disciplinary Authority to divide the recovery amount into 20 installments and the failure on the part of the competent authority to recover such amounts in time rather the initiative by the Petitioner to deposit the same in the year 2018 i.e. 24.05.2018 cannot adversely impact or affect the year of the assessment matrix.

16. The Petitioner contends that there is no controversy relating to the law laid down about the competency of the Tribunal or any Court of law to sit in an appeal and to act as an appellate authority on the decision of the selection committee consisting of experts.

17. However, it is equally trite that the Court and the Tribunal has every right to interfere with the decision-making process while evaluating the conclusion of the Selection Committee if such decision-making process is arbitrary and suffers from irregularity.

18. As the present case relates to the very approach on the part of the authorities in determination of currency of punishment in order to arrive at a conclusion having its effect on a particular year of assessment matrix, this Court has ample jurisdiction to interfere with such erroneous decision making process resulting in a patently defective decision arrived at by the Selection Committee. It is stated that the learned Tribunal completely failed to appreciate such settled position and glossed over the real issue in determining the currency of punishment and its effect on any particular year of assessment matrix.

19. Therefore, the Petitioner prays for interference with the decision of the learned Tribunal particularly relying upon the principles of "relate back" as decided in the case of (i) P.H. Kalyani vrs. Air France, Kolkata, AIR 1963 SC 1756 and (ii) Punjab Dairy Development Corporation Ltd. & another Vs. Kala Singh and others, 1997 SCC (L&S) 1434.

The Petitioner also relied upon the settled position of law that an employee cannot be made to suffer for no fault of his in as much as the authorities cannot take advantage of their own delay and laches so also their own failure to put the employee in a disadvantage position in terms of his service condition and in this context relied on the judgment of the Apex Court in the case of Laxmi Saroj Vs. State of U.P. & Ors., AIR 2023 SC 120.

STAND OF UPSC

20. Opposite Party No.2–UPSC in their counter before the learned Tribunal so also in the present writ petition stated that the Petitioner has been declared unfit by the Selection Committee taking into consideration the fact that the effect of penalty of recovery was over only on 24.05.2018 i.e. the date on which the Petitioner deposited the amount having been informed that such amount has not been recovered so far.

21. The lack of commitment on the part of the Petitioner as a Government Servant is evident from his submissions that nothing is attributable to him regarding delay in recovery. The Petitioner cannot claim to be innocent and wash off his hands due to non-implementation of the penalty. As such the writ petition is liable to be dismissed.

It is argued that the view expressed by the Selection Committee in arriving at a conclusion with respect to non-suitability of the Petitioner was due to evaluation of the effect of punishment on any of the year of assessment matrix since the currency of punishment remains in operation till the amount is actually deposited by the delinquent (Petitioner) and as such the reasoning of the selection cannot be faulted. And, in this context reliance was placed on para 3.1, 4.6, 4.7 and 4.7.1 of **"The Guidelines/Procedures for categorization of State Civil/Police/Forest Service officers and preparation of a list of suitable officers by the Selection Committee for promotion to the Indian Administrative Service/Indian Police Service/Indian Forest Service in terms of Regulations 5(4) and 5(5) of the Promotion Regulations"**, which is extracted hereunder:

"**A. SPAN /SCOPE OF ASSESSMENT**

3.1 The Selection Committee would go through the service records of each of the eligible officers, with special reference to the performance of the officer during the last five years including the vacancy year, and after deliberation will record the assessment of the Committee in the Assessment Sheet comprising the Assessment Matrix (Officer x Year-wise assessment) and the Column for Overall Assessment of the officers.

xxx xxx xxx

B.4 Treatment of Penalties

xxx xxx xxx

4.6 The Selection Committee, while preparing Select Lists, may take into account the effect of 'Censure' as under:

(a) If the date of imposition of the 'censure' falls within any of the years in the Assessment Matrix, the Committee would categorise the officer as 'Unfit' for the year in which it is imposed for the first Select List prepared in which he is eligible to be considered. Thereafter, the Overall Assessment of the officer may be made as per the procedure given in section B.3 of the Guidelines.

(b) If the date of imposition of the 'censure' is subsequent to the last year in the Assessment Matrix, and upto the date of the SCM, the Committee would categorise the officer as 'Unfit' in the overall Assessment for the first Select List prepared in which he is eligible to be considered.

(c) The penalty of 'censure' would be ignored for the subsequent Select Lists for which the officer may be eligible to be considered.

4.7 The Selection Committee, while preparing Select Lists, may take into account the effect of currency of penalties other than 'censure' as under:

The currency of the Penalty is taken from the date from which it is imposed/effective to the date it ceases to be in force.

4.7.1. The Selection Committee meets to prepare the Selection List for the **current year** only.

(a) If the currency of the penalty flows into the SCM year, the officer would be graded as 'Unfit' in the Overall Assessment for the current year.

(b) If the currency/effect of the penalty before the SCM year, but is having implications on any of the years in the Assessment Matrix, the Committee would categorise the officer as "Unfit" for the relevant year(s) in the Assessment Matrix when the penalty was current. Thereafter, the Overall Assessment of the officer may be made as per the procedure given in Section B.3 above."

(SCM: Selection Committee Meeting)

And, on the basis of such guidelines it is the consistent stand of the UPSC that as per guidelines as above the currency of the Penalty is taken from the date from which it is imposed/effective till the date it ceases to be in force.

22. It is further stated that the period of currency of the said penalty in the case of the Petitioner was flowing into the Assessment Matrix (2014-15 to 2018-19) for the Select List of 2019 and as per the Guidelines extracted hereinabove, the Applicant was assessed overall as 'Unfit' since the currency of the penalty of 'recovery of Rs.39657.95' was over only on 24.05.2018 as intimated by the State Government and on such basis the Petitioner was not included in the Select list of 2019 for promotion to IAS of Odisha Cadre.

23. The assessment of the selection committee in respect of the Petitioner for being included in the select list of 2019 submitted in the tabular form in the counter is extracted under:

Position of DE/ Cr.P./IC/ Adv.Remarks	Sl. No.	Name of Officer (Shri) and Date of Birth	Assessment by previous SCM	Assessment of last five years					Overall Relative Assessment	Remarks
				2014-15	2015-16	2016-17	2017-18	2018-19		
	3.	Sangram Keshari Swain 08.03.1965		Unfit *	Unfit *	Unfit *	Unfit *	Unfit *	Unfit *	Penalty of Recovery of Rs. 39,657.95/- in twenty instalments was imposed on 23.05.2012. Penalty was over on 24.05.2018.

*Unfit due to penalty

It is further contended that the State Government in their proposal submitted to the Commission had furnished Statement of Penalty wherein it was indicated that penalty of 'Censure' and 'Recovery' of Rs. 39657.95 only in 20 instalments was imposed upon the Petitioner vide State Government's Order dated 23.05.2012. The State Government also intimated that the currency of penalty was over on 24.05.2018.

24. Regarding non-recovery of penalty amount on time by the State Government, it is submitted that apart from the Administration, it is also the responsibility of the concerned officer to inform the Administration/ the competent authority, if the recovery of penalty amount has not been effected. In the instant case, the penalty of recovery of Rs. 39657.95 in 20 instalments was imposed upon Shri Sangram Kesari Swain, the Petitioner, on 23.05.2012 and the Petitioner being senior and responsible State Service Officer should have informed the Administration/ the competent authority immediately that the instalments are not deducted from his salary. Only after the receipt of the communication dated 23.05.2018 from the State Government, he deposited the entire amount of the Penalty on 24.05.2018. The Petitioner has failed to inform the State Government that the order of recovery from his salary has not been implemented and as such, he cannot be absolved of negligence solely blaming the State Government.

25. It is further submitted that in the case of **Union of India etc. etc. vrs. Jankiraman etc. etc., AIR 1991 SC 2010** the Apex Court held that an employee found guilty of misconduct cannot be placed at par with other employees and his case has to be treated differently. The relevant portion of the judgment relied upon reads as under

> "While considering an employee for promotion, his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it' is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion."

26. It is apt to note here that in terms of the order dated 03.11.2022 notice of this writ petition was served on the Opposite Parties 4 to 22. Memo evidencing the same filed by the learned Additional Standing Counsel is on record. There is no appearance on behalf of the said Opposite Parties.

ANALYSIS

This Court has to answer the core issue raised by the Petitioner with respect to the interpretation of currency of punishment and its impact on the assessment matrix and the approach thereof by the Selection Committee.

27. After perusing the material on records, it transpires that the issue framed by the learned tribunal only centres around the competency of the court to sit on appeal with a decision taken by a duly constituted selection committee.

28. This Court is of the considered view that the Tribunal has committed an error in ignoring the real issue i.e. the legality in the decision-making process by the selection committee in reaching a conclusion about the unsuitability of the Petitioner. Rather the Tribunal allowed its focus to be digressed to a non-issue i.e. interference with the decision of the selection committee.

29. No doubt, it is the settled position of law that decision of the experts in a selection committee should not be ordinarily reviewed by the court assuming power as if it is an appellate authority but it is also trite that exceptions to such proposition is there when the very process of assessment is vitiated either on the ground of bias, malafides, arbitrariness or unreasonableness in the decision making process. In this context it is apt to refer to the decision of the Apex Court in the case of Union Public Service Commission vs. M. Sathiya Priya and ors. reported in (2018) 15 SCC 796 outlining the contours of judicial review relating to functioning of Selection Committee while cautioning that the self imposed restrictions cannot be given an absolute go bye. The Apex Court held that;

> "In our Constitutional Scheme, the decision of the Selection Committee/Board of Appointment cannot be said to be final and absolute. Any other view will have a very

> dangerous consequence and one must remind oneself of the famous words of Lord Acton 'Power tends to corrupt, and absolute power corrupts absolutely'."

Thus the power of this Court exercising plenary jurisdiction under Articles 226 & 227 of the Constitution of India is not fettered to examine as to whether the decision arrived by the Selection Committee, as in the case at hand, regarding correct interpretation and application of the Regulation governing the field.

In the event of such scrutiny it cannot be said that this Court has assumed the jurisdiction as an Appellate Authority sitting in judgment over the views of experts.

30. Since the Petitioner in the present case has raised a very pertinent point with respect to the manner of approach of the Selection Committee in interpreting the imposition of minor punishment and its impact on the assessment matrix in terms of the Rules and Regulations in force vis-a-vis the arbitrary action of the disciplinary authority in lingering the process of concluding the proceeding as well as taking steps to recover the amount towards punishment therefore this Court is of the view that the Tribunal has committed an error in ignoring the core aspect of arbitrariness i.e. whether there is unreasonableness and/or irrationality in the decision making process in reaching such erroneous conclusion. The approach of the learned Tribunal can best be expressed reiterating the old saying "when you ask the wrong question you cannot get the right answer".

31. Paras 4.7 and 4.7.1 of the Guidelines of the Commission stated above envisages the effect of currency of penalties other than 'censure' is as under:

> "4.7 The Selection Committee, while preparing Select Lists, may take into account the effect of currency of penalties other than „censure" as under:
>
> The currency of the Penalty is taken from the date from which it is imposed/effective to the date it ceases to be in force.
>
> "4.7.1 The Selection Committee meets to prepare the Select List for the **current year** only.
>
> (a) If the currency of the penalty flows into the SCM year, the officer would be graded as 'Unfit' in the Overall Assessment for the current year.
>
> (b) If the currency/effect of the penalty lapses before the SCM year, but is having implications on any of the years in the Assessment Matrix, the Committee would categorise the officer as "Unfit" for the relevant year(s) in the Assessment Matrix **when the penalty was current**. Thereafter, the Overall Assessment of the officer may be made as per the procedure given in Section B.3 above." (Emphasis Supplied)

A bare reading of the aforesaid provision and applying the same in the present case, it can be stated that the disciplinary proceeding initiated against the petitioner was concluded on 23.05.2012 where two minor punishments were imposed out of which one is Censure which admittedly was not the ground of disqualification on account of the nature of penalty as evident from the guidelines.

32. Similarly, the punishment of recovery is also a single penalty having no defined currency of punishment. Discretion lies with the authority to take a decision

in deciding whether the amount is to be recovered once or in instalments and if on instalments then the number of instalments in which it is to be recovered. But on account of extension of the period of recovery it cannot be construed that the same is effective and treated to be in force.

This Court is of the firm view that the word "Recovery" itself puts a responsibility on the competent authority to recover the amount and no discretion is neither left nor can be exercised by the delinquent to deposit the same.

33. However, the Petitioner-delinquent deposited the said amount on the very next day when he was informed about non-recovery of instalments fixed by the authorities. As such the currency of punishment cannot be stretched as per the desire and interpretation of the Selection Committee making it dependent upon the last amount deposited by the Petitioner in terms of communication issued by the authorities. There are other defined penalties in the OCS (CC&A) Rules 1962 where the authority has to indicate the number of year(s) to remain effect of such penalty and in such cases the currency of punishment shall have a cascading effect.

34. In the present case the nature of penalty being recovery, therefore, the currency of the punishment is on the date when the order was passed and under no circumstances it can be till a future date depending upon the execution of the order as per discretion and whims of the authority in recovering the last pie. The currency of the both punishments i.e. Censure as much as Recovery ought to be construed to be co-terminus on the date on which it is imposed.

35. This Court took note of the other relevant provisions regulating the selection process wherein it is stated that if the currency/effect of the penalty lapses before the SCM year, but is having implications on any of the years in the Assessment Matrix, the Committee would categorise the officer as 'Unfit' for the relevant year(s) in the Assessment Matrix when the penalty was current. The same does not come into play in the instant case.

36. On account of the finding that the currency of the punishment is limited to the year of its imposition i.e. 2012 the same cannot have any impact on the Assessment Matrix 2014- 2015 to 2018-19 for the Select List of 2019. As such the view expressed by the Selection Committee with respect to the Petitioner as unfit for his promotion and its acceptance by the Union and State Government is not sustainable.

37. Therefore, this Court is of the considered view that the learned Tribunal has fallaciously judged the case before it by deciding a non-issue while ignoring the real issue as stated above for which the order passed at Annexure 1 is not sustainable and liable to be interfered with and hence set aside.

38. As such the relief sought by the Petitioner to interfere with the finding of the Selection Committee and to extend him the benefit of promotion at par with his juniors Opposite Parties 4 to 22, who got such promotion stands allowed.

39. In the facts of the present case this Court while not inclined to quash the notification at Annexure-2 issued by the State Government in G.A. Department relating to the promotion of the Opposite Parties 4 to 22, directs the Opposite Parties 1 to 3 to convene a review Selection Board within a period of three months hence to consider the case of the Petitioner for promotion to the rank of IAS on the basis of assessment matrix 2014-15 to 2018-19, without being impeded by the penalty of recovery.

40. In the event the Petitioner is found suitable, he be promoted to the cadre of IAS from the date, the Opposite Parties 4 to 22 were given such promotion, in terms of Notification dated 26.03.2021 at Annexure-2 with all consequential service benefits.

40-A. However, the pay of the Petitioner shall be fixed notionally from such retrospective period and he shall be eligible to get actual financial benefits from the date of this order in the event he is found suitable.

41. The Writ Petition is accordingly disposed of.

Headnotes prepared by:
Jnanendra Ku. Swain, Judicial Indexer
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case :
Writ petition disposed of.

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2024 (III) ILR-CUT-1009

BANSHIDHAR BAUG
V.
ORISSA HIGH COURT & ORS.

(W.P.(C) NO. 14219 OF 2022)

19 SEPTEMBER 2024

[S.K. SAHOO, J & Dr. S.K. PANIGRAHI J.]

Issue for Consideration

Petitioner challenges the action of the Permanent Committee in failing to forward his name to the Hon'ble Full Court for consideration of his name as the Senior Advocate.

Headnotes

(A) HIGH COURT OF ORISSA (DESIGNATION OF SENIOR ADVOCATE) RULES, 2019 – Rules 6(5), 6(6) – The petitioner, who is a practicing advocate of the High Court of Orissa, seeks a direction that the Permanent Committee be directed to submit his name along with a comprehensive assessment to the Full Court for consideration for designation as Senior Advocate – The petitioner applied for consideration for designation as a Senior Advocate under the 2011 notification notified on 13.06.2011 – While his application was pending,

the Court formulated 2019 Rules as per the directive of Hon'ble Supreme Court of India in *Indira Jaising-Vrs.-Supreme Court of India through Secretary General and Others*, reported in *(2017) 9 SCC 766* – Consequently, Advertisement No.1 dated 22.04.2019 was issued for Designation of Senior Advocates – Petitioner was requested to resubmit his application in the prescribed format – Accordingly, the petitioner submitted his application on 22.05.2019 – Defects found in his application – Notice issued on 02.07.2019 for compliance – The Permanent Committee recommended the names of O.Ps.4 to 8 to be designated as Senior Advocates on 08.08.2019 – On 09.08.2019 a notice was issued by the Court soliciting suggestions and views regarding the petitioner and other applicant-advocates (45 numbers) with a deadline of 08.09.2019 – Before the deadline expires, Advertisement No.2 dtd. 04.09.2019 was issued for designation of Senior Advocates – In the meantime O.P. Nos. 4 to 8 were declared Senior Advocates as per notification dtd. 19.08.2019 – Petitioner filed W.P.(C) No. 17009 of 2019 to annul the designation of O.P. Nos. 4 to 8 as Senior Advocates - O.P. Nos.9 and three other advocates filed W.P.(C) No. 17110 of 2019 for similar relief – Both the Writs were disposed of by a Division Bench in a common Judgment and Order dtd. 10.05.2021 by declaring sub-rule(9) of Rule 6 of 2019 Rules as *ultra vires* – Direction issued that the Full Court would render a new decision on the designation of Senior Advocates and to conclude the process by July 2021 – Is the Permanent Committee's decision not to forward the name of the petitioner for consideration, despite his appearance before the Committee for interaction/interview and to withhold his name, asserted to be entirely without jurisdiction?

Held: The Permanent Committee's role is confined to making an assessment and submitting a comprehensive assessment report to the Hon'ble Full Court for consideration – It does not have the authority to make final decisions on designation or exclude candidates from consideration based on its recommendations – The Permanent Committee is required to perform its overall assessment based on the point-based format outlined in APPENDIX-B after reviewing the materials provided by the Secretariat and, if necessary, interacting with the concerned Advocates – The Permanent Committee does not possess the discretion to withhold, eliminate, or defer the name of any advocate at this stage – The Full Court has the authority to review any advocate's case based on their overall merits, position of eminence at the Bar, seniority, legal acumen, and ethical standards, independent of the points assigned by the Permanent Committee – Directions issued to the Permanent Committee to conduct an overall assessment of the application of the petitioner filed afresh and to submit the petitioner's name to the Hon'ble Full Court along with its assessment report.

(Paras 9 -12)

(B) Cases of *Indira Jaising-Vrs.-Supreme Court of India through Secretary General and Others, **(2017) 9 SCC 766**, T.N. Raghupathy -Vrs.- High Court of Karnataka through its Registrar General and Ors., **2020 SCC OnLine Kar 93*****,*** etc. were discussed. (Para 9)

Citation References

Indira Jaising -Vrs.- Supreme Court of India through Secretary General & Ors., **(2017) 9 SCC 766**; East Coast Railway & Anr. -Vrs.- Mahadev Appa Rao & Ors., **2010 AIR SCW 4210**; State of Orissa & Ors. -Vrs.- Chandra Nandi, **(2019) 4 Supreme Court Cases 357**; Deep Chand -Vrs.- State of Rajasthan, **A.I.R. 1961 Supreme Court 1527**; Nazir Ahmad -Vrs.- King Emperor, **A.I.R. 1936 Privy Council 253**; Banshidhar Baug v. Orissa High Court, represented through its Registrar General & Ors, **W.P.(C) Nos.17009 & 17110 of 2019**; T.N. Raghupathy -Vrs.- High Court of Karnataka through its Registrar General & Ors., **2020 SCC OnLine Kar 93**; S. Lawrence Vimalraj v. Registrar (Judicial), High Court of Madras & Ors., **2022 SCC OnLine Mad 6088 - referred to.**

List of Acts & Rules

Advocates Act, 1961; High Court of Orissa (Designation of Senior Advocate) Rules, 2019

Keywords

Designation, Senior Advocate, Consideration, Permanent Committee.

Appearances for Parties

For Petitioner : Mr. Banshidhar Baug (In person)
For Opp.Parties : Mr. Jyoti Prakash Patnaik, (Govt. Adv.)

Judgment/Order

Judgment

S.K. SAHOO, J.

The petitioner, who is a practicing advocate of this Court, has filed this writ petition for issuance of a 'Rule-NISI' calling upon the opp. parties to show cause as to why:

> **(i)** The decision of the Permanent Committee to refrain from forwarding the petitioner's name and the names of the applicant-advocates to the Hon'ble Full Court for consideration should not be deemed jurisdictionally invalid and in contravention of Rules 6(5) and 6(6) of the High Court of Orissa (Designation of Senior Advocate) Rules, 2019 (hereinafter referred to as the '2019 Rules');
>
> **(ii)** The Permanent Committee's notification dated 21.04.2022 (Annexure-9) concerning the second interaction, and the Permanent Committee's resolution dated 26.04.2022 (Annexure-14) should not be annulled on the grounds of jurisdictional invalidity and noncompliance with the 2019 Rules;

(iii) The decision of the Permanent Committee to recommend the names of Opposite Party Nos. 4 to 11 to the Full Court for consideration for designation as Senior Advocates should not be invalidated;

(iv) The decision and approval of the Full Court dated 27.04.2022, and the notification dated 27.04.2022 (Annexure-10) should not be annulled.

Furthermore, the petitioner requests that the Permanent Committee be directed to submit the names of all applicant-advocates, including the petitioner and Opposite Party Nos. 4 to 11, along with a comprehensive assessment as per Appendix-B of the 2019 Rules, to the Full Court for their consideration for designation as Senior Advocates.

At the outset of the argument, the petitioner, appearing in person, clarified that his request is now confined exclusively to his own case. Specifically, he seeks to address the action of the Permanent Committee in failing to forward his name to the Hon'ble Full Court for consideration. The petitioner requests that the Permanent Committee be directed to submit his name, along with a comprehensive assessment and points as outlined in Appendix-B of the 2019 Rules, to the Full Court for consideration for designation as Senior Advocate. Mr. Baug further emphasized that he does not seek any order affecting Opposite Parties Nos. 4 to 11, as he has no objections to their being designated as Senior Advocates and does not view them as his competitors.

2. The petitioner contends that he is a practicing advocate of the Orissa High Court, with Enrollment Number 0176/1981 issued by the Odisha State Bar Council on 26.02.1981. He has amassed over 43 years of practice in this Court, as well as in the Civil and Criminal Courts in Cuttack and Bhubaneswar.

The petitioner asserts that Section 16 of the Advocates Act, 1961 (hereinafter referred to as the '1961 Act') empowers the Hon'ble Supreme Court and High Courts to confer the designation of Senior Advocate upon an advocate, provided that the Court is satisfied that the advocate's skill, standing at the Bar, or specialized knowledge and experience in law warrants such a designation.

The petitioner further states that on 13.06.2011, this Court published a notification outlining the procedure for designating an advocate as a Senior Advocate. The details of the procedure are as follows:

"1. The advocate seeking consideration shall not be less than 35 years of age of the time of moving an application and he must have an experience which is not less than 10 years at the Bar. The services rendered by the advocate at the State Judicial Services will also be considered.

2. The advocate must have a net annual taxable income which is not less than three lakh rupees.

3. The Full Court shall consider the application and designation is conferred upon advocates who secure a simple majority of votes. The advocates rejected by the High Court will not be considered for a subsequent period of one year."

During the year 2013-14, the petitioner applied for consideration for designation as a Senior Advocate under the 2011 notification. While this application was still pending, the Court adhering to a directive from the Hon'ble Supreme Court

in ***Indira Jaising -Vrs.- Supreme Court of India through Secretary General and Others***[1] formulated the 2019 Rules. These rules outline a comprehensive procedure for the designation of Senior Advocates. Under the 2019 Rules, a Permanent Committee is constituted, consisting of the Hon'ble Chief Justice, the two Seniormost Hon'ble Judges of the High Court, the Advocate General of the State of Odisha and a Senior Advocate of the Bar who is nominated by the Committee members.

Subsequent to the establishment of the Permanent Committee, the High Court issued Advertisement No. 1 dated 22.04.2019, inviting applications from eligible candidates for designation as Senior Advocates in accordance with the format specified in the 2019 Rules. On the same date, the Special Officer (Special Cell) of the High Court sent a letter to the petitioner requesting him to resubmit his application for designation as a Senior Advocate, using the prescribed format outlined in the advertisement.

The petitioner further asserts that, in response to the letter issued by the Special Officer (Special Cell) of the Court, he submitted his application for designation as a Senior Advocate on 22.05.2019, using the prescribed format. Opposite Parties Nos. 4 to 11 also applied for designation as Senior Advocates in accordance with the 2019 Rules. Due to defects identified in the applications, the Registrar (Judicial) of the Court issued a notice dated 01.07.2019 requesting the petitioner and other applicants to rectify these defects. Additionally, the Special Officer (Special Cell) issued a notice on 02.07.2019 asking the petitioner to provide the necessary documents, including a declaration as specified in the advertisement.

During this process, and prior to compliance with sub-rule (3) of Rule 6 of the 2019 Rules, the Permanent Committee recommended the names of Opposite Parties Nos. 4 to 8 for designation as Senior Advocates on 08.08.2019. The following day, 09.08.2019, the Registrar (Judicial) issued a notice soliciting suggestions and views regarding the petitioner and other applicant-advocates, totalling 45 in number with a deadline of 08.09.2019. Notably, the names of Opposite Parties Nos.4 to 8 were not included in these 45 names. Instead, on 17.08.2019, the Full Court approved the recommendation for Opposite Parties Nos. 4 to 8 to be designated as Senior Advocates. Consequently, a notification dated 19.08.2019 declared Opposite Parties Nos. 4 to 8 as Senior Advocates. The petitioner also highlights that, while the notice inviting proposals and views was still pending as per the notice dated 09.08.2019, the Registrar (Judicial) issued Advertisement No.2 dated 04.09.2019, inviting applications from eligible advocates for designation as Senior Advocates in the prescribed format.

The petitioner being dissatisfied with the notification dated 19.08.2019 which designated Opposite Parties Nos. 4 to 8 as Senior Advocates, filed W.P.(C) No. 17009 of 2019 with this Court. The petitioner sought to invalidate the inclusion

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1. (2017) 9 SCC 766

of the suo moto power of the High Court under sub-rule (9) of Rule 6 of the 2019 Rules, arguing that it was inconsistent with the guidelines established in the ***Indira Jaising*** case (supra), and also sought to annul the designation of Opposite Parties Nos.4 to 8 as Senior Advocates. In a related petition, three other advocates, including Opposite Party No.9, filed W.P.(C) No. 17110 of 2019 seeking similar relief.

The Division Bench of this Court, in a common judgment and order dated 10.05.2021, declared sub-rule (9) of Rule 6 of the 2019 Rules ultra vires in view of the the guidelines set forth in paragraph 73 of the ***Indira Jaising*** case (supra). The Court also annulled the notification dated 04.09.2019, which had invited fresh applications from eligible advocates for the designation of Senior Advocates and ruled that applications submitted in response to that notification should not be considered. Furthermore, the Division Bench upheld the notification No. 1378 dated 19.08.2019 which would remain effective until the Full Court rendered a new decision on the designation of Senior Advocates, taking into account all 48 applications, including those of Opposite Parties Nos.5 to 9. The Court also directed that the process for designating Senior Advocates be concluded by the end of July 2021.

The petitioner further states that, while the writ petitions W.P.(C) No. 17009 of 2019 and W.P.(C) No. 17110 of 2019 were pending, a notice dated 03.10.2019 (Annexure-8) was issued directing 48 advocates, including the petitioner, to appear for an interaction as per Rule 6(5) of the 2019 Rules. The petitioner attended the interaction before the Permanent Committee on 18.10.2019.

Challenging the observation made in paragraph 27 of the common judgment dated 10.05.2021, the petitioner filed Special Leave Petition (Civil) No. 7129 of 2021 before the Hon'ble Supreme Court which was dismissed by order dated 28.06.2021. Other advocates also contested the same judgment by filing Special Leave Petition (Civil) No. 8346 of 2021, and the Hon'ble Supreme Court stayed the observation in paragraph 32(ii) of the judgment regarding the calling for fresh applications through the second notification dated 04.09.2019. Additionally, the High Court filed Special Leave Petition (Civil) Nos.11605 and 11606 of 2021 before the Hon'ble Supreme Court, challenging the judgment. The Supreme Court by order dated 02.08.2021 stayed the operation of paragraph 24 of the judgment dated 10.05.2021.

Subsequently, the Permanent Committee issued a notice dated 21.04.2022, directing 40 advocates including the present Opposite Parties Nos.4 to 11 to appear before the Committee on 24.04.2022 for a fresh interaction via virtual mode. Following this interaction, the Permanent Committee recommended the names of nine advocates including Opposite Parties Nos.4 to 11 and Mr. Abhijit Pal, Advocate for consideration by the Full Court for designation as Senior Advocates. The Full Court met on 27.04.2022 and approved the designation of eight advocates— Opposite Parties Nos. 4 to 11— out of the nine recommended names. Consequently,

the Hon'ble Chief Justice declared these eight advocates, i.e. Opposite Parties Nos. 4 to 11, as Senior Advocates under Section 16 of the 1961 Act read with Rule 7(1) of the 2019 Rules. The Registrar (Judicial) subsequently issued Notification No.855 dated 27.04.2022, officially designating Opposite Parties Nos.4 to 11 as Senior Advocates.

According to the petitioner, the Permanent Committee's decision not to forward his name for consideration, despite his appearance before the Committee for interaction/interview, and to withhold his name, is asserted to be entirely without jurisdiction. The petitioner contends that this action contravenes Rules 6(5) and 6(6) of the 2019 Rules and violates the directives issued by the Division Bench of this Court in its judgment dated 10.05.2021 in the aforementioned writ petitions.

3. A counter affidavit has been submitted by the learned Registrar General of this Court on behalf of Opposite Parties Nos.1 and 2. In the counter affidavit, the assertions made in the writ petition are refuted. It is stated, inter alia, that in response to a requisition dated 29.08.2019 from the Secretary, High Court Bar Association, Cuttack, and a notification calling for applications from eligible lawyers, the Permanent Committee convened a meeting on 24.09.2019. During this meeting, the Committee reviewed the request and subsequently issued Advertisement No. 02 of 2019, setting a deadline of 01.10.2019 for receiving applications.

The counter affidavit further notes that out of 40 applicant advocates, 30 attended an interaction session on 24.04.2022 with the Permanent Committee. Following this, the Full Court, in its meeting on 27.04.2022, resolved to utilize a ballot voting process for the names recommended by the Permanent Committee. Consequently, eight advocates were designated as Senior Advocates on 27.04.2022.

It is also mentioned that the Permanent Committee evaluated all applicants individually according to the 2019 Rules and assigned marks based on a point-based system. This assessment was presented to the Full Court. Records indicate that nine advocates achieved 70% or more of the total points, and a draw of ballots was conducted for eight of these advocates before the Full Court.

The counter affidavit further asserts that the Permanent Committee provided the Full Court with the pointbased evaluations of all participating advocates in accordance with the 2019 Rules. The Full Court considered this information and made its decision without delay. It is emphasized that no information was withheld from the Full Court by the Permanent Committee. It is explained that the petitioner's case had been deferred by the previous Permanent Committee and that is the reason why it was not reviewed during the interaction.

Additionally, following the Supreme Court's order dated 28.06.2021 in S.L.P. (C) No. 7129 of 2021 and due to the unavailability of Permanent Committee members who had interacted with applicants on 18.10.2019, a new interaction was conducted on 24.04.2022. The Permanent Committee prepared and presented the point-based evaluations according to the Rules to the Full Court on 27.04.2022.

Therefore, the designation of Opposite Parties Nos. 4 to 11 as Senior Advocates is asserted to be in strict accordance with the law.

The counter affidavit also mentions that as per the Supreme Court's direction in S.L.P. (C) No. 7129/2021, the Full Court resolved for the Permanent Committee to reconsider the cases of Opposite Parties Nos.4 to 8 along with the other applicants. The Permanent Committee decided to invite all advocates who had participated in the interaction on 17th and 18th October 2019, except those whose cases had been deferred. The point-based evaluations for all 40 applicants, including the nine who scored 70% or more, were submitted to the Full Court. In its meeting on 27.04.2022, the Full Court resolved to use a ballot voting process for the names proposed by the Permanent Committee, leading to the designation of eight advocates as Senior Advocates on 27.04.2022.

4. In response to the counter-affidavit submitted by Opposite Parties Nos. 1 and 2, the petitioner has filed a rejoinder affidavit. The petitioner reiterates that the directive specified in paragraph 32(iii) of the judgment dated 10.05.2021, in W.P.(C) Nos. 17009 and 17110 of 2019, has not been implemented. The petitioner underscores that this paragraph explicitly required that all 48 applicants, including those who were formerly Opposite Parties Nos. 5 to 9 (now Opposite Parties Nos. 4 to 8), be evaluated by the Full Court. The petitioner contends that this mandate was not complied by the Permanent Committee.

Additionally, the rejoinder affidavit emphasizes that sub-rule (9) of Rule 6 was declared ultra vires by the Court in the judgment dated 10.05.2021 in the above cited writ petitions.

The petitioner argues that the Permanent Committee’s recommendation of Opposite Parties Nos.4 to 8, pursuant to subrule (2) of Rule 6 of the 2019 Rules was unlawful, contravened the provisions of the 2019 Rules, and was inconsistent with the aforementioned judgment.

The petitioner disputes the assertions made by Opposite Parties Nos.1 and 2, which claim that the recommendation of Opposite Parties Nos.4 to 9 for designation as Senior Advocates did not contravene any provisions of the 2019 Rules. The petitioner contends that the Court in its judgment dated 10.05.2021 deemed such recommendations and the subsequent approval by the Full Court to be discriminatory.

Furthermore, concerning the postponement of the petitioner’s and two other advocates’ cases, the petitioner notes that the counter-affidavit lacks minutes from the Permanent Committee’s meeting on this issue. The petitioner refutes the statements regarding the deferment as presented in the counter-affidavit.

Finally, the petitioner highlights that while W.P.(C) Nos. 17009 and 17110 of 2019 were pending, a notice for interaction under Annexure-8 was issued to the petitioner and 44 others. The petitioner had filed I.A. No. 14249 of 2019 requesting a stay of the interaction process. The Court, after hearing the matter, instructed the

petitioner and the other petitioners to attend the interaction before the Permanent Committee as per the notice. However, this directive was issued without prejudice to any rights or arguments that could be raised in the writ petitions.

The rejoinder affidavit further asserts that the 2019 Rules do not permit the deferral of an applicant's case after an interaction has occurred. The petitioner contends that the Permanent Committee did not have the authority under the 2019 Rules to defer his case for Full Court consideration. The petitioner also argues that even if the Permanent Committee decided to defer his case on 23.10.2019, such a decision should have been disclosed during the proceedings of the earlier writ petitions which was not done.

The petitioner further asserts that there has been no formal notice or explanation provided regarding the deferral of his case, and any such deferral should not be indefinite, particularly given that his application for Senior Advocate status was submitted on 05.08.2013.

Additionally, the petitioner contends that 2019 Rules do not provide for a second interaction for applicants who have already participated in an interaction under Annexure-8 of the writ petition.

The petitioner emphasizes that the judgment dated 10.05.2021 in W.P.(C) Nos.17009 and 17110 of 2019 did not stipulate that only Opposite Parties Nos. 4 to 8 (formerly Nos. 5 to 9) were required to undergo further processes including inviting suggestions and additional interactions, while excluding other applicants such as the petitioner who had already participated in the initial interaction.

The petitioner contends that the Permanent Committee's decision dated 21.04.2022 to conduct a fresh interaction, although mentioned in the counter-affidavit, was neither officially documented nor included in the official record. The petitioner argues that such a decision, if it indeed occurred, should not be acknowledged as it would contravene the Court's earlier directives issued in the judgment dated 10.05.2021.

The petitioner further argues that if there was a need to amend the previous order, a formal application should have been filed with this Court to seek authorization for a second interaction and to defer the petitioner's case from consideration by the Full Court. The petitioner asserts that any modification regarding the fresh interaction held on 24.04.2022 and the deferral of his case to the Full Court should have been sought through an appropriate order from this Court.

According to the petitioner, there has been a substantial breach of the Court's directive in paragraph 32(iii) of the judgment dated 10.05.2021 in W.P.(C) Nos.17009 and 17110 of 2019. The petitioner claims that the decision to hold a second interaction for 40 applicant-advocates is inconsistent with the 2019 Rules and was conducted without specific authorization from this Court in the resolved writ petitions. The petitioner highlights a perceived inconsistency in the treatment of applicants in W.P.(C) No. 17009 of 2019, where he was the sole petitioner, his case was deferred, whereas in W.P.(C) No. 17110 of 2019 which involved three

petitioners, their cases were not deferred but were scheduled for a second interaction.

The petitioner further asserts that there was no directive from the Hon'ble Supreme Court in S.L.P.(C) No. 7129 of 2021 for this Court or the Permanent Committee to solicit suggestions and views from all applicant-advocates who had previously participated in the interaction held on 18.10.2019. The Supreme Court's order dated 28.06.2021 which stipulated that the second notification would be considered only after the first notification was completed, effectively stayed the directive in paragraph 32(ii) of the judgment dated 10.05.2021. As a result, the second notification was addressed and some advocates were subsequently designated as Senior Advocates. Therefore, the petitioner argues that the S.L.P. regarding the second notification dated 04.09.2019 has become moot.

The petitioner also contends that following the judgment dated 10.05.2021, the Permanent Committee undertook actions under Rule 6(3) of the 2019 Rules specifically concerning Opposite Parties Nos.4 to 8 who were formerly Opposite Parties Nos. 5 to 9 in the previous writ petitions. The petitioner argues that this procedure was not consistent with the Court's directives from the judgment and was conducted in a manner that deviated from the Court's earlier orders.

The petitioner further asserts that the Permanent Committee constituted under the 2019 Rules lacked the authority to fix cut-off points for the consideration of applicantAdvocates for designation as Senior Advocates by the Full Court. As such, the Resolution of the Permanent Committee dated 26.04.2022 is claimed to be entirely without jurisdiction and legally null and void as it contravenes 2019 Rules.

Additionally, the petitioner notes that out of the 40 applicant-Advocates excluding the petitioner, only thirty appeared for the interaction. The petitioner questions as to why the names of all forty applicants were submitted to the Full Court for consideration when only thirty participated. Specifically, the petitioner highlights that nine applicant-Advocates were considered by the Full Court which the petitioner argues is contrary to Rule 6(6) of the 2019 Rules and the judgment dated 10.05.2021 in the aforementioned writ petitions.

Moreover, the petitioner points out that the Permanent Committee failed to submit the names of all applicant-Advocates who participated in the initial interactions held on 17.10.2019 and 18.10.2019 as required by Rule 6(6) of the 2019 Rules. This omission contradicts the explicit directive in the judgment dated 10.05.2021 which mandated that all 48 applicant-Advocates including Opposite Parties Nos.4 to 8 be considered by the Full Court. The petitioner asserts that neither the 2019 Rules nor does the 1961 Act provide for the piecemeal consideration of applicant-Advocates when all 48 had applied and participated in the interactions.

The petitioner further contends that the resolution dated 23.10.2019 to defer the petitioner's case, if such a resolution indeed exists, is entirely beyond jurisdiction. This is because it conflicts with both the 2019 Rules and the judgment dated 10.05.2021 in the two writ petitions. Opposite Parties Nos. 1 and 2 should

have presented the purported decision of the Permanent Committee dated 23.10.2019 for the Court's review and provided the petitioner with an opportunity to respond. The judgment dated 10.05.2021 did not exclude the petitioner nor did it mandate a second interaction. Consequently, the Permanent Committee's actions are in violation of the Court's directive in paragraph 32(iii) of that judgment. The Permanent Committee should have sought a modification of the order from this Court to conduct a second interaction and defer the petitioner's case, but this was not done, leading to a breach of the judgment and directives dated 10.05.2021.

Additionally, the petitioner asserts that the Permanent Committee, as constituted under the 2019 Rules then in effect, did not possess the jurisdiction to establish cut-off points for the submission of applicant-Advocates' names to the Full Court after their interaction.

The petitioner also notes that paragraph 32(iii) of the judgment dated 10.05.2021 specifically directed that all 48 applicant-Advocates be sent to the Full Court and that the process of designating Senior Advocates be completed by the end of July 2021. This directive has not been adhered to and the counter-affidavit does not offer any explanation for the failure to implement this Court's directive.

5. Mr. Banshidhar Baug, the petitioner representing himself, argued that the decision or minutes of the Permanent Committee dated 23.10.2019 to defer his case are in contravention of Rule 6(5) and Rule 6(6) of the 2019 Rules. He contended that this decision is beyond jurisdiction and has been rendered null and void by the judgment dated 10.05.2021 in the aforementioned two writ petitions. Mr. Baug asserted that any decision, minute, or order made without providing a rationale is legally unsustainable. To support this contention, he cited decisions of the Hon'ble Supreme Court in the case of **East Coast Railway and another -Vrs.- Mahadev Appa Rao and others reported in 2010 AIR SCW 4210 and State of Orissa and others -Vrs.- Chandra Nandi reported in (2019) 4 Supreme Court Cases 357**.

Mr. Baug further argued that following the second interaction held on 24.04.2022, the counter-affidavit indicates that out of 40 applicant-advocates notified for the interaction, only 30 participated. Despite this, only nine names were submitted to the Permanent Committee, and a cut-off point of 70% or more was established, which Mr. Baug contends violates Rule 6(6) of the 2019 Rules. Mr. Baug also highlighted a discrepancy regarding the cut-off points mentioned in the Permanent Committee's minutes. He noted that the minutes dated 23.10.2019 set the cut-off at 50% or more, whereas the minutes dated 26.04.2022 raised the cut-off to 70% or more.

Furthermore, Mr. Baug argued that under Rule 6(5) of the 2019 Rules, points are to be awarded based on AppendixB of the Rules, and overall assessments should be derived from these points. Even if an advocate receives a negative assessment, Rule 6(6) requires that all assessed names be submitted to the Full Court along with the Permanent Committee's reports.

Mr. Baug asserted that the Permanent Committee lacks the jurisdiction to defer or withhold an advocate's case indefinitely. Thus, he contends that the Permanent Committee's failure to present his case to the Full Court contravenes Rule 6(6) of the 2019 Rules. Mr. Baug further argued that when a statute or rule mandates a specific method of performance, it must be followed precisely as prescribed or not performed at all. Any deviations from the prescribed method are impermissible. In support of this contention, he cited judgments from the Hon'ble Supreme Court in the cases of ***Deep Chand -Vrs.- State of Rajasthan reported in A.I.R. 1961 Supreme Court 1527 and Nazir Ahmad -Vrs.- King Emperor reported in A.I.R. 1936 Privy Council 253.***

Mr. Baug further argued that he initially applied for designation as a Senior Advocate on 05.08.2013. He subsequently submitted another application under Advertisement No. 1 dated 22.04.2019, which was deferred. A second Advertisement dated 04.09.2019 was issued for Senior Advocate designations, followed by a third notification dated 15.03.2023. Throughout this period, his application was neither considered for placement before the Hon'ble Full Court nor was he instructed to submit a new application; his case was simply deferred. Mr. Baug noted that, with the exception of two Advocates, all those designated as Senior Advocates through the notifications dated 22.04.2019, 04.09.2019, and 15.03.2023 are significantly junior to him. Mr. Baug also contended that the notice issued to him on 07.08.2024, detailed in Annexure-B/1 of the counteraffidavit, constitutes a form of humiliation and renders the writ petition infructuous. He argued that the criteria for consideration under the 2019 Rules and the amended Rules of 2023 differ substantially which prejudices his case. Therefore, he should not be required to apply afresh under the amended Rules of 2023.

Additionally, Mr. Baug asserted that since the suggestions and views for his case were contemplated under Rule 6(3) of the 2019 Rules, and he participated in the first interaction held on 18.10.2019 as per the notice dated 03.10.2019, where his name was listed at Sl. No. 37, there was no justification for the Permanent Committee to withhold his name from being placed before the Hon'ble Full Court for consideration, in accordance with Rule 6(7) of the 2019 Rules.

6. Mr. Jyoti Prakash Patnaik, the learned Government Advocate representing the High Court, contended that the petitioner's application, submitted in response to Advertisement No. 1 dated 22.04.2019 under the 2019 Rules, was duly reviewed by the Permanent Committee. The petitioner was requested to provide both reported and unreported decisions, articles, and other relevant details, and participated in the interaction on 18.10.2019. However, on 23.10.2019, the Permanent Committee decided to defer his case. Consequently, Mr. Patnaik argued that the petitioner cannot justifiably claim that his case was not given due consideration.

Mr. Patnaik further argued that while there were significant changes in the Permanent Committee before the second interaction, this does not render the process unlawful. Citing sub-Rule (1) of Rule 3 of the 2019 Rules, he asserted that the

Permanent Committee is vested with the authority to handle all matters related to the designation of Senior Advocates. He noted that the term "shall" indicates a mandatory duty, and therefore, the Permanent Committee, in accordance with Rule 6(6) of the 2019 Rules, resolved to submit only the names of those applicant-Advocates who secured 70 or more points to the Full Court. Mr. Patnaik emphasized that rules are designed to facilitate justice and should not be used as impediments to achieving the core objectives of the Act.

Additionally, Mr. Patnaik noted that any questions regarding the interpretation of the Rules should be referred to the Chief Justice, whose decision on such matters is final under Rule 10 of the 2019 Rules.

Mr. Patnaik further submitted that as of 08.08.2024, the petitioner was invited to participate in the selection process and, therefore, should have submitted a fresh application for consideration. Consequently, he argued that the writ petition is liable to be dismissed as no cause of action remains.

7. Adverting to the contentions raised by the learned counsel for both parties, the questions that now arise for our consideration are as follows: -

> **(i)** Whether the Permanent Committee has the authority to withhold or defer an Advocate's name from being submitted to the Full Court following the interaction stage, as prescribed by Rule 6(5) of the 2019 Rules?
>
> **(ii)** Whether the Permanent Committee possesses the authority to exclude the names of certain Advocates from consideration based on the points they have secured in the overall assessment?
>
> **(iii)** In light of the petitioner's fresh application in response to Advertisement No. 1 dated 22.04.2019, which adhered to the 2019 Rules and included the invitation of suggestions and views on his name under Rule 6(3), as well as his submission of reported and unreported decisions, articles, and particulars, and his participation in the interaction on 18.10.2019, was the Permanent Committee justified in deferring his case on 23.10.2019?
>
> **(iv)** Given the Division Bench's directive in its judgment dated 10.05.2021 in the aforementioned two writ petitions, which mandated the consideration of all 48 applications, including that of the petitioner and Opposite Parties Nos. 5 to 9, should the petitioner have been excluded from participating in the second interaction based on the prior decision made on 23.10.2019?

8. In **Indira Jaising** (supra), the following guidelines were issued by the Hon'ble Supreme Court: -

> **I**. All matters relating to the designation of Senior Advocates in the Supreme Court of India and in all High Courts of the country shall be dealt with by a Permanent Committee, to be known as the "Committee for Designation of Senior Advocates."
>
> **II**. The Permanent Committee shall be headed by the Hon'ble Chief Justice of India and shall consist of two Senior-most Judges of the Supreme Court of India (or High Court(s), as may be). The learned Attorney General for India (or Advocate General of the State, in the case of a High Court) shall be a Member of the Permanent Committee. The above four Members of the Permanent Committee shall nominate another Member of the Bar to be the fifth Member of the Permanent Committee;

III. The said Committee shall have a permanent Secretariat, the composition of which will be decided by the Chief Justice of India or the Chief Justices of the High Courts, in consultation with the other members of the Permanent Committee;

IV. All applications, including written proposals by Hon'ble Judges, shall be submitted to the Secretariat. Upon receipt of such applications or proposals from Hon'ble Judges, the Secretariat will compile the relevant data and information regarding the reputation, conduct, and integrity of the Advocate(s) concerned, including his/her participation in pro-bono work, reported judgments in which the concerned Advocate(s) had appeared, and the number of such judgments from the last five years. The source(s) from which information/data will be sought and collected by the Secretariat will be as decided by the Permanent Committee;

V. The Secretariat shall publish the proposal for the designation of a particular Advocate on the official website of the concerned Court, inviting suggestions and views from other stakeholders on the proposed designation;

VI. After the database is compiled in accordance with the above, and all such information, as specifically directed by the Permanent Committee to be obtained concerning any particular candidate, is collected, the Secretariat shall present the case before the Permanent Committee for scrutiny.;

VII. The Permanent Committee shall examine each case in light of the data provided by the Secretariat of the Permanent Committee, interview the concerned Advocate, and make its overall assessment based on a point-based format as indicated below:

Sl. No.	*Matter*	*Points*
1	Number of years of practise of the applicant advocate from the date of enrolment. Points 20 points [10 points for 10-20 years of practise; 20 points for practise beyond 20 years]	20 Points
2.	Judgments (reported and unreported) which indicate the legal formulations advanced by the advocate concerned in the course of the proceedings of the case; pro bono work done by the advocate concerned; domain expertise of the applicant advocate in various branches of law, such as Constitutional law, Inter-State Water Disputes, Criminal 40 points law, Arbitration law, Corporate law, Family law, Human Rights, Public Interest Litigation, International law, law relating to women, etc	40 Points
3.	Publications by the applicant advocate	15 Points
4.	Test of personality and suitability on the basis of interview/interaction	20 Points

VIII. All the names that are listed before the Permanent Committee/cleared by the Permanent Committee shall go to the Full Court.

IX. Voting by secret ballot shall not normally be resorted to by the Full Court except when unavoidable. In the event of resort to secret ballot decisions shall be carried by a majority of the Judges who have chosen to exercise their preference/choice.

X. All cases that have not been favourably considered by the Full Court may be reviewed/reconsidered after expiry of a period of two years following the manner indicated above as if the proposal is being considered afresh;

> **XI**. In the event a Senior Advocate is guilty of conduct which according to the Full Court disentitles the Senior Advocate concerned to continue to be worthy of the designation the Full Court may review its decision to designate the concerned person and recall the same;

In the exercise of the authority granted by Section 34(1), read in conjunction with Section 16(2) of the Advocates Act, 1961, and in adherence to the guidelines established by the Hon'ble Supreme Court in ***Indira Jaising*** (supra), this Court promulgated the 2019 Rules governing the designation of Senior Advocates and related matters. Consequently, Notification No. 324/R, dated 13.02.2019, was issued.

Rule 3 of the 2019 Rules deals with Permanent Committee for designation of Senior Advocate, which reads as follows:

> (1) All the matters relating to designation of Senior Advocates in the High Court shall be dealt with by the Permanent Committee, which shall be headed by the Chief Justice and consist of the two Seniormost Judges of the High Court; (ii) the Advocate General of the State of Odisha; and (iii) a designated Senior Advocate of the Bar to be nominated by the members of the Committee.
>
> (2) The Committee constituted under sub-rule (1) shall have a Secretariat, the composition of which will be decided by the Chief Justice of the High Court, in consultation with other members of the Committee.
>
> (3) The Committee may issue such directions from time to time as deemed necessary regarding functioning of the Secretariat, including the manner in which, and the source(s) from which, the necessary data and information with regard to designation of Senior Advocates are to be collected, complied and presented.

Rule 4 of the 2019 Rules deals with Designation of an Advocate as Senior Advocate, which reads thus:

> (1) The High Court may designate an Advocate as a Senior Advocate, if in its opinion, by virtue of his/her ability and standing at the Bar, the said Advocate is deserving of such distinction.
>
> Explanation: The term "standing at the Bar" means position of eminence attained by an Advocate at the Bar by virtue of his/her seniority, legal acumen, and high ethical standards maintained by him, both inside and outside the Court.
>
> (2) No person shall be eligible to be designated as Senior Advocate unless he/she:
>
> (i) has a minimum ten years of practice as an Advocate in the High Court of Orissa or in the Courts subordinate to the High Court of Orissa.
>
> (ii) has appeared and actually argued cases in High Court of Orissa or Courts Subordinate to it.

Rule 5 of the 2019 Rules stipulates motion for designation as Senior Advocate, which states as follows:

> (1) Designation of an Advocate as Senior Advocate by the High Court of Orissa may be considered on the written proposal made by; (a) the Chief Justice or any sitting Judge of the High Court of Orissa;
>
> Provided that every such proposal shall be made, as far as possible, in Form No.1 of Appendix-A appended to these Rules and shall carry a written consent of the Advocate concerned to be designated as Senior Advocate.

(2) Designation of an Advocate as Senior Advocate by the High Court of Orissa may also be considered on the written application of the Advocate concerned that shall be made, as far as possible, in Form No. 2 of Appendix-A appended to these Rules.

(3) Along with the proposal or application, as the case may be, the Advocate concerned shall append his certificate that he has not applied to any other High Court for being designated as Senior Advocate and that his application has not been rejected by the High Court within a period of two years prior to the date of the proposal or application.

Rule 6 of the 2019 Rules deals with procedure for designation, which stipulates as follows:

(1) All the written proposals or applications for designation of an Advocate as a Senior Advocate shall be submitted to the Secretariat.

Provided further that in case the proposal emanates from a Judge, the Secretariat shall request such Advocate to submit Form No. 2 duly filled in within such time as directed by the Committee.

(2) On receipt of an application or proposal for designation of an Advocate as a Senior Advocate, the Secretariat shall compile the relevant data and the information with regard to the reputation, conduct, integrity of the Advocate concerned and on the matters covered by Sl. Nos. 2 & 3 of Appendix-B covering a period of last 5 years.

(3) The Secretariat shall notify the proposed names of the Advocates to be designated as Senior Advocates on the official website of the High Court of Orissa, inviting suggestions and views within such time as may be fixed by the Committee.

(4) After the material in terms of the above is complied and all such information, as may be specifically required by the Committee to be obtained in respect of any particular candidate, has been obtained and the suggestions and views have been received, the Secretariat shall put up the case before the Committee for scrutiny.

(5) Upon submission of the case by the Secretariat, the Committee shall examine the same in the light of the material provided and, if it so desires, may also interact with the concerned Advocate(s) and thereafter make its overall assessment on the basis of the point based format provided in APPENDIX-B to these Rules.

(6) After the overall assessment by the Committee, all the names listed before it shall be submitted to the Full Court along with its Assessment Report.

(7) Normally voting by ballot shall not be resorted to unless unavoidable. The motion shall be carried out by consensus, failing which voting by ballot may be resorted to. In the event of voting by ballot, the views of the majority of the Judges present and voting shall constitute the decision of the Full Court. However the Seniormost Judge or Chief Justice as the case may be present in the Full Court shall not cast his vote. In case the Judges present be equally divided, the Chief Justice or in his absence the Seniormost Judge present shall have the casting vote.

(8) The cases that have not been favourably considered by the Full Court may be reviewed/reconsidered after the expiry of a period of two years, following the same procedure as prescribed above as if the proposal is being considered afresh.

(9) *Notwithstanding the above noted procedure for designation of an Advocate as Senior Advocate, Full Court on its own can designate an Advocate as Senior Advocate even without any proposal from Hon'ble Judges or application from the Advocate if it is of the opinion that by virtue of his/her ability or standing at the Bar, said Advocate deserves such designation.* **[Declared as ultra vires by virtue of judgment of the**

Court in the case of Banshidhar Baug v. Orissa High Court, represented through its Registrar General & Ors, W.P.(C) Nos.17009 & 17110 of 2019]

Rule 7 of the 2019 Rules speaks about Designation of Advocate as Senior Advocates by the Chief Justice, which states as follows:

> (1) On the approval of the name of the Advocate by the Full Court, the Chief Justice shall designate such an Advocate as a Senior Advocate under section 16 of the Advocate's Act, 1961.
>
> (2) The Registrar General shall notify the designation to the Secretary General of the Supreme Court of India, Registrar General of other High Courts, the Bar Council of Odisha, Bar Council of India and also to all the District & Sessions Judges subordinate to the High Court of Orissa.
>
> (3) A record of the proceedings of the Committee and the record received from the Full Court in this regard shall be maintained by the Permanent Secretariat for further reference.

The 2019 Rules were amended through a Gazette Notification dated 8th December 2023 titled 'High Court of Orissa (Designation of Senior Advocate) Amendment Rules, 2023, which *inter alia* substituted/inserted some portions in Rule 6 of the said Rules.

Sub-Rule (9) of Rule 6 has been substituted in the following manner:

> "(9) Notwithstanding the above noted procedure for designation of an Advocate as Senior Advocate, the Full Court suo motu may designate an exceptional and eminent Advocate as Senior Advocate through consensus, if it is of the opinion that by virtue of his/her ability or standing at the bar, the said Advocate deserves such designation."

In the amended Rule, sub-Rule (10) has been inserted in the following manner:

> "(10) The process of designation of Advocate as Senior Advocate shall be carried out at least once in a year."

Re : Question No.(i)

9. Mr. Baug contended that Rule 6(6) of the 2019 Rules explicitly mandates that the Permanent Committee must submit all names it has assessed to the Full Court, accompanied by its evaluation reports. He argued that the 2019 Rules do not provide for the deferral of any Advocate's case after the interaction stage, and thus the Permanent Committee lacks the authority to withhold or defer the submission of an Advocate's name to the Full Court.

In contrast, Mr. Patnaik, the learned Government Advocate, argued that the Permanent Committee inherently possesses the power to defer an Advocate's case. He maintained that after reviewing the suggestions, views, and interacting with the Advocate, the Committee may at its discretion, choose to defer the case if deemed necessary, and this action falls within its inherent authority.

To resolve this issue, it is crucial to understand the origins and objectives of the Permanent Committee. The Hon'ble Supreme Court, in its judgment in ***Indira Jaising*** (supra), established detailed guidelines for the designation of Senior Advocates under Section 16 of the Advocates Act, 1961. The Court directed the

formation of a 'Permanent Committee'— referred to as the 'Committee for Designation of Senior Advocates'—tasked with evaluating each candidate based on the data provided by the Secretariat of the Permanent Committee, conducting interviews, and making a comprehensive assessment using a point-based system.

In para 35(VIII) of the judgment, the Hon'ble Supreme Court directed as follows:

> "VIII. All the names that are listed before the Permanent Committee/cleared by the Permanent Committee will go to the Full Court."

The following words employed in the above directive are critical for this case: 'listed before the Permanent Committee' and 'cleared by the Permanent Committee.' The plain meaning suggests that the Advocates whose names are either 'listed' before the Permanent Committee or 'cleared' by the Permanent Committee shall be placed before the Hon'ble Full Court for final consideration and designation.

From the foregoing discussion, it is evident that the Hon'ble Supreme Court, in its directives issued in the ***Indira Jaising*** (supra) case, has left it to the High Courts to determine the scope of the Permanent Committee's jurisdiction and authority. Specifically, a High Court may choose to empower the Permanent Committee to establish a cut-off score based on the criteria outlined in the ***Indira Jaising*** (supra) and to recommend only those Advocates who meet this threshold. Conversely, another High Court might decide to restrict the Permanent Committee's role to merely reviewing applications, conducting interviews, and presenting all names, along with its recommendations, to the Full Court. In such a scenario, the Permanent Committee would not have the authority to exclude any Advocates based on a cut-off score it has set.

In this context, we may gainfully refer to the decision of the High Court of Karnataka in the case of ***T.N. Raghupathy -Vrs.- High Court of Karnataka through its Registrar General and Ors., reported in 2020 SCC OnLine Kar 93***, where it had the occasion to discuss, among other things, the role of the Permanent Committee in the designation of Senior Advocates. The relevant conclusions arrived at by the Division Bench, headed by the then Chief Justice Hon'ble Mr. Justice Abhay S. Oka, are as follows:

> "**151.** xx xx xx xx xx
>
> (f) The function of the Permanent Committee constituted by the High Court is firstly, to direct its Permanent Secretariat to collect certain information/data from certain sources about the Advocates who have applied for designation, if the Permanent Committee finds it necessary. The second function of the Permanent Committee is to examine each case in the light of the data compiled by the Secretariat of the Permanent Committee, hold interactions/ interviews with each candidates and to make overall assessment of all candidates by assigning points/marks out of 100, as provided in the table, forming a part of paragraph 73.7 of the directions issued by the Apex Court. The Apex Court has not conferred any specific power on the Permanent Committee to make any recommendation of any particular candidate. At highest, the points assigned by the Permanent Committee to the candidates will constitute its recommendation;

> (g) The overall assessment made by the Permanent Committee in respect of every candidate shall be placed before the Full Court for decision, as the decision making authority vests in the Full Court;
>
> (h) The Full Court is not bound by the overall assessment or points/marks assigned by the Permanent Committee. The Full Court may agree or may not agree or may partially agree with the overall assessment made by the Permanent Committee. The members of the Full Court can always ignore the point based overall assessment of the Permanent Committee and call for the records of each candidate and take appropriate decision."

The Division Bench of the Karnataka High Court clearly outlined the functions of the Permanent Committee established by the High Court as follows: (i) to instruct its Permanent Secretariat to gather necessary information and data about the Advocates applying for designation if deemed necessary; (ii) to review each case based on the data collected by the Secretariat; (iii) to conduct interviews with each candidate and to make an overall assessment by assigning points or marks out of 100, as detailed in paragraph 73.7 of the Supreme Court's directions. The Court emphasized that the Supreme Court has not explicitly granted any specific powers to the Permanent Committee; thus, it is governed by the rules established by the High Court. Furthermore, the Court noted that the overall assessment by the Permanent Committee must be submitted to the Full Court for a final decision, as the ultimate decision-making authority lies with the Full Court. The Full Court is not obligated to adhere to the Permanent Committee's assessments or scores and may choose to fully agree, partially agree, or disagree with them.

While adjudicating a similar issue, the High Court of Madras in the case of ***S. Lawrence Vimalraj v. Registrar (Judicial), High Court of Madras & Ors reported in 2022 SCC OnLine Mad 6088*** referred to the decision of the Karnataka High Court in the case of ***T.N. Raghupathy*** (supra) and held as follows:

> "29. From the above, it is clear that after discussing at length, the Karnataka High Court has concluded that the Permanent Committee only makes an overall assessment of the candidates. The ultimate power to designate an Advocate as a Senior Advocate lies with the Full Court. The Full Court can take a contrary view if necessary."

It is needless to say that the 2019 Rules has been framed by Orissa High Court on the bedrock of the guidelines issued by the Hon'ble Supreme Court in the case of ***Indira Jaising*** (supra). Rule 6(6) of the 2019 Rules reads as follows:

> "After the overall assessment by the Committee, all the names listed before it will be submitted to the Full Court Assessment Report." **[Emphasis supplied]**

The 2019 Rules do not grant the Permanent Committee the authority to set a cut-off score based on the criteria outlined in the ***Indira Jaising*** (supra) directives, nor does it empower the Committee to advance only those Advocates who meet such a cut-off. The counter-affidavit submitted by Opposite Parties Nos. 1 and 2 does not indicate that the Permanent Committee has the power to submit only the names of candidates who pass a cut-off score to the Full Court. There is no evidence that the High Court has conferred upon the Permanent Committee the authority to exclude candidates during the scrutiny process. The ultimate authority to designate an

Advocate as a Senior Advocate clearly resides with the Hon'ble Full Court, not the Permanent Committee. Therefore, the Permanent Committee's role is confined to making an assessment and submitting a comprehensive assessment report to the Hon'ble Full Court for consideration. It does not have the authority to make final decisions on designation or exclude candidates from consideration based on its recommendations.

We respectfully conclude that under the 2019 Rules, the Permanent Committee is required to perform its overall assessment based on the point-based format outlined in APPENDIX-B after reviewing the materials provided by the Secretariat and, if necessary, interacting with the concerned Advocates. The Permanent Committee does not possess the discretion to withhold, eliminate, or defer the name of any Advocate at this stage.

According to the counter affidavit submitted by Opposite Parties Nos. 1 and 2, the Permanent Committee, following its individual assessments and awarding marks based on the point-based format, submits only those names of Advocates who have secured 70% or more points to the Full Court for consideration. However, we assert that even if an Advocate scores below 70 points as per the APPENDIX-B format, this should not serve as a basis for withholding their name or deferring their case. Instead, all names listed before the Committee, regardless of their score, must be submitted to the Hon'ble Full Court along with the assessment report, in accordance with Rule 6(6). The Full Court has the authority to review any Advocate's case based on their overall merits, position of eminence at the Bar, seniority, legal acumen, and ethical standards, independent of the points assigned by the Permanent Committee.

The withholding, elimination, or deferral of an Advocate's name after scrutiny falls outside the permissible functions of the Permanent Committee. This stance is consistent with established legal principles from cases such as ***Deep Chand*** (supra) and ***Nazir Ahmed*** (supra), which affirm that when a statute or rule prescribes a specific method for carrying out a task, it must be adhered to precisely, or not undertaken at all.

Sub-rule (3) of Rule 3 of the 2019 Rules empowers the Permanent Committee to issue directions concerning the collection, compilation, and presentation of data related to the designation of Senior Advocates. However, these directions must adhere to the stipulations of Rule 6. Specifically, Rule 6(6) requires that all names considered by the Permanent Committee, together with its assessment report, be submitted to the Full Court. This provision does not grant the Permanent Committee the authority to restrict submissions to only those names meeting a specified cut-off score, or to withhold, eliminate, or defer any candidate's name following the interactions mandated by Rule 6(5). Actions contrary to these requirements would violate the provisions of Rule 6(6) of the 2019 Rules.

Question no. (i) is answered accordingly.

Re : Question No.(ii)

10. The counter affidavit indicates that the Permanent Committee submitted the point-based evaluations of all applicant-Advocates who participated in the interaction under the 2019 Rules to the Full Court, applying a 70% cut-off point. However, based on our analysis in response to question No. (i), it is our view that the Permanent Committee does not have the authority to exclude Advocates solely based on the points they obtained in the overall assessment. The Committee is not authorized to forward only the names of those who meet the cutoff score to the Full Court. Additionally, the High Court has not delegated such jurisdiction to the Permanent Committee to eliminate candidates based on whether they scored below 70 points according to the point-based format in APPENDIX-B.

Unless explicitly provided in the 2019 Rules or granted to the Committee, the imposition of a 70% cut-off for submitting applicants' cases to the Full Court for Senior Advocate designation is not justifiable. Merely notifying the Full Court about the adoption of a 70% cut-off point is insufficient. There is no evidence indicating that the Full Court was informed that the petitioner's case was deferred or provided with any reasoning for such deferral. Deferring the petitioner's case indefinitely, particularly in light of the judgment dated 10.05.2021 in W.P.(C) Nos.17009 & 17110 of 2019, effectively denies him his right to be considered.

Question no.(ii) is answered accordingly.

Re : Question No.(iii)

11. Based on the submissions of Mr. Baug and Mr. Patnaik, the following facts are not disputed i.e. the petitioner was admitted as an Advocate on 28.02.1981 and began practicing law in March 1981. It is also acknowledged that the petitioner initially sought designation as a Senior Advocate under the 2011 Rules and subsequently reapplied under Advertisement No. 1 dated 22.04.2019, following the implementation of the 2019 Rules. According to Rule 6(6) of the 2019 Rules, the petitioner was invited to provide suggestions and views on his candidacy, and to submit reported and unreported decisions, articles, and other relevant documents as per the notice dated 03.10.2019. He participated in the interaction held on 18.10.2019.

We find that the Permanent Committee's decision to defer the petitioner's case on 23.10.2019 was not appropriate at that juncture. It is pertinent to note that, at that time, both the writ petitions i.e. W.P.(C) No.17009 of 2019 filed by the petitioner and W.P.(C) No.17110 of 2019 filed by other Advocates were pending before this Court. Following the Division Bench's order dated 15.10.2019, the petitioner attended the interaction on 18.10.2019. It appears that the Permanent Committee's decision to defer the petitioner's case was not communicated to the Division Bench overseeing the matter. Such communication should have occurred. Consequently, it is our view that the Permanent Committee should not have deferred the petitioner's case on 23.10.2019 after the interaction held on 18.10.2019.

If the Permanent Committee acquired any new information post-interaction with the petitioner that could adversely impact his candidacy, such information

should have been presented to the Full Court along with the overall assessment conducted by the Permanent Committee. At a minimum, such information should have been disclosed to the Court.

The minutes, counter affidavit, and written submissions by the opposite parties nos. 1 and 2 do not provide any reasons for deferring the petitioner's case. According to the principle established in ***East Coast Railway*** (supra), an order issued by a public authority exercising administrative, executive, or statutory functions must be justified by reasons stated either in the order itself or in contemporaneous records. Any absence of such reasoning cannot be remedied by later justifications presented in affidavits when the validity of the order is challenged. Likewise, in ***Chandra Nandi*** (supra), it was held that both the parties involved and the Court must be made aware of the rationale behind the authority's decision. Without such discussion, the basis of the authority's decision remains unclear.

In light of these considerations, it is our view that, following the petitioner's interaction on 18.10.2019, the Permanent Committee should not have deferred his case on 23.10.2019.

Question no. (iii) is answered accordingly.

Re : Question No. (iv)

12. In its judgment dated 10.05.2021 in W.P.(C) Nos. 17009 and 17110 of 2019, the Division Bench of this Court specifically directed that all 48 applications, including the petitioner's, be considered. This indicates that the Permanent Committee's decision to defer the petitioner's case on 23.10.2019 was not communicated to the Court. Even if it had been, the Court's directive required the consideration of the petitioner's application along with the other applicants, including opposite parties nos. 5 to 9.

Given this context, the Permanent Committee's decision of 23.10.2019 to defer the petitioner's case has effectively been rendered null and void. There was no justification for excluding the petitioner from participating in the second interaction on 24.04.2022 based on the prior deferral noted in the counter affidavit filed by the opposite parties.

If the Permanent Committee believed that deferring the petitioner's case was warranted due to newly obtained information, it should have sought a modification of the judgment, specifically addressing paragraph 32(iii). Without such a modification, the petitioner should not have been barred from participating in the second interaction solely on the basis of the prior deferral. Thus, the deferral of the petitioner's case could not be extended indefinitely.

Question no. (iv) is answered accordingly.

Conclusion :

13. Having addressed all the questions in favour of the petitioner, we would ordinarily have directed the Permanent Committee to submit the petitioner's name to the Full Court for consideration for designation as Senior Advocate, following an

overall assessment and the point-based format as per AppendixB of the 2019 Rules. However, it has come to our attention through the counter affidavit filed by the learned Registrar General of this Court that Advertisement No. 1 dated 08.05.2024 has been issued, inviting applications for Senior Advocate designation. Several Advocates have already submitted applications in response.

According to the notice dated 07.08.2024, Advocates are requested to rectify any defects or deficiencies in their submissions within two weeks from 08.08.2024. Additionally, the Registrar (Judicial)'s notice dated 07.08.2024 indicates that the petitioner has also been asked to submit a fresh application in the new format (Form-2 of Appendix-A of the High Court of Orissa (Designation of Senior Advocate) Amendment Rules, 2023) within two weeks from 08.08.2024.

During the proceedings, the petitioner indicated that he had refrained from submitting a fresh application due to the pendency of this writ petition, fearing it would render the petition infructuous. Nevertheless, he expressed his willingness to file a fresh application and requested that his name be considered without further deferral. He also sought a reasonable extension of time to submit the application, acknowledging that the original deadline had passed. The learned Government Advocate has raised no objections to this request.

In light of these considerations, we dispose of the writ petition with the following directions:-

The petitioner shall submit a fresh application in the new format, i.e., Form-2 of Appendix-A of the High Court of Orissa (Designation of Senior Advocate) Amendment Rules, 2023, within two weeks from today. Upon receipt of the fresh application, the Permanent Committee shall proceed in accordance with Rule 6 of the 2019 Rules, as amended by the 2023 Amendment Rules. The Committee shall conduct an overall assessment and submit the petitioner's name to the Hon'ble Full Court along with its assessment report.

Before concluding, we wish to acknowledge and express our deep appreciation for the meticulous preparation, presentation, and invaluable assistance provided by the petitioner Mr. Bansidhar Baug and the learned Government Advocate, Mr. Jyoti Prakash Patnaik.

Headnotes prepared by:
Shri Pravakar Ganthia, Editor-in-Chief.

Result of the case :
Writ petition disposed of.

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2024 (III) ILR-CUT-1031

RAMAMURTY GAMANGO
V.
STATE OF ODISHA

(CRLA NO. 715 OF 2023)

30 OCTOBER 2024

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

Issue for Consideration

Whether the appellant is guilty for the offence U/s. 302 of I.P.C.

Headnotes

(A) CRIMINAL TRIAL – Offence Under Section 302 of IPC – There is no eye witness – The case is based on circumstantial evidence – The conclusive nature of the evidence, including ante-mortem injuries inconsistent with his rescue claim – The appellant's minor injuries inconsistent with his rescue claim and immediately called to the police instead of seeking medical help collectively negates any hyposthesis of innocence – Whether the circumstances collectively proved the appellant's guilt.

Held: Yes. (Paras 36-37)

(B) INDIAN EVIDENCE ACT, 1872 ─ Section 106 – Burden of proof – The appellant who was present in the house stated that his wife has committed suicide and already died, without any attempt for medical intervention or verifying her condition with professional assistance – The actions reflect a deliberate choice not to seek immediate help, despite the possibility that his wife could have survived with medical care – The appellant failed to act appropriately as he was present at home when the incident took place – Effect of – In absence of any reasonable explanation under section 106 of the Act, significantly weakens his evidence and supports the prosecution's case of foul play rather than suicide. (Paras 38-39)

Citations Reference

Darshan Singh vs. State of Punjab, **[2024] 1 S.C.R.**; Bindeshwari Prasad Singh @ B.P. Singh vs. State Of Bihar (Now Jharkhand), **AIR 2002 SC 2907**; Trimukh Maroti Kirkan vs. State of Maharashtra, **2006 (10) SCC 681**; Basheera Begam vs. Mohammed Ibrahim and Ors., **(2020) 11 SCC**; Vijay Kumar Arora vs. State Govt. of NCT of Delhi, **(2010) 45 OCR (SC) 634**; Satish Setty vs. State of Karnataka, **2016 Cri.L.J. 3147**; Sharad Birdhi Chand Sarda vs. State of Maharashtra, **AIR 1984 SC 1622**; Anees v. State Govt. of NCT, **2024 INSC 368** – **referred to.**

List of Acts

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

Keywords

Burden of Proof, Circumstantial Evidence, Absence of reasonable explanation.

Case Arising From

Order of conviction dated 27th of June, 2023 passed by Smt. Sasmita Parhi, 3rd Addl. Sessions Judge, Bhubaneswar in Crl. Trial No. 268 of 2013.

Appearances for Parties

For Appellant : Mr. A. P. Bose
For Respondent : Mr. P. B. Tripathy, A.S.C.

Judgment/Order

Judgment

CHITTARANJAN DASH, J.

1. The Appellant, namely Ramamurty Gamango, faced the trial on the charges under Section 302/201 of the Indian Penal Code (in short, hereinafter referred to as "IPC") before the 3rd Additional Sessions Judge, Bhubaneswar on the charge of murder of his wife, Sashirekha Gamango and for disappearing the evidence to screen himself as offender, wherein, the learned Court found him guilty therefor and convicted therein. Under section 302 IPC, the Appellant has been sentenced to undergo imprisonment for life and to pay a fine of ₹50,000/-, in default, to undergo further rigorous imprisonment for one year and under section 201 IPC, he has been sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of ₹10,000/-, in default, to undergo further rigorous imprisonment for six months and with further direction that both sentences shall run concurrently.

2. The prosecution case, in brief, is that the Appellant used to reside with his wife, Sashirekha Gamango, in Qr. No. D.S. 18/1, MLA colony, Bhubaneswar since 1990. On the morning of 29.08.1995, Sashirekha rose from bed late, causing her husband to express his displeasure. It is alleged that at around 9 a.m., while the Appellant was reading the newspaper in the bedroom, he heard his wife scream. He rushed to the bathroom with Nila (the kitchen boy), Kishore Behera, and Ramachandra Panigrahi. They found the bathroom door locked from inside and smoke coming out of the room. Water was poured through the window and Kishore and others forcibly opened the door and found Sashirekha, the wife of the Appellant committed suicide by burning herself.

3. On the written report of the Appellant, the IIC, Kharavelnagar Police Station registered a U.D. Case No. 6/1995 relating to the death of the wife of the Appellant, Sashirekha Gamango due to burn injuries. P.W.10, the then S.I. of Police, Kharvelnagar Police Station namely Kishore Chandra Patsani proceeded with the enquiry in the said U.D. Case. In course of the enquiry, he examined the Informant, namely, Ramamurty Gamango, the present Appellant, visited the spot and prepared the spot map (Ext.15). He sent intimation to the S.O., DFSL, Khurda and Chief Medical Officer, Capital Hospital, Khurda to depute F.M.T. Specialist to the spot. He made requisition to the S.D.M., Bhubaneswar to depute an Executive Magistrate to attend inquest over the dead body of the deceased, Sashirekha. On his intimation, Sri Bibhutibhusana Rath, the Scientific Officer and his team along with the Assistant Photographer Durga Prasad Nayak visited the spot, conducted inspection, took photographs of the deceased and the spot. Dr. S. K. Mishra, the F.M.T. Specialist of Capital Hospital, Bhubaneswar also visited vthe spot and inspected the dead body.

P.W.10 received the spot visit report of the Scientific Officer under Ext.8. P.W.10, in course of the enquiry held inquest over the dead body of the deceased under Ext.1 and dispatched the dead body to the Capital Hospital, Bhubaneswar for post mortem. He issued injury requisition for medical examination of the Appellant, Ramamurty Gamango and the inmate namely Kishore Ch. Behera vide Exts. 6 & 7 respectively. During his spot visit, P.W.10 seized the incriminating materials and prepared seizure list under Ext.2. He too received the injury report in respect to the injured Ramamurty Gamango, the Appellant and the inmate, Kishore Ch. Behera. P.W.10 also seized the original command certificate, blood sample of the deceased, letter of the Specialist, F.M.T., Capital Hospital, Bhubaneswar and other incriminating articles under seizure list Ext.5. He also received the P.M. report. Subsequently, P.W.10 made query to FMT, Specialist, Capital Hospital, Bhubaneswar for his opinion as regards the mode and time of death of the deceased and received the opinion of the doctor. He too received one photocopy of the chemical examination report from SFSL vide M.O. No.5259 dated 01.09.1995. P.W.10 from his enquiry coupled with the spot visit, the mark of injury on the dead body so also injuries received by the Appellant and the report sent by the SFSL found sufficient material that the death of the deceased is one of murder and disappearance of evidence. Accordingly, P.W.10 submitted a report to the IIC under Ext.17 wherein the IIC, Kharavelnagar P.S. registered the P.S. Case No.270 dated 01.09.1995 under Sections 302/201 of the Indian Penal Code and on the direction of the IIC, P.W.10 himself proceeded with the investigation. However, as per the direction of the S.P., Khurda, Bhubaneswar, he handed over the charge of investigation to Rajnish Ray, P.W.11, the then Addl. Superintendent of Police, on 01.09.1995.

4. Before formally assuming the charge of investigation, P.W.11 had visited the spot of the alleged incident, where he observed the deceased's body completely burned, including the soles of the feet, face, and hands. A bleeding injury was noted on the back of the deceased's head, while the bathroom, where the body was found showed no signs of tampering or violence. The soot deposit patterns on the bathroom door and objects nearby suggested no disturbance, indicating a staged scene. Broken glass pieces beneath the body and intact bangles on the deceased's wrists, along with undisturbed surroundings, pointed to foul play. During the investigation, P.W.11 discovered injuries on the Appellant's hand, which the Appellant attributed to Erythema, a claim later dismissed by medical examination. The deceased was pregnant, and rumors of the Appellant suspecting her fidelity surfaced during enquiries. Based on forensic reports, circumstantial evidence, and the absence of defensive injuries or signs of a struggle, P.W.11 concluded that the death was homicidal, leading to the submission of the charge sheet under Sections 302 and 201 IPC.

5. The case of the defence is one of complete denial and false accusations. The further case of the defence is that his wife committed suicide and he has been falsely entangled in the case due to political rivalry.

6. To bring home the charge, the prosecution examined 12 witnesses in all. P.W.1, Narasingha Behera is an inmate of the quarter and a post-occurrence witness; P.W.2, Nilakantha Mulia is the cook of the Appellant; P.W.3, Lalit Ranjan Gomango, is the son of the deceased and the Appellant; P.W.4, Dr. Nagaja Nandan Das, is the medical officer who examined the Appellant; P.W.5, Mustafa Khan, is the police constable who escorted the dead body of the deceased to Capital Hospital for P.M. Examination; P.W.6, Ashok Kumar Bisoi, is the S.I. of Police who assisted the I.O. during course of investigation; P.W.7, Dr. Pradipta Das is the medical officer who examined the Appellant and found injury on his right hand; P.W.8, Bibhuti Bhushan Rath, is the scientific officer of DFSL, Khorda; P.W.9, Dr. Santosh Kumar Mishra, is the medical officer who conducted the P.M. Examination over the deceased's dead body; P.W.10, Kishore Chandra Patsani, is the enquiring officer as well as the Informant; and finally, P.W.11, Rajnish Rai, is the then A.S.P., who conducted investigation after the case was registered and submitted the chargesheet.

The defence on the other hand, examined one witness, D.W.1, Kishore Chandra Behera, who was an inmate of the house.

7. The learned trial Court having believed the evidence of the prosecution witnesses found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding sentence as described above.

8. Mr. A. P. Bose, learned counsel for the Appellant, vigorously argued that the prosecution has failed to establish its case beyond a reasonable doubt, thereby warranting the acquittal of the Appellant. Mr. Bose contended that there was no history of animosity or discord between the Appellant and the deceased, and the prosecution has not established a credible motive for the alleged murder. According to Mr. Bose, given that the entire case is based on circumstantial evidence, the absence of motive seriously undermines the prosecution's narrative and casts doubt on the alleged intent behind the incident. He argued that without a clear motive, the prosecution's case lacks the foundational support required for conviction under Section 302 IPC. Mr. Bose further argued that the FIR's reference to the absence of Carboxy-haemoglobin (COHb) in the deceased's blood was not supported by any documentary evidence from the SFSL report, leaving the allegation unsubstantiated. He emphasized that without concrete proof of COHb absence, the claim that the deceased inhaled smoke during a homicidal fire becomes questionable. Furthermore, Mr. Bose argued that when charges are framed under Section 302 IPC, it is incumbent upon the prosecution to conclusively prove that the death was homicidal. In this case, the prosecution has not produced definitive evidence to establish that the death was a result of intentional killing rather than an accidental or self-inflicted injury.

Referring to the testimony of P.W.9, who conducted the postmortem examination, Mr. Bose highlighted that the medical opinion merely suggested that death was caused by asphyxia due to inhalation of smoke. Importantly, the medical

opinion was inconclusive as to whether the death was homicidal or suicidal. Mr. Bose elaborated that "subeoxia," or very low oxygen concentration, could occur in any fire, accidental or otherwise, thereby casting doubt on the prosecution's assertion of homicidal intent. He contended that without a clear indication of homicidal action, the prosecution has failed in its duty to eliminate all other possibilities, as required in cases based on circumstantial evidence. Additionally, Mr. Bose raised concerns over the quality of the investigation, arguing that it was perfunctory at best. He highlighted contradictions between the Scientific Officer's report and the Investigating Officer's (P.W.11) observations during the spot visit. These inconsistencies, he argued, create significant doubt regarding the reliability of the prosecution's evidence. He pointed out that the presence of an ante-mortem injury on the back of the deceased's head could reasonably have resulted from an accidental strike within a closed room during the course of a self-inflicted act, rather than as an intentional assault by the Appellant. In light of these ambiguities, Mr. Bose argued that the possibility of suicide cannot be ruled out and should be considered a viable explanation.

Finally, Mr. Bose underscored that in criminal jurisprudence, when two plausible interpretations are possible, the one favoring the accused must be accepted. He argued that the defence's theory of suicide is as credible as the prosecution's theory of homicide and, therefore, should lead to the benefit of the doubt being given to the Appellant. On these grounds, Mr. Bose submitted that the evidence does not support a conviction under Sections 302 and 201 IPC and that the Appellant is entitled to an acquittal. Mr. Bose has relied on the decisions in **Darshan Singh vs. State of Punjab** reported in **[2024] 1 S.C.R.**; **Bindeshwari Prasad Singh @ B.P. Singh vs. State Of Bihar (Now Jharkhand)** reported in **AIR 2002 SC 2907**; **Trimukh Maroti Kirkan vs. State of Maharashtra** reported in **2006 (10) SCC 681**; **Basheera Begam vs. Mohammed Ibrahim and Ors.** reported in **(2020) 11 SCC**.

9. Mr. P. B. Tripathy, learned ASC for the State, argued that the evidence overwhelmingly points toward a case of homicide rather than suicide. He submits that the testimonies of key witnesses, including those who described hostile interactions between the Appellant and the deceased, reveal a strained relationship marked by frequent quarrels and verbal abuse. This friction culminated on the morning of the incident, where the Appellant's behaviour towards the deceased created an environment of fear and potential harm. P.W.2, the cook, testified to abusive language used by the Appellant towards his wife, indicating a level of animosity inconsistent with the defence's portrayal of a peaceful household. Mr. Tripathy further submits that P.W.8, the forensic expert, noted the absence of forced entry marks on the bathroom door, which contradicts the defence's claim that D.W.1 and the Appellant struggled to gain entry by force. This discrepancy suggests that the bathroom door may not have been locked or bolted, thereby undermining the theory of suicide and raising suspicion of foul play.

He further emphasised on the findings of P.W.9, the medical officer, who documented ante-mortem injuries i.e. a scalp hematoma on the deceased, which suggests she was incapacitated before the fire was set. He asserts that the deceased was overpowered before being burned, rather than self-immolating herself. The report also notes soot and blood in the trachea, indicating that the deceased was breathing when the fire started, thus assuring that the deceased may have died due to burning but she was not conscious. Mr. Tripathy further contends that the Appellant's immediate recourse to calling the police, rather than seeking medical assistance, signals a lack of urgency or care for the deceased's wellbeing, pointing instead to premeditation. The decision not to call an ambulance highlights that the Appellant may have already assumed or been aware of the deceased's fate. Their reported injuries of the Appellant and D.W.1, were minor, raising doubt as to the extent of their claimed efforts to break down the door or extinguish the fire. Such minor abrasions do not align with the intense exertion that would be expected from a prolonged rescue attempt, thereby casting further doubt on the defence's narrative. Overall, Mr. Tripathy points out that the Appellant has failed to provide any plausible explanation under Section 106 of the Evidence Act and further asserts that the totality of evidence, including forensic findings, witness testimonies, and inconsistencies in the defence's account, establishes a strong chain of circumstantial evidence pointing toward homicide, and therefore urges this Court to uphold his conviction. The prosecution has relied on the decisions in **Vijay Kumar Arora vs. State Govt. of NCT of Delhi** reported in **(2010) 45 OCR (SC) 634**, and **Satish Setty vs. State of Karnataka** reported in **2016 Cri.L.J. 3147**.

10. Here is a peculiar case before us where the death appears to be one out of burn injuries. However, the circumstances appearing in the scene of occurrence and the background facts indicate that the deceased before being affected by the burn injury, had no control over herself and almost helpless, having suffered injuries to the vital part of the body. She died from the burn injuries set out on her while in moribund condition. As a result, the circumstances forthcoming in the case neither speaks of a complete case of suicidal or homicidal death. However, various facts emerge including the conduct of the Appellant and the testimony of the prosecution witnesses so also the only defence witness leads to the conclusion that the death is one of homicidal nature.

At the outset it is felt expedient to mention that from the sequence of events as apparently disclosed in the case record every endeavor has been made in the case to suppress material evidence besides the inordinate delay caused in bringing the case to trial so much so that the incident that took place in the year 1995 wherein the Appellant who happened to be an Ex-MLA caused his appearance only after 19 years upon his release on bail i.e within three months of the incident. Surprisingly, not a single witness has been cited from the side of the family of the deceased though her parents, brothers and sister were present at the relevant time. Leaving the official witnesses, all others have turned hostile as they were directly or indirectly interested in favour of the Appellant. Even the Doctor and Scientific team have

preferred not to examine the case with utmost clarity. Had the investigation not been in the hand of P.W.11 (An IPS Officer), the matter would have been closed with the U.D. enquiry only. With this factual background, we venture to evaluate the evidence to answer whether the trial Court is justified in holding the Appellant guilty.

11. Having regard to the arguments advanced by the learned counsel for the respective parties, while it is incumbent for this Court to examine first the nature of death of the deceased in view of the fact that the Appellant stood charged under Section 302 Indian Penal Code, the medical evidence in the case being inconclusive with regard to the nature of death as to whether suicidal or homicidal, a greater responsibility is bestowed upon this Court to examine the evidence and give a conclusive finding from the circumstances as to the nature of death. In this regard although the evidence of P.W.8, the Scientific Officer so also P.W.9, the Medical Officer carries importance, other circumstances appearing in the case coupled with the evidence of the witnesses being equally important are required to be taken into account to deduce the conclusion. Accordingly, we find it necessary to deal with the evidence in totality.

12. P.W.1, a resident of the MLA colony quarters where the incident occurred, testified that he knew the Appellant well and had been residing in the outhouse of the same quarters where the Appellant and his family were residing. According to him, on the morning of the incident, which took place on Ganesh Chaturthi sometime in August 1995, he invited the Appellant to accompany him to the temple. However, the Appellant chose to stay behind, allowing his son to go instead. They returned from the temple around 11 a.m. and found some police personnel and a crowd gathered at the Appellant's quarters. P.W.1 then learned that the Appellant's wife had allegedly set herself ablaze in the bathroom. He witnessed the burnt body being recovered by the police, who, along with an Executive Magistrate, conducted an inquest in his presence. The police documented the incident in an inquest report, which P.W.1 signed as Ext.1. Furthermore, they seized several items from the scene, including a plastic jerrican containing kerosene, broken bangles, a gold chain, a matchbox, an iron bucket, a soap case, and broken glass pieces, and prepared a seizure list marked as Ext. 2.

During cross-examination, P.W.1 stated that upon returning, he heard that the deceased had allegedly committed suicide by bolting the bathroom door from the inside. He noted that local residents had broken the bathroom's ventilator glass, when they failed to open the door, in an attempt to enter after noticing smoke and a kerosene smell coming from the bathroom. He affirmed that he had known the Appellant and the deceased for thirty years and believed that their relationship had been cordial. P.W.1 reiterated his belief that the deceased had committed suicide by pouring kerosene, having written this endorsement on the inquest report (Ext.1), indicating no other cause of death.

13. P.W.2, the cook employed by the Appellant, testified that on the morning of Ganesh Chaturthi, he and the Appellant noticed smoke emanating from the bathroom. They then broke open the door to find that the Appellant's wife had allegedly set herself on fire by pouring kerosene. P.W.2 stated that he had not observed any quarrel between the couple immediately prior to the incident.

In cross-examination by the prosecution, P.W.2, however, acknowledged previous statements made by him to the police indicating that there had been an argument between the Appellant and his wife the night before and again on the morning of the incident. He detailed that the Appellant had verbally abused his wife, allegedly due to her getting up late on the festive day, and even used obscene language towards her while P.W.2 was retrieving vegetables from the refrigerator. Following the argument, he observed the Appellant raising a loud cry, after which both he and one Rath Babu tried to extinguish the fire by throwing water through the bathroom's ventilator. Meanwhile, the Appellant and Kishore (D.W.1) managed to break down the bathroom door, where they found the deceased's body badly burned and a plastic jerrican containing some kerosene. P.W.2 revealed that he had purchased the kerosene and kept it in a jar under the bed, which he admitted was an unusual storage choice.

During cross-examination by the defence, P.W.2 mentioned that the Appellant and the deceased generally had a good relationship, with the deceased often participating in household tasks like cooking and daily worship. However, he admitted that while the deceased had a generally calm temperament, she would occasionally react strongly to mistakes. He confirmed that he stated in his earlier statement that regular quarrels occurred between the Appellant and the deceased, and on the day of the incident, the Appellant had berated his wife for waking up late.

14. P.W.3, the son of the deceased and the Appellant, testified that on the day of the incident, which was Ganesh Chaturthi in 1995, he went to the temple with P.W.1 around 8:30 a.m. Upon returning at approximately 11:00 a.m., he found that his mother had allegedly committed suicide by setting herself on fire in the bathroom, using kerosene and locking the door from the inside. Inside the bathroom, he observed a plastic jerrican with some kerosene and a matchbox. P.W.3 noted that he does not remember seeing his mother's burned body, attributing this to his young age at the time of the incident.

In cross-examination by the prosecution, P.W.3 confirmed that his mother, the deceased, was the Appellant's second wife, as his father's first wife had passed away. He also stated that he had not observed any serious quarrel between his parents and denied that his father had ever verbally abused his mother over her occasional late mornings. He mentioned that he still visits his father, who resides in their village.

During the defence's cross-examination, P.W.3 explained that the Government quarters were allocated to his father due to his position as an MLA, and that his parents generally had a good relationship. He acknowledged that his father

married the deceased after his first wife's death. However, this account contrasts with his statement under Section 161 of the Criminal Procedure Code, where he previously informed the police that he had witnessed quarrels between his parents before he left for the temple. This inconsistency suggests a possible lack of clarity or memory about the events from his childhood.

15. P.W.7, a Medical Officer at the Casualty Capital Hospital in Bhubaneswar, testified that on 29.08.1995, he examined Mr. Ram Murty Gamango, the Appellant, upon police requisition. During the examination, he made following observation vide Ext. 6/1:

> "1. Abrasion on the dorsal aspect of right middle finger in the proximal 1/3" of size 1/4" inch × 1/6" inch.
>
> 2. Abrasion on the dorsal aspect of right ring finger in proximal 1/3" of size 1/6" inch × 1/6" inch."

P.W.7 observed that both the injuries were simple in nature and could have been caused by hard and blunt object, age of injuries within 48 hours, from the time of his examination which is 4:45 P.M. The identification mark is one dimple scar mark below right zygomatic area.

Later that day, at 5:00 p.m., P.W.7 examined Kishore Chandra Behera (D.W.1) and found the following observations vide Ext. 7/1:

> "Partial burning of hairs just above the forehead and on the left parietal region, which were simple in nature and could have been caused by fire, age of injuries within 12 hours from the time of his examination. The identification mark is one black mole above the inner end of the left eyebrow on the forehead"

In cross-examination by the defence, P.W.7 stated that the abrasions mentioned in Ext.6/1 could have occurred if the Appellant had come in contact with a wall, and the partial burning on D.W.1's hair noted in Ext.7/1, could have been caused by contact with fire while attempting to extinguish a fire.

16. P.W.8, the Scientific Officer from the District Forensic Science Laboratory (D.F.S.L.), Khurda, testified that on 29.08.1995, he, along with his staff, arrived at the crime scene, in response to a requisition from the I.O. Upon arrival, he observed that the body of the deceased was completely burnt, with most part of the upper skin was completely burnt. Her garments were mostly burnt, and a noticeable swelling was present on the right side of her forehead.

Additionally, P.W.8 noted a white jerrycan, partially burnt except for its lower part, which contained a small quantity of kerosene and was found near a washing machine. An iron bucket and a plastic mug were located close to the legs of the deceased, and broken bangles were scattered across the bathroom floor. He further made the following observation:

> 1. No mark of violence was detected on the door frame, door bolt and door of the bathroom.

2. No marks of tampering was noticed on the outer part of the door bolt or inside the door bolt.

3. No marks of violence found on the four walls of the bathroom.

4. The articles of the bathroom were found intact and undisturbed, though iron bucket and plastic mug were very close to the left region of the leg.

5. Broken pieces of glass of ventilator of the bathroom were detected beneath of the dead body and broken glass bangles were found lying scattered on the floor of the bathroom.

6. No injury was detected on the dorsal surface of the deceased i.e. the back side of the deceased and on the wrist area.

7. There was uniform smoke deposit all over the wall of the bathroom and on the bolt of the door of the bathroom. The bolt was found in open condition.

8. There was uniform smoke deposit in the inner portion of the door frame.

9. The colour paint of the bath room door (outside) was swollen and bulged, but inside part of that door was less effective to heat than outside.

17. P.W.9, the Medical Officer in F.M.T. at Capital Hospital, Bhubaneswar conducted the post-mortem examination of the deceased along with Dr. Ashok Ku. Pattnaik. He found the following:

EXTERNAL INJURIES –

a) The scalp hair was burnt (partly burnt and singed at places, longest at back of head).

b) Burn injuries covering all over body surface 100% with epidermal and demo-epidermal, burns mostly affecting deeper tissues, skin surface absent with tags of dark skin on the body

c) Charred skin flaps present on the hands

d) Lacerated wound 1/4th x l/4th x scalp deep on the back of head 2" right of midline.

ON DISSECTION –

a) Sooty & blood lined mucous present on trachea

b) Scalp hematoma 1" x 1" dia on back of head, right to midline, corresponding to External Injury No.2

c) Uterus enlarged containing foetus-17 c.m. long; 200 g.m., Sex- Male with intact amniotic sac.

Opinion: (i) The injuries were antemortem in nature (ii) The cause of death was due to 100% burn of body surface (iii) Time since death - within 4 to 12 hours from the time of post-mortem examination i.e. 4.15 P.M. (iv) The deceased was 14-16 weeks pregnant at the time of death.

THE I.O. MADE FOLLOWING QUERIES ON 01.09.1995 –

a) To ascertain the mode of death of the deceased either asphyxia or shock resulting put of burn.

b) To ascertain the approximate time of death with reasonable + and - hour.

Opinion: The mode of death was asphyxia and time since death was 4 to 12 hours as mentioned in the report vide Ext. 10/1

THE I.O. MADE FURTHER QUERY ON 04.09.1995 AS FOLLOWS –

a) To ascertain if the asphyxia was due to throttling/ strangulation or suffocation arising out of the smoke produced by burning

b) To ascertain if the cause of death was suicidal/ homicidal or accidental.

Opinion: The mode of death was asphyxia (shock and subeoxia) was due to suffocation resulting from inhalation of smoke from combustion. The manner of death was not accidental; however, the findings were not conclusive to opine whether the death was homicidal or suicidal. The query of the I.O. is marked Ext. 11. Ext. 12 is the reply.

18. The sole defence witness examined on behalf of the Appellant namely Kishore Chandra Behera cited as D.W.1, is an inmate of the house. He deposed on oath that the incident occurring around 7:30 a.m. on Ganesh Chaturthi. He explained that on that morning, while he was heading to the bathroom, the wife of the Appellant, Mrs. Gamango, restrained him, indicating she wanted to use the bathroom herself. She entered and bolted the door from inside. Shortly after, smoke started emanating from the bathroom, and he heard her shouting. D.W.1 attempted to open the bathroom door but was unsuccessful, so he called for the Appellant, who was in the lobby talking to two other individuals. Together, D.W.1 and the Appellant forced open the door after about 10 minutes, breaking the bolt in the process. Upon entering, they saw the deceased lying on the bathroom floor, her clothing aflame. D.W.1 tried to extinguish the fire with a blanket, and the Appellant sustained hand injuries while assisting. D.W.1's own hair and eyebrows were singed as he tried to put out the fire.

After seeing that the wife of the Appellant was dead, the Appellant went to the police station. D.W.1 remained at the scene as neighbors and approximately 30-40 people gathered. Although many people arrived, none of the MLA's nearby family members came forward. D.W.1 stated that he then poured water on the body, and when the police arrived, they conducted an investigation, later sending both him and the Appellant for medical examination. D.W.1 also sustained an injury to his left hand. He was not present at the time of the inquest but signed the injury report as Ext. A.

19. For proper appreciation of the evidence, it is imperative to examine the evidence in the clear and chronological order taking into account the testimonies presented by both the prosecution and the defence which would allow the detailed understanding of the circumstantial evidence surrounding the tragic death of the deceased and its connection with the Appellant.

20. Starting with P.W.3, who is none but the son of the deceased and the Appellant examined under oath during the trial in 2013 claimed that he did not recall if he had seen his mother's burnt body at the time of her death in 1995, as he was a small child then. This statement seems to reflect the natural fading of memory by efflux of time as he was only 13 years' old at the time of the incident. However, it is crucial to juxtapose this statement with the one he made under Section 161 of the CrPC immediately after the incident in 1995. In his earlier statement recorded under section 161 Cr.P.C statement, P.W.3 specifically recounted that his father, the

Appellant, was shouting at his mother on the morning of Ganesh Chaturthi for waking up late. Additionally, he mentioned that his mother was reluctant to send him to the temple, but his father insisted upon it. P.W.3 also stated that the Appellant and his mother frequently quarrelled, particularly over her habit of waking up late. This previous statement, given in the immediate aftermath of the incident, though found significant admittedly does not carry an evidentiary value. However, it indicates an environment of regular conflict between the Appellant and the deceased, underpinned by frustration, anger, and domestic strife. Such an atmosphere sets the stage for analysing whether the Appellant's conduct played a more direct role in the death of the deceased. For reasons obvious, this Court cannot take this into account for the evaluation of the case. However, it can be fairly regarded to visualise a scenario in absence of any such evidence forthcoming from either side to contribute towards the circumstances that lead to the occurrence.

Furthermore, the testimony of P.W.2, the cook, provides additional corroboration regarding the strained relationship between the Appellant and the deceased. This witness too in his earlier statement recorder under 161 CrPC had explicitly stated that the Appellant was abusing the deceased in obscene language on the morning of the incident, as well as on the preceding night. He also noted that the Appellant regularly abused his wife. While P.W.2 initially testified on oath in Court that he had not seen any quarrel immediately prior to the incident, he later conceded in cross-examination that he had stated before the police about the quarrels between the Appellant and the deceased, particularly on the day of the occurrence. This shift in his testimony suggests some hesitation in fully disclosing the extent of the domestic conflict during his examination in Court. However, his acceptance under cross-examination reinforces the narrative of regular discord and emotional abuse between the Appellant and the deceased, lending credibility to the prosecution's version of events.

When both P.W.3 and P.W.2's statements are considered together, they paint a picture of a volatile marital relationship. P.W.2 has been consistent with his statement as to the troubled relationship of the deceased and the Appellant citing repeated quarrelling, particularly over seemingly trivial matters like waking up late.

21. Coming to the incident itself, according to P.W.2's testimony, after hearing the Appellant shout "Podigala, Podigala" (meaning "burning"), he and others, including one Ratha Babu and D.W.1, followed the Appellant to the bathroom whereas D.W.1's version, on the other hand, describes that the smoke coming from the skylight was followed by the deceased's cry of "marigali, marigali" (meaning "I am dying"). These accounts emphasise a sudden and frantic situation where the Appellant, along with others, attempted to rescue the deceased from a burning scenario in the bathroom. However, the defence case argues that the deceased committed suicide, and D.W.1's narrative attempts to explain the efforts made to forcefully enter the bathroom.

The fact that the P.W.2, who only saw smoke emanating from the bathroom did not hear any scream, contradicts the version of D.W.1 account, where he claims to have first seen smoke and then heard the deceased scream "marigali, marigali." This cry of desperation holds significant weight in evaluating the circumstances surrounding her death. If the deceased had truly intended to commit suicide, as claimed by the defence, it is unlikely that she would have screamed for help while the fire consumed her. The cry "marigali, marigali" indicates a clear effort, either consciously or unconsciously, to alert others to her plight and to escape the pain of burning. Further, if the deceased had intended to commit suicide by burning, her screams would have likely been cries of pain rather than cries for help. The fact that her words indicate an appeal for assistance suggests that she was not entirely resigned to death but instead was seeking to escape the situation. This distinction between a cry of pain and a cry for help is crucial. A person committed to the act of suicide would not typically call out for rescue in such a manner. Instead, the scream "marigali, marigali" reveals that the deceased was in distress and wanted to be saved, casting doubt on the theory of a deliberate, premeditated self-immolation.

Furthermore, D.W.1's testimony that the deceased restrained him before entering the bathroom, ostensibly to commit suicide, is incongruent with typical behaviours observed in suicidal actions, which are generally acts of isolation. In cases of suicide, individuals often seek to ensure solitude, minimising the chance of intervention or rescue. The act of instructing someone to wait before using the bathroom if the intent was truly self-immolation raises questions, as it inherently increases the risk of being discovered and saved. Additionally, the timing between the deceased's alleged instructions to D.W.1 and the immediate act of setting herself on fire introduces an unusual haste and lack of privacy, which are atypical in suicide cases where the individual often seeks controlled isolation.

22. The key issue here revolves around the plausibility of the situation where entry was difficult. There are multiple inconsistencies between this testimony and the forensic evidence at the scene, which fundamentally disputes the credibility of the defence's version of events.

23. First, it is essential to note that as per the evidence of P.W.8, the Scientific Officer, no visible signs of tampering or violence were found on the door frame, the bolt, or the door itself. If the door was indeed pushed with significant force, for 10-15 minutes, naturally, such a forceful and prolonged effort to break open the door would have left some physical evidence, such as damage to the door frame, the bolt, or the door itself.

Moreover, both P.W.2 and D.W.1 testified that they assisted the Appellant in breaking open the door; P.W.2 claimed he and the Appellant forced open the door, while D.W.1 similarly stated that he and the Appellant pushed the door together to rescue the deceased. However, the absence of any physical marks or indications of forced entry contradicts their statements and does not align with P.W.8's findings.

Throughout the trial, no suggestion was made to P.W.8, that the door to the bathroom had been forcibly broken open, either by the Appellant with P.W.2, or by the Appellant with D.W.1. P.W.8's observations clearly indicate that there was no visible mark of violence, no sign of damage to the door, and no evidence of a broken tar bolt; findings that remain unchallenged in the cross-examination.

At this juncture, an explanation from the side of the Appellant having special means of knowledge was inevitable, the absence whereof gives a cogent link to the scenario where the only plausible explanation is that the door was never closed or bolted from the inside, contradicting the defence's portrayal of a locked and inaccessible bathroom and raising serious questions about the true nature of the events that led to the deceased's death.

24. Turning to the defence, according to D.W.1, on the morning of the incident, the deceased entered the bathroom, bolted the door from inside, and after some time, smoke began to emerge from the skylight. He then heard the deceased scream "marigali, marigali" and rushed to the bathroom, but despite pushing the door, it would not open. He then went to call the Appellant, who was conversing with two other individuals in the lobby. The Appellant and D.W.1 together tried to break open the door, and after several minutes of pushing, they managed to break the upper bolt of the door and enter the bathroom. Inside, they found the deceased engulfed in flames, lying on the floor. D.W.1 claims that they extinguished the fire, and the Appellant then left to inform the police.

25. Secondly, D.W.1 stated that after the door was opened, he and the Appellant found the deceased already engulfed in flames. However, the fact that the body continued burning for about 10-15 minutes raises questions about the timeline and their response. It is highly unlikely that a body could sustain 100% burns from just 10-15 minutes of burning, especially in a confined space like a bathroom. While the intensity of the fire, the materials involved (e.g., clothing, accelerants), and the environment could influence the severity of the burns, achieving 100% burns on a human body in such a short time typically requires sustained, high-temperature exposure.

26. Furthermore, P.W.8's observations revealed that there was a uniform smoke deposit across the walls of the bathroom and on the bolt of the bathroom door, which was found in an open condition. Despite the claim of the defence that the supposed-suicidal burning occurred inside the bathroom, the articles in the bathroom were intact and undisturbed. Additionally, broken pieces of glass from the ventilator were detected beneath the dead body, and scattered glass bangles were observed on the bathroom floor. These details provide important clues about the state of the scene, suggesting that while there was a fire or smoke event, no signs of disturbance or struggle were immediately visible, other than the broken glass. This evidence could be significant in determining the cause of death and the sequence of events leading up to it.

P.W.8 also noted that the paint on the outside of the bathroom door was swollen and bulged, indicating exposure to significant heat, while the inside of the door, which is supposed to be the spot of occurrence, was less affected by the heat. If the fire had originated or burned intensely inside the bathroom, one would expect the inner side of the door to show more significant heat damage, with uniform signs of burning across the bathroom's interior. However, the fact that the outside of the door was more damaged by heat suggests that the fire or a major heat source was either stronger or positioned outside the bathroom.

Analysing this in the context of the defence's argument, it raises doubt about the claim that the burning took place inside the bathroom, which is a central point for the defence to support a theory of suicide. If the deceased had set herself on fire or the fire began from within, it would be logical for the inner side of the door to exhibit greater signs of heat exposure than the outside. Instead, the reverse seems true. This discrepancy weakens the argument of suicide, as it implies that the fire or heat source might have been external to the bathroom, raising the possibility of foul play or external involvement.

Moreover, the presence of undisturbed bathroom items, broken glass beneath the body, and scattered bangles further complicates the narrative of suicide. Together, these elements create an inconsistent picture that challenges the defence's claim, pointing instead to the likelihood of external factors contributing to the death. Thus, this analysis could potentially rule out suicide and strengthen the case for homicidal nature of death.

27. Moving on to the medical evidence provided by P.W.9, the ante-mortem injuries observed on the deceased offer significant insight into the nature of the death. The medical officer noted a lacerated wound on the back of the deceased's head, which was later confirmed to correspond with a scalp hematoma during internal examination. This injury, which occurred prior to death, is indicative of blunt force trauma, suggesting that the deceased was struck or otherwise injured before she was exposed to the fire. This is crucial evidence pointing towards a homicide, as it indicates that the deceased was likely incapacitated or killed by this head injury before her body was set on fire. It is improbable that this kind of injury would be self-inflicted in the course of a suicide, especially since there is no evidence to suggest the deceased fell or accidentally hit her head in a manner that could have caused this wound.

28. According to Modi's Medical Jurisprudence reported in Modi, J. P. (2021), *A textbook of medical jurisprudence and toxicology* (27th ed.), Chapter IX: Death from Burns, Scalds, Lightning, And Electricity - Burns and Scalds (p. 200), it is mentioned –

> "Causes of Death.—1. Shock.—Severe pain from extensive burns causes shock to the nervous system, and produces a feeble pulse, pale and cold skin and collapse, resulting in death instantaneously or within twenty-four to forty-eight hours. In children it may lead to stupor and insensibility deepening into coma and death within forty-eight hours.

> In order to avoid the suggestion that coma was due to the drug it is advisable not to administer opium in any form for the alleviation of pain.
>
> 2. Suffocation.—Persons removed from the houses destroyed by fire are often found dead from suffocation due to the inhalation of smoke, carbon-dioxide and carbon-monoxide—the products of combustion. In such a case the burns found on the body are usually post-mortem…
>
> Between 1 a.m. and 3 a.m. on the 6th January, 1922, some dacoits broke into the house of one Kusher Lodh, aged 50 years, and, finding him and his son, 20 years old, sleeping in a room, chained it from outside. On leaving the house they set fire to rubbish lying at the door with the result that the father and the son died in the room. The post-mortem examination of both the bodies afforded clear evidence of death from suffocation. The larynx and trachea in both were congested with a deposit of soot along the interior. The lungs were congested and exuded frothy blood on section. The brain vessels were found engorged with blood. There was general venous engorgement. Externally the bodies showed a few small superficial burns on the face, thighs and legs with singeing of the hair of the head.
>
> 3…
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> 4…
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> 5…
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> 6…
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> 7…
>
> Fatal Period.—As already mentioned, death may occur within twenty-four to forty-eight hours, but usually the first week is the most fatal. In suppurative cases death may occur after five or six weeks or even longer ."

29. According to P.W.9 the cause of death was asphyxia due to suffocation from inhalation of smoke, even in the absence of carboxyhemoglobin in the blood. While the absence of carboxyhemoglobin (which typically indicates that a person was alive when they inhaled smoke) could raise doubts, the presence of sooty and blood-tinged mucus in the trachea suggests that the deceased was indeed breathing in smoke at the time of the fire. This aligns with the principles outlined in Modi's Medical Jurisprudence, which emphasises that suffocation can be a primary cause of death in fire-related incidents. D.W.1's claim that the deceased's body was burning for 10 to 15 minutes presents a crucial inconsistency. According to Modi's text, death can occur within 24 to 48 hours post-burn, especially when considering factors and the extent of injuries cause by the fire. If D.W.1's assertion is accurate, the prolonged burning time indicates that the victim was likely alive during this period, which raises significant concerns about the circumstances of her death. Given that asphyxia is cited as the cause of death, it suggests that the deceased may have been incapacitated or unable to escape the flames, potentially indicating foul play. The presence of asphyxia in conjunction with D.W.1's account of extended burning time points to a scenario where the deceased was not just a victim of fire but may have been deliberately placed in a situation that led to her suffering both from smoke inhalation and severe burns. P.W.9 was unequivocal in stating that the death was not accidental, further narrowing down the possible manner of death to either suicide or homicide. However, the surrounding circumstances make it highly unlikely that the death was the result of suicide.

The report of P.W.9 to the effect that the cause of death was asphyxia due to suffocation from inhalation of smoke seems stage managed for the simple reason that if the findings of the report was correct, the doctor could safely have opined with a definite report as to the cause of death to be suicidal but it did not happen so as he found a hurdle before him that is the CE report. In the CE report, it was opined that there was absence of Carboxy Hemoglobin suggesting that the death could not have been for suffocation. This discrepancy is what is observed by this Court earlier as suppression of material. This is more so when original CE report was not produced before the trial Court while a true attested copy was produced which was not accepted by the learned trial Court as evidence. We, however, do not find the opinion of the trial Court correct. This is because the case record reveal that a photocopy of the CE report has been annexed to the FIR by the I.O who relied upon it as one of the key documents holding prima facie the cause of death of the deceased as homicidal. P.W.8 adduced evidence on oath to the effect that there was absence of Carboxy Hemoglobin ruling out possibility of inhalation of smoke as per medical jurisprudence. As we have already observed there was every possible effort made to weaken the evidence and it is for this reason in order to get rid of the consequence of the opinion in the CE report, the only way out was to withdraw the said documents from being proved to accommodate the Appellant. Consequently, therefore, in the opinion of this Court having regard to the fact that the existence of the original cannot be denied as the attested true copy has been produced from proper custody and its authenticity has not been challenged by the defence in any manner, the same can very well be read in evidence accepting the document (the CE Report marked "Z") as proved by secondary evidence. Otherwise, this would amount to travesty of justice and the investigating agency shall be allowed to "rule the roost." In sequel to the above, once the CE report is read in the manner it is opined, it is clear to suggest that the victim had already died by the time she was put to fire.

30. Finally, the testimony of P.W.9 further corroborates the theory of homicide by highlighting the pregnancy of the deceased. The deceased was approximately 14-16 weeks pregnant at the time of her death significantly weakens the possibility of suicide. The maternal instinct to protect an unborn child is a powerful force, and it is highly unlikely that a woman in her second trimester, who was carrying a fetus would deliberately seek to harm herself or her unborn baby without a compelling cause. The absence of any evidence suggesting emotional distress, a suicidal mindset, or any circumstantial triggers that could lead a pregnant woman to take such a drastic step further diminishes the likelihood of suicide. The pregnancy becomes a critical factor in the analysis, suggesting that the deceased was the victim of homicidal violence, with her pregnancy possibly playing a role in escalating tensions within her marriage, rather than someone who would willingly end her own life and that of her unborn child. The medical officer's findings, along with circumstantial evidence suggesting a strained relationship between the Appellant and his wife, may suggest a motive for the crime.

31. While neither P.W.8 nor P.W.9 provided a definitive medical conclusion that the death was homicidal, the combination of antemortem injuries, the undisturbed scene, and the pattern of smoke deposition, as well as the absence of evidence supporting suicide or accident as argued by the defence strongly indicate that homicide is the most likely explanation. The head injury, coupled with the asphyxia caused by smoke inhalation, points to a scenario where the deceased was incapacitated before the fire was started, suggesting an intentional act to both kill and conceal the evidence.

32. The Appellant, being the husband of the deceased and present at the house at the time of the occurrence, failed to provide any reasonable explanation for the defence of suicide. Under Section 106 of the Indian Evidence Act, the burden of proving facts that are peculiarly within the knowledge of a person rests on that person. The prosecution has established that the Appellant was seen quarreling with the deceased before the occurrence and was present at the scene during the critical time. These circumstances placed the Appellant in a position where he had exclusive knowledge of the events leading to the death of the deceased.

Since the Appellant was the only individual with close access to the deceased at the time of her death, it was incumbent upon him to provide a plausible explanation for her death, especially when claiming that it was a case of suicide. The burden of proof, while primarily on the prosecution to prove guilt beyond reasonable doubt, shifts in part to the Appellant under Section 106 when it comes to facts exclusively within his knowledge. He failed to explain the cause of the fire and the circumstances under which his wife was found engulfed in flames. This failure to discharge the burden raises an adverse inference against him.

33. Moreover, D.W.1's testimony contains notable inconsistencies, regarding his claim that he attempted to extinguish the fire by placing a blanket over the deceased's body. He stated that while trying to smother the flames with the blanket, he sustained minor burns to his eyebrow and hair and even the Appellant sustained injuries on his hand. However, no blanket was found or seized from the bathroom during the investigation, as confirmed by the seizure list. It is expected that a blanket used to put out a fire to be present at the scene or to exhibit burn marks or soot if it had indeed been in contact with the flames.

The analysis of injuries suffered by the Appellant and D.W.1, as documented by P.W.7, reveals inconsistencies that weaken the defence's narrative of a desperate rescue attempt. According to P.W.7, the Appellant sustained only minor abrasions on the dorsal aspect of his right middle and ring fingers, injuries that could be caused by contact with a hard surface but are not consistent with the vigorous force that would be required to break down a door or manage a burning body.

Furthermore, D.W.1, who claims to have sustained partial burns while attempting to extinguish the flames, exhibited burns only on the hair above the forehead and the left parietal region. This minor burn pattern does not align with the defence's portrayal of a sustained attempt to rescue a person on fire, as one would

expect more extensive burns or injuries to the hands, arms, or clothing. Furthermore, the Appellant's assertion of suffering from Erythema, a skin condition that could potentially explain injuries from scratching or irritation, was not corroborated by any medical findings. P.W.7's examination report found no signs of Erythema or any other dermatological condition that could justify the abrasions. The evidence presented by P.W.7 does not support a scenario where the Appellant and D.W.1 undertook a strenuous, genuine rescue attempt.

These inconsistencies, along with the absence of physical evidence such as a blanket, undermines the defence's claim of a genuine rescue effort. Collectively, this supports the prosecution's theory that the injuries and the rescue narrative were minimal, contrived, and insufficient to support a plausible defence, reinforcing the prosecution's case of intentional conduct rather than a spontaneous, earnest attempt to save the deceased.

34. The prosecution has provided sufficient circumstantial evidence such as the Appellant's presence, prior quarreling, and lack of effort to explain the situation that casts serious doubt on the defence of suicide. Without a credible explanation from the Appellant, especially considering the circumstantial evidence strongly implicating him, the prosecution's burden to prove guilt beyond a reasonable doubt is sufficiently met.

35. Furthermore, the Appellant's decision to contact the police rather than immediately seek medical assistance, such as calling an ambulance, raises significant doubts about his conduct during the critical moments following the incident. In a situation where an individual is engulfed in flames, a natural and reasonable reaction would be to prioritise obtaining medical help, as every second counts in the case of burn injuries. The fact that the Appellant did not first attempt to arrange for urgent medical care, but instead contacted the police, reflects a lack of concern for the potential survival of his wife and raises questions about his state of mind and intentions.

The timeline of the burning is crucial to understanding the proximity of the events. D.W.1's testimony suggested that the deceased was engulfed in flames for approximately 10-15 minutes, which is inconsistent with the typical response expected in such an emergency. The Appellant, who was present in the house, could not have reasonably concluded that his wife had already died without any attempt at medical intervention or verifying her condition with professional assistance. Burns of 100%, as recorded, often result in death, but the Appellant's immediate assumption that his wife was beyond help without even attempting to summon an ambulance seems premature and raises suspicions about his foreknowledge of the situation.

This conduct further diminishes the credibility of the Appellant's defence. His actions reflect a deliberate choice not to seek immediate help, despite the possibility that his wife could have survived with timely medical care. The Appellant's failure to act appropriately in such a situation, coupled with his absence

of any reasonable explanation under Section 106 of the Indian Evidence Act, significantly weakens his defence and supports the prosecution's case of foul play rather than suicide.

36. In a case of circumstantial evidence, before reaching a conclusion, the Court is required to examine the evidence on the touchstone of the decision reported in the matter of ***Sharad Birdhi Chand Sarda vs. State of Maharashtra*** reported in **AIR 1984 SC 1622** –

> "3:3. Before a case against an accused vesting on circumstantial evidence can be said to be fully established the following conditions must be fulfilled as laid down in Hanumant's v. State of M.P. [1953] SCR 1091.
>
> 1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
>
> 2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> 3. The circumstances should be of a conclusive nature and tendency;
>
> 4. They should exclude every possible hypothesis except the one to be proved; and
>
> 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. These five golden principles constitute the panchsheel of the proof of a case based on circumstantial evidence and in the absence of a corpus deliciti.
>
> Hanumant v. The State of Madhya Pradesh [1952] SCR 1091; Tufail (Alias) Simmi v. State of Uttar Pradesh [1969] 3 SCC 198; Ramgopal v. State of Maharashtra AIR 1972 SC 656; and Shivaji Sahabrao Babode & Anr. v. State of Maharashtra [1973] 2 SCC 793 referred to.
>
> 3:4. The cardinal principle of criminal jurisprudence is that a case can be said to be proved only when there is certain and explicit evidence and no pure moral conviction."

37. The prosecution has meticulously established a robust chain of circumstantial evidence that firmly points to the Appellant's guilt, fulfilling the standards set forth in ***Sharad Birdhi Chand Sarda vs. State of Maharashtra*** (*supra*). Each circumstance, from the forensic findings to witness testimonies, aligns solely with the hypothesis of the Appellant's involvement in the crime, with no reasonable alternative explanation. The conclusive nature of the evidence, including ante-mortem injuries on the deceased, the Appellant's minor injuries inconsistent with his rescue claim, and the Appellant's immediate call to the police instead of seeking medical help, collectively negates any hypothesis of innocence. Therefore, in all likelihood and based on the well-founded evidence, the prosecution has decisively proved the Appellant's guilt.

38. It is pertinent to note that Section 106 of the Evidence Act serves as an exception to the general rule that the burden of proof lies with the prosecution. Under Section 106, if any fact is especially within the knowledge of a person, the burden of proving that fact lies upon him. As held in **Anees v. State Govt. of NCT** reported in **2024 INSC 368** by the Hon'ble Supreme Court –

"35. Section 106 of the Evidence Act reads as follows:

"106. Burden of proving fact especially within knowledge.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

36. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act. Section 101 with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish the facts which are, "especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience."

39. Section 106 of the Evidence Act applies particularly in cases where the accused is in a unique position to explain facts or circumstances that are otherwise difficult for the prosecution to establish. Therefore, in circumstances such as those presented here, the Appellant is expected to provide an explanation for the events within his exclusive knowledge, as required by Section 106 of the Evidence Act. The Appellant's actions following the incident further reinforce a strong link to his culpability. His repeated absences and delays in appearing before the Court, alongside witnesses turning hostile, reflect a pattern of evasion that is inconsistent with the behaviour of an innocent person. By invoking Section 106 of the Evidence Act, the prosecution rightfully argued that the Appellant, being in exclusive control of the household and present at the time of the incident, bore the burden of providing a plausible explanation for the death of his wife. However, the Appellant's narrative of suicide was unsupported by both forensic evidence and witness testimonies, leaving the prosecution's version as the only plausible conclusion.

40. A disturbing fact before parting with the case is the glaring reality that the witnesses have gone hostile, and the Appellant has been persistently avoiding Court proceedings. The Appellant was released on bail on 01.11.1995. Despite the order dated 27.10.1995 directing the case record to be placed before the Presiding Officer (P.O.) on 10.11.1995, it was not presented until 20.09.1996, when the final form was received by the Court.

Upon notice, the Appellant failed to appear before the Court on 06.01.1997 and subsequently filed repeated petitions requesting time to appear from 06.01.1997 until 26.11.1997. When the Appellant did appear on 26.11.1997, the case was

adjourned to 15.12.1997 for the supply of police papers. However, he continued to be absent, represented solely by his lawyer. Due to his continued absence, despite repeated notifications from the Court, a Non-Bailable Warrant (NBW) was issued on 22.03.2003. Unfortunately, this NBW remained unexecuted until 23.08.2013, when the trial Court issued an order directing the Petitioner to be released upon his appearance.

The case record was subsequently transmitted to the Court of sessions on 27.08.2013, with instructions for the Appellant to appear before the Sessions Court. The matter was placed before the Sessions Judge on 30.10.2013, on which date the charges were formally framed, and the trial commenced.

41. The case record reveals a disappointing lapse in adherence to the legislative mandate of Section 309 of the CrPC, which stipulates that the trials should proceed on a day-to-day basis to ensure timely justice. Despite the fact that the Forensic Science Laboratory was situated only a few kilometres from the trial Court, the case experienced repeated adjournments due to the unavailability of the original Chemical Examination Report, without a diligent effort to secure its prompt production.

Moreover, the delay in examining witnesses spanning nearly four years from the first witness being examined on 24.06.2014 to the last on 12.02.2018 exemplifies an unacceptably depressed pace that fails to meet the standards expected of a fair and expeditious trial. The accused statement, recorded as late as 28.03.2023, reflects a gross departure from timely trial obligations, raising serious concerns about the trial Court's commitment to judicial efficiency. While it appears that the Appellant may have contributed to certain delays, the trial Court's passive role in permitting such prolonged adjournments cannot be overlooked. This regrettable delay undermines the justice system's ability to uphold procedural mandates.

42. In light of the above discussion, the conviction of the Appellant under Sections 302 and 201 of the IPC stands firmly substantiated. The prosecution has established, beyond a reasonable doubt, that the Appellant intentionally caused the death of his wife, fulfilling the requirements of Section 302 IPC for murder. The forensic findings, including antemortem injury on the deceased, soot in the trachea indicating inhalation during the fire, and the Appellant's implausible claims of suicide, all negate any hypothesis other than intentional homicide.

Furthermore, the Appellant's actions to mislead the investigation and create a narrative of suicide meet the criteria under Section 201 IPC for causing the disappearance of evidence. The tampering with the scene and delayed call to the authorities, with no attempt to seek immediate medical assistance, reflect clear intent to mislead and obstruct the course of justice. Each element of Section 201 is satisfied, as the Appellant's actions were intended to shield himself from liability by erasing critical evidence of the crime.

43. The decisions referred to by the Appellant is not elaborately discussed, as they are factually distinguishable. However, while analysing the case in hand, the ratio of the decisions cited by the learned counsel is taken care of. Thus, the evidence leaves no reasonable ground for doubt regarding the Appellant's guilt under both Sections 302 and 201 IPC. The conviction on both counts is therefore confirmed, as it is supported by a coherent and complete chain of evidence that establishes the Appellant's culpability.

44. The impugned order and judgment of the learned 3rd Additional Sessions Judge, Bhubaneswar, in Crl. Trial No. 268 of 2012, dated 27.06.2023, being consistent and akin to the evidence both in fact and law cannot be faulted with and in our humble opinion, the same meets the requirement of law with regard to the circumstantial evidence is accordingly confirmed. Since the sentence awarded is absolutely in accordance with law, there is nothing to interfere therewith.

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

46. The Appellant who is reported to be on bail is directed to surrender forthwith before the learned trial Court to suffer the sentences and deposit the fine amount. Needless to say, that on the failure of the Appellant to surrender, the learned Court shall proceed in accordance with law.

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

Result of the case :
Appeal dismissed

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2024 (III) ILR-CUT-1054

SAMARA MAHAKUD
V.
STATE OF ODISHA

(JCRLA NO. 46 OF 2008)

28 NOVEMBER 2024

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

Issues for Consideration

(i) Effect of absence of motive in a case based on circumstantial evidence.
(ii) Effect of Non-production of material object before the Court.

Headnotes

(A) CRIMINAL TRIAL – The appellant found guilty U/ss. 302/364/201 of I.P.C. – The case is based on circumstantial evidence – Absence of motive when fatal to the case of prosecution.

Held: In a case which is based on circumstantial evidence motive holds a greater importance – In the instant case, the prosecution case is solely based on circumstantial evidence and failure on the part of prosecution to put forward even any probable motive for commission of ghastly crime, certainly weakens its stance and leaves a hollow in the chain of incriminatory circumstances. (Para 9)

(B) INDIAN EVIDENCE ACT, 1872 – Section 106 – Principle of last seen theory – The dead body was found almost fifteen hours after the so called last seen of the appellant with the deceased – Whether the appellant is liable to discharge the burden U/s. 106 of the Act.

Held: No – There is no rigid proof as to whether the appellant knew the whereabouts of the deceased, especially when the time gap between the last seen and discovery of corpse of the deceased is a substantial one. (Para 10)

(C) CRIMINAL TRIAL – Non-production of material object before the court – Tangia (M.O.) was seized, but no blood was detected on it as per C.E. report and the 'TANGIA' was not produced in the court for its identification by the P.W. who had seen the appellant carrying the Tangia so also by the seizure witness – No explanation has been offered by the prosecution as to why the seized 'Tangia' was not produced before court – Effect of.

Held: Non-Production of the alleged weapon of offence before the court undoubtedly creates a doubt on the prosecution case. (Para-11)

Citation Reference

Anwar Ali -Vrs.- State of H.P., **(2020) 10 Supreme Court Cases 166**; Suresh Chandra Bahri v. State of Bihar, **1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60**; Babu v. State of Kerala, **(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179**;State of U.P. v. Sanjay Singh(Dr.), **1994 SUPP(2) SCC 707;** Kiriti Pal -Vrs.- State of W.B., **(2015) 11 Supreme Court Cases 178**; State of U.P. v. Satish, **(2005) 3 SCC 114 : 2005 SCC (Cri) 642**; State of Rajasthan v. Kashi Ram, **(2006) 12 SCC 254 : (2007) 1 SCC (Cri) 688;** Naina Mohmed, In re**, 1959 SCC OnLine Mad 173: AIR 1960 Mad 218;** Gopabandhu Swain v. State of Orissa**, (1991) 71 Cuttack Law Times 411 – referred to.**

List of Acts

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

Keywords

Motive, last seen theory, Non-production of M.O., Circumstantial evidence, Absence of motive, Recovery

Case Arising From

Order dated 20.02.2008 passed by learned Sessions Judge, Keonjhar in Sessions Trial No. 119 of 2007.

Appearances for Parties

For Appellant : Mr. Bikash Chandra Parija
For Respondent : Mr. Jateswar Nayak, A.G.A.

Judgment/Order

Judgment

S.K. SAHOO, J.

The appellant Samara Mahakud faced trial in the Court of learned Sessions Judge, Keonjhar in Sessions Trial No. 119 of 2007 for the offences punishable under sections 302/364/201 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 13.02.2007 in the afternoon at Khajurimundi, the appellant kidnapped Guru Mahakud (hereinafter 'the deceased') and committed his murder by intentionally causing his death and thereafter, threw his dead body inside the jungle with an intention to screen himself from legal punishment.

The learned trial Court vide judgment and order dated 20.02.2008 found the appellant guilty under sections 302/364/201 of the I.P.C. and sentenced him to undergo imprisonment for life for commission of offence under section 302, I.P.C., R.I. for ten years for the offence under section 364 of the I.P.C. and to undergo R.I. for five years under section 201 of the I.P.C.

Prosecution Case :

2. The prosecution case, as per the first information report (for short, 'F.I.R.') (Ext.8) lodged by Sabitri Mahakud (P.W.1) before P.W.7 Ajit Kumar Swain, the Officer-in-Charge (O.I.C.) of Sadar Police Station, Keonjhar, in short, is that on 13.02.2007 during afternoon around 4.00 p.m., the deceased who was her seven years old son, told her that the appellant had asked him to accompany him to eat '*kendu'* and without paying any heed, the deceased proceeded with the appellant on his bicycle. Around the evening, the appellant came back alone on his bicycle without the deceased. When P.W.1 asked the appellant about the whereabouts of the deceased, the appellant told her that the deceased had not gone with him. Thereafter, P.W.1 went inside the village and searched for the deceased, but without getting any trace of him, she informed to her co-villagers and the ex-member of the village. On 14.02.2007, some of her co-villagers went out in search of the deceased and around 11.00 a.m., she was informed that the deceased had been murdered and was lying two kilometers away from village at Sianal jungle and his neck had been cut. On hearing the same, she sent for her younger brother Indramani Mahakud and informed her husband. Since there was delay in arrival of her husband, she along with Indramani went to Saukati police outpost. While P.W.7 was camped at Saukati out-post, he received the written report from the informant (P.W.1) and finding a

cognizable case to have been made out, he treated it as an F.I.R. and registered Keonjhar Sadar P.S. Case No. 24 of 2007 and took up investigation of the case.

P.W.7 himself took up investigation. During the course of investigation, he visited the spot, examined the informant (P.W.1) and other witnesses and recorded their statements. P.W.7 prepared the spot map (Ext.9), seized some blood stained earth and sample earth as per seizure list Ext.4, held inquest over the dead body of the deceased and prepared the inquest report as per Ext.1 and sent the dead body to the District Headquarters Hospital, Keonjhar for post-mortem examination vide dead body challan (Ext.10). P.W.7 seized the wearing apparels of the deceased as per seizure list Ext.11. On 16.02.2007, P.W.7 arrested the appellant and while the appellant was in police custody, he confessed to have killed the deceased by an axe and concealed the same in his bed room, which was under lock and key and the key being with him. The disclosure statement of the appellant was recorded as per Ext.2 and the appellant led the police party to his house, opened the lock of that room and showed P.W.7 the tangia, which was kept in a corner of that room. P.W.7 seized the tangia as per seizure list Ext.3. The wearing apparels of the appellant as well as his bicycle was seized as per seizure list Ext.5 and thereafter, P.W.7 sent the appellant to D.H.H., Keonjhar for collection of his biological samples and on being collected, the same were seized as per seizure list Ext.12. P.W.7 made a query to the Medical Officer conducting autopsy over the dead body of the deceased as per Ext.7 as to whether the injuries sustained by the deceased could be possible by the seized Tangia. He produced the exhibits seized in the Court of learned S.D.J.M., Keonjhar and prayed for dispatching the same to the S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and also received the chemical examination report (Ext.14) and serological examination report (Ext.15). Upon completion of investigation, P.W.7 submitted charge sheet against the appellant on 26.04.2007 under sections 302/364/201 of the I.P.C.

Framing of Charges :

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

Prosecution Witnesses, Exhibits & Material Objects :

4. In order to prove its case, the prosecution examined as many as seven witnesses.

P.W.1 Sabitri Mahakud is the mother of the deceased and sister-in-law of the appellant and also the informant in this case. She stated that on the date of occurrence at around 03.00 p.m., the appellant took the deceased from her house on a bicycle on the plea of collecting "*kendu*" and around 05.00 p.m., the appellant returned alone and when P.W.1 enquired about the whereabouts of the deceased, the appellant told that he might be playing somewhere. She further stated that even though thorough search was made on the same day, but the deceased could not be

traced out and in the morning she found the dead body of the deceased in the jungle near Sia Nala having cut injuries on his face and both side neck. She further stated that by the morning, the appellant had fled away from their house.

P.W.2 Parikha Dehury is a co-villager of the informant and a witness to the preparation of the inquest report vide Ext.1 and also a witness to the disclosure statement made by the appellant as per Ext.2. He is further a witness to the seizure of tangia (Ext.3) and seizure of blood stained earth as per seizure list Ext.4.

P.W.3 Amuli Mahakud is the brother of the appellant and he stated that around evening of the date of occurrence, the appellant called the deceased and took him away on a bicycle on the plea of collecting *kendu* and he further stated that the appellant had a tangia with him. He also stated that at night when the appellant returned alone and the deceased was not with him, he asked him about the deceased to which he replied that the deceased had not gone with him. He further stated that in spite of thorough search, the whereabouts of the deceased could not be traced out and on the next day, the dead body of the deceased was found in the jungle and his neck had been cut.

P.W.4 Kandra Pradhan is a co-villager of the appellant who stated that upon being informed about missing of the deceased, he along with others conducted a search on being requested by the family members of the deceased. He is a witness to the seizure of blood stained earth as per seizure list Ext.4 and also a witness to the disclosure statement made by the appellant as per Ext.2 as well as seizure of the tangia and bicycle of the appellant as per Exts.3 and 5 respectively.

P.W.5 Dr. Pradip Kumar Nayak was working as an Assistant Surgeon at the District Headquarters Hospital, Keonjhar and he conducted post-mortem examination over the dead body of the deceased and submitted his report as per Ext.6. He also furnished the query report as per Ext.7/1.

P.W.6 Magu Pradhan is a co-villager of the appellant who stated that that upon being informed about missing of the deceased, he along with others conducted a search on being requested by the family members of the deceased. He further stated that on the next day of the occurrence, the dead body of the deceased was found in Sia Nala jungle and the neck of the deceased had been cut. He further stated that three days after the occurrence, the appellant who had escaped came to the village and police arrested him and he confessed to have murdered the deceased.

P.W.7 Ajit Kumar Swain was working as Officer incharge of Sadar P.S., Keonjhar and he is the Investigating Officer of the case.

The prosecution proved fifteen numbers of documents to fortify its case. Ext.1 is the inquest report, Ext.2 is the disclosure statement made by the appellant, Ext.3 is the seizure list in respect of one tangia, Ext.4 is the seizure list in respect of blood stained earth, Ext.5 is the seizure list in respect of one bicycle, Ext.6 is the post-mortem examination report, Ext.7 is the query made by P.W.7, Ext.8 is the F.I.R., Ext.9 is the spot map, Ext.10 is the dead body challan, Ext.11 is the seizure

list in respect of wearing apparels of the deceased and command certificate, Ext.12 is the seizure list in respect of nail clippings etc., Ext.13 is the office copy of forwarding report of S.D.J.M., Keonjhar to S.F.S.L., Bhubanewar, Ext.14 is the C.E. report and Ext.15 is the S.E. report.

Defence Plea :

5. The defence plea is one of complete denial of the prosecution case. To dislodge the prosecution case, the appellant examined himself as the sole defence witness.

D.W.1 Samara Mahakud is the appellant in this case who stated that the informant is his sister-in-law and P.W.3 is his sister. He stated that he stayed outside his village and used to take cattle of people for grazing and his wife stayed in her parent's house with his children. He further stated that he had good and cordial relationship with his parents, brothers and sisters. He further stated that the deceased was his brother's son, i.e. nephew and he was very cordial with him. He further stated that on the date of alleged occurrence, voting for panchyat election was going on in his village school and he was outside the school and the deceased was not with him at that time. He further stated that after the alleged occurrence, he had not escaped from his village and he had not led the recovery or seizure of any budia.

Findings of the Trial Court :

6. The learned trial Court after assessing the oral as well as documentary evidence on record, came to hold that the appellant is the relative of the deceased, who was seven years old at the time of occurrence. Learned trial Court further held that the appellant took the deceased on bicycle on the plea of collecting *Kendu* and during such time, he was carrying a tangia with him. After some time, he returned alone without the deceased and when questioned about whereabouts of the deceased, he gave prevaricating statements and thereafter escaped somewhere and on the next day morning, the dead body of the deceased was found with fatal injuries. It is also held that no strong reason is there to disbelieve the witnesses on this score and the prosecution has well established the 'last seen theory'. It is also held that the fact that the appellant escaped somewhere after the occurrence and gave prevaricating statements about the deceased whom he had taken on the plea of collecting *kendu* fortified his guilt. It is also held that there is no reason to disbelieve the evidence of the prosecution that the appellant after the occurrence while in police custody led to the recovery and seizure of the weapon of offence, i.e. tangia. It is further held that the evidence of the prosecution is clear that the appellant kidnapped the deceased on the plea of collecting *kendu* and killed him and threw the dead body in Sia Nala jungle. The learned trial Court also relied on the chemical examination report (Ext.14) and serological examination report (Ext.15) and came to hold that the wearing apparels of the appellant contained human blood. Learned trial Court also held that in view of clinching, acceptable, cogent and trustworthy evidence of the prosecution, the evidence of the appellant denying the allegations, would carry less value and further held that minor discrepancies here and there are to be over-looked.

Accordingly, the learned trial Court found the appellant guilty under sections 364/302/201 of the I.P.C.

Contentions of the Parties :

7. Mr. Bikash Chandra Parija, learned counsel appearing for the appellant contended that this is a case based on circumstantial evidence and there are mainly three circumstances in this case i.e. **(i) the appellant was last seen with the deceased; (ii) leading to discovery of axe at the instance of the appellant and (iii) wearing apparels of the appellant were seized and human blood was found on the half pant of the appellant.** Learned counsel further argued that the prosecution has failed to establish any motive behind the commission of murder and there was time gap of about fifteen hours between last seen as deposed to by P.Ws.1 and 3 and the recovery of the dead body and when the evidence on record indicates that the deceased had been to the school in the afternoon where the voting was going on for Panchayat election and the villagers were present there in the school and there is no evidence when the deceased returned to his house from the school and accompanied the appellant on the bicycle, the last seen theory is a doubtful feature. So far as leading to discovery of axe is concerned, the statements of the witnesses are discrepant in nature and moreover, it appears from the evidence of P.W.2 that the appellant had not been with the police to the house of P.W.1 wherefrom the tangia was seized and thus, much importance cannot be attached to the seizure of tangia, particularly when no blood was found on it and even the tangia was not produced during trial to be marked as a 'material object'. Learned counsel urged that since the circumstances have not been cogently and firmly established and even if taken cumulatively, do not form a complete chain unerringly pointing towards the guilt of the appellant, it is very difficult to sustain conviction of the appellant and therefore, it is a fit case where benefit of doubt should be extended to the appellant.

Mr. Jateswar Nayak, learned Addl. Government Advocate, on the other hand, argued that P.W.1 and P.W.3 have specifically stated that the deceased, who was a boy aged about seven years, accompanied the appellant on the bicycle in the afternoon and after two hours, the appellant alone returned back and when he was confronted about the whereabouts of the deceased, he expressed his ignorance and stated that the deceased had not gone with him and nobody has seen the deceased alive thereafter and on the next day, the dead body of the deceased was found in the jungle and the appellant has not explained as to when and where he parted with the company of the deceased and therefore, this is a very strong circumstance against the appellant. Learned counsel further argued that P.W.3 had seen the appellant carrying a tangia with him while taking the deceased on the bicycle and the tangia was recovered at the instance of the appellant on the basis of his statement recorded under section 27 of the Evidence Act and the doctor who conducted the post mortem examination has noticed incised wounds on the body of the deceased and he has also examined the tangia seized at the instance of the appellant on the query made by the I.O. and gave his opinion in the affirmative, which is also a clinching evidence

against the appellant. Learned counsel further submitted that the wearing apparels of the appellant were seized on being produced by the appellant and the chemical examination report (Ext.14) indicates that human blood was found on his half pant and therefore, the learned trial Court is quite justified in convicting the appellant and thus, the appeal should be dismissed.

Whether the deceased met a homicidal death? :

8. Before adverting to the contentions raised by the learned counsel for the respective parties, we have to carefully scrutinize the evidence on record to determine as to how far the prosecution has proved that the deceased had met with a homicidal death.

The doctor (P.W.5) conducted post-mortem on the dead body of the deceased and noticed the following injuries:

> (i) Incised wound on right cheek on the ramus of the mandible of size 1½ x ½ " x 1/5th ;
>
> (ii) Incised wound that started from the left side of the neck below the middle of the body of mandible runs anteriorly to the right side and then to the middle of the nape of neck. The size was 6 ½ "x 3" x 2".

The doctor opined that all the injuries were ante mortem in nature and might have been caused by a sharp cutting weapon. On dissection, P.W.5 found that larynx was cut above thyroid cartilage transversely. Trachea was intact. External and internal jugular veins and common carotid arteries on both the sides were cut and lacerated and oesophagus was cut transversely and these injuries were ante mortem in nature. He opined that the death of the deceased was due to haemorrhage as a result of injury to carotid vessels and the said injuries were sufficient in ordinary course of nature to cause instantaneous death and the death was homicidal in nature. The I.O. (P.W.7) also made a query regarding the possibility of the injuries sustained by the deceased by the weapon 'tangia' seized during investigation and the doctor opined that it is possible and the query report has been marked as Ext.7/1.

In view of the evidence available on record, the inquest report (Ext.1), the post mortem findings as per Ext.6 and the evidence of the doctor (P.W.5), who conducted post mortem examination over the dead body of the deceased, we are of the view that the prosecution has successfully established that the deceased met with a homicidal death.

Whether the prosecution proved any motive behind the commission of crime by the appellant? :

9. The informant (P.W.1) has stated that the appellant is her brother in-law, being the younger brother of her husband. She further stated that the appellant was staying separately from his wife and children and he was living with the family of P.W.1. She has stated that the appellant was quarrelling with her, her son (the deceased), her husband and her father in-law. In the cross-examination, she has stated that for one year, the appellant was staying with his parents in their house and

he was earning by tending cattle of the sahi people. She further stated that in her house, the appellant was staying separately and she along with her family members were staying separately and her parents-in-law were staying separately and the appellant sometimes used to have food with them and at times, he was taking food with his parents. She further stated that the appellant had no dispute with her, her husband and her son, but he was having dispute with his parents. She further stated that she along with her husband's sister (P.W.3) were present in the house when the appellant took the deceased on the bicycle.

P.W.3, on the other hand, stated that though the appellant had no good relationship with the family members, but he had good relationship with the deceased and on the date of occurrence, the deceased served food to the appellant. No other family members of the appellant had been examined. From the evidence of P.Ws.1 and 3, nothing has been proved that there was any kind of motive on the part of the appellant to commit the murder of the small child who is none else than his nephew, particularly when their relationship was very good.

Law is well settled that motive for commission of an offence holds greater importance in a case which is based on circumstantial evidence. Absence of motive can be a missing link in the chain of incriminating circumstances, though if other circumstances are proved by the prosecution to the hilt which are clinching and forming a complete chain, then absence of motive cannot be a ground to disbelieve the entire prosecution case. In the case of **Anwar Ali -Vrs.- State of H.P. reported in (2020) 10 Supreme Court Cases 166**, the Hon'ble Supreme Court held as follows:

> "24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in Suresh Chandra Bahri v. State of Bihar **[Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60]** that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by this Court in Babu **[Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]**, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused . In paras 25 and 26, it is observed and held as under: **(Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , SCC pp. 200-01)**" [Emphasis supplied]

It is also settled position of law that motive alone, in absence of any other circumstantial evidence, would not be sufficient to convict the appellant. Presence of motive bereft of other circumstances, may create strong suspicion, but suspicion howsoever strong cannot relax the requirement of proving guilt of the accused beyond all reasonable doubts. To this effect, we may profitably borrow credence from the following observations made by the Hon'ble Supreme Court in the case of **State of U.P. -Vrs.- Sanjay Singh (Dr) reported in 1994 Supp (2) SCC 707**.

> "18. At the highest, the prosecution can only suggest from the circumstances what is or may be the motive for any particular act. However, motive is not a sine qua non for bringing the offence of murder or of any crime home to the accused. At the same time the absence of ascertainable motive comes to nothing, if the crime is proved to have been committed by a sane person but to eke out a case by proof of a motive alone - that too suspicion of motive - apparently tending towards any possible crime, is not only a very unsatisfactory but also a dangerous process, because circumstances do not always lead to particular and definite inferences and the inferences themselves may sometimes be erroneous."

We are of the view that the prosecution has failed to establish any motive on the part of the appellant to commit the murder of the deceased. Admittedly, in the instant case, the prosecution case is solely based on circumstantial evidence and failure on the part of the prosecution to put forward even any probable motive for commission of the ghastly crime, certainly weakens its stance and leaves a hollow in the chain of incriminatory circumstances.

Whether the appellant is liable to discharge burden U/S 106 of the Evidence Act? :

10. With regard to the next important circumstance i.e. the last seen of the deceased in the company of the appellant, P.Ws. 1 and 3 are two witnesses who have deposed in that respect. P.W.1 has stated that on the date of occurrence around 3.00 p.m. while she was in her house, the appellant took the deceased from the house on a bicycle on the plea of collecting '*kendu'* and the appellant alone returned around 5.00 p.m. in the evening and when she asked the appellant regarding the whereabouts of the deceased, the appellant replied that the deceased might be playing somewhere and on the next day morning, the appellant fled away somewhere and the dead body of the deceased was found in the jungle near Sia Nala with cut injuries on his face and neck. In the cross-examination, she stated that she had not seen the occurrence and further stated that except P.W.3 and herself, none had seen the appellant taking the deceased on his bicycle. Since the relationship between the appellant and the deceased so also beween the appellant and the family members of the deceased was good, it seems that there was no objection from the side of P.W.1 to the deceased accompanying the appellant.

P.W.3, on the other hand, stated that in the afternoon, the appellant and the deceased took rice and around evening, the appellant called the deceased and took him on a bicycle on the plea of collecting '*Kendu'* and the appellant had a 'tangia' with him and in the night, when the appellant returned alone, the deceased was not with him and when she asked the appellant regarding the whereabouts of the deceased, the appellant replied that the deceased had not gone with him. Even though P.W.3 has stated that while leaving the house with the deceased, the appellant was carrying a tangia with him, the evidence of P.W.1 is silent in that respect though P.W.1 and P.W.3 were the only persons present in the house when the appellant stated to have taken the deceased with him. In the cross-examination, P.W.3 has stated that in the afternoon voting was going on for Panchayat Election in the School outside the village and the villagers were there in the school for such

election and the deceased had also gone to that school. If that be so, then there should have been evidence on record as to when the deceased returned from the school to his house to accompany the appellant. Similarly, the timing when the appellant took the deceased with him is discrepant inasmuch as P.W.1 stated that it was around 3.00 p.m. and that the appellant returned alone at 5.00 p.m. whereas P.W.3 has stated that the appellant took the deceased in the evening hours and he alone returned in the night. If the deceased had gone to the village school where Panchayat Election was going on and the villagers were present there, then the possibility of the deceased coming in contact with other persons cannot be ruled out. Therefore, it is a doubtful feature as to whether the deceased was last seen in the company of the appellant. The time gap is also a very relevant factor in this case as the dead body was found almost fifteen hours after the so-called last seen of the appellant with the deceased and the recovery of dead body. The last seen theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is so small that possibility of any person than the accused being the author of the crime becomes impossible. This principle of law has received reiteration from the Hon'ble Supreme Court in a number of cases. In the case of **Kiriti Pal -Vrs.- State of W.B. reported in (2015) 11 Supreme Court Cases 178**, the Hon'ble Court has referred to some previous precedents on this point and held as follows:

> "18. In **State of U.P. v. Satish [State of U.P. v. Satish, (2005) 3 SCC 114 : 2005 SCC (Cri) 642]**, this Court had stated that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. In **State of Rajasthan v. Kashi Ram [State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254 : (2007) 1 SCC (Cri) 688]** , in para 23, this Court has held as under: (SCC p. 265)
>
> "23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in **Naina Mohamed, In re [Naina Mohamed, In re, 1959 SCC OnLine Mad 173 : AIR 1960 Mad 218]**."

It is no doubt true that in view of section 106 of the Evidence Act, when any fact especially within the knowledge of a person, the burden of proving such fact is open to him and therefore, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted with the company of the deceased. He must furnish explanation which should appear to the Court to be probable and satisfactory. If he does so, he must be held to have discharged his burden and if he fails to offer any explanation, then that provides an additional link in the chain of circumstances proved against him. However, section 106 does not shift the burden of proof in a criminal trial, which is always open to the prosecution.

In the instant case, it is incumbent upon us to thoroughly interpret the words employed in section 106 of the Evidence Act, which reads as follows:

> **"106. Burden of proving fact especially within knowledge:** When any fact is especially within the knowledge of any person , the burden of proving that fact is upon him."

To shift burden on the appellant to prove the whereabouts of the deceased, it is a precondition for the prosecution to prove that the deceased was in fact last seen alive with the appellant and it must rule out any and every possibility of any third person coming in contact with the deceased after the appellant parted way with the deceased. Furthermore, it must also show that the whereabouts of the deceased is 'especially within the knowledge' of the appellant. However, in this case, there is no concrete evidence to rule out the possibility of the deceased meeting any other person after parting way with the appellant and also, there is no rigid proof as to whether the appellant knew the whereabouts of the deceased, especially when the time gap between the last seen and discovery of the dead corpse of the deceased is a substantial one.

The other witnesses like P.W.2 and the I.O. (P.W.7) also stated that on the date of occurrence, voting for Panchayat Election was going on in the school of that village. Therefore, in the present case, when the last seen evidence adduced by the prosecution is not clinching and possibility of the deceased coming in contact with other persons, particularly in the school where voting for Panchayat Election was going on. Further, since there was a huge time gap between the last seen and discovery of the dead body of the deceased and as there are discrepancies as to places where the two were allegedly last seen and the dead body was recovered, it would be very risky to accept such evidence.

Whether the evidence adduced U/S 27 of Evidence Act unerringly inculcates the appellant? :

11. The next circumstance adduced by the prosecution is the leading to discovery of '*tangia'*, which is deposed to by P.W.2, P.W.4 and the I.O. (P.W.7). P.W.2 has stated in the examination-in-chief that the police recorded the disclosure statement of the appellant vide Ext.2 and thereafter, the appellant led him as well as the police to his house and produced the '*tangia'* which was seized under seizure list

Ext.3. However, in the cross-examination, he has stated that the police brought out the '*tangia'* from the house of P.W.1 and there the seizure list was prepared and thereafter, the police returned to the police station and at the time of seizure, the appellant was at the police station. Therefore, the evidence of P.W.2 that the appellant led the police party to his house and gave recovery of '*tangia'* becomes a doubtful feature.

P.W.4 has stated that he had not entered into the house of the appellant when the '*tangia'* was brought out of the house and he further stated that he could not say in which place of the house, the *'tangia'* was concealed and he further stated that weapon like '*tangia'* is available in all the houses of the village.

P.W.7 stated that after the disclosure statement under Ext.2 was recorded, the appellant led him as well as the witnesses to his house and after unlocking the room, he showed him the '*tangia'* which was kept in one corner of the room and accordingly, the '*tangia'* was seized as per seizure list Ext.3.

As rightly pointed out by the learned counsel for the appellant, even though the doctor (P.W.5) opined regarding possibility of the injury being sustained by means of '*tangia'*, but no blood was detected on it as per the C.E. report (Ext.14) and the '*tangia'* was also not produced in the Court for its identification by P.W.3, who had seen the appellant carrying the '*tangia'* so also by the seizure witnesses. No explanation has been offered by the prosecution as to why the seized *tangia* which was sent to the doctor for query so also to the S.F.S.L., Rasulgarh, Bhubaneswar for C.E. examination was not produced during trial. Non-production of the alleged weapon of offence in the case of this nature further weakens the prosecution case. In the case of **Gopabandhu Swain -Vrs.- State of Orissa reported in (1991) 71 Cuttack Law Times 411**, this Court has held that non-production of weapon of offence before the Court undoubtedly creates a dent on the prosecution case and observed as follows:

> "7. As regards non-production of the spade with which the petitioner was armed, though the same was seized, is undoubtedly a lacuna on the part of the prosecution. Production of the seized arm with which the offence is committed is always salutary and when it is not so produced, an explanation for the same should forth come. But it is not an uniform rule in all cases that where the weapon of offence is not produced the prosecution must fail. There are a large number of cases where the weapon if not recovered or even if recovered is not possible to be produced for reason of being lost or damaged but for such reason alone the prosecution case cannot be thrown out. It again is a question of prejudice suffered by the accused on that account."

In the present case, the weapon of offence i.e. '*tangia'* was recovered and the same was also produced before the Forensic Science Laboratory for chemical examination and also before the doctor (P.W.5), who conducted post mortem examination over the dead body of the deceased, for his opinion as to the possibility of the injuries sustained by the deceased by such weapon, but it was not produced before the learned trial Court to be marked as a material object. Though law is clear that mere non-production of weapon of offence does not derail prosecution case

which is otherwise proved through reliable evidence, but when the prosecution case is not proved to the hilt and production of weapon has potential to affect the judgment of the learned Court, then omission to produce such weapon may cause irreparable damage to the prosecution case. Furthermore, the reason behind non-production of the '*tangia'* has not been explained and it has been kept away from the Court for the reason best known to the investigating agency.

Moreover, out of two last seen theory witnesses, i.e. P.W.1 and P.W.3, P.W.3 has stated about the appellant carrying a '*tangia'* with him while taking the deceased on the bicycle, but none of them have stated that when the appellant returned to the house, he had brought back that '*tangia'*. Therefore, how the '*tangia'* came back to the house of P.W.1, if the same had been taken by the appellant with him, is also a doubtful feature. Though P.W.7 has stated that the appellant came to his house, opened the lock of his room and showed him the '*tangia'*, which he had kept in a corner of that room, no other seizure witnesses have stated in that way. The seizure list under Ext.3 indicates that it was prepared on 16.02.2007, but P.W.2 has stated that the police had not read over and explained the seizure list to him and being told by the police, he signed on the seizure list. Therefore, the evidence of seizure of '*tangia'* cannot be used as an incriminating material against the appellant.

So far as wearing apparels of the appellant is concerned, the seizure list indicates that one deep blue colour half pant and one red colour full shirt was seized on 16.02.2007 as per seizure list Ext.5. The forwarding report of such wearing apparels for C.E. Examination is dated 16.04.2007. The Investigating Officer has not adduced any evidence as to whether he kept the seized wearing apparels of the appellant in a sealed condition for two months before it was produced in the Court for being sent for chemical examination. When the safe custody of the wearing apparels is a doubtful feature, the allegation of blood stain found on the pant of the deceased as per the C.E. report (Ext.14) cannot be utilized against him.

Conclusion :

12. In view of the foregoing discussions, we are of the humble view that the prosecution has failed to establish the chain of unimpeachable evidence against the appellant. The circumstances of this case have no definite tendency to unerringly point towards the guilt of the appellant and that it cannot be said that the circumstances adduced by the prosecution only point towards the conclusion that it is the appellant and none else who was the author of the crime. There is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. Even though a seven year old child has lost his life and a grave and heinous crime has been committed, but since there is no satisfactory proof of guilt against the appellant, we have no other option but to give benefit of doubt to him. Accordingly, the impugned judgment and order of conviction of the appellant under sections 302/364/201 of the I.P.C. is not sustainable in the eyes of law and the same is hereby set aside. The appellant is acquitted of all the charges.

The appellant is in judicial custody since 17.02.2007. He be set at liberty forthwith if his detention is not required in any other case.

In the result, the JCRLA is allowed.

The trial Court records with a copy of this judgment be sent down to the Court concerned forthwith for information and compliance.

Before parting with the case, we would like to put on record our appreciation to Mr. Bikash Chandra Parija, Advocate for the appellant for rendering his valuable help and assistance towards arriving at the decision above mentioned. This Court also appreciates the valuable help and assistance provided by Mr. Jateswar Nayak, Addl. Govt. Advocate.

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

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2024 (III) ILR-CUT-1068

M/s. MAGMA FINCORP LTD., KHURDA
V.
RAJESWARI MOHANTY & ANR.

(CMP NO.1476 OF 2018)

12 NOVEMBER 2024

[K.R. MOHAPATRA, J.]

Issue for Consideration

Whether due Order of dismissal under Order IX, Rule 13 of CPC is valid.

Headnotes

CODE OF CIVIL PROCEDURE, 1908 – Order IX, Rule 13 – Setting aside of *ex parte* decree – The petitioner had appeared in the final decree through his lawyer – The proceeding was subsequently transferred to the Court of learned Civil Judge (Sr. Division) – Petitioner did not appear – Paper publication made as per the provision under Order V, Rule 20 of C.P.C. – Learned trial Court held that service of notice on the petitioner/defendant is sufficient and it was set *ex parte* on 12.01.2012 – The petitioner filed Petition U/o. IX, Rule 13 to set aside the *ex parte* decree with a plea that its lawyer left the profession without intimation for which it could not take step – Whether the reason stated above to be regarded as sufficient enough to set aside the *ex parte* decree.

Held : No – Non-appearance of learned counsel in the Final Decree Proceeding or any misdemeanor on his part in not informing the Defendant-Petitioner about the proceeding cannot be construed as sufficient cause for setting aside an *ex parte* decree. (Para 9)

Citations Reference

Sunil Poddar & Ors. -v- Union Bank of India, **AIR 2008 SC 1006 ─ referred to.**

List of Acts

Code of Civil Procedure, 1908

Keywords

Ex-parte decree, Setting aside, Sufficient cause

Case Arising From

Judgment dated 2nd November, 2018 passed in F.A.O. No.15 of 2018 by learned District Judge, Khurda at Bhubaneswar.

Appearances for Parties

For Petitioner : Mr. Ramakant Mohanty, Sr. Adv., Mr. D. Mohanty
For Opp.Parties : Mr. S.R. Pattanaik.

Judgment

Judgment

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioner in this CMP seeks to assail the judgment dated 2nd November, 2018 (Annexure-1) passed in F.A.O. No.15 of 2018, whereby learned District Judge, Khurda at Bhubaneswar dismissing the Appeal, confirmed the order dated 8th February, 2018 (Annexure 4) passed by learned Civil Judge, (Senior Division), Bhubaneswar in CMA No.06 of 2007 (arising out of MS No.13 of 1999) dismissing the application filed by the Defendant-Petitioner under Order IX Rule 13 CPC.

3. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner-Company submits that MS No.13 of 1999 (MS No.56/13 of 2004/1999) was filed by the Plaintiff-Opposite Party No.1 for accounts. The Plaintiff-Opposite Party No.1 taking financial assistance from the Petitioner-Company had purchased a vehicle bearing Registration No.OR-13-2661. It is asserted in the plaint that after adjustment of the amount paid by the Plaintiff-Opposite Party No.1, the vehicle should be handed over to the Plaintiff-Opposite Party No.1 within a stipulated time. The Plaintiff also prayed for damages and cost, etc. The suit was decreed preliminarily vide judgment dated 24th December, 2005 with the following order:

> *"That, the suit is preliminarily decreed on contest against the defendants with cost. The defendants are hereby directed to render the account regarding the amount due to be*

paid by the plaintiff as per the terms of the hire purchase agreement within two months hence and on receipt of such amount from the plaintiff. The defendants are further directed to release the seized vehicle in favour of the plaintiff and to pay a sum of Rs.1,54,500/- to he within two months, failing which the plaintiff shall be at liberty to execute the same by applying the court to make decree final."

4. Accordingly, the preliminary decree was prepared. Subsequently, the Plaintiff-Opposite Party No. 1 initiated the Final Decree Proceeding for ascertainment of the amount to be paid by the Defendant to him. Although, the Defendant-Petitioner appeared through his Advocate, but, he subsequently left practice without any notice to the Petitioner-Company, for which he was in dark about the developments and status of the Final Decree Proceeding. The Final Decree Proceeding was pending in the Court of learned District Judge-cum-First Track Court, Bhubaneswar, when the Petitioner entered appearance through its panel Advocate, but subsequently the Final Decree proceeding was transferred to the Court of learned Civil Judge (Senior Division), Bhubaneswar on 5th May, 2010. As the Defendant-Petitioner did not have notice of the same it could not appear and contest the proceeding for which notice under Order V Rule 20 CPC was published in the Odia Daily 'The Sambad'. Accepting the said paper publication under Order V Rule 20 CPC, learned trial Court held service of notice on the Defendant-Petitioner to be sufficient and proceeded with the Final Decree Proceeding setting the Defendant-Petitioner ex parte on 12th January, 2012. The Defendant-Petitioner came to know about the ex-parte final decree only when it received the notice in Execution Case No. 215 of 2016. Non-appearance of the Defendant-Petitioner in the Final Decree Proceeding was bona fide and beyond its control. The preliminary decree was passed only determining the entitlement of the Plaintiff-Opposite party No.1. But, the calculation of the amount was done in the Final Decree Proceeding, in which the Petitioner was prevented by sufficient cause to participate. It is, therefore, contended that the ex parte final decree should be set aside and the Defendant-Petitioner should be allowed to contest the Final Decree Proceeding.

4.1. It is further submitted by Mr. Mohanty, learned Senior Advocate that assailing the preliminary decree, the Defendant Petitioner had filed RFA No.67 of 2006. The matter is at present pending before Hon'ble Supreme Court and further proceeding of the Execution Case has been stayed. He, therefore, submits that unless the Defendant-Petitioner is allowed to participate in the Final Decree Proceeding by setting aside the ex-parte decree, it will be highly prejudiced.

5. Mr. Pattanaik, learned counsel for the contesting Opposite Party No. 1 vehemently objects to the submission of Mr. Mohanty, learned Senior Advocate and contends that the Defendant-Petitioner has not assigned good reason/cause for not participating in the Final Decree Proceeding. The explanation given by the DefendantPetitioner is not a cause, but an excuse. Mere excuse cannot be a ground to be considered for setting aside an ex parte decree. It is submitted that both learned trial Court as well as learned appellate Court considering the materials from

all angles have opined that the Petitioner is not entitled to the relief sought for in the petition under Order IX Rule 13 CPC. Hence, he prays for dismissal of this CMP.

6. Heard learned counsel for the parties.

7. Perused the materials on record.

8. It apparent from record that the Defendant-Petitioner had appeared in the Final Decree Proceeding by engaging a lawyer. The Final Decree Proceeding was pending in the Court of learned Additional District Judge-cum-First Track Court, Bhubaneswar, when the Defendant-Petitioner entered appearance through its panel lawyer. The proceeding was subsequently transferred to the Court of learned Civil Judge (Senior Division), Bhubaneswar. But, learned counsel engaged by the Defendant-Petitioner did not appear. Thus, an application was filed by the Plaintiff-Opposite Party No.1 under Order V Rule 20 CPC to take out substituted notice. The said notice was published in Odia Daily 'The Sambad', which has wide circulation in the locality, where the Defendant-Petitioner was ordinarily carrying on its business for gain. Accepting the notice published under Order V Rule 20 CPC, learned trial Court held that service of notice on the Defendant-Petitioner to be sufficient and it was set *ex parte* on 12th January, 2012. Thereafter, the Final Decree Proceeding continued.

9. It is alleged by the Defendant-Petitioner that it came to know about the final decree only when it received the notice on Execution Case No.215 of 2016. The said fact cannot be accepted, as the Defendant-Petitioner was being represented by learned counsel in the Final Decree Proceeding. Of course, a plea is taken by the Petitioner that its panel lawyer left the profession without intimation to the Petitioner. Thus, the Petitioner was in dark about the proceeding for which it could not take step and was set ex parte. Learned appellate Court, while adjudicating the matter, has taken note of the ratio in the case of ***Sunil Poddar and others -v- Union Bank of India***, reported in AIR 2008 SC 1006, wherein it is held that the party seeking a relief under Order IX Rule 13 CPC was duty bound to take necessary enquiry about the proceeding in the suit. Admittedly, no such effort appears to have been made by the Defendant-Petitioner. It is easy to allege against the advocate to seek a relief in the Court, but, the Petitioner in the petition under Order IX Rule 13 CPC has to satisfy the Court that he was prevented by sufficient cause from not appearing on the date of hearing of the suit/Final Decree Proceeding. In the instant case, no such ground has apparently been made out. It further appears that the Defendant Petitioner has taken a ground that the suit was not maintainable as the Petitioner-Company was merged with the Opposite Party No.2 in a proceeding under the Companies Act, 2013. Learned appellate Court dealt with the said contention elaborately and observed that the said objection merits no consideration in a petition under Order IX Rule 13 CPC. Non-appearance of learned counsel in the Final Decree Proceeding or any misdemeanor on his part in not informing the Defendant-Petitioner about the proceeding cannot be construed as a sufficient cause for setting aside an *ex-parte* decree.

10. Fact remains that Defendant had notice to the Final Decree Proceeding. It had participated in the said proceeding by engaging a lawyer. Thus, he was under obligation to ascertain the status and proceeding of the litigation. It is, more so, because of the fact that that Petitioner is a Finance Company and has a legal cell to assist the management.

11. On perusal of the impugned orders under Annexures-1 and 4, it is manifest that the same are passed considering the materials on record and the findings are based on evidence. The findings are based on sound legal principles. Only because a different view may be possible by re-appreciating the evidence, this Court in exercise of extra ordinary jurisdiction under Article 227 of Constitution of India, should not substitute its own finding. Hence, I am not inclined to interfere with the impugned orders under Annexures-1 and 4.

12. Accordingly, this CMP, being devoid of any merit, stands dismissed.

13. Interim order dated 3rd January, 2019 passed in IA No.1568 of 2018 stands vacated. In the facts and circumstances, there shall be no order as to cost.

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

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2024 (III) ILR-CUT-1072

BHARATI SATPATHY
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO. 23242 OF 2024)

06 DECEMBER 2024

[K.R. MOHAPATRA, J.]

Issue/s for Consideration

Whether the petitioner is eligible to get ex-gratia as well as special family pension as per the resolution passed by the Government.

Headnotes

COMPENSATION – Resolution No. 22086 dated 4th August 2020 issued by Finance Department – Husband of petitioner was serving as Constable in Odisha Police Service – While continuing in his service he was tested as COVID positive and admitted in the Government Hospital – The Medical Officer declared him as dead – The petitioner being widow applied for ex-gartia as well as special family pension as per the finance department resolution – The Government rejected the claim of

petitioner – Whether the petitioner is entitled to ex-gartia of ₹ 50 lakh and special pension as per the finance department resolution.

Held: Yes – The case of the husband of the Petitioner satisfies the requirements of Clause 3(iii) of the resolution, as he was active line of duty dealing with service records of the staff and officers of the office which was controlling the COVID management duty and was not on leave when he was diagnosed as infected in COVID-19 – He might not be discharging duty in the field, but dealing with service records and related works of the said staff and officers and other related works of the COVID management – The said duty made him vulnerable to COVID infection and ultimately took his life.

(Para 7)

Keywords

Compensation, Ex-gratia, Resolution

Case Arising From

Finance Dept. Resolution No. 22086 dated 4th August 2020.

Appearances for Parties

For Petitioner : Mr. Niranjan Singh
For Opp. Parties : Mr. Deepak Kumar Sahoo, A.S.C.

Judgment

Judgment

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioner, being the widow of late Satyabadi Dehury, former Constable in Odisha Police Service, claims exgratia of Rs.50.00 lakh and special family pension as per the provision made in Finance Department Resolution No.22086 dated 4th August, 2020, in this writ petition.

3. It is submitted by Mr. Singh, learned counsel for the Petitioner that late Satyabadi Dehury (inadvertently stated as Satyabadi Behera in the cause title of the writ petition) was appointed as a Constable on 5th May, 1999 in Odisha Police Service. In course of his employment, he was attached to HRMS Section, Angul vide D.O. No. 445 dated 9th April, 2016 and was directed to work at Reserve Office, Angul for HRMS under the control of Reserve inspector of Police, Angul. While continuing as such, he was tested COVID positive on 25th August, 2021 while on duty. But, most unfortunately, while undergoing treatment at Pradhan Nursing Home (at present Surendra Hospital, Angul), his health condition deteriorated due to COVID infection of his lungs and he was referred to Care Hospital, Bhubaneswar and then to Aditya Aswini Hospital, Bhubaneswar. While undergoing treatment at Government COVID Care Centre, i.e., Aditya Aswini Hospital, Bhubaneswar, the treating Medical Officer declared him dead on 12th October, 2021 at about 10.15 P.M. Death Certificate of the husband of the Petitioner has been annexed as

Annexure-2 to the writ petition. Accordingly, Superintendent of Police, Angul issued certificate dated 24th November, 2021 (Annexure3) stating as under:

> *"This is to certify that Sri Satyabadi Dehury, son of Rabindra Dehury, age 44 years, resident of At/P.O. Basantapur, P.S. Chhendipada, Dist. Angul, Odisha was engaged at Reserve Office, Angul vide Angul D.O. No. 445 dtd. 09.04.2016 as Constable of Police (designation) from 16.08.2020 to 25.08.2020 (Date of test) and he was assigned duty at Reserve Office to update the Service Books and all other HRMS related works. Being a part of Reserve Office, he was always exposed to infection as most of the COVID-19 related deployment is done from the office which is COVID 19 management related duty."*

Thus, the certificate under Annexure-3 clearly reveals that the husband of the Petitioner was always exposed to infection as most of the COVID-19 related deployment was being done from the said office, which was a COVID-19 Management related duty. On his death, the Petitioner being the widow applied for grant of ex-gratia and special family pension under the Finance Department Resolution (Annexure-7). It is alleged that the Home Department vide its Letter No.22694/SAPW, Bhubaneswar dated 7th July, 2022 (Annexure-6) rejected her application.

3.1 Mr. Singh, learned counsel for the Petitioner further submits that the certificate under Annexure-3 granted by the Superintendent of Police, Angul clearly discloses that the husband of the Petitioner was a COVID warrior as per the provisions of the Government resolution under Annexure-7 (Annexure-D/2 to the counter affidavit). But, most unfortunately, the Government of Odisha, Home Department, Bhubaneswar in its letter under Annexure-6 rejected her application. Hence, the Petitioner finding no other alternative has filed this writ petition for the aforesaid relief.

4. Mr. Sahoo, learned Additional Standing Counsel submits that the husband of the Petitioner was never certified to be the COVID Warrior when he was working in the Reserve Office and deployed for COVID-19 enforcement duty. Thus, drawing attention to Clause-2 of the said notification under Annexure-7, Mr. Sahoo, learned Additional Standing Counsel submits that the Petitioner is not entitled to the relief sought for.

5. Considering the rival contentions of the parties and on perusal of the record, the question that requires to be answered in this case as to whether the Petitioner being the widow of late Satyabadi Dehury, Constable, who died in COVID-19, is entitled to ex-gratia of Rs.50.00 lakh and special family pension in view of the provisions of the Finance Department Resolution dated 4th August, 2020 under Annexure-7 to the counter affidavit. Clause-2 and 3 of the said Resolution is relevant for our consideration, which reads as under:

> *"2. The Collector or S.P. of the District, Municipal Commissioners or Commissioner of Police, authorized Officers of Health and Family Welfare Department or Special Relief Commissioner will certify the deployment. District level Medical Officer of Health and*

Family Welfare Department will certify cause of death of the Government servant in active line of duty to be Covid-19 infection.

3. The following conditions need to be satisfied for determination of active line of duty –
(i) That the Government employee was drafted by Government or by its authorized field formations to perform COVID-19 related duties/responsibilities.
(ii) That he/she succumbed to disease due to COVID-19 infection.
(iii)The COVID-19 infection should have occurred while in active line of duty and the employee should not be on leave from the duty.

Provided that if the Government employee is detected COVID-19 positive within 30 days of his/her last day of COVID-19 related duty, it will be deemed that he/she was infected during active line of duty. Authorized persons as mentioned at para-2 above need to certify that the person was on duty during the last 30 days when he/she was found to be COVID-19 positive before his/her demise."

6. Keeping in mind the aforesaid provisions of the Finance Department Resolution, this Court examined the case of the Petitioner. In the instant case, the Superintendent of Police, Angul, who was the Disciplinary Authority of the husband of the Petitioner, had already certified that Satyabadi Dehury, son of Rabindra Dehury was a Constable of police from 16th August, 2020 to 25th August, 2021 and he was assigned duty as Reserve Officer to update the Service Books and all other HRMS related works. Being a part of Reserve Office, he was always exposed to infection as most of the COVID-19 related deployment is done from the said office which is a COVID-19 management related duty. In Annexure-E/2 to the counter affidavit, it is clearly stated by the Superintendent of Police, Angul in his Letter No.4015 dated 1st June, 2022 addressed to the Additional Director General of Police (L & O), Odisha, Cuttack, as under:

"With reference to the letter on the subject cited above, it is to intimate that Constable/203 Satyabadi Dehury of Angul Police District was attached to RSI, Section (HRMS, R.O. Angul) vide D.O. No.445 dated 09.04.2016. His duty was to update the Service Books and all other HRMS related works. Being a part of Reserve Office, he was always exposed to infection as most of COVID-19 related deployments are done from the Reserve Office. Despite taking all the precaution against Covid-19 infection, C/203 Satyabadi Dehury was tested positive on dt.25.08.202l, following symptoms of viral fever. He underwent treatment at Pradhan Nursing Home, Angul. As his health condition deteriorated due to infection of his lungs due to COVID-19, the treating physician referred him to Care Hospital, BBSR on dt.01.09.2021 for better treatment of COVID-I9. Further, the M.O., Care Hospital, BBSR referred him to Govt. COVID Care Centre, Aditya Aswini Hospital, BBSR on 18.09.2021. During treatment, on 12.10.2021, at about l0.l5 P.M., he died. He was discharging his duties in the Reserve Office till he was unwell due to COVID-19.

Hence, it is requested that the application of the wife of the deceased Constable/203 Satyabadi Dehury may kindly be approved considering the place of posting even though he was not deployed for enforcement duties related to COVID-19."

7. From the above, it appears that it is clearly established that the husband of the Petitioner died during treatment on 12th October, 2021 at about 10.15 P.M. and he was discharging his duties as Reserve officer actively till he was unwell being diagnosed infected with COVID-19. Thus, the Petitioner was in duty till he was

diagnosed COVID-19. Hence, the case of the husband of the Petitioner satisfy the requirements of Clause3(iii) of the resolution under Annexure-7 as he was active line of duty dealing with service records of the staff and officers of the said office which was controlling the COVID management duty and was not on leave when he was diagnosed infected with COVID-19. He might not be discharging duty in the field, but dealing with service records and related works of the said staff and officers and other related works of the COVID management. The said duty made him vulnerable to COVID infection and ultimately took his life.

8. In view of the above, there cannot be any iota of doubt that the Petitioner being the widow of late Satyabadi Dehury, who died due to COVID-19 while on active line of duty, is entitled to ex-gratia of Rs.50.00 lakh (Rupees fifty lakh) and special family pension as per the notification under Annexure-7.

9. Accordingly, the writ petition is allowed and it is directed that the Superintendent of Police, Angul-Opposite Party No.2 and Director General of Police (L&O), Odisha, Cuttack-Opposite Party No.3 as well as Additional Chief Secretary to Government of Odisha, Home Department, Bhubaneswar shall take prompt steps to grant ex-gratia of Rs. 50.00 lakh (Rupees fifty lakh) as well as special family pension to the Petitioner as expeditiously as possible preferably within a period of six months from the date of production of certified copy of this order.

10. In the circumstances, there shall be no order as to costs.

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

Result of the case :
Writ Petition allowed

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2024 (III) ILR-CUT-1076

ARTABANDHU BEHERA
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 8596 OF 2021]

06 NOVEMBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether the petitioner would be entitled for salary and other financial beneifts upon his subsequent acquittal by the Appellate Court.

Headnotes

SERVICE JURISPRUDENCE – Back wages – The petitioner was dismissed from service on account of conviction in criminal case – Pursuant to his acquittal in appeal the petitioner was reinstated in

service and discharged his duty as usual – The petitioner prayed for back wages for the period which he was in absence of duty, the same was rejected by the competent authority – Whether the petitioner would be entitled to salary and other financial benefits upon his acquittal by the Appellate Court.

Held: No – When the petitioner has been reinstated in service pursuant to the order of acquittal passed by the Appellate Court, it was not the fault of the employer to dismiss him and therefore, the direction of the authority not to pay the financial benefits for his period of absence in duty resulting dismissal from service can't be faulted with. (Para 9)

Citations Reference

Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) & Anr., **(1996) 11 SCC 603;** Krishnakant Raghunath Bibhavenekar Vs. State of Maharashtra & Ors., **(1997) 3 SCC 636;** Union of India (UOI) & Ors. v. Jaipal Singh, **(2004) 1 SCC 121 – referred to.**

Keywords

Back wages, Absence in duty, Dismissal from service, Representation.

Case Arising From

Order dated 23rd February 2021 passed by the Home Dept. Govt. of Odisha.

Appearances for Parties

For Petitioner : Mr. Umakanta Sahoo
For Opp.Parties : Mr. G. Tripathy, A.G.A.

Judgment

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. U.K. Sahoo, learned counsel for the Petitioner and Mr. G. Tripathy, learned AGA for State - Opposite Parties.

2. The Petitioner who is serving as Havildar in Government Railway Police has prayed for release of his salary and other financial benefits for the period he was dismissed from service on account of conviction in criminal case.

3. On 21st May, 1999 when the Petitioner was posted in Odisha Motor Vehicle Department and discharging his duty of checking the vehicles at Link road, Cuttack was found collecting illegal money from the vehicles and accordingly upon vigilance raid huge amount of unexplained cash was found from possession of the Petitioner. Thus a case was registered for commission of offences under Sections 7 & 13(2) read with Section 13(1)(d)(i)(ii) of the PC Act, 1988. In the trial in TR Case No.204 of 2007/15 of 2001 the Petitioner was convicted and consequently he was

dismissed from service on 6th December, 2010. The Petitioner then preferred appeal before the High Court in Criminal Appeal No.455 of 2010 wherein by judgment dated 17th May, 2019 this court directed for his acquittal by setting aside the impugned judgment of conviction and sentence. Pursuant to his acquittal in appeal the Petitioner was reinstated in service on 19th August, 2019 and discharged his duty as usual. In the order of reinstatement dated 19th August, 2019 his period of dismissal/absence from duty from 7th December, 2010 to 19th August, 2019 was treated as extraordinary leave i.e. leave without pay. Being aggrieved with the same he preferred WP(C) No. 33434 of 2020 and pursuant to order dated 4th December 2020 the authorities were directed to consider the representation of the Petitioner seeking back wages for such period of leave. The authority then in order dated 23rd February, 2021 under Annexure-7 considered the representation and rejected the prayer of the Petitioner to release his back wages for the period of absence from duty.

4. The short question falls for determination here is that, whether the Petitioner after his dismissal from service, consequent upon his conviction in the criminal case, would be entitled for salary and other financial benefits upon his subsequent acquittal by the Appellate Court?

5. The law is no more res integra on the question and it has been decided in several decisions of the Hon'ble Supreme Court. The Supreme Court in the case of ***Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) and Another, (1996) 11 SCC 603*** have held that question of back wages would be considered only if the respondents have taken action by way of disciplinary proceeding and the action was found to be unsustainable in law and the Petitioner was unlawfully prevented from discharging the duties. The Supreme Court have further held that since the Petitioner was involved in a crime, though being acquitted later, he had disabled himself from rendering the service on account of conviction and incarceration in jail and under such circumstances he is not entitled for payment of back wages.

6. In ***Krishnakant Raghunath Bibhavenekar Vs. State of Maharashtra and others, (1997) 3 SCC 636***, where the petitioner was convicted for criminal charges and was put under suspension but acquitted subsequently, the Supreme Court have held as follows:-

> "4. xxxxxxxxxx. It is true that when a Government servant is acquitted of offences, he would be entitled to re-instatement. But the question is : whether he would be entitled to all consequential benefits including the pensionary benefits treating the suspension period as duty period, as contended by Shri Ranjit Kumar? The object of sanction of law behind prosecution is to put an end to crime against the society and laws there by intends to restore social order and stability. The purpose of prosecution of a public servant is to maintain discipline is service, integrity, honesty and truthful conduct in performance of public duty or for modulation of his conduct to further the efficiency in public service. The Constitution has given full faith and credit to public acts. Conduct of a public servant has to be an open book; corrupt would be known to everyone. The reputation

would gain notoriety. Though legal evidence may be insufficient to bring home the guilt beyond doubt or fool-proof. The act of reinstatement send ripples among the people in the office/locality and sows wrong signals for degeneration of morality, integrity and rightful conduct and efficient performance of public duty. The constitutional animation of public faith and credit given to public acts, would be undermined. Every act or the conduct of a public servant should be to effectuate the public purpose and constitutional objective. Public servant renders himself accountable to the public. The very cause for suspension of the petitioner and taking punitive action against him was his conduct that led to the prosecution of him for the offences under the Indian Penal Code. If the conduct alleged is the foundation for prosecution, though it may end in acquittal on appreciation or lack of sufficient evidence, the question emerges : whether the Government servant prosecuted for commission of defalcation of public funds and fabrication of the records, though culminated into acquittal, is entitled to be reinstated with consequential benefits? In our considered view, this grant of consequential benefits with all back wages etc. cannot be as a matter of course. We think that it would be deleterious to the maintenance of the discipline if a person suspended on valid considerations is given full back wages as a matter of course, on his acquittal. Two courses are open to the disciplinary authority, viz., it may enquire into misconduct unless, the self-same conduct was subject of charge and on trial the acquittal was recorded on a positive finding that the accused did not commit the offence at all; but acquittal is not an benefit of doubt given. Appropriate action may be taken thereon. Even otherwise, the authority may, on reinstatement after following the principle of natural justice, pass appropriate order including treating suspension period as period of not on duty, (and on payment of subsistence allowance etc.) Rules 72(3), 72(5) and 72(7) of the Rules give a discretion to the disciplinary authority. Rule 72 also applies, as the action was taken after the acquittal by which date rule was in force. Therefore, when the suspension period was treated to be a suspension pending the trial and even after acquittal, he was reinstated into service, he would not be entitled to the consequential benefits. As a consequence, he would not be entitled to the benefits of nine increments as stated in Para 6 of the additional affidavit. He is also not entitled to be treated as on duty from the date of suspension till the date of the acquittal for purpose of computation of pensionary benefits etc. The appellant is also not entitled to any other consequential benefits as enumerated in paragraph 5 and 6 of the additional affidavit."

7. Further in ***Union of India (UOI) and Others v. Jaipal Singh, (2004) 1 SCC 121*** in a similar situation, the Supreme Court have held that *"If prosecution, which ultimately resulted in acquittal of the person concerned was at the behest or by department itself, perhaps different considerations may arise. On the other hand, if as a citizen the employee or a public servant got involved in a criminal case and if after initial conviction by the trial court, he gets acquittal on appeal subsequently, the department cannot in any manner be found fault with for having kept him out of service, since the law obliges, a person convicted of an offence to be so kept out and not to be retained in service. Consequently, the reasons given in the decision relied upon, for the appellants are not only convincing but are in consonance with reasonableness as well. Though exception taken to that part of the order directing re-instatement cannot be sustained and the respondent has to be re-instated, in service, for the reason that the earlier discharge was on account of those criminal proceedings and conviction only, the appellants are well within their rights to deny back wages to the respondent for the period he was not in service. The*

appellants cannot be made liable to pay for the period for which they could not avail of the services of the respondent."

8. As stated earlier, in the case at hand the Petitioner was dismissed from service upon his conviction by the Trail Court and subsequently reinstated upon his acquittal by the Appellate Court. The period of dismissal remains from 7th December, 2010 to 19th August, 2019. As per the submission of Mr. Sahu learned counsel for the Petitioner, Rule 91 of Odisha Service Code speaks in his favour that upon his reinstatement after dismissal he is entitled for back wages. But I do not find any support from Rule 91 to favour the submission of Mr. Sahu. Rule 91 reads as under:-

> "91.AUTHORITY COMPETENT TO ORDER THE REINSTATEMETN SHALL CONSIDER AND MAKE A SPECIFIC ORDER:
>
> (1) When a Government servant who has been dismissed, removed, compulsorily retired or suspended is reinstated or would have been reinstated but for his retirement on superannuation while under suspension the authority competent to order the reinstatement shall consider and make a specific order:
>
> (a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty or for the period of suspension ending with the date of his retirement on superannuation, as the case may be, and
>
> (b) whether or not the said period shall be treated as a period spend on duty.
>
> (2) Where such competent authority hold that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled has he not been dismissed, removed, compulsorily retired or suspended, as the case may be, together with any allowances of which he was in receipt to his dismissal, removal or suspension.
>
> (3) (a) In the case of dismissal, removal and compulsory retirement when a Government servant who is not completely exonerated of the charges, is reinstated in service, it shall be open to the competent authority to decide not to allow any pay or allowances to him.
>
> (b) In the case of suspension when a Government servant, not having been exonerated of the charges fully, is reinstated in service, he may be allowed subsistence allowance only for the period of suspension as admissible under rule 90.
>
> (4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.
>
> (5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:
>
> Provided that if the Government servant so desires, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant."

9. When the Petitioner has been reinstated in service pursuant to the order of acquittal passed by the Appellate Court, it was not for the fault of the employer to dismiss him and therefore, the direction of the authority not to pay the financial benefits for his period of absence from service due to dismissal cannot be faulted with. It is true that the order of dismissal of the Petitioner from service was not for

the fault of the employer but for the criminal prosecution launched against him resulting his conviction. So in no circumstance, for the principles discussed above, the Petitioner is found entitled for the back wages for the period of his absence from duty due to dismissal. Accordingly no merit is seen in the contentions of the Petitioner and the writ petition is dismissed.

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

Result of the case :
Writ Petition dismissed

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2024 (III) ILR-CUT-1081

DHANANJAYA DUTTA
V.
STATE OF ODISHA & ORS.

[W.P(C) NO. 41362 OF 2021]

21 NOVEMBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether the action of the disciplinary authority in appointing Second Enquiry Officer without assigning any reasons is valid under the law.

Headnotes

ODISHA POLICE MANUAL RULES, 1940 – Rule 828 – Disciplinary Proceeding – Punishment of dismissal from service – Appointment of second enquiry officer – No reason was assigned while appointing the second Enquiry Officer – Re-assessment of facts and evidences brought in course of enquiry by the second Enquiry Officer – Appointment of second Enquiry Officer and procedure of the same questioned.

Held: Re-assessment of the facts and evidences brought in course of enquiry by the first Enquiry Officer is impermissible by appointing second Enquiry Officer only to give a separate finding **–** When the disciplinary authority disagreed with the enquiry report of the Enquiry Officer, the right procedure open for him was to record the reasons of his disagreement either for conducting further enquiry on specific suggested points or to proceed himself in accordance with law with reasons to be recorded **–** Therefore, as it is seen, the procedure adopted by the authorities in punishing the Petitioner for dismissal from the service is found completely illegal & unsustainable in the eye of law **–** For such violation of the procedure against the delinquent, the entire order of punishment is liable to be set aside. (Paras 10-13)

Citations Reference

Lala Narendra Kishoro v. State of Bihar, **2000 SCC OnLine SC 91**; Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors, **(2019) 17 SCC 184 – referred to.**

List of Rules

Odisha Police Manual Rules, 1940

Keywords

Service law, Disciplinary proceeding, Punishment, Appointment of second Enquiry Officer, Re-assessment of facts & evidences.

Case Arising From

Order dated 26.11.2021 passed in the Revision.

Appearances for Parties

For Petitioner : Mr. S.K.Das
For Opp.Parties : Ms. B.L.Tripathy, ASC

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. S.K.Das, learned counsel for the Petitioner, and Ms.B.L.Tripathy, learned ASC for State-Opposite Parties.

2. The Petitioner who is serving as Havildar under Cuttack Urban Police Department within the Commissionerate of Police, Cuttack-Bhubaneswar was charged for criminal misconduct under Annexure-2 on 18th July 2018. The disciplinary proceeding was initiated against him in terms of Rule 824 to 828 of the Odisha Police Manual Rules. An Enquiry Officer namely, Narottam Samal, Inspector of Police was appointed who upon taking evidences and examination of witnesses submitted his enquiry report on 31st October 2019 at Annexure-4. The relevant finding of the Enquiry Officer is reproduced below:-

> "Under the above fact and circumstances discussed above and back drop, I feel the charged Havildar should have taken utmost care to his bag containing the Govt. issued ammunitions. But due to his laxity the bag was exchanged and such untoward incident happen so I conclude the charged Havildar may be held partially neglected guilty."

3. Then the Petitioner was issued with the show-cause notice along with the copy of enquiry report as per Annexure-5 and the Petitioner submitted his show-cause reply on 11th December 2019 under Annexure-6.

4. Thereafter, the disciplinary authority without passing any order and without the knowledge of the Petitioner appointed another Enquiry Officer namely, Jatindra Kumar Panda, Assistant Commissioner of Police to give his finding on the facts and

evidences collected during the enquiry. Second Enquiry Officer submitted his enquiry report on 28th May 2020 under Annexure-7 with his findings as follows:-

> "Taking into account the evidence of both prosecution and defense along with the documents exhibited during the enquiry of the proceeding, I am of the findings that the charges brought against the charged Hav./322 Dhananjay Dutta are well proved beyond all reasonable doubts."

5. Then again a show-cause notice was issued to the Petitioner on 5th June 2020 under Annexure-8 and he submitted his reply on 24th June 2020 under Annexure-9. Then second show-cause notice was issued to the Petitioner under Annexure10 and finally, order of punishment was passed on 3rd October 2020 under Annexure-12 directing for dismissal of the Petitioner from Government service with immediate effect.

6. The Petitioner preferred appeal against the same and the Appellate Authority dismissed the appeal by order dated 4th February 2021 and communicated the same to him under Annexure-14. The revision preferred by the Petitioner was also dismissed as per order dated 26th November 2021. Such orders of dismissal from service, confirmed in appeal and revision are subject matter of challenge in the present writ petition.

7. Mr. Das, learned counsel for the Petitioner submits that the action of disciplinary authority in appointing second Enquiry Officer, without assigning any reasons for disagreement to the findings of the first Enquiry Officer, is contrary to law and on such ground the impugned orders need to be revisited.

8. The State has filed its counter narrating the allegations made against the Petitioner for proceeding against him in the disciplinary action. But nothing is mentioned with regard to dissatisfaction on the first enquiry report and the reasons of disagreement for appointing the second Enquiry Officer.

9. Ms.Tripathy, learned Additional Standing Counsel submits that since the disciplinary authority was not satisfied with the enquiry report of the first Enquiry Officer under Annexure-4, he upon his discretion as vested under the rule, directed for report from the second Enquiry Officer, and in such action no illegality can be alleged without any malice on the part of the disciplinary authority.

10. It is important to reproduce relevant Rules for disciplinary proceeding, as prescribed in Odisha Police Manual Rules. As per Rule 828, the procedure for disciplinary action has been prescribed in Appendix-49. Clause-10 and 11 of said Appendix-49, which are relevant for the present purpose, are reproduced below:-

> "10.At the conclusion of the enquiry, the enquiring authority shall prepare a report of the enquiry, recording reasoned findings on each charge separately taking into account the evidence on both sides and shall submit the record of proceedings with his findings to the authority competent to pass final orders (when he is not competent to do so). The disciplinary authority shall, if it is not the enquiring authority, consider the records of proceedings and record its findings on each charge. If it is found that the enquiry has not been properly conducted, the punishing authority may order for a fresh enquiry on the

> point or points suggested. Orders passed by the disciplinary authority shall be communicated to the charged officer with a full copy of his findings and when the disciplinary authority is other than the enquiring authority, the findings of the enquiring authority in addition shall also be supplied to the charged officer.
>
> 11. Orders passed by the disciplinary authority shall be communicated to the Government servant who shall also be supplied with a copy of the report of the enquiring authority and where the disciplinary authority is not the enquiring authority a statement of its findings together with brief reasons for disagreement, if any, with the findings of the enquiring unless they have already been supplied to him."

11. authority and where the disciplinary authority is not the enquiring authority a statement of its findings together with brief reasons for disagreement, if any, with the findings of the enquiring unless they have already been supplied to him." It is clear from the above stated procedure that when the disciplinary authority found that the enquiry was not properly conducted, record its findings with brief reasons for disagreement and make order for fresh enquiry on such suggested points with communication to the delinquent officer of the statements and reasons.

12. It is a well-known principle that before going for second enquiry, the reasons of disagreement of the disciplinary authority should be recorded in writing with communication to the delinquent officer. It is also the settled principles that an Enquiry Officer should not be changed or no second Enquiry Officer should be appointed without a substantial reason. In ***Lala Narendra Kishoro v. State of Bihar, 2000 SCC Online SC 91***, it is held as follows:-

> 5. In our view, it is not permissible to appoint a second inquiry officer merely because the authorities are not satisfied with the first enquiry. According to the guidelines applicable to the department, the disciplinary authority, after perusal of the enquiry report may either agree with the report or proceed with the determination of the punishment or may disagree with the report of the inquiry officer and in the later event, he has to record the reason for differing with the inquiry officer. The disciplinary authority should consider the entire inquiry report, check whether the inquiry was held properly i.e. whether there was anything which may lead to violation of any statutory rules or constitutional provisions. If any such defect is noticed by him, he may remit the case to the inquiry officer for further or fresh inquiry.

In ***Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors, (2019) 17 SCC 184***, it is observed that;

> 9. The view of the High Court that a fresh appointment of an inquiry officer could not have been made without recording reasons why the disciplinary authority disagreed with the enquiry report is correct. This is borne out by the decision of this Court in CSHA University v. B.D. Goyal, (2010) 15 SCC 776, where a three-Judge Bench of this Court observed:
>
> *"7. It is no doubt true that the punishing authority or any higher authority could have disagreed with the finding of the enquiring officer, but in such a case the authority concerned is duty-bound to record reasons in writing and not on ipse dixit can alter the finding of an enquiring officer. The order of the Vice-Chancellor, which was produced before us does not satisfy the requirements of law in the matter of differing with the findings of an enquiring officer."*

13. In the instant case as stated above, it is seen that the disciplinary authority after completion of enquiry by the first Enquiry Officer has appointed the second Enquiry Officer without recording any reason of disagreement for the same. It is not that a further enquiry was directed by another Enquiry Officer but as stated in the order under Annexure-8, the second Enquiry Officer was appointed for reassessing the facts and evidences brought on record only for the reason that it does suite the disciplinary authority. Reassessment of the facts and evidences brought in course of enquiry by the first Enquiry Officer is impermissible by appointing second Enquiry Officer only to give a separate finding. When the disciplinary authority disagreed with the enquiry report of the Enquiry Officer, the right procedure open for him was to record the reasons of his disagreement either for conducting further enquiry on specific suggested points or to proceed himself in accordance with law with reasons to be recorded. Therefore, as it is seen, the procedure adopted by the authorities in punishing the Petitioner for dismissal from service is found comletely illegal and unsustainable in the eye of law. For such violation of the procedure in conducting the disciplinary proceeding against the delinquent, the entire order of punishment is liable to be set aside.

14. It is further seen that the first Enquiry Officer in his report under Annexure-4 has given the finding that the Petitioner was partly guilty of the charges, whereas the second Enquiry Officer in his report under Annexure-7 held the Petitioner absolute guilty of the charges. Therefore, the intention of the disciplinary authority is seen clear that they wanted to punish the Petitioner with dismissal from service and they had a pre-occupied mind. It is different of course that, whether the nature of charges are commensurating the punishment of dismissal from service and this Court refrains from giving its opinion on the same. The Appellate Authority as well as the Revisional Authority have failed to appreciate such failure on the part of the disciplinary authority and the lacuna cropped up for maintaining a fair proceeding in maintaining disciplinary action. Accordingly, the punishment imposed by the disciplinary authority under Annexure-12 and confirmation of the same by the Appellate as well as Revisional Authorities under Annexures-14 and 16 are set aside. The Opposite Parties are directed to reinstate the Petitioner in service with such order with regard to his period of absence from duty, within a period of four weeks from the date of receipt of certified copy of this order.

15. Accordingly, the writ petition is disposed of as allowed.

Headnotes prepared by:
Jnanendra Ku. Swain, Judicial Indexer
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case :
Writ Petition disposed of.

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2024 (III) ILR-CUT-1086

DILLIP KUMAR BEHERA
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 41919 OF 2023]

24 SEPTEMBER 2024

[Dr. S. K. PANIGRAHI, J.]

Issue for Consideration

Whether the petitioner is entitled to claim compensation for any damage caused by the wild animal.

Headnotes

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 r/w Govt. Notification No. 5266/8F (WL) (6/2011/F&E) dt. 23.03.2011 in exercise of power conferred U/s. 64 of the Wildlife (Protection) Act, 1972 – Permanent disablement due to attack of wild animal (Elephant) – Claim of compensation with regard to survival/treatment – Maintainability of such claim.

Held: It is reasonable to assert that if wild animals, being the property of the government, cause harm to any citizen or farmers, it is the Government's duty to take responsibility for the loss – Citizens are entitled to claim compensation for any damage caused by wild animals, whether or not such claims are specifically mentioned in existing Govt. orders, schemes or provisions. (Para 9)

List of Acts

Constitution of India, 1950; Wildlife (Protection) Act, 1972; Wildlife (Protection)(Odisha) Amendment Rule, 2014

Keywords

Compensation, Damage, Attack, Wild animal

Appearances for Parties

For Petitioner : Mr. Prabir Kumar Ray.
For Opp.Parties : Mr. G. R. Mohapatra, A.S.C.

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. The Petitioner, through this Writ Petition, seeks for a direction to the Opposite Parties to make necessary provisions for the survival of the Petitioner and his family members as the Petitioner has become permanently disable due to attack by wild elephants.

2. The petitioner seeks for a direction to the Opp. Parties to make provisions for the payment of Rs.10,000/- per month to the petitioner and his family for their survival or a payment of lump sum amount of Rs.50 lakhs towards compensation for the survival of the petitioner and his family members.

I. Factual Matrix of the Case:

3. The brief facts of the case are as follows:

(i) The petitioner, a 38-year-old male hailing from an impoverished family, was engaged in agricultural activities for his livelihood. On the evening of 22.10.2020, at approximately 8 PM, while the petitioner was vigilantly guarding his corn crop, a herd of wild elephants intruded upon his field and attacked him, resulting in a fall that caused significant injury to his spinal cord.

(ii) Despite being promptly transported to medical facilities, first to the District Headquarters Hospital in Khordha, then to SUM Hospital in Bhubaneswar, and subsequently to Apollo Hospital in Bhubaneswar, where a surgical procedure on his spinal cord was performed, the medical professionals were unable to prevent the petitioner from becoming a quadriplegic. He has been diagnosed with cervical myelopathy (traumatic) quadriplegia, a condition characterized by paralysis of all four limbs and the inability to move any part of his body below the neck.

(iii) The Forest Department sought a report regarding the petitioner's medical condition, and the District Medical Board, in its meeting on 05.02.2021, concluded that the petitioner suffers from quadriplegia due to a cervical spine injury, which is permanent in nature. Consequently, the competent authority issued a Disability Certificate in the prescribed format.

(iv) The petitioner asserts that he has incurred expenses exceeding ten lakhs, utilizing his entire savings, liquidating nearly all of his assets, and borrowing funds from friends and relatives.

(v) Although the petitioner has expended over eight lakhs on his medical treatment, with documentation confirming expenses of ₹5,67,704 incurred at SUM Hospital and Apollo Hospital, he requested the opposite parties to reimburse these expenses. This request is substantiated by correspondence from the Forest Range Officer of Tangi to the DFO of Khurda dated January 25, 2021. However, the Opposite Parties have failed to acknowledge or fulfill his request for reimbursement.

(vi) The petitioner, through his family, submitted an application for financial assistance designated for victims of such incidents. Nonetheless, the Government of Odisha and the Department of Forest and Environment only disbursed ₹1 lakh, as indicated by office order no. 102/4F-(misc)-24/2021 dated 16.03.2021.

(vii) In light of the foregoing, the Petitioner has filed this Writ Petition seeking appropriate relief.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

4. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) The current state of the petitioner is tantamount to a condition worse than death, as while death results in an immediate cessation of life, the petitioner endures daily

suffering. His family is burdened with the continuous responsibility of caring for him, not only providing nourishment but also managing his paralyzed body, which is subject to infections from bedsores and other complications. This combination of debilitating illness and extreme poverty has rendered the petitioner's existence unbearable.

(ii) The compensation of ₹1 lakh awarded is grossly insufficient for the survival of the petitioner and his family. The petitioner's family is heavily indebted due to the expenses incurred for treatment at SUM Hospital and Apollo Hospital. Presently, the petitioner requires ongoing medical treatment, including medication, in addition to daily living expenses for the family, such as food and other necessities. The family is effectively living in destitution, relying on the charity of their neighbors.

(iii) The opposite parties have neglected the petitioner by providing a one-time compensation of ₹1 lakh, erroneously believing that this amount would suffice for the petitioner's and his family's survival. This sum fails to account for even a fraction of the costs already incurred for his medical treatment.

(iv) The petitioner finds himself in this dire situation due to the state's gross failure to protect innocent individuals like him by regulating the movement of wild animals within designated forest areas and preventing them from encroaching into human habitats. In this instance, the petitioner did not venture into the forest; rather, it was the inaction of the opposite parties in preventing elephants from entering populated areas that led to the attack on the petitioner, resulting in his lifelong disability. Consequently, the state bears a duty to ensure that individuals like the petitioner are afforded the means to meet their basic life necessities.

(v) The petitioner's right to life, as enshrined in Article 21 of the Constitution of India, has been violated. The Honorable Supreme Court has consistently held that the right to livelihood constitutes a vital aspect of the right to life under Article 21. Thus, the state's failure to provide the petitioner with the minimum means of livelihood necessitates the intervention of this Court.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

5. *Per contra*, learned counsel for the Opp. Parties earnestly made the following submissions in support of his contentions:

(i) The petitioner was immediately shifted to District Headquarter Hospital, Khordha and admitted vide registration no.211212003121363 dated 22.12.2020 and after preliminary treatment, he was referred to AIIMS, Bhubaneswar but this petitioner got himself admitted at IMS & SUM Hospital, Kalinga Nagar, Bhubaneswar vide registration No.SUM.OP.2012221665 dated 23.12.2020. Then, he was shifted to Apollo Hospital, Bhubaneswar.

(ii) The Range Officer, Tangi submitted the prescription & medicine bills of Sri Behera in support of his treatment at SUM Hospital and Apollo Hospital on 25.01.2021. Immediately the matter was referred to Chief District Medical Officer, Khordha with request to issue injury report in favour of the victim Sri Behera to ascertain the nature of injury whether permanent or temporary for sanction of Wildlife grant as per Wildlife (Protection) (Odisha) Amendment Rule, 2014. The nature of injury of Sri Behera was examined by the District Medical Board, Khordha under the chairmanship of Chief District Medical Officer, Khordha and

P.H.O, Khordha on 05.02.2021. The DMO-cum Superintendent, District Headquarter Hospital, Khordha vide his Letter No.561 dtd.09.03.2021 communicated the said injury report to this office wherein it has been clearly mentioned that the patient is having Quadriplegia due to Cervical Spine injury and the injury is permanent in nature.

(iii) Based on the report of the medical Board and in pursuance to Wildlife (Protection) (Odisha) Amendment Rule, 2014, an amount of Rs.1 Lakh (Rupees one lakh only) was sanctioned towards compassionate grant in favour of Sri Dillip Kumar Behera vide this Office Order No.102 dated 16.03.2021 and the Range Officer, Tangi was directed for payment of compassionate grant Rs.100000/- (Rupees one lakh) only to Sri Dillip Kumar Behera under budget head 2406-04-796-3364-91348 (CAMPA, Wildlife) during March, 2021.

(iv) In order to protect the people from the Wild elephants/wild animals the following steps have been taken by this Division:-

(a) Vehicles fitted with sound system have also been provided to Range Officers to ascertain the presence of the wild elephant and to transmit the information to the nearby villagers.

(b) Awareness programme are being conducted among the villagers adjacent to forest, sufficient posters and books are being distributed and banners have been fixed in frequent interval of sensitive zone to educate the people on man- animal conflict.

(c) Solar street light also been fixed in 31 villages where elephants are moving.

(d) 60 nos of local youths have been engaged as Elephant Squad, Wildlife Protection Squad and Rapid Action team, Site Specific Wildlife Conservation squad to drive the elephants from human habitation towards forest and to protect the lives of the general people.

(v) Govt. of Odisha in their Forest & Environment Deptt. vide Notification No.5266/8F (WL) (6/2011/F&E) dtd.23.03.2011 in exercise of power conferred under Section-64 of the Wildlife (Protection) Act, 1972 makes the Rule for payment of compassionate grant in case of death of human beings by the wild animal, permanent injury, temporary injury, cattle kill, crop damage or house damage by wild elephant. Subsequently, the compassionate grant meant for permanent injury was enhanced from Rs.75,000/- to Rs.1,00,000/- vide notification No.13505/8F(WL) (6/2014/F&E) dated 22.07.2014.

(vi) Government has been taken sufficient precautionary measure to protect the people from wild animal attack and also make provision for payment of compassionate grant. This petitioner has not taken care of his own knowing it pretty well that wild elephants are present in and around in his paddy field. After availing the facilities provided by the statute filing of the writ petition by the petitioner indicates his intention which may not be considered.

(vii) The District Head quarter Hospital, Khordha referred this petitioner to AIIMS, Bhubaneswar for his better treatment but this petitioner got himself admitted in private (SUM hospital and thereafter in Apollo hospital, Bhubaneswar) for his treatment and for the reasons best known to him. Treatment in private hospitals definitely invites more expenditure.

(viii) As per the legal provision, payment of Rs.100000/- has been made on receipt of the permanent injury Certificate from the Medical Board. The DHH, Khordha

referred the petitioner to AIIMS, Bhubaneswar, but the family members decided to continue his treatment in Private medical like SUM and Apollo hospital. There is no such provision to reimbursement the medicine bill of the victim obtained from private hospitals.

IV. EXAMINATION OF THE LEGAL MATRIX:

6. I have heard the rival contentions and perused the materials on record.

7. In the State of Odisha, the man-animal conflict, particularly the recurrent encounters between elephants and humans, has escalated into a matter of grave concern, resulting in both loss of life and extensive destruction of property. Odisha, home to a significant population of elephants, frequently witnesses these animals stray into human habitations due to shrinking forest cover, habitat fragmentation, and scarcity of food. As agricultural and urban development encroach upon forested areas, elephants, having lost access to their traditional migratory paths, are forced to enter villages and farmlands, thereby causing considerable devastation. The consequences are often tragic—human lives are lost, crops are destroyed, and homes and livelihoods are decimated. Official data indicates that fatalities linked to elephant encounters in Odisha have surged over recent years, with hundreds of lives being claimed.

8. The ongoing destruction caused by elephants has instilled a deep sense of fear and instability among local communities, especially in districts like Angul, Dhenkanal, and Keonjhar, where such incidents are frequent. Farmers in these areas are particularly vulnerable as elephants trample crops ready for harvest, often leading to significant financial ruin. This growing conflict serves as a reflection of a broader environmental crisis, where deforestation and unregulated development push wildlife closer to human settlements, intensifying the risk of encounters. The law, which unequivocally designates wild animals as government property for the purposes of protection from hunting, logically extends the Government's responsibility to compensate for any loss or damage caused by these animals, given that they remain government property in all respects.

9. Therefore, it is reasonable to assert that if wild animals, being the property of the Government, cause harm to any citizen or farmers, it is the Government's duty to take responsibility for the loss. Citizens are entitled to claim compensation for any damage caused by wild animals, whether or not such claims are specifically mentioned in existing Government Orders, schemes, or provisions.

10. The Government, as a welfare state, must revise its policies to ensure that all affected individuals, irrespective of when the incident occurred, are granted their rightful claims.

11. In the present case, while the petitioner’s plea for compensation warrants sympathy, the State's argument is equally valid. The petitioner’s decision to seek private medical care rather than treatment at AIIMS Bhubaneswar led to a significant increase in medical expenses, and thus the state cannot be held liable for

the entirety of the petitioner's medical costs.

12. However, this Court notes that the Government of Odisha, in 2023, revised its compensation policy, increasing the amount of assistance for permanent disability caused by man-animal conflicts. For injuries resulting in less than 60% disability, the compensation has been raised from ₹1 lakh to ₹1.50 lakh, and for disabilities exceeding 60%, the compensation has been increased to ₹2.50 lakh. The petitioner is, therefore, entitled to make a fresh representation to the relevant authorities for consideration of his claim. The said authority shall decide the Petitioner's representation and consider granting some compensation in accordance with the prevalent compensation policy within three months from the date of filing of the representation.

13. Accordingly, this Writ Petition is partially allowed with the expectation that the authorities will consider the Petitioner's case for compensation as expeditiously as possible.

Headnotes prepared by:
Jnanendra Ku. Swain, Judicial Indexer
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case :
Writ Petition partially allowed

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2024 (III) ILR-CUT-1091

BISHNU CH. PATI
V.
ODISHA STATE WAREHOUSING CORPORATION

[W.P.(C) NO. 11687 OF 2016]

29 OCTOBER 2024

[Dr. S.K. PANIGRAHI, J.]

Issue for Consideration

Whether the petitioner is entitled to receive interest due to delay in paying the provident fund.

Headnotes

INTEREST ACT, 1978 – Section 4(1), 4(2)(b) r/w Regulation 12 of the ODISHA STATE WARE HOUSING CORPORATION EMPLOYEES PROVIDENT FUND REGULATION, 1969 – Whether the employee is entitled to interest for delayed payment of his provident fund.

Held: Yes – The Petitioner shall be entitled to interest @ 9% on Provident Fund dues from the date of retirement to the date of actual disbursement. (Para 12)

Citation References

H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Ltd., **AIR 2003 SC 1526;** Alok Shanker Pandey v. Union of India & Ors., **2007 (3) SCC 545 – referred to.**

List of Acts

Odisha State Warehousing Corporation Employees Provident Fund Regulations, 1969; Warehousing Corporations Act, 1962; Interest Act, 1978.

Keywords

Provident Fund, Interest, Disbrusement, General Provident Fund (GPF), Contributory Provident Fund (CPF).

Appearances for Parties

For Petitioner : Mr. B. S. Triapthy-1
For Opp.Party : Mr. B. K. Sahoo

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

In the present Writ Petition, the petitioner challenges the inaction of the Opposite Party Corporation in denying the petitioner his legitimate entitlement to interest on his provident fund dues from March 1, 2010, onwards. This denial is asserted to be in direct violation of the Odisha State Warehousing Corporation Employees Provident Fund Regulations, 1969, as well as the statutory resolutions issued by the Finance Department of the State Government, which require the payment of interest on accumulations in both the General Provident Fund (GPF) and the Contributory Provident Fund (CPF).

I. FACTUAL MATRIX OF THE CASE:

1. The brief facts of the case are as follows:

(i) The Odisha State Warehousing Corporation ("Corporation") is a statutory, state-owned entity created under the Warehousing Corporations Act, 1962. The petitioner, who retired on 31.01.2010, on superannuation, held the position of Zonal Manager in Balasore at the time of his retirement.

(ii) The Odisha State Warehousing Corporation Employees Provident Fund Regulations, 1969 ("Regulations 1969") were established under Section 42 of the Warehousing Corporations Act, 1962, with the prior sanction of the State Government. These regulations govern provident fund benefits for Corporation employees and became effective from 01.04.1970. The Government of Odisha has periodically prescribed interest rates applicable to Corporation employees.

(iii) Following his retirement, the petitioner requested the Corporation to release his provident fund (PF) dues with accrued interest. However, his request was not entertained.

(iv) The Corporation made partial disbursements to the petitioner as follows:

Date	Amount	Remark
23.11.2010	Rs.4,40,997/-	Paid to Petitioner
23.11.2010	Rs.4,40,997/-	Paid to Petitioner
16.06.2011	Rs.51,172/-	Paid to Corporation's liability
3.8.2013	Rs.3,90,850/-	Paid to Petitioner

(v) At its 143rd meeting on 23.09.2013, the Corporation's Board of Directors resolved to approve interest payments on delayed CPF dues for retired/deceased employees, clarifying that settled cases would not be reopened.

(vi) Despite repeated requests, the Corporation delayed payment of the petitioner's CPF dues. Although a payment of ₹3,90,850/- was made on 03.10.2013, the Corporation did not provide payment particulars. The petitioner submitted representations on 05.10.2013, and 23.10.2013, requesting details on his CPF account balance as of his retirement date, the interest accrued up to 05.10.2013, and any remaining balance for future disbursement.

(vii) The petitioner received no response regarding his CPF account particulars, both pre- and post-retirement. On 08.11.2013, he submitted a detailed representation to the Corporation's Chairman/ estimating his accrued interest as ₹1,61,397/- up to October 2013, with ongoing accrual due to delayed payment.

(viii) During his service, the petitioner faced two disciplinary actions: one on 12.12.2008, concerning alleged unauthorized leave, and another on 28.01.2010, regarding alleged possession of disproportionate assets. The petitioner filed writ petitions (WP(C) No. 2883/2009 and WP(C) No. 19108/2010) to challenge these proceedings. On 23.12.2011, the Court quashed the proceedings and directed the Corporation to release all retiral benefits within three months. Notwithstanding this directive, the Corporation delayed the release of his CPF dues, withholding the final amount of ₹3,90,850 until 03.08.2013, without updating accrued interest.

(ix) The Corporation subsequently referred the petitioner's case to its EPF Committee to determine whether it fell under "settled" or "unsettled" cases, obtaining legal opinion affirming the petitioner's entitlement to interest until his dues were fully paid.

(x) The Corporation calculated the petitioner's interest entitlement at ₹1,91,166 as of June 2015, and presented the matter at its 149th Board meeting on 23.07.2015. The Board, referencing its prior decision in 2013, deemed further action unnecessary.

(xi) Upon further denial of interest payment, with no response to his earlier requests, the petitioner submitted further representations to the Managing Director on 22.10.2014, and 11.11.2014, and to the Principal Secretary of the Co-operation Department on 06.04.2015. Following this, the Chairman referred the matter to the Managing Director, who then requested the petitioner to attend a meeting on 18.04.2015, per letter No. 1282 dated 15.04.2015. At this meeting, the petitioner presented his grievances, and the Managing Director assured him that he would facilitate the release of the interest claimed. However, no relief was ultimately granted and no interest was paid to the petitioner.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

2. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i). Under Regulation 12 of the 1969 Regulations, "interest" is to be calculated on both employee's contributions and Corporation's contributions at rates prescribed periodically by the Government of Odisha, aligning with the interest rates for Government GPF. Interest credits must be recorded separately for Corporation and member's contributions.

(ii). On 31st March of each year, or as soon as possible thereafter, the Corporation must: (i) notify the interest rate for deposits held by each fund subscriber, (ii) prepare an account of total accrued interest, and (iii) credit each subscriber's account with the due interest, calculated on the monthly balance products from the previous year.

(iii). The petitioner, through the RTI Act, received Corporation note sheets indicating that his case does not fall under "Settled Cases," which are defined as cases where final payments were accepted without objection. Notably, the last CPF payment on 05.08.2013 only included interest up to 28.02.2010, despite ongoing objections from the petitioner. Hence, the petitioner's case should not be considered a "Settled Case."

(iv). Under Sections 4(1) and 4(2)(b) of the Interest Act, 1978, the petitioner is entitled to interest on outstanding CPF dues until the full payment is made.

(v). Based on the Board's decision in the 143rd meeting, the petitioner qualifies for interest on delayed CPF payments, as his case is not classified as a "Settled Case." The term "Settled Cases," as defined by the Corporation, refers to cases where final payments were accepted without dispute.

(vi). Given the clear delay in paying the petitioner's CPF dues in installments, with the final payment on 05.08.2013, calculated only up to 28.02.2010/ Regulation 12 has been breached/ prompting the petitioner's objections. Therefore, his case does not meet the criteria for a "Settled Case," and he is entitled to the reliefs sought.

(vii). Even if it is assumed (without admission) that the petitioner's case falls under "Settled Cases," the interpretation of "Settled Cases" and the Board's 143rd meeting decision contradicts Regulation 12 of the 1969 Regulations, which requires interest calculation up to the payment date (in this case, 05.08.2013).

(viii). It is a well-established legal principle that statutory provisions cannot be overridden. Consequently/the Board's decisions must align with Regulation 12 of the 1969 Regulations, entitling the petitioner to the reliefs requested.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

3. *Per contra,* learned counsel for the Opposite Parties earnestly made the following submissions in support of his contentions::

(i) The petitioner in this case has prayed for payment of balance amount of CPF dues along with interest on such delayed payment @18% quarterly compounded with effect from 01.03.2010 in terms of regulation 12 of Regulation 1969 read with section 4(1) of interest act 1978.

(ii) The petitioner has been paid all his CPF dues with interest upto the date of his retirement as per the provisions laid down in OSWC EPF Regulation 1969. The manner of payment made to the petitioner is described as: ₹4,40,997 on 23.11.2010; ₹51,172 on 16.06.2011 (adjusted for certain dues); and ₹3,90,850 on 05.08.2013.

Interest was calculated only up to 28.02.2010, rather than up to the actual dates of payment, as statutorily required.

(iii) During the service period the petitioner was proceeded against for misconduct and disobedience of office order. Being aggrieved by the action of the authority, he filed WP(C) No. 2833/2009 in this court and obtained a stay order with a direction not to take any final decision on the disciplinary proceeding. As such, a portion of CPF dues i.e. leave salary of the petitioner could not be paid. After disposal of the said Writ Petition on 23.12.2011 and finalization of CPF audit for the year 2009-10, total CPF dues with interest upto the date of his retirement was paid to him on 03.08.2013 which was pursuant to the direction of this Court and as per the statutory provisions laid down in the OSWC EPF Regulation 1969.

(iv) Since all the CPF-dues with interest upto the date of his retirement has been paid on 03.08.2013 as per the provisions laid down in OSWC EPF Regulation, further claim by the petitioner is not maintainable.

(v) It is not correct that the Managing Director assured the petitioner to release the the amount claimed by him. There is no such order passed by the Managing Director for release of the amount as claimed by the petitioner.

(vi) There is no deliberate delay in releasing the CPF dues of the petitioner. 90% of CPF dues were paid on 23.11.2010 as per resolution 2 of OSWC BPF committee dated 20.11.2010. As soon as the CPF audit for the year 2009-10 was finalized, his 10% CPF dues with interest was released on 3.8.2013.

(vii) On the request of the petitioner, the proposal for payment of interest on delay release of CPF dues of retired employees was placed in the 143rd BOD meeting held on 23.9.2013. The decision of the Board is reproduced hereunder:-

"The Board resolved to approve the proposal to make payment of interest on delay payment of CPF dues in favour of the retired/deceased employees of the OSWC who have not received their pending dues for want of finalization of audit with a stipulation that the settled cases are not be reopened again"

(viii) In the 149th BoD meeting held on 23.7.2015 also the Board agreed with the decision taken on the matter in the previous Board meeting dated 23.9.2013.

(ix) Since the petitioner was paid all the CPF dues with interest upto the date of his retirement, prior to the decision of the 143rd BOD meeting held on 23.9.2013; after finalization of CPF audit, his case deserves no merit for consideration.

(x) The claim made by the petitioner in his representation dated 27.7.2015 has got no basis since all his dues has been paid as per provisions laid down in the Regulation followed in the Corporation to that effect.

(xi) The Managing Director of the corporation has acted upon on direction of the government in PG & Pension Administration Department by furnishing a detailed position on the matter coming within the purview of the OSWC EFP Regulation 1969& as per the decision taken by the apex Body i.e. Board of Directors.

(xii) The payment of interest on CPF is governed by the OSWC EPF Regulation 1969. As per paragraph 19 of the regulation, interest ceases from the date of retirement or death of the employee. Paragraph 19 of the OSWCEPF Regulation 1969 is relevant in this context which mandates the followings:-

"interest to cease on termination of service, death of subscriber- interest on all sums standing in the books of the fund to the credit of a subscriber, shall cease on the date on

which he leaves the service of the corporation or on the date of his death, whichever is earlier"

(xiii) As per decision of the 143rd BoD meeting held on 23.9.2013, the petitioner's case is not coming under "unsettled category" because all the CPF dues along with interest upto the date of his retirement was paid to him on 3.8.2013 after finalization of CPF audit for the year 200910. The OSWC Board categorically decided to make payment of interest on delayed payment of CPF dues in favour of retired / deceased employees of the corporation who have not received their pending dues for want of finalization of audit with a stipulation that the settled cases are not to be reopened again.

IV. COURT'S REASONING AND ANALYSIS:

4. Heard the counsels for the parties and perused the materials placed on record.

5. It is admitted fact that the Opp.Party/Corporation delayed paying the PF dues to the petitioner for around 3 years after the retirement of the petitioner i.e. ₹4,40,997/- on 23.11.2010; ₹ 51,172 on 16.06.2011 (adjusted for certain dues); and ₹3,90,850/- on 05.08.2013. Interest was calculated only up to 28.02.2010, rather than up to the actual dates of payment, as statutorily required.

6. The Opp. Party/Corporation became liable to pay interest from the day it became due till actual disbursement. During all this period, the petitioner was deprived of the use of that money.

7. From the above facts/it is evident that the petitioner's case cannot be considered "settled" because the Corporation has yet to fulfill its statutory obligation by paying the interest due on the delayed provident fund (PF) payments. Although the principal amounts were eventually disbursed in installments; the interest was only calculated up to 28.02.2010, rather than the actual dates of payment. This discrepancy goes against statutory requirements and deprives the petitioner of the interest accrued during the extended delay.

8. While dealing with a similar matter, the Supreme Court in ***H. Gangahanume Gowda v. Karnataka Agro Industries Corporation Ltd.***[1] has held that the provident fund amount or the gratuity amount has to be paid by the employer immediately on the retirement of the employee or on the cessation of his service and the employee would be entitled to interest if there is a delay on the part of the employer in payment of such amounts.

9. Similar sentiment has been echoed in ***Alok Shanker Pandey v. Union of India &Ors.***[2] wherein the Apex Court has held that interest is neither a penalty nor punishment but it is a normal accretion on capital; that the person who thereon (which otherwise would have been earned by the person who was entitled to that

[1] AIR 2003 SC 1526
[2] 2007 (3) SCC 545

amount), equity demands that the person who kept the money should pay the principal amount to the person to whom it is due with interest.

10. In the light of these rulings, it is clear that withholding accrued interest not only fails statutory compliance but also breaches principles of fairness/ as it unjustly benefits the Corporation at the petitioner's expense. Until this outstanding interest is settled/ the petitioner's case remains "unsettled", as full payment extends beyond the principal to include all financial increments due over the period of delay.

V. CONCLUSION:

11. Upon careful consideration of the facts and circumstances in the present case, this Court is of the opinion that the Petitioner is entitled to interest on the Provident Fund amount, which should have been disbursed to the Petitioner in 2010 but was ultimately paid on 16.06.2011 and 03.08.2013.

12. In these circumstances, the Petitioner shall be entitled to interest @ 9% on Provident Fund dues from the date of retirement to the date of actual disbursement.

13. The Opposite Party/Corporation is directed to reconsider the case of the Petitioner afresh and calculate the remaining dues accrued to the Petitioner as per the directions of this Court factoring into the interest on delayed payment.

14. This exercise shall be completed within two months from the date of receipt of copy of this judgment, and the amount shall be disbursed within the aforesaid period.

15. In light of the foregoing, this Writ Petition is allowed and disposed of in terms of the aforesaid observations.

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

Result of the case :
Writ Petition allowed and disposed of.

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2024 (III)-ILR-CUT-1097

SURESH CHANDRA MOHAPATRA
V.
THE BRANCH MANAGER, SBI, DHENKANAL & ANR.

[W.P.(C) NO. 19475 OF 2023]

08 NOVEMBER 2024

[Dr. S.K. PANIGRAHI, J.]

Issue for Consideration

Whether the Bank account of Petitioner can be kept as frozen on the plea of continuance of investigation.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Section 102(1) – The petitioner's bank account remains frozen due to a contested transaction arising from the alleged misplacement of a cheque by Opp.Party No. 2 – The account containing a sum of Rs. 9.75 lakhs has been subjected to this restrictive measure to safeguard the ongoing investigation – Whether the account could remain frozen indefinitely due to the ongoing investigation.

Held: No – Prolonged restrictions on access to funds can severely disrupt an individual's ability to meet routine expenses, such as housing, healthcare, and other basic needs, thereby affecting their livelihood and financial stability – Therefore, while investigative actions may necessitate temporary account restrictions, these measures should be strictly time-bound and proportionate, ensuring that they do not impose undue hardship beyond what is reasonably necessary for the investigation's objectives. (Para 12)

Citations Reference

Mohammad Enamul Haque v. Central Bureau of Investigation, **2018 SC OnLine Ker 22772**; Manikandan v. The State rep, **Crl.R.C (MD) No. 1251 of 2023 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Negotiate Instruments Acts, 1881

Keywords

Frozen of account, Prolonged restriction to access fund, Investigation.

Appearances for Parties

For Petitioner : Mr. Prasanta Kumar Sahoo
For Opp.Party : Mr. Subrat Kumar Mohanty

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. In this Writ Petition, the Petitioner challenges the legality of the hold placed on his account on the grounds of an ongoing investigation into the theft of a cheque.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) The petitioner deposited a cheque worth Rs. 9.75 lakhs, drawn by Opposite Party No. 2, Dulei Kisan, into his account (Account No. 30663439610) at the State Bank of India (SBI) on 26.12.2022. This cheque was credited to the petitioner's account on the same day.

(ii) Following the credit, Dulei Kisan reported the cheque as missing and requested Opposite Party No. 1, the Branch Manager of SBI, to place a hold on the funds, claiming that the cheque had been misplaced. A hold was subsequently placed on the petitioner's account to safeguard Dulei Kisan's interests.

(iii) On 31.12.2022, the Assistant Sub-Inspector (ASI) of Kamakhyanagar Police Station requested that the petitioner's account remain frozen for the amount of Rs. 9.75 lakhs, pending an investigation into a police case filed by Dulei Kisan against the petitioner under various sections of the Indian Penal Code (IPC) (P.S. Case No. 506 dated 31.12.2022).

(iv) The ASI of Kamakhyanagar Police Station later informed Opposite Party No. 1 that preliminary investigations supported the claims made in the FIR and suggested that the cheque amount might need to be released to Dulei Kisan.

(v) The petitioner attempted to obtain information regarding Dulei Kisan's account under the Right to Information Act, 2005. However, the bank denied the request, stating that the petitioner was not entitled to such information.

(vi) Aggrieved by the bank's actions, the petitioner filed a writ petition challenging the legality of the hold placed on his account, sought relief and the release of the funds being held.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) The petitioner submitted that, as per Sections 7 and 8 of the Negotiable Instruments Act, he is the holder of the cheque in due course and thus lacks legal basis, and infringes on his right to access his money.

(ii) He further submitted that the bank's act of freezing his account, despite having validly deposited a negotiable instrument, is arbitrary, lacks legal basis, and infringes on his right to access his money.

(iii) The petitioner contended that the denial of his RTI request for information on the hold is unjustified, as he seeks legitimate clarification on his account status and the basis of the hold.

(iv) He further contended that the deposited amount is his and cannot be claimed by either the drawer (Dulei Kisan) or the bank, thus the freeze infringes on his rights.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. The Learned Counsel for the Opposite Parties earnestly made the following submissions in support of his contentions:

(i) It is submitted that the hold on the petitioner's account is justified due to the ongoing police investigation and seizure under Section 102(1) of the Code of Criminal Procedure, 1973, thereby disputing the petitioner's claim that the hold is arbitrary and illegal.

(ii) He further submitted that the petitioner's attempt to obtain information about Dulei Kisan's account through the RTI Act was correctly denied as he has no entitlement to such information.

(iii) It is contended that since both the petitioner and Dulei Kisan have filed separate FIRs, with associated police cases still under investigation, the bank contends that it is improper to release the funds until completion of the investigation and subsequent judicial determination by a competent court.

(iv) He further contended that the petitioner is not entitled to seek extraordinary relief under Articles 226 and 227 of the Constitution, as the matter is sub-judice and lacks merit.

IV. COURT'S REASONING AND ANALYSIS:

5. Heard the learned counsel for both parties and perused the documents submitted.

6. It is apparent, at the outset, that the petitioner's bank account remains frozen due to a contested transaction arising from the alleged misplacement of a cheque by Opposite Party No.2. The account, containing a sum of ₹9.75 lakhs, has been subjected to this restrictive measure to safeguard the ongoing investigation.

7. The pivotal question now before this Court is whether the petitioner's account may lawfully remain frozen for an extended duration solely on the grounds of an ongoing investigation. It is a well-established legal principle that while freezing a bank account in connection with an ongoing investigation, such an action must be for a limited, specified period. The freeze cannot extend indefinitely solely due to the investigation, as it would impose an undue restriction on the account holder's rights. Courts have consistently held that freezing an account indefinitely, absent concrete findings or specific timelines, is an excessive measure and infringes upon the individual's right to property and economic activity under Article 300-A of the Constitution.

8. In ***Mohammad Enamul Haque v. Central Bureau of Investigation***[1], the Kerala High Court examined a similar matter, where the appellant, accused of participating in a cattle smuggling syndicate, was denied bail due to his influential status and alleged role as the conspiracy's mastermind. His frozen bank account reportedly contained bribe sums, including Rs.12.80 crore linked to BSF officials. The Court addressed whether the account could remain indefinitely frozen due to the ongoing investigation and held as follows:

> *"Every investigating agency is governed by the laws of the land, including the Code of Criminal Procedure. No agency can arbitrarily freeze bank accounts under Section 102 Cr.P.C., or keep the accounts frozen indefinitely, because it will have the ultimate effect of denying the Constitutional or legal rights of the account holder. Such a step can be resorted to by the investigating agencies only if it is found absolutely necessary. Just because, a person is said to have paid bribe to an accused, his bank accounts cannot be mechanically or arbitrarily frozen. Arbitrariness in investigation, or investigative excess, cannot be, in any circumstance, condoned by the courts."*

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1 . 2018 SCC OnLine Ker 22772

9. In a similar vein, the Madras High Court in ***Manikandan v. The State Rep***[2] addressed the issue of bank account freezes imposed by investigative authorities, highlighting the procedural safeguards required. The court emphasized that indefinite freezes undermine the account holder's rights and, therefore, any such action must be closely monitored, limited in scope, and justified by a demonstrable necessity tied to the investigation. It was held in para 8 which is as follows:

> *"Freezing of bank accounts by investigating authorities in a mechanical fashion is an increasing problem faced by Indian businesses and companies. Such actions are routinely predicated on mere allegations or suspicions of tainted amounts being credited by accused persons or suspects involved in dubious financial dealings into the business or personal accounts of a bonafide party. One does not need to be an accused in the offence or even named in the First Information Report for the accounts to be frozen during investigation. This may have a crippling effect on the operational aspects of a business and can cause grave financial hardships and a party bearing the brunt of such actions, often get into deep waters."*

10. Applying the aforementioned judicial precedents to the facts at hand, it is noted that the ASI issued directions to freeze the petitioner's bank account on 31.12.2022, citing preliminary findings following the filing of the FIR. Yet, nearly two years have elapsed with no substantive progress in the investigation.

11. This prolonged stagnation prompts significant concerns. First, it is perplexing as to why only a preliminary inquiry has been conducted thus far, in a matter involving such substantial financial implications. Moreover, given the sequence of events and the duration of inactivity, there appears to be a discernible possibility of mala fides at play. Such circumstances invite the Court's scrutiny, particularly as the prolonged freeze of the petitioner's account without demonstrable cause or due investigative diligence may constitute an abuse of procedural authority.

12. It is essential that a bank account, which serves as a fundamental resource for a person's daily financial needs and overall well-being, should not be frozen for an unreasonable period during an investigation. Prolonged restrictions on access to funds can severely disrupt an individual's ability to meet routine expenses, such as housing, healthcare, and other basic needs, thereby affecting their livelihood and financial stability. Therefore, while investigative actions may necessitate temporary account restrictions, these measures should be strictly time-bound and proportionate, ensuring that they do not impose undue hardship beyond what is reasonably necessary for the investigation's objectives.

V. CONCLUSION:

13. In light of the above, the Investigating Authorities are directed to complete the investigation within two months from the date of presentation of this judgment/ order. If any misconduct or malfeasance by the Opposite Parties is established, stringent criminal action may be initiated against the responsible individual(s).

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2. Crl.R.C (MD) No.1251 of 2023

14. Furthermore, if the investigation is not concluded within the stipulated two-months timeframe, the bank shall be required to unfreeze the Petitioner's account.

15. Accordingly, this Writ Petition is allowed.

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

Result of the case :
Writ Petition is allowed

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2024 (III) ILR-CUT-1102

BALGOPAL SATPATHY
V.
STATE OF ORISSA

(I.A. NO. 542 OF 2024)
[ARRISING OUT OF CRLREV NO. 133 OF 2006]

22 NOVEMBER 2024

[MISS SAVITRI RATHO, J.]

Issue for Consideration

Whether the Court is empowered to modify on recall its judgment passed under Sections 401 and 397 Cr.P.C. though there is bar provided under the Code.

Headnotes

ORISSA HIGH COURT RULES, 1948 – Chapter VI, Rule 27(A) r/w Section 362 of Code of Criminal Procedure – Interim application has been filed with a prayer to recall/modify the Judgment passed in Criminal Revision – Whether the Court is empowered to modify on recall its Judgment passed U/s. 401 r/w 397 of Cr.P.C., though there is bar U/s. 362 of the Code.

Held: No – After an Order or Judgement in a criminal case filed U/s. 401 r/w 397 of the code is signed, the Court becomes functus officio and cannot alter or review the Judgement in view of the provision U/s. 362 of the Cr.P.C. – There is no provision for modification of the Judgement – The court is not inclined to modify on recall Judgement dated 15.05.2024 in Criminal Revision No. 133 of 2006, other than correcting the typographical error by deleting the words "in default" to rigorous imprisonment for a period of nine months" as no fine has been imposed. (Para 13 & 14)

Citations Reference

State of Punjab vrs. Davinder Pal Singh Bhullar & Ors., **(2011) 14 SCC 770;** Hari Singh Mann v. Harbhajan Singh Bajwa & Ors., **AIR 2001 SC 43**; Chhanni v. State of U.P., **AIR 2006 SC 3051**; Moti Lal v. State of M.P., **AIR 1994 SC 1544**; State of Kerala v. M.M. Manikantan Nair, **AIR 2001 SC 2145;**Chitawan & Ors. v. Mahboob Ilahi, **1970 Crl.L.J. 378**; Deepak Thanwardas Balwani v. State of Maharashtra & Anr., **1985 Crl.L.J. 23**; Habu v. State of Rajasthan, **AIR 1987 Raj. 83 (F.B.)**; Swarth Mahto & Anr. v. Dharmdeo Narain Singh, **AIR 1972 SC 1300**; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, **AIR 1981 SC 1156**; Asit Kumar Kar v. State of West Bengal & Ors., **(2009) 2 SCC 703**; Vishnu Agarwal v. State of U.P. & Anr., **AIR 2011 SC 1232;** State Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors., **AIR 2009 SC 46;** Smt. Sooraj Devi v. Pyare Lal & Anr., **AIR 1981 SC 736;** Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee & Anr, **(1990) 2 SCC 437**; Kurukshetra University & Anr. v. State of Haryana & Anr., **AIR 1977 SC 2229**; State of W.B. & Ors. v. Sujit Kumar Rana, **(2004) 4 SCC 129;** Lalit Mohan Mondal & Ors. v. Benoyendra Nath Chatterjee, **AIR 1982 SC 785**; Rameshchandra Nandlal Parikh v. State of Gujarat & Anr., **AIR 2006 SC 915**; Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS & Anr., **AIR 2006 SC 2872**; Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors., **AIR 2008 SC 251**; Pankaj Kumar v. State of Maharashtra & Ors., **AIR 2008 SC 3077— referred to.**

List of Rules/Codes

Orissa High Court Rules, 1948; Code of Criminal Procedure, 1973.

Keywords

Recall, Review, Modification of judgment, Power of the Court

Appearances for parties

For Petitioner : Mr. D.P. Nanda, Sr. Adv, Mr. L.R. Rayatsingh
For Opp.Party : Mr. M.R. Patra, A.S.C.

Judgment/Order

Judgment

SAVITRI RATHO, J.

This interim application has been filed "*under Chapter-VI, Rule-27(A) of the Orissa High court Rules for recalling modifying the judgment*".

2. The prayer in the I.A is reproduced below :

> *"It is therefore humbly prayed that this Hon'ble Court may be graciously pleased to allow this petition and recall/modify the judgment dated 15.05.2024 by hearing the matter through the present new counsel, for the interest of justice.*
>
> *And for the said act of kindness, the petitioner shall as in duty bound ever pray."*

3. Paragraphs 4, 5, 6, 7 and 8 of the application are reproduced below :

"4. That, thereafter the matter was listed this year before this Hon'ble Court for hearing of the revision. It is worthwhile to mention here that the previous conducting counsel has not taken any effective steps for hearing of the matter. Accordingly on 25.04.2024 the associates of the previous counsel has prayed for time on the ground that the LCR may be supplied to him. Then again the matter was taken on 14.05.2024 wherein the previous conducting counsel did not appear before this Hon'ble Court and the judgment was reserved. Then again on 15.05.2024 the judgement has been pronouced without hearing the petitioner wherein the sentence has been modified from two years to one year RI and on default the RI for a period of nine months.

5. That, the petitioner was a Teacher and has been falsely implicated in this case because of the dispute going on between the school mangement and parents of the student.

6. That, the settled principle of law is that after long lapse of time and the change of circumstances the sentence can be reduced or be set aside. In the present case the petitioner has changed his attitude and did not indulge himself in any kind of cases till date, the petitioner also dedicate his life for the bright future of the student and he has therefore did not get married till date.

7. That, taking into consideration the change of circumstances and the lapse of 28 valuable years, the petitioner is entitled to get the lesser simple imprisonment punishment instead of any Rigorous imprisonment for the interest of justice;

8. That, unless the petitioner be heard this Hon'ble Court through his counsel for a fair, better and proper adjudication of the case, then the petitioner will suffer irreparably and will prejudiced."

4. After an order or judgment in a criminal case is signed, the Court becomes *functus officio* and cannot alter or review the judgment in view of the provisions of Section – 362 of the Cr.p.C which is reproduced below :

"362. Court not to alter judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

5. This I.A was heard on 22.11.2024. After hearing Mr. D.P. Nanda, learned Senior Counsel and perusing the pages of the placitum of the decision in the case of ***the State of Punjab vrs. Davinder Pal Singh Bhullar and Others*** reported in ***(2011) 14 SCC 770*** produced by the learned counsel, the I.A was dismissed in open court observing that a detailed order would be passed after going through the decision of the Supreme Court, which had not been produced by the learned counsel.

6. The Supreme Court in the case of ***Davinder Pal Singh Bhullar*** (supra) after referring to a number of previous decisions has in no uncertain terms held that the criminal court has no power of review after a judgment has been rendered except for correction of clerical or arithmetical errors. It become *functus officio* once the order disposing of the case has been signed but has power to alter or review its judgment before it is signed.

7. It has also held that the inherent power of the High court under Section – 482 of the Cr.P.C is intended to prevent the abuse of the process of the Court and to

secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. The power of recall is different from the power of altering/ reviewing the judgment. But a party seeking recall/alteration has to establish that it was not at fault. If the order which has been pronounced is without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers under Section – 482 Cr.P.C can be exercised to recall such order as such order would be a nullity.

8. The relevant paragraphs of the judgment are extracted below :

" III. BAR TO REVIEW/ALTER- JUDGMENT

*44. There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (**See: Hari Singh Mann v. Harbhajan Singh Bajwa & Ors., AIR 2001 SC 43; and Chhanni v. State of U.P., AIR 2006 SC 3051)**.*

*45. Moreover, the prohibition contained in Section 362 Cr.P.C. is absolute; after the judgment is signed, even the High Court in exercise of its inherent power under Section 482 Cr.P.C. has no authority or jurisdiction to alter/review the same. **(See: Moti Lal v. State of M.P., AIR 1994 SC 1544; Hari Singh Mann (supra); and State of Kerala v.M.M. Manikantan Nair, AIR 2001 SC 2145)**.*

*46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. **(Vide: Chitawan & Ors. v. Mahboob Ilahi, 1970 Crl.L.J. 378; Deepak Thanwardas Balwani v. State of Maharashtra & Anr., 1985 Crl.L.J. 23; Habu v. State of Rajasthan, AIR 1987 Raj. 83 (F.B.); Swarth Mahto & Anr. v. Dharmdeo Narain Singh, AIR 1972 SC 1300; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, AIR 1981 SC 1156; Asit Kumar Kar v. State of West Bengal & Ors., (2009) 2 SCC 703; and Vishnu Agarwal v. State of U.P. & Anr., AIR 2011 SC 1232)**.*

47. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for

doing that which is specifically prohibited by the Code itself. ***(Vide: State Represented by D.S.P., S.B.C.I.D., Chennai v. K.V. Rajendran & Ors., AIR 2009 SC 46)***.

48. In ***Smt. Sooraj Devi v. Pyare Lal & Anr., AIR 1981 SC 736,*** *this Court held that the prohibition in Section 362 Cr.P.C. against the Court altering or reviewing its judgment, is subject to what is "otherwise provided by this Code or by any other law for the time being in force". Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in Section 362 Cr.P.C.and, therefore, the attempt to invoke that power can be of no avail.*

49. Thus, the law on the issue can be summarised to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.

IV. INHERENT POWERS UNDER SECTION 482 Cr.P.C.

50. "3…..The inherent power under Section 482 Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. If any consideration of the facts by way of review is not permissible under the Cr.P.C. and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there are no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362 Cr.P.C."

(See: Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee & Anr, (1990) 2 SCC 437).

*51. The inherent power of the court under Section 482 Cr.P.C. is saved only where an order has been passed by the criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court, amounts to abuse of the process of court. Therefore, such powers can be exercised by the High Court in relation to a matter pending before a criminal court or where a power is exercised by the court under the Cr.P.C. Inherent powers cannot be exercised assuming that the statute conferred an unfettered and arbitrary jurisdiction, nor can the High Court act at its whim or caprice. The statutory power has to be exercised sparingly with circumspection and in the rarest of rare cases. (****Vide: Kurukshetra University & Anr. v. State of Haryana & Anr., AIR 1977 SC 2229; and State of W.B. & Ors. v. Sujit Kumar Rana, (2004) 4 SCC 129)*.

52. The power under Section 482 Cr.P.C. cannot be resorted to if there is a specific provision in the Cr.P.C. for the redressal of the grievance of the aggrieved party or where alternative remedy is available. Such powers cannot be exercised as against the express bar of the law and engrafted in any other provision of the Cr.P.C. Such powers can be exercised to secure the ends of justice and to prevent the abuse of the process of

court. However, such expressions do not confer unlimited/unfettered jurisdiction on the High Court as the "ends of justice" and "abuse of the process of the court" have to be dealt with in accordance with law including the procedural law and not otherwise. Such powers can be exercised ex debito justitiae to do real and substantial justice as the courts have been conferred such inherent jurisdiction, in absence of any express provision, as inherent in their constitution, or such powers as are necessary to do the right and to undo a wrong in course of administration of justice as provided in the legal maxim "quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest". However, the High Court has not been given nor does it possess any inherent power to make any order, which in the opinion of the court, could be in the interest of justice as the statutory provision is not intended to by-pass the procedure prescribed. ***(Vide:Lalit Mohan Mondal & Ors. v. Benoyendra Nath Chatterjee, AIR 1982 SC 785; Rameshchandra Nandlal Parikh v. State of Gujarat & Anr., AIR 2006 SC 915; Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS & Anr., AIR 2006 SC 2872; Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors., AIR 2008 SC 251; and Pankaj Kumar v. State of Maharashtra & Ors., AIR 2008 SC 3077).*** *"*

9. In the present Criminal Revision, ample opportunity was given to the petitioner for hearing of the case. The case was listed for hearing on 04.03.2024, 20.03.2024, 21.03.2024, 04.04.2024, 04.04.2024, 25.04.2024, 03.05.2024, 14.05.2024 and 15.05.2024 and was adjourned on eight occasions, either suo motu and also on the request of the learned counsel. On 03.05.2024, considering the mention made on behalf of the petitioner that Mr. D.P. Nanda, learned Senior Counsel had been engaged to argue the matter, the case was adjourned to 14.05.2024. On 14.05.2024 no counsel appeared on behalf of the petitioners so the case was adjourned to 15.05.2024. Neither on 14.05.2024, nor or 15.05.2024, did any counsel appear on behalf of the petitioner nor was any prayer for adjournment made. So after perusing the records and hearing the learned State Counsel, the criminal revision was dismissed on 15.05.2024 with modification in sentence. The judgment was pronounced in separate sheets.

10. So it cannot be said that there were violations of principles of natural justice or that opportunity of hearing was not afforded to the petitioner for which the judgment is a nullity, so as to necessitate exercise of power under Section – 482 Cr.P.C by ignoring the provision Section –362 of the Cr.P.C.

11. The orders passed between 04.03.2024 and 15.05.2024 are extracted below:

"Order No.4 ***<u>04.03.2024</u>***

(Through hybrid mode)

1. None appears for the petitioner when the matter is called. The matter was last listed on 27.04.2006, when the revision admitted, and the petitioner had been directed to be released on bail.

2. List this case on 18.03.2024.

3. Registry is directed to inform Mr. J. N. Rath and Mr. S. K. Jethy, learned counsel for the petitioner regarding their non-appearance today and the next date of listing of the case. Their telephone/mobile numbers should be available in the High Court Bar Association Telephone Directory.

Order No.5 ***20.03.2024***

(Through hybrid mode)

1. A strange noting has been furnished by the Dealing Assistant, who has made the noting that Mr. S. K. Jethy, learned counsel for the petitioner has been informed about his non-appearance through phone call and copy of order No. 4 dated 04.03.2024 is yet to be received. There was no order for providing a copy of the order to the Dealing Assistant. As Mr. S. K. Jethy, learned counsel for the petitioner has been informed about his non-appearance in the case pursuant to order dated 04.03.2024, it is presumed that the copy of the order was available with the dealing assistant. Such endorsement in the order sheet should not be repeated.

2. None appears for the petitioner when the matter is called. In order to give another chance to learned counsel for the petitioner to make his submission in the said case, list this case tomorrow, i.e. on 21.03.2024.

Order No.6 ***21.03.2024***

(Through hybrid mode)

1. Mr. L. Rayatsingh, learned counsel prays for an adjournment on behalf of Mr. S.K. Jethy, learned counsel for the petitioner stating that the file which is of the year 2006 has recently been located and they need some time for preparation.

2. List this matter on 04.04.2024.

Order No.7 ***04.04.2024***

(Through hybrid mode)

1. Mr. L.N. Rayatsingh, learned counsel submits that he has received Vakalatnama on behalf of the petitioner and will file the same tomorrow and prays for adjournment of two weeks time in order to obtain the certified copies of the documents and argue the case.

2. Considering the said prayer, list this matter on 22.04.2024.

Order No.8 ***25.04.2024***

(Through hybrid mode)

1. Mr. L. Rayatsingh, learned counsel appearing on behalf of Mr. S.K. Jethy, learned counsel for the petitioner prays for another adjournment in order to obtain the certified copy of the depositions of the witnesses.

2. When the matter was listed on 04.03.2024, none had appeared for the petitioner for which Registry had been directed to inform Mr.J.N.Rath and Mr.S.K.Jethy, learned counsel for the petitioner regarding their non-appearance and the next date of listing of the case. On 20.03.2024, when the matter was listed, none had appeared for the petitioner. On 21.03.2024, when the matter was listed, Mr.Rayatsingh, learned counsel submitted that the file has been recently located and they need some time for preparation for which the matter was adjourned to 04.04.2024. On 04.04.2024, when the matter was listed, Mr.Rayatsingh, learned counsel submitted that he has received Vakalatnama on behalf of the petitioner and will file the same by 05.04.2024 and prayed for two weeks adjournment in order to obtain the certified copies of the documents and argue the case. The matter is listed today, i.e. after 20 days and Mr.Rayatsingh, learned counsel has again prayed for an adjournment stating that he has not received the certified copies of the depositions of the witnesses.

3. Since this case is of the year 2006, it is directed that if the learned counsel for the petitioner produces a pen drive before the Registry by 29.04.2024, he shall be supplied the soft copies of the depositions of the witnesses.

4. List this matter on 03.05.2024.

Order No.9 ***03.05.2024***

(Through hybrid mode)

1. Mr. S.S. Mohapatra, learned Addl. Standing Counsel has produced the instructions of the Inspector-in-Charge, Nimakhandi P.S., Berhampur wherein it is stated that the petitioner–Balgopal Satpathy is alive and working as Headmaster of Buguda High School and is staying at Nimakhandi village. The said instructions are taken on record.

2. Prayer for adjournment is made on behalf of Mr. D.P.Nanda, learned Senior Counsel stating that he has been recently engaged by the petitioner.

3. Since this case is of the year 2006 and for last two months on five occasions, the matter has been adjourned, I am not inclined to adjourn the matter after vacation.

4. List this matter on 14.05.2024.

Order No.10 ***14.05.2024***

(Through hybrid mode)

1. This Revision had been admitted on 27.04.2006. The LCR had been called for and the petitioner has been directed to be released on bail of Rs.10,000/- with two sureties for the like amount to the satisfaction of the trial Court in GR Case No. 106 of 1996.

2. On 04.03.2024, when the matter was called, no counsel appeared on behalf of the petitioner for which the case was adjourned to 18.03.2024 and the Registry has been directed to inform Mr. J.N. Rath and Mr. S. K. Jethy, learned counsel for the petitioner regarding the non-appearance and the next date of listing of the case.

3. On 20.03.2024, none appeared for the petitioner for which in order to give another chance to the learned counsel for the petitioner, the case was directed to be listed on 21.03.2024.

4. On 21.03.2024, Mr. L. Rayatsingh, learned counsel prayed for an adjournment on behalf of Mr. S. K. Jethy, learned counsel for the petitioner stating that as the file is of the year 2006, it has been recently located and they need some time for preparation, for which the case was adjourned to 04.04.2024.

5. On 04.04.2024, Mr. L. Rayatsingh, learned counsel submitted that he has received the vakalatnama on behalf of the petitioner and filed the same on tomorrow and prayed for an adjournment for two weeks to obtain the certified copies of the documents and argue the case. Considering the said prayer, the case had been adjourned to 22.04.2024.

6. The matter was thereafter taken up on 25.04.2024, on which date Mr. L. Rayatsingh, learned counsel appearing on behalf of Mr. S. K. Jethy, learned counsel for the petitioner prayed for an adjournment in order to obtain the certified copies of the depositions of the witnesses. It was directed that if the learned counsel for the petitioner produces the pen drive before the Registry by 29.04.2024, he would be supplied with soft copies of the depositions of the witnesses and the matter was adjourned to 03.05.2024.

7. On 03.05.2024, Ms. Payal Ray, learned counsel prayed for an adjournment on behalf of Mr. D. P. Nanda, learned Senior Counsel stating that he has been recently engaged by the petitioner. On the said date Mr. S. S. Mohapatra, learned Additional Standing Counsel had produced the instructions of the Inspector-in-charge, Nimakhandi Police Station, Berhampur, wherein it was stated that the petitioner Balgopaalm Satapathy was alive and working as Headmaster of Guguda High School and staying at Nimakhandi Village. The said instructions were taken on record. Since the case is of the year 2006 and for the last two months on five occasions the matter had been adjourned, the case was directed to be listed on 14.05.2024.

8. Today, when the matter is listed, no counsel appears on behalf of the petitioner. In the interest of justice, list the case tomorrow, i.e. on 15.05.2024. If no counsel appears on behalf of the petitioner tomorrow, this Court may be constrained to vacate the order passed on 27.04.2006 in Misc. Case No. 200 of 2006 releasing the petitioner on bail and issue NBW of arrest against the petitioner or dispose of the Revision on the basis of materials on record.

Order No.11 ***15.05.2024***

(Through hybrid mode)

1. This Revision had been admitted on 27.04.2006. The LCR had been called for and the petitioner has been directed to be released on bail of Rs.10,000/- with two sureties for the like amount to the satisfaction of the trial Court in GR Case No. 106 of 1996.

2. On 04.03.2024, when the matter was called, no counsel appeared on behalf of the petitioner for which the case was adjourned to 18.03.2024 and the Registry has been directed to inform Mr. J.N. Rath and Mr. S. K. Jethy, learned counsel for the petitioner regarding the non-appearance and the next date of listing of the case.

3. On 20.03.2024, none appeared for the petitioner for which in order to give another chance to the learned counsel for the petitioner, the case was directed to be listed on 21.03.2024.

4. On 21.03.2024, Mr. L. Rayatsingh, learned counsel prayed for an adjournment on behalf of Mr. S. K. Jethy, learned counsel for the petitioner stating that as the file is of the year 2006, it has been recently located and they need some time for preparation, for which the case was adjourned to 04.04.2024.

5. On 04.04.2024, Mr. L. Rayatsingh, learned counsel submitted that he has received the vakalatnama on behalf of the petitioner and would file the same on the next day and prayed for an adjournment for two weeks to obtain the certified copies of the documents and argue the case. Considering the said prayer, the case had been adjourned to 22.04.2024.

6. The matter was thereafter taken up on 25.04.2024, on which date Mr. L. Rayatsingh, learned counsel appearing on behalf of Mr. S.K. Jethy, learned counsel for the petitioner prayed for an adjournment in order to obtain the certified copies of the depositions of the witnesses. It was directed on that day that if the learned counsel produces a pen drive before the Registry by 29.04.2024, he would be supplied with soft copies of the depositions of the witnesses and the matter was adjourned to 03.05.2024.

7. On 03.05.2024, Ms. Payal Ray, learned counsel prayed for an adjournment on behalf of Mr. D. P. Nanda, learned Senior Counsel stating that Mr. Nanda had been recently engaged by the petitioner. On the said date Mr. S. S. Mohapatra, learned Additional Standing Counsel had produced the instructions of the Inspector-in-charge, Nimakhandi Police Station, Berhampur, wherein it was stated that the petitioner Balgopaalm Satapathy was alive and working as Headmaster of Guguda High School and staying at Nimakhandi Village. The said instructions were taken on record. Since the case is of the year 2006 and for the last two months on five occasions the matter had been adjourned, the case was directed to be listed on 14.05.2024.

8. Today, when the matter is taken up, none appears for the petitioner when the matter is called.

9. Since the Criminal Revision is of the year 2006 and the record of the lower court are available, I have gone through the records and decided to dispose of the Criminal Revision on the basis of materials on record.

10. Judgment in separate sheet is pronounced in Court.

11. The Criminal Revision is dismissed with modification in sentence."

12. After perusing the impugned judgments and the depositions of the witnesses and hearing the learned State Counsel, I did not find any reason to interfere with the conviction of the petitioner under Section 354 of IPC. But as almost thirty years had elapsed since the incident, the sentence was modified from two years Rigorous Imprisonment (R.I.) to one year R.I. This sentence cannot be said to be excessive or without jurisdiction, so as to attract exercise of power under Section – 482 of the Cr.P.C to modify the sentence to fine only.

13. An apparent typographical/clerical error in paragraph 22 of the judgment dated 15.05.2024 has not been pointed out by learned counsel for the petitioner, but was noticed before signing this judgment. The words "*in default to rigorous imprisonment for a period of nine months*" in paragraph 22 are required to be deleted as no fine has been imposed.

14. In view of the above discussion and circumstances and in view of the bar under Section – 362 Cr.P.C., I am not inclined to modify or recall judgment dated 15.05.2024 in Criminal Revision No. 133 of 2006 other than correcting the typographical error in paragraph 22 by deleting the words "*in default to rigorous imprisonment for a period of nine months*".

15. The interim application being bereft of merit has already been dismissed.

16. Copy of the judgment and the order along with the lower court records be sent to the learned trial Court forthwith, if not already done.

(CRLREV NO. 133 OF 2006)
DATE OF JUDGMENT :15 MAY 2024

SAVITRI RATHO, J.

This Criminal Revision under Section 401 read with Section 397 of the Code of Criminal Procedure (in short 'Cr.P.C.') has been filed challenging the judgment dated 28.01.2006 passed by the learned Additional Sessions Judge (FTC), Bolangir in Criminal Appeal No. 17/26 of 2004-05 confirming the conviction of the petitioner under Section 354 of IPC and sentencing him to undergo rigorous imprisionment for 2 years by the judgment dated 30.07.2004 passed by the learned J.M.F.C., Bolangir in G.R. Case No. 106/1996 (T.R. No. 22 of 2022).

PROSECUTION CASE

2. The prosecution case in brief is that on 13.03.1996 in the night, the daughter of the informant (name withheld) informed her mother that she would not go to school any more as Gopal Sir is a bad person. On being asked by the wife of the informant, the victim stated that the petitioner used to write on the black board in her class room and also asked the students to write and then he would come and sit near her and insert his hand inside her pant. Thereafter, he used to put his finger inside

her private part. On 13.03.1996, she felt pain in her private part. The wife of the informant intimated all the facts before her husband (informant) on the same night. On the next date i.e. 14.03.1996, the informant along with his wife, daughter (victim) and two other guardians, three advocates went to the Little Flower School, Bolangir where the victim disclosed all the facts before the Administratrix, Sister Tressa. They also discussed with Sister Tressa regarding the matter. Co-accused Father Richard Vaz was called by Sister Tressa and he was informed about the facts. They all requested to co-accused Father Richard Vaz to take action against the petitioner. Co-accused Father Richard Vaz was assured them to take action against the petitioner and requested them not to report the matter before the Police in the interest of the School. The informant and other guardians agreed with father Vaz. But on 15.03.1996 at 5.00 P.M., the informant was asked through a letter issued from the said School to take Transfer Certificate of his daughter. On the same day co-accused Father Richard Vaz had sent some gundas to the house of the informant who threatened to kill him if he would report the matter before the Police. Due to mental tension, the informant presented a written report before the IIC, Town P.S. Balangir on 17.03.1996. Basing on the said report, the IIC Town P.S., Balangir registered Police Station case and directed S.I. P.K. Mishra to take up investigation.

During course of investigation, the I.O. visited the spot, examined the informant, victim and other witnesses and arrested the petitioner and forwarded him to Court in custody. After completion of investigation, he submitted charge sheet against the petitioner under Section 354 of IPC. Thereafter the informant filed 1.C.C. Case No. 52/1996 against the co-accused Father Richard Vaz and the present petitioner which is tagged to the present case for which the co-accused Father Richard Vaz faced trial under Section 506 of IPC while the present petitioner faced trial for the offence under Section 354 of IPC to the court of the learned J.M.F.C., Balangir.

DEFENCE PLEA

3. The defence plea was one of denial and false implication.

4. The learned J.M.F.C., Balangir framed the following points for determination:-

> *"(i) Whether on 13.03.1996 in the class room of Little Flower School, Balangir the accused Balgopal Satpathy used criminal force to the daughter of the informant namely Sristi intending to outrage her modesty punishable u/s 354 of IPC. (ii) Whether on 15.03.1996 the accused Father Richard Vaz committed criminal intimidation to the informant by threatening him to kill with intent to cause alarm to him punishable u/s 506 of IPC."*

WITNESSES

5. The prosecution examined 9 witnesses to prove its case out of whom P.W.5 is the informant, P.W.7 is the victim (daughter of the informant), P.W.8 is the wife of the informant, P.W.1-Pratap Kumar Maharana, P.W.2-Rabinarayan Bahidar and P.W.3-Krushna Prasad Mishra are the independent witnesses who had accompanied

the informant, victim and wife of the informant to School. P.W.4-Sister Tressa Chandi is the Administratrix of School. P.W.6-Bodharam Satpathy is a seizure witness and P.W.9-Sampad Kumar Mishra is the I.O. who investigated into the case. But no witness has been examined by the defence.

EXHIBITS

6. The prosecution proved four Exhibits which include Ext.1 is the letter sent by the Administratrix to P.W.5, Ext.2 is the F.I.R., Ext.3 is the seizure list and Ext.4 is a formal F.I.R.

TRIAL COURT JUDGMENT

7. The learned trial court after examining the evidence of the witnesses found that the prosecution had failed to prove its case beyond all reasonable doubt against the co-accused Father Richard Vaz under Section 506 of IPC for which he was acquitted for the said offence as per provision of Section 255 (I) of Cr.P.C. The learned trial court found that the prosecution has successfully established its case beyond all reasonable doubts against the petitioner under Section 354 of IPC for which he was convicted for the said offence and sentenced to undergo R.I. for 2 years.

The learned trial court held that it is not a fit case to extend the benefit of the Probation of Offenders Act to the convict to the petitioner as the victim in question is a young girl aged about six years who had been subjected to a heinous and inhuman crime.

APPELLATE COURT JUDGMENT

8. Challenging the said judgment, the petitioner had filed Criminal Appeal No. 17/26 of 2004-05 in the court of the learned Additional Sessions Judge (FTC), Balangir.

9. After going through the evidence of the prosecution witnesses, the learned appellate court found the evidence of the victim was corroborated by her parents as well as other witnesses namely P.Ws.1, 2 and 3 and her Advocates having status in the society did not find any ground to disbelieve the prosecution case. Learned appellate court also found that the delay of 3-4 days in lodging the F.I.R. have been explained for which there was no ground to disbelieve the prosecution case. As the case related to a small child for which the parents first took steps to settle the matter through the School authorities where the School authorities instead of taking action against the petitioner took action against the victim and the informant was also threatened by some gundas not to report the matter before the Police. Learned appellate court also held that the minor girl would not depose falsehood and the matter had been reported by her father for taking action by the School authorities.

10. In the absence of the learned counsel for the petitioner, I have felt it necessary to carefully peruse the grounds taken in the Criminal Revision, the impugned judgments and scanned copy the lower court records which contains the depositions of the witnesses and the exhibits.

11. GROUNDS OF REVISION

(i) P.W.7 has been tortured as she has stated during cross examination that she has narrated the incidents to the APP and her parents.

(ii) P.W.8 mother of the victim did not mark any injury on the private part of the victim and never asked her about the blood stains she had seen on her chaddi before 13.03.1996 and did not show her to a doctor.

(iii) P.W.5 father of the victim has stated that he has neither applied any medicine or showed the victim to a doctor even though his wife informed him that she was feeling pain.

(iv) There is unexplained delay in lodging the F.I.R.

(v) Evidence of P.W.4 Sister Tressa that the student did not tell her anything about the incident has been ignored.

(vi) The woman Sub-Inspector who was to record statement of the victim has not been examined in the trial.

SUBMISSION OF STATE COUNSEL

12. Ms. S. Mishra learned Additional Standing Counsel has submitted that the evidence of P.W. 7 the victim and her parents P.W. 5 and P.W.8 clearly make out the offence of Section 354 IPC against the petitioner who being the teacher of the victim girl has committed a heinous offence. After the 2013 amendment of the IPC, he would have been liable under Section–376(2)(f) and Section 376(2)(j) of the IPC. She has further submitted that the grounds taken in the revision do not have any merit and are liable to be rejected.

ORAL EVIDENCE

13. P.W.1-Ratan Kumar Maharana who has stated that on 14.03.1996 (Thursday) in the early morning the informant informed him about the incident that his daughter who is a student of class-1 of Little Flower School, Bolangir who has stated on 13.03.1996 the petitioner had molested her giving details of the over task and that it is a painful experience that she had narrated the incident to her mother on 13.03.1996 which she informed to her husband on the next morning. So on 14.03.1996 he asked the informant to meet him in the court premises at about 11.00 A.M. On 14.03.1996 the informant had come to the court premises and accompanied him to the School at about noon along with one Sri Nabin Nanda, Jasbir Singh Advocate, Rabinarayan Bohidar Advocate, Krushna Pr. Mishra Advocate, mother of the victim and the victim girl and they reported the matter to the Administratrics, Sister Tressa. She expressed her inability to solve the problem for which she was requested to call the co-accused Father Richard Vaz from his Rugudipada residence. Over telephone Sister Tressa called him and he reached there within half an hour. They putforth their grievances before him and he assured to take legal action against the petitioner and assured them to remove the petitioner from the School with immediate effect. On 15.03.1996 (Friday) he was informed that at about 8.00 P.M. the informant had received a letter from the School at 5.00 P.M. to take the T.C. of his daughter from the School and four gundas had been to his house and threatened him not to report the matter before the Police or they would kill him.

During cross-examination, his evidence has not been affected.

P.W.2-Rabinarayan Bahidar who has stated that he knows the accused persons and the informant and the occurrence took place on 13.03.1996. On 14.03.1996 at about 8.00 A.M. the informant informed him that the petitioner used to misbehave with his daughter by inserting his finger inside her private part for which he asked the informant to go to the School at the time of court hour. On that date he along with P.W.1 Krushna Mishra, Advocate, one Jasbir Singh and Nabin Nanda along with informant, his wife and his daughter went to the Little Flower School, Bolangir. They complained before the Administratix of the School-Sister Tressa who also heard about the incident from the girl. When Sister Tressa expressed her inability to take any action against the petitioner without obtaining permission of the co-accused Father Richard Vaz, they requested her to call Father Vaz to the School. She telephone the co-accused Father Vaz and after 20-30 minutes he reached the School premises and Sister Tressa narrated the incident in their presence and he also heard about the incident from the victim girl. The co-accused Father Richard Vaz assured to take action against the petitioner and requested them not to lodge report against the petitioner in order to protect the prestige of the School. Then they left the School with a hope that he would take action against the petitioner. On 16.03.1996 in the evening, the informant informed him that he had received a letter from the School to take the Transfer Certificate of his daughter. He also informed that on 15.03.1996 four unknown gundas had been to his house and had said that they have been sent by the co-accused Father Richard Vaz and threatened him not to report the matter to the Police failing which they would kill him. On 16.03.1996 he had telephone the co-accused Father Richard Vaz stating about the issue of Transfer Certificate of the daughter of the informant asking him as to how he issued the Transfer Certificate instead of taking action against the petitioner and he replied to a rough tone that that he had acted correctly and had conveyed the matter to the informant through his men and if he would dare to report the matter to the Police, he would be killed. He was surprised at the reply of co-accused Father Richard Vaz and asked the informant to lodge a report before the Police.

In cross-examination he has stated that he had not gone to the School before 14.03.1996 and on the same day he saw Sister Tressa in the School and he had no prior acquaintance with her. He also met co-accused Father Richard Vaz for the first time and he had no knowledge about who is staying in the Rugudipada residence of co-accused Father Richard Vaz. He has stated that he has personally seen the Transfer Certificate of the victim but he does not remember if he asked the informant that under what circumstances T.C. had been granted to his daughter and that he also stated that he has not asked anything to Sister Tressa regarding issue of Transfer Certificate to the victim after 16.03.1996 and on 16.03.1996 at about 6.00 P.M., the informant had informed him about the incident of 15.03.1996 at Bikram Chowk of Tikrapada Bikram Chhak which is at the distance of half kilometer from the Bolangir Police Station. He has also admitted that he has not accompanied the informant to the Police Station and that the house of the informant is 50-100 yards

away from Bikram Chhak of Tikrapada. He has admitted that he does not own any telephone and had made the telephone call to co-accused Father Richard Vaz on 16.03.1996 from a STD booth situated near daily market chhak and cannot say the name of the proprietor of that STD booth as the STD booth has already been closed. He has also admitted that co-accused Father Richard Vaz has not threatened him and he has been examined on behalf of the complainant under Section 202 of the Cr.P.C. in 1.C.C. Case No. 152 of 1996 and that he has stated before the Magistrate that he should not keep himself with the complaint because that may invite danger to his life like him. He has denied the suggestion that he has not made any telephone call to the co-accused Father Richard Vaz and that the co-accused has not threatened him in any manner and that the co-accused had not told him not to report the matter to the Police. He has stated in his cross-examination that the informant is a man of his pada but not his friend and that he has been examined by the I.O. in this case. He has denied the suggestion that to help the informant he has concocted a false story of threat to the informant by co-accused Father Richard Vaz in order to harass him.

P.W.3-Krushna Prasad Mishra has stated that on 14.03.1996, the informant had come to him in the morning and told him that the petitioner, teacher of Little Flower School, Bolangir had committed foul play with his daughter aged about 5-6 years. He had misbehaved with his daughter in her class room and requested him to accompany him to the class room to meet co-accused Father Richard Vaz. On 14.03.1996 at about 11.30 to 12 noon he along with P.Ws1, 2, one Nabin Nanda and the informant went to School along with the victim as well as her mother. They complained about the matter to Sister Tressa who after being satisfied informed coaccused Father Richard Vaz who came to the School after half an hour. The victim narrated the entire incident before co-accused Father Richard Vaz who assured to take action against the petitioner and requested them not to go to the Police because it would hamper the image of the School. On 16.03.1996 in the evening the informant informed him that co-accused Father Richard Vaz instead of taking action against the petitioner had written a letter to him to withdraw his daughter from the School and he also informed that he had sent some gundas to him to threaten him not to take any action against the petitioner and to withdraw his daughter from the School. On 17.03.1996 he advised the informant to go to the Police and also accompanied the informant to the Police Station (Town Police Station, Bolangir).

During cross-examination, he has stated that he knows the informant since his childhood as he belongs to his pada but he admitted that he cannot name all the members of his pada. He stated that he knows the gist of the F.I.R. but has not gone through the F.I.R. prior to it being lodged in the Police Station and had gone through the F.I.R. after it was lodged. The informant was present at that time. He has stated that since he was an Advocate and was aware that one cognizable offence had been committed, he had not advised the informant to lodge F.I.R. immediately because he wanted to draw the attention to the Head of the Institution first. Being aware of the facts that whenever one cognizable offence is committed, should be immediately

reported the matter to the Police or to the nearest Magistrate. He has stated that he has no connection with Little Flower School, Bolangir or the petitioner. Prior to 16.03.1996, he had not gone to School. Sister Tressa was alone present in the School when the victim narrated the incident to coaccused Father Richard Vaz and he has said that it was in the presence of her mother and he had not spoken to the victim or her mother regarding the incident. He had denied the suggestion that he being the friend of the informant was deposing falsehood.

In cross-examination by the co-accused Father Richard Vaz, he has stated that neither any of his children are studying in the Schoolor is a guardian of any children of that School. On 14.03.1996 the informant had come to him and narrated the incident at about 9.00 A.M. for which he advised him to come to the court as he was busy with his business at that time. Around 11.30 of 14.03.1996 he was free and he and the informant along with some other lawyer friends had discussed the matter and decided to go to the School. They wanted the School authority to report the matter to the Police for taking criminal action against the petitioner teacher. He has stated that the School is located at a distance of 5-6 kilometers from the court and Town Police Station is at a distance of half kilometre from the court premises. On 16.03.1996 the informant showed the letter of co-accused Father Richard Vaz to him intimating him to withdraw his daughter from the School. After going through the letter he had suggested the informant to report the matter to the Police but does not remember under what capacity co-accused Father Richard Vaz had written that letter. He had advised the informant to proceed straight to the Police Station to report the matter and it was about 8.30 P.M. at that time. On 17.03.1996 the informant had again gone to him but he has not discussed the matter with the informant. Along with his friends Advocate Rabi Bohidar, himself, Pradip Sahu, Jasbir Singh and the informant, they had gone to the Police Station and he has been examined by the Police in the case.

P.W.4-Sister Tressa Chandi has stated that she knows the informant and the petitioner. On 14.03.1996 she was working as the Administratix of the School and at about 11.30 A.M. while she was in the School the informant along with his daughter and his wife and 10-11 unknown person had come and made allegation before her against the petitioner alleging that he misbehaved with his child who was one of the students of the School. The petitioner was serving in the School for three years and he was the class teacher of the daughter of the informant. The persons who accompanied the informant hesitated in her office and she requested them to go outside and she wanted to know the incident from the child and her mother but the child did not say anything before her. She has proved the Ext.1 the letter issued by her asking the informant to withdraw his daughter from the School. She has been declared hostile and during her cross-examination by the prosecution has denied that he has stated before the I.O. that the victim had disclosed before her that the petitioner used to write question in the black board of standard I and asked the students to copy out the same and solve the problems and that by the time he used to sit with her bench and insert his finger in her private part and had threatened her not

to disclose the fact to anybody. On 13.03.1996, the petitioner did the same and inserted his finger deep in her private part for which she experienced pain and disclosed the incident before her mother and that the informant asked her to take departmental action against the petitioner and that they called for explanation from the petitioner and that on 14.03.1996 the petitioner submitted his resignation and went away and informed the incident to co-accused Father Richard Vaz and the victim narrated the total incident before her and that petitioner is a young man and his conduct is doubtful.

In the cross-examination by the petitioner she stated that the informant and his friends who had accompanied the victim did not allow the victim and her mother to meet her when she wanted to know about the incident. On 14.03.1996 the petitioner had informed her about the stealing, telling lie and copying in the examination on many occasions and except that there was no allegation against the petitioner and his conduct was satisfactory and there was no other allegation against him.

In the cross-examination by co-accused Father Richard Vaz she has stated that she was the Administratix of the School and Mr. Kishore Bag was the Principal of the School who belonged to religious congregation of blessed Risa of Nesa Ninini and the congregation runs education institutions and others philanthropic institution. In 1995 the School has been handed over to the congregation by co-accused Father Richard Vaz. After handing over the School to the congregation, he had no role to play in the School matter. On 14.03.1996 the petitioner resigned from the School and his resignation had been accepted on the same day at about 4.00 P.M. he was relieved on the same date. When he had been confronted with the allegation made by the informant, he had expressed his innocence and stated that he has not committed any wrong and that the allegation against him is totally false but as an Administratix she thought that although the allegation was false but it is better on the part of the petitioner to resign from the School and he agreed to do so. She enquired from the students of the class of the victim, but nobody said anything regarding the alleged incident. On 14.03.1996, the informant had told her that the victim is not willing to come to School and that she is under shock and for the betterment of the child, they issued the letter directing her father to take T.C. of the girl from the School.

P.W.5 is the informant and father of the victim who has stated that he knows the accused persons in the case and came to know about the occurrence in the night of 13.03.1996 from his wife who told him that his daughter was refusing to go to School. On enquiry she said that the petitioner put some questions to the students in the black board and directed the students to prepare the answers and in the meanwhile, he used to sit near her and put his finger inside her private part. She also stated that previously he had also done so. On that particular date she complained of pain before his wife and told her wife that the petitioner threatened her to assault if she would report the matter to anybody. On the next date at about 10.00 A.M. to 11.00 A.M., he informed the matter to Jasbir Singh, Nabin Nanda, Ratan Maharana, Krushna Mishra and Rabi Bohidar and requested them to go the School with him.

Thereafter he, his wife, his daughter and the aforesaid persons had gone to the School and the met the Administratix of the School Sister Tressa and reported the matter to her. She personally asked his wife and daughter about the incident and immediately telephoned to coaccused Father Richard Vaz who arrived at the School within half an hour and enquired about the matter from Sister Tressa. Co-accused Father Richard Vaz also enquired the matter from his wife and daughter and thereafter requested them not to report the matter before the Police for the interest of the School and assured to take action against the petitioner. On 15.03.1996 at about 5.00 P.M., a Peon of the School handed over a letter to him, where he had been directed to withdraw his child from the School. On the same date at about 8.30 P.M. while he was talking with one Pradeep Sahu, four gundas had come to his house and called him outside and threatened him to take away his life if he would report the matter before the Police. They also stated that they have been sent by co-accused Father Richard Vaz. On 16.03.1996 he reported the incident to witness Rabi Bohidar who talked with Father Vaz over telephone. Thereafter they decided the matter before Police. On 17.03.1996 he lodged the F.I.R. before the Police. He has put Ext.2 his report, Ext.2/1 his signature and Ext.1 the letter sent to him by the Administratix of School which has been already marked as Ext.

In cross-examination he has stated that beside the persons who have named in his examination-in-chief, he has not narrated the incident before anybody else as he did not feel it necessary to tell others. He has also stated that he has not stated to anybody but only stated the incident before his near and dear friends. Even though, there are many houses surrounding his house and many relations are residing at Bolangir town, he has not narrated the incident before them. Excepting Nabin Nanda, all the other persons stated above are Advocates. He also stated that though he has having his separate mess, but his brothers and father are residing in a compact block. On 14.03.1996 he had discussed about the incident with his father, first. He has stated that his daughter was reading in the School but he does not remember what percentage of mark has been secured by her in the examination. He takes interest in the study of his daughter and used to discuss less about the study of his daughter with her but his wife takes more interest and used to discuss with her about her study. He has admitted that he never received any complaint against his daughter from the School. Prior to the incident, the petitioner who happens to be the Class Teacher of his daughter would advise him to rectify some subjects in which she is weak and one occasion had reported that his daughter has done malpractice in the examination. Neither the petitioner nor anybody of the School made allegation before him regarding the conduct of his daughter that she was committing theft in the class and she was indisciplined in the School. After hearing the incident from his wife on 13.03.1996, he had not got his daughter examined before any Doctor and his wife has informed him that his daughter was complaining pain in her private part. He had never seen the alleged injury on the private part of his daughter and never shown his daughter to any Doctor after the incident till the date of his deposition. He has stated that he does not remember as to how many persons he had spoken to

before lodging the F.I.R. in the case and that he does not remember when he decided to lodge the report before the Police, but has stated the decision was taken by him in his house and he personally scribed the F.I.R. in his house but does not remember when he lodged the F.I.R. before the Police on 17.03.1996. He does not remember whether he lodged the report in the morning or in the afternoon or in the evening of 17.03.1996. He has denied the suggestion that he has not mentioned in the F.I.R. that the petitioner threatened his daughter not to report the matter to anybody. It is not a fact that he has not stated before the Police that the petitioner threatened his daughter not to report the matter to anybody and that he was deposing falsehood there was no such occurrence as alleged and the petitioner had complained against his daughter before the School authority and before him, he had foisted a false case against him.

In cross-examination by co-accused Father Richad Vaz he has stated that he had taken the advice of Advocates and on some occasions, he had taken his own decision. The decision to lodge F.I.R. was his own decision. None of the Advocates had advised him to report the matter before the Police. That he had gone to the School to report the matter there and when he asked Father Vaz about the appropriate action taken against the petitioner, Father Vaz told him they would remove the petitioner from the School and he was satisfied with the commitment of Father Vaz and left the School. After receipt of the letter from the School on 15.03.1996 at about 5.00 P.M., he has not informed his Advocate friends but on 16.03.1996 in the evening hours he told his Advocate friends. He has admitted that he had never gone to the School during School hour of 16.03.1996 after receipt of that letter. He has also stated that he has no acquaintance with co-accused Father Richard Vaz and no intimacy with Father and no acquaintance with the four gundas and he had not spoken with the gundas and not asked the names of those gundas. He has not stated about the appearance of those gundas before the Police. In the morning of 17.03.1996 he took the decision to report the matter before the Police. He denied the suggestion that on 14.03.1996 Sister Tressa and co-accused Father Richard Vaz have not sent anything either to his daughter and to his wife and that on 14.03.1996 when Sister Tressa wanted to talk with her daughter personally, he had sent his daughter and his wife to his house and did not allow them to talk with Sister Tressa and nobody threatened him that he has foisted a false case in order to harass the accused persons and that there was no such occurrence took place as alleged. He has also stated that there was no threatening to him on 15.03.1996 night by co-accused Father Richard Vaz and that Father Richard Vaz has not talked with Rabi Bohidar on 16.03.1996 over telephone.

P.W.6-Bodharam Satpathy has stated that the occurrence took place on 13.06.1996. He was present in the Town Police Station when the S.I. went for enquiry. Police seized the letter on the production of the informant P.W.5, father of the victim. Seizure list was prepared and she has signed the seizure list as Ext.3 and Ext.3/1 is his signature.

P.W.7 is the victim herself who was aged about 9 years when her oral evidence was recorded in the year, 1999. She was studying in Class-IV at that time. As she was a child witness, questions were put to her to ascertain her competency to adduce evidence, thereafter her evidence was recorded. She has stated that the occurrence took place in the year, 1996 when she was studying in Class-I. She has stated that the petitioner would give mathematic problems on the black board and come and sit beside her and insert his finger in her private part causing pain and at times bleeding. As he would threaten to assault her if she disclosed the incident to anybody, she did not do so. As she felt intense pain, she informed her mother. Her evidence has not been shaken cross-examination.

P.W.8 is the mother of the victim who has stated that P.W.7 is her only daughter and the petitioner was the mathematics teacher of School who used to teach her daughter and others and the appearance took place on 13.03.1996 and on that evening her daughter returned from School, she asked her to do mathematics homework she informed that the petitioner is a very bad person and she does not want to do the homework and does not go to the School. When she asked the victim the reason for doing so, she narrated that the petitioner everyday used to give mathematics problems in the black board of her School and told the students to solve the problem and then used to come near her and sat beside her in a bench and inserted his hand through her skirt and chadi and put his finger inside her private part for which there was bleeding and she felt pain there. On that very day she felt intolerable pain and she informed about the incident to her. Victim also informed her that the petitioner used to threaten her in the School tiffin time to assault her if she expressed the same incident before anybody. So out of fear she has not expressed the same before her on earlier occasions. She narrated the incident before her husband when he came that night. On the next day, she, her husband, the victim and some well wishers of said pada had gone to the School for complaining. They complained before Sister Tressa regarding the above incident but they did not take any action rather the petitioner and Sister Tressa threatened them and told them not to report the matter before the Police. On 17.03.1996 she and her husband reported the matter before the Town P.S. Police and she was examined by a lady Police officer on that day in her residence.

During cross-examination the co-accused Father Richard Vaz, she has stated that she had gone to Little Flower School on 14.03.1996 but does not remember the time. She has also stated that she cannot say the names of the other persons who went with her on that day. She does not know if they have come to date to that court or not. She has also stated that she does not know if any Advocate went with him on that day or not. She does not remember where she was standing on that day in the School and does not remember how many persons of her pada went with them and it may be 4-5 persons. She has stated that there was no talk between herself and Sister Tressa on that day and it is not a fact that she had no talk with Father Richard. The witness volunteers that she replied what Father had asked her. She has stated that it is not a fact that when Sister Tressa wanted to talk with her daughter alone in a room, her husband sent herself and her daughter away from the School premises in a

scooter. She has stated that she has been examined by the Police in her residence and that it is not a fact that he had not stated before the Police that Father and Sister Tressa threatened them and told not to report the matter before the Police and that it is not a fact that she was deposing falsehood at the instance of her husband and his friends and that there was no such occurrence at all.

In the cross-examination by the petitioner, she has stated that no complaint had been made before them regarding their daughter and she has not marked any injury in the private part of her daughter and that she had marked once or twice the blood stains on the chadi of the victim before 13.03.1996 but she never asked her as to how her chadi was blood stained. She has stated that she has not noted any abnormal behavior by the victim before the date of occurrence and has not shown her daughter to any Doctor on that day. She has stated that she had told the victim before deposing in the court not to go to School as she has to attend the court, concerning the petitioner's case and that she cannot say as to why there was delay in lodging the report before the Police. She has denied the suggestion that the victim was poor in her studies and that she is deposing falsehood and that the petitioner had complained before them and the School authority they have foisted the false case in order to harass him.

P.W.9- Sampad Kumar Mishra has stated that on 17.03.1996 he was posted at Bolangir (T) Police Station and on the same day at 7.00 P.M., the IIC (T) P.S., registered the P.S. Case No. 38 dated 17.03.1996 under Sections 354/506 of IPC against the accused persons and that under the direction of the IIC, he investigated the case. During investigation he examined the witnesses, visited the spot, served the requisitions to the Women S.I. for recording of the statement of the victim girl on 19.03.1996. He prayed to the court to record the statement of the victim under Section 164 of Cr.P.C. on 20.03.1996, the statement of the victim was recorded. On 19.05.1996, he gave requisitions to the OIC Sadar P.S., Berhampur to assist him. On the same day he arrested the petitioner and on 20.05.1996 forwarded him to the court. On 23.05.1996 at about 11.15 A.M. he seized the letter on production by the complainant and one letter issued to her by Administratrix Officer, Little Flower School. After completion of investigation he submitted chargesheet against the petitioner under Section 354 of IPC. He stated that he is well acquainted with the handwriting of the then IIC, making the endorsement in the F.I.R. which has been marked as Ext.2/2 and he has proved the formal F.I.R. which has been marked as Ext.4 and his signature is marked as Ext.4/1. Seizure list has been marked as Ext.3 and he has put his signature as Ext.3/2.

During his cross-examination, he has stated that the date of occurrence is 13.03.1996 and the F.I.R. was lodged in 17.03.1996 and he has not seized any wearing material of the victim nor sent her for medical examination. He has stated that he prepared the spot map and examined some students recorded their statements and that it is a fact that P.W.8 has not stated that Father Richard threatened him. That he denied the suggestion that he has not investigated the case properly which

was falsely filed against the petitioner. During cross-examination he has stated that he has not submitted chargesheet as there is no interrogative material against him.

ANALYSIS AND DISCUSSION

14. The protection of Children from Sexual Offences Act (in short 'POCSO Act') has been enacted in the year 2012 to protect children from the offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and related matters. As this is an occurrence of the year 1996, none of the offences under the POCSO Act are attracted.

15. The petitioner has been charged and proceeded against for alleged commission of the offence under Section 354 of IPC which before its amendment in the year 2013, provided as follows:

> ***"354. Assault or criminal force to woman with intent to outrage her modesty.—***
>
> *Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or both."*

Two years was the maximum imprisonment prescribed for the offence and or with fine. After amendment in the year 2013, a minimum punishment of one year imprisonment of either description has been prescribed and maximum punishment is imprisonment upto five years and fine payment has been provided.

16. As this is a case of the year 1996, the enhanced punishment for commission of offence under Section 354 of IPC which has been brought in by amendment in the year 2013 cannot be imposed on the petitioner. Similarly the offence under Section 376 (2) (f) or Section 376 (2) (n) of the IPC are also not attracted.

17. On a careful perusal of the deposition of the witnesses, I find that except the victim P.W.7 on her parents P.W.5 and P.W.8., there are minor discrepancies in the deposition of some of the witnesses. But as the witnesses were deposing in the trial more than three years after the occurrence, such minor discrepancies are natural. But they do not affect the gravamen of the prosecution case in view of the categorical evidence of P.W.5, P.W.7 and P.W.8.

18. The grounds taken in the criminal revision have no merit as because : -

i) telling the APP and her parents about the incident does not amount to tutoring.
ii) the failure of her parents to get the victim examined by a doctor does not falsify the prosecution allegations.
iii) P.W. 5 being the father is not expected to apply medicine, though he could have taken the victim to a doctor. But not doing so is not fatal to the prosecution case.
iv) Delay in filing the FIR has been explained.
v) As P.W. 7 the victim has not stated that she has informed about the incident to her classmates , the evidence of P.W 4 that othet students did not say about the incident does not affect the prosecution case.
vi) Non examination of the Woman S.I, does not affect the prosecution case.

19. As the learned trial Court has discussed the evidence evidence of the P.Ws in detail and given reasons for accepting the prosecution case while convicting the petitioner and the conviction of the petitioner has been confirmed by the learned appellate court and the defence has not been able to prove that the parents of the victim or the victim who was aged only six years at the time of the occurrence had any reason to make such serious allegations against the petitioner falsely , I am not satisfied that the conviction of the petitioner under Section 354 I.P.C calls for any interference . I am of the view that the plea of false implication is absurd as neither the parents of a small child nor a child would make such allegations against any person let alone a teacher . The plea of false implication apart from being absurd, is not supported by any evidence on record.

20. P.W.4, the Administratix of the School was declared hostile as she did not support the prosecution case and stated the victim had not told her about the heinous conduct of the petitioner. Her evidence that the petitioner resigned and left the School corroborates the allegations against him. Her version that the victim did not tell her anything, even if accepted does not affect the prosecution case.

21. In view of the evidence of the victim P.W.7 and her parents P.W.5 and P.W.8, which is corroborated by the evidence of independent witnesses in material particulars, I am not inclined to interfere with the conviction of the petitioner under Section 354 of IPC and confirm the conviction.

22. As far as the sentence is concerned, considering the fact that almost 30 years have elapsed since the date of occurrence an no minimum sentence had been provided at that time, I am inclined to modify the sentence from two years rigorous imprisonment to rigorous imprisonment for a period of one year in default to rigorous imprisonment for a period of nine months. The period if any spent in custody, shall be set off.

23. With the above modification of sentence, the Criminal Revision is dismissed.

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

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2024 (III)-ILR-CUT-1124

KUSUM DEEP
V.
STATE OF ODISHA & ANR.

[W.P. (C) NO. 26627 OF 2024]

07 NOVEMBER 2024

[R.K. PATTANAIK, J.]

Issue for Consideration

Whether the notice of no-confidence motion issued against the petitioner is valid as per the Law.

Headnotes

ORISSA GRAMA PANCHAYATS ACT, 1964 – Section 24(2)(a) and (c) – The petitioner was made aware of the vote of no-confidence to be held on 8th November 2024 and that apart, effort was made to ensure service of notice on 23rd, 24th, 25th, October – The notice was issued on 19th October, the date on which it was dispatched – Whether any prejudiced is established against the petitioner.

Held: No – As the notice was signed on 19th October, 2024 and immediately dispatched on the same day, the notice as per section 24(2)(a) and (c) has been complied and no prejudiced has been established. (Para 8)

Citations Reference

Sarat Padhi Vrs. State of Orissa & Ors.**, AIR 1988 Orissa 116;** Nilambar Majhi Vrs. Secretary to Government of Orissa, Panchayati Raj Department & Ors.**, 2005(II) OLR 659;** Debraj Mallika Vrs. The Collector, **1978(45) CLT 313;** Nirakar Sethi Vrs. State of Odisha & Ors.**, 2022 (I) OLR 377– referred to.**

List of Acts

Orissa Grama Panchayats Act, 1964

Keywords

No confidence motion, Notice.

Appearances for Parties

For Petitioner : Mr. S. Palit, Sr. Adv.
For Opp.Parties : Mr. B.K. Nayak, A.G.A.
Mr. A.P. Bose (O.P. Nos. 7 to 14)

Judgment/Order

Order

R.K. PATTANAIK, J.

1. Heard Mr. Palit, learned Senior Advocate appearing for the petitioner and Mr. Nayak learned AGA for the State-opposite party Nos. 1 to 6 besides Mr. Bose, learned counsel for opposite party No. 7 to 14.

2. Instant writ petition is filed by the petitioner challenging the correctness, legality and judicial propriety of the impugned notice dated 19th October, 2024 issued by opposite party No.3 vis-à-vis a no confidence motion initiated against him scheduled to be held on 8th November, 2024 on the grounds stated therein.

3. Mr. Palit, learned Senior Advocate for the petitioner submits that since the petitioner registered a complaint with the local administration so revealed from Annexure-1 alleging misappropriation of fund by the Ex-Sarpanch, the vote of confidence has, therefore, been engineered at his instance. It is submitted that the allegation so made therein regarding the defalcation of Government fund is the cause of action for the no confidence motion initiated with the issuance of impugned notice under Annexure-4. It is again submitted that the petitioner has all along been present in the previous meetings of the GP and the duly discharged the duties and responsibility assigned to him, which is clearly revealed from Annexure-2 series, therefore, to allege that he has defaulted in respect thereof, hence, lost the confidence, thus, the the motion with the impugned notice i.e. Annexure-4 issued is unjustified and grossly erroneous. The contention of Mr. Palit, learned Senior Advocate is that the requisition as at Annexure-3 is not accompanied with a copy of the proposed resolution, hence, there is non-compliance of the provisions of the Odisha Gram Panchayat Act, 1964 (hereinafter referred to as 'the Act') and in particular, Section 24(2)(a)& (c) thereof. It is further contended that there is no clear fifteen days allowed for the no-confidence motion to take place since the petitioner received the impugned notice i.e. Annexure-4 on 26th October, 2024, hence, the entire exercise in that regard stands vitiated. In support of such contention, Mr. Palit, learned Senior Advocate cited a decision of a Full Bench in **Sarat Padhi Vrs. State of Orissa & others AIR 1988 Orissa 116**. It is further submitted that the scheme of the notice contemplated under Section 24(2)(c) of the Act demands compliance of the requirements, such as, fixing the margin of time between the date of notice and meeting to be held with such notice being issued and served on all the Members. It is fairly admitted by Mr. Mr. Palit, learned Senior Advocate that such provision, as has been held by the Full Bench in the decision (supra) with respect to issuance of fifteen days' notice as one of the conditions contemplated in Section 24(2)(c) of the Act, to be directory in nature. It is the contention that notwithstanding the fact that the provision to be directory since because notice was received by the petitioner on 26th October, 2024, therefore, it has caused serious prejudice to him. At the same time, a decision of this Court in **Nilambar Majhi Vrs. Secretary to Government of Orissa, Panchayati Raj Department & others 2005(II) OLR 659** is referred to satisfy the Court that prejudice has really been caused to the petitioner due to shortage of notice period to be complied with as per Section 24(2)(c) of the Act. Furthermore, Mr. Mr. Palit, learned Senior Advocate would submit that in so far as notice period as provided in Section 24(2(c) of the Act is concerned, even though held to be directory but in view of the notice being received on 26th October, 2024 and as against the backdrop of facts that the petitioner had represented the local administration with allegations of misappropriation of Government fund as per Annexure-1, a case of prejudice is clearly made to reveal and established, hence, therefore, the no confidence motion with such a notice as per Annexure-4 is to be declared as invalid.

4. Mr. Bose, learned counsel for opposite party Nos. 7 to 14, on the contrary, referring to the decision of **Sarat Padhi** (supra) submits that the observation of this Court in **Debraj Mallika Vrs. The Collector** reported in **1978(45) CLT 313**, a subject matter of reference before the Full Bench was disapproved and it has been categorically held therein that the provision is directory in nature. It is further submitted that the minority view expressed in Sarat Padhi case with the interpretation to the expression 'at least 15 days' as appearing in Section 24(2)(c) of the Act though has been dealt with, the conclusion at the end is that a prejudice is shown to be caused to the petitioner as a result of short notice being received on 26th October, 2024. The sum and substance of the contention as advanced by Mr. Bose, learned counsel is that two of the other conditions, such as, requirement of a notice and the margin of time besides service of notice to be mandatory but it shall have to be a period counted from the date of notice issued with the meeting for no-confidence motion to be held, otherwise, any such other interpretation would frustrate the very exercise which has so been held by the Full Bench of this Court in **Sarat Padhi** (supra).

5. Mr. Nayak, learned AGA for the State corroborates and supports the contention of Mr. Bose, learned counsel for the private opposite parties and submits that there has been no illegality committed in the issuance of notice and the same having been served on 26th October, 2024, there is due compliance of Section 24(2)(a) & (c) of the Act, hence, the writ petition at the behest of the petitioner is liable to be dismissed allowing the vote of confidence to take place on the scheduled date.

6. For better appreciation, it is profitable to quote the extract of the relevant provisions, such as, Section 24(1) &(2) of the Act and the same is reproduced herein below;

> "24. Vote of no confidence against Sarpanch or NaibSarpanch:
>
> (1) Where at a meeting of the Grama Panchayat specially convened by the Sub-divisional Officer in that behalf, a resolution is passed, supported by a majority of not less than two-thirds of the total membership of the Grama Panchayat, regarding want of confidence in the Sarpanch or Naib-Sarpanch, the resolution shall forthwith be forwarded by the Sub-Divisional Officer to the Collector, who shall immediately on receipt of the resolution publish the same on his notice board and with effect from the date of such publication, the member holding the Office of Sarpanch or the Naib Sarpanch, as the case may be, shall be deemed to have vacated such Office.
>
> (2) In convening a meeting under Sub-Section (1) and in the conduct of business at such meeting, the procedure shall be in accordance with such rules, as may be prescribed, subject however to the following provisions, namely:
>
> (a) no such meeting shall be convened except on a requisition signed by at least one-third of the total membership of the Grama Panchayat along with a copy of the resolution proposed to be moved at the meeting;
>
> (b) XXX XXX
>
> (c) the Sub-Divisional Officer on receipt of such requisition shall fix the date, hour and place of such meeting and give notice of the same to all the members holding Office on

the date of such notice along with a copy of the requisition and of the proposed resolution, at least fifteen clear days before the date so fixed;

(d) the aforesaid notice shall be sent by post under Certificate of posting and a Copy thereof shall be published at least seven days prior to the date fixed for the meeting in the notice-board of the Samiti;

(e) the proceedings of the meeting shall not be invalidated merely on the ground that the notice has not been received by any member;

(f) XXX XXX

(g) XXX XXX

(h) no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Sarpanch or Naib-Sarpanch, as the case may be, shall be taken up for consideration at the meeting;

(i) if the number of members present at the meeting is less than two-thirds of the total membership of the Grama Panchayat, the resolution shall stand annulled;

(j) if the resolution is passed at the meeting supported by the majority as specified in Sub-Section(1), the Presiding Officer shall immediately forward the same in original along with the record of the proceedings to the Collector who shall forthwith publish the resolution in accordance with the provisions of Sub-Section (1); and

(k) XXX XXX."

7. In so far as the requisition is concerned as at Annexure-3, there is no denial to the fact that it has been at the instance of the Members in favour of the vote of confidence. The only grievance of the petitioner against it is that such requisition has not been accompanied with a copy of the resolution. On a bare reading of Annexure-4, the Court finds that along with the requisition, the proposed resolution was dispatched to the petitioner, which is said to have been received by him on 26th October, 2024. Mr. Palit, learned Senior Advocate for the petitioner alleges that notwithstanding any such claim with reference to the impugned notice i.e. Annexure-4, the fact remains, the petitioner was never served with a copy of the resolution being sent with the requisition i.e. Annexure-3 but the Court is not in agreement with such a plea for the fact that the same stands negatived by Annexure-4. In fact, in course of hearing, this Court had directed the State by an order dated 6th November, 2024 to file an affidavit through opposite party No.3 with regard to issuance of notice along with requisition, whether, was accompanied with a copy of the proposed resolution, which has been duly complied with. The opposite party No. 5 has filed the affidavit today stating therein that a copy of the resolution duly attested was sent along with the requisition while impugned notice was issued. Such affidavit dated 7th November, 2024 filed by opposite party No. 5 is accepted and taken on record. Along with the said affidavit, relevant documents have been furnished for perusal of the Court to show and satisfied that a copy of the resolution was in fact sent along with the requisition and was ultimately served on the petitioner. Besides the above, the private opposite parties obtained information under the RTI Act and the same is produced in Court with an affidavit sworn by opposite party No.10 again to convince the Court that there has been due compliance with the sending of a copy of the proposed resolution with Annexure-3.

As against the matters brought to the notice of the Court with the affidavits filed by opposite party No.5 and opposite party No.10, the Court, on an overall assessment and keeping in view the plea advanced from the side of the petitioner, reaches at a conclusion that there has been compliance of Section 24(2)(c) of the Act. The said fact is also verified from the impugned notice i.e. Annexure-4, hence, there is no escape from the conclusion that the petitioner was issued with the impugned notice on the basis of a requisition received along with a copy of the proposed resolution.

8. In so far as prejudice aspect is concerned, there is nothing on record to suggest that the petitioner was ever subjected to after having received the impugned notice i.e. Annexure-4 on 26th October, 2024. Of course, in Nilambar Majhi (supra), it has been held by this Court that prejudice is to be established. In the said decision, the authority of the Full Bench of this Court in Sarat Padhi has been referred to. In the facts and circumstances of the case therein, since the notice was signed on 13th May, 2005 and was issued on 16th May, 2005, in absence of clear fifteen days notice in view of Section 24(2)(c) of the Act, it was held that the exercise is invalid. A distinction sought to be made by Mr. Bose, learned counsel for the private opposite parties that in the present case, no real prejudice has been caused to the petitioner for the fact that he was made aware of the vote of confidence to be held on 8th November, 2024 and that apart, effort was made to ensure such service of notice on 23rd October, 2024, 24th October, 2024 as well as 25th October, 2024 and at last, it could be served on 26th October, 2024. The contention is that the notice was issued on 19th October, 2024, the date on which, it was dispatched so revealed from Annexure-4, hence, the exercise having been initiated on 19th October, 2024 itself, no case of prejudice is proved and the decision in **Nilambar Majhi**(supra) is, therefore, clearly distinguishable. The Court is inclined to accept the contention of Mr. Bose, learned counsel for the private opposite parties since because in **Nilambar Majhi** (supra), there was a delay of three days in dispatching the notice, hence, was the prejudice, however, it is not the case vis-à-vis the petitioner, as the notice was signed on 19th October, 2024 and immediately dispatched on the same day. The point on prejudice as has been raised by Mr. Palit, learned Senior Advocate was also taken cognizance of by this Court in **Nirakar Sethi Vrs. State of Odisha & others 2022 (I) OLR 377**, wherein, it has been held that no confidence motion would stand vitiated only if the prejudice is shown to have been caused and proved. Having regard to the plea of the petitioner with respect to the shortage of notice and the exercise undertaken on the vote of confidence with the notice dated 19th October, 2024 signed and dispatched on 19th October, 2024 and the fact that the motion was well within the knowledge of the petitioner, he having received such notice on 26th October, 2024, being alive to the settled legal position discussed hereinabove, the Court is not inclined to hold that the notice as such to be invalid. Regard being had to the settled law that fifteen days notice is necessary from the date of notice being signed and dispatched irrespective of any such service of the same on the delinquent Sarpanch or Naib-Sarpanch, as the case may be, anytime within a period of less than fifteen days from the date of meeting to be held, it shall

not be vitiated, the irresistible conclusion is that impugned notice under Annexure-4 having been issued on 19th October, 2024, the statutory mandate of at least fifteen days before the motion to be held has been duly complied with. With the discussions as aforesaid, the Court is of the final view that no case is made out for interference.

9. Hence, it is ordered.

10. In the result, the writ petition stands dismissed.

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

12. Urgent copy of this order be issued to Mr. Bose, learned counsel for the private opposite parties as per the rules and in course of the day since requested.

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

Result of the case :
Writ Petition dismissed.

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2024 (III) ILR-CUT-1130

Dr. NIHAR RANJAN RAY
V.
ANANYA ROUTRAY & ANR.

(CRLREV NO. 681 & 699 OF 2023)

12 NOVEMBER 2024

[R.K. PATTANAIK, J.]

Issues for Consideration

(1) Whether a wife can claim maintenance under the Protection of Women from Domestic Violence Act independently even she is getting maintenance by virtue of Order passed in other laws.

(2) Whether the affidavit of wife with regard to income of husband/ assets & liability is straightaway to be accepted without ascertaining the same.

Headnotes

(A) PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 23 – Interim Maintenance – Claim – Whether a wife can claim maintenance under this section independently even she is getting maintenance by virtue of order passed in other laws.

Held: Yes – Independent reliefs may be granted to an aggrieved wife under the D.V. Act besides other laws **–** There is no bar with necessary adjustment made with a set off, if there is an earlier order by any of the Courts **–** The only requirement while considering quantum of maintenance is that the latter

Court allowing such maintenance under any law to direct set off to reconcile any such earlier orders, otherwise, it would result in granting the relief more than once causing severe prejudice to the husband. (Para 11)

(B) PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 23 – Interim Maintenance – Affidavit disclosing asset & liability – Affidavit was filed by the wife but the same was not filed by the husband – Whether the affidavit of the wife is to be accepted straightaway at its face value without any exercise to ascertain the income of the Husband by the Court.

Held: It is reiterated that directly accepting the disclosure affidavit of the wife could unlikely to serve the purpose, as any such maintenance, even if interim, may not be realized, with an amount determined, which may go on the higher side, with the husband having no real means to comply and honour it **–** For a just decision, it would rather be a proper course for a Court to have a pragmatic approach to consider the materials made available by the wife and if not sufficient, on a subjective satisfaction reached at, to determine the quantum of maintenance even by undertaking an exercise demanding the employer and such other institutions including Bank to furnish relevant papers on the income and assets besides liabilities of the employee husband. (Para 13)

Citation Reference

Rajnesh Vrs. Neha & Anr., **OLR 1 SC 2021 ─ referred to.**

List of Acts & Rules

Protection of Women from Domestic Violence Act, 2005; Protection of Women from Domestic Violence Rules, 2006.

Keywords

Domestic violence, Interim maintenance, Maintainability of two maintenance applications, Affidavit disclosing asset & liability, Acceptance of affidavit, Income of husband.

Case Arising From

Orders dated 24th November, 2023 passed in CRLA No. 78 of 2022 & CRLA No. 40 of 2022 passed by the learned 2nd Additional Sessions Judge, Cuttack.

Appearances for Parties

For Petitioners : M/s. S.K. Dash & Associates.
For Opp.Parties : M/s. A.K. Mohanty & Associates.

Judgment/Order

Judgment

R.K. PATTANAIK, J.

As a common order is under challenge, both the revisions are, therefore, disposed of analogously.

CRLREV No.681 of 2023:

1. Instant revision is filed by the petitioner husband challenging the impugned decision of learned Court below dated 24th November, 2023 passed in CRLA No. 78 of 2022 on the grounds inter alia that the same is erroneous and against the weight of materials on record and hence, the same is liable to be set aside.

CRLREV No.699 of 2023:

2. This revision is at the behest of the aggrieved wife questioning the correctness, legality and judicial propriety of the order of the learned Court below in CRLA No.40 of 2022 seeking modification of the same with enhancement of maintenance awarded to her with such other consequential and for reliefs.

3. In fact, the aggrieved wife with her daughter with an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the D.V. Act') read with Rule 6(1) of the Protection of Women from Domestic Violence Rules, 2006 have approached the Court of learned S.D.J.M. (Sadar), Cuttack in D.V. Misc. Case No.162 of 2021 (now pending before the Transferee Court) seeking appropriate reliefs including maintenance against the husband. In the said proceeding, an application under Section 23 of the D.V. Act was filed for interim monetary relief with a plea that the husband is having an earning of Rs.3 lac a month having other valuable landed properties at his disposal, which was objected to with a plea that net income per month to be Rs.82, 853/- only, considering which, learned J.M.F.C., Cuttack by order dated 6th May, 2022 disposed it of with a direction to make payment of Rs.25,000/- every month payable to them from the date of filing of the same i.e. on and from 20th September, 2021. The said order in D.V. Misc. Case No.162 of 2021 was challenged by both the sides, one, in CRLA No.40 of 2022 by the aggrieved wife and the other, by the husband in CRLA No.78 of 2022. The said appeals were disposed of by a judgment dated 24th November, 2023 of learned 2nd Additional Sessions Judge, Cuttack, whereby, the order of maintenance under Section 23 of the D.V. Act directed by learned J.M.F.C., Cuttack was upheld. So, to say, the appeals filed by both the parties stood dismissed on contest, however, without cost. Since the maintenance amount considered to be less and meagre, the aggrieved wife has sought for modification of the impugned order dated 24th November, 2023 seeking its enhancement. The husband equally aggrieved challenged it on the ground that there is gross error committed by the learned Courts below in exercising the jurisdiction under the D.V. Act, hence, opposed any such order of maintenance payable to the wife and daughter on various grounds. On the one hand, the wife demands higher maintenance than it has been allowed in her favour, whereas, on the other hand, the husband outrightly denies it

primarily on the ground that he is already directed to pay interim maintenance by the learned Judge, Family Court, Cuttack in connection with C.P. No.468 of 2021.

4. The relationship between the parties is not in dispute. So revealed from the pleadings on record, the estranged couple married in the year, 2010 and their daughter was born in 2012 and according to the wife, she stayed with her husband till 20th July, 2021, the date on which, there was separation. It is alleged against the husband that he is guilty of domestic violence, hence, was the separation. After the parties separated in 2021, the application under Section 12 of the D.V. Act was filed by the wife, wherein, the husband filed show cause and thereafter, both made disclosures of assets and liabilities in terms of the decision of the Apex Court in **Rajnesh Vrs. Neha and another OLR 1 SC 2021**. However, the husband's affidavit since did not reveal the required information with relevant documents, it was challenged by the wife and such objection was disposed of on 5th July, 2022 by an order of learned J.M.F.C., Cuttack with a finding that the latter had indeed failed to file an affidavit in the light of the decision (supra) and direction for him to file a fresh one vis-à-vis his assets and liabilities. It is made to understand that despite such a direction, no further affidavit is filed by the husband. In the meanwhile, learned J.M.F.C., Cuttack disposed of the application filed under Section 23 of the D.V. Act with a direction to the husband to pay interim maintenance of Rs.25,000/-. As earlier stated, the said order was challenged by both the spouses and it has resulted in passing of the impugned judgment dated 24th November, 2023. The question is, therefore, whether, such decision of the learned 2nd Additional Sessions Judge, Cuttack, while disposing of the appeals can be sustained in law?

5. Heard Mr. Mohanty, learned counsel for the aggrieved wife and Mr. Dash, learned counsel for the husband.

6. Perused the pleadings of the parties on record.

7. Referring to the facts pleaded on record, Mr. Dash, learned counsel for the husband submits that the wife did not disclose any such maintenance order passed in C.P. No. 468 of 2021, hence, was guilty of suppression of facts. It is further submitted that learned J.M.F.C., Cuttack did not consider the said fact and laying much emphasis on the decision of the Apex Court in **Rajnesh** (supra), allowed the interim maintenance of Rs.25,000/- a month. It is contended by Mr. Dash, learned counsel that the order of maintenance dated 6th May, 2022 was passed behind the back of the husband. That apart, the husband, as according to Mr. Dash, learned counsel, is not liable to pay further maintenance after the order in C.P. No.468 of 2021. The contention is that the learned Courts below miserably failed to appreciate the materials on record and such order of maintenance of learned Judge, Family Court, Cuttack, which has been modified by order dated 8th February, 2023 in W.P.(C) No.3864 of 2022 filed by the husband against the order in I.A. No.52 of 2021 arising out of the proceeding in C.P. No.468 of 2021 with a direction for him to pay an amount of Rs.15,000/- per month till disposal of the I.A. With the above plea and submission, Mr. Dash, learned counsel would finally submit that the

impugned decision of learned Court below for an amount of Rs.25,000/- towards interim maintenance under the D.V. Act to be an erroneous finding, morefully when, the wife suppressed the fact of the order in C.P. No.468 of 2021 and for the fact that the husband could not have been directed to pay maintenance to her twice.

8. On the contrary, Mr. Mohanty, learned counsel for the aggrieved wife submits that both the learned Courts below erred in allowing interim maintenance under Section 23 of the D.V. Act for an amount of Rs.25,000/- only as the same is grossly disproportionate to the needs and demand of the wife, who is having an additional responsibility to look after their daughter. It is submitted that the husband did not file a proper affidavit of disclosure of assets and liabilities as was directed by learned J.M.F.C., Cuttack. Upon receiving the objection against the disclosure affidavit and as the husband was required to file the same once again but the direction was brazenly flouted by him as further alleged. It is the contention of Mr. Mohanty, learned counsel that there is no bar for the Courts to entertain requests for monetary reliefs simultaneously under the D.V. Act as well as any other laws in force, as in the present case, learned Family Court, Cuttack granted maintenance in favour of the wife in a proceeding of divorce filed by the husband. The further contention is that the Courts are having parallel jurisdictions and hence, learned J.M.F.C., Cuttack did have the powers to grant maintenance besides other reliefs entertaining an application Section 12 of the D.V. Act notwithstanding the order of maintenance by learned Judge, Family Court, Cuttack. In so far as the quantum of maintenance is concerned, Mr. Mohanty, learned counsel submits that considering the social status and financial needs, an amount of Rs.25,000/- is not only inadequate but also exceptionally low, the fact, which was completely lost sight of by the learned Courts below. Furthermore, it is submitted that when the husband failed to comply the order to file a fresh affidavit on disclosure of assets and liabilities, in absence of any such rebuttal evidence, the learned J.M.F.C., Cuttack and learned Court below, for that matter, should have accepted the affidavit filed by the wife, however, such a duty cast upon them was not discharged, rather, it was abdicated. Not only that, according to Mr. Mohanty, learned counsel, learned Courts below neither accepted the affidavit of the wife nor made any attempt to ascertain the real income of the husband, who spared no stones unturned to conceal the same and also the assets, an act, which is clearly deliberate and intentional. The plea is that the income of the husband could have been ascertained with the process of the Court, an exercise, which was not undertaken and the maintenance was casually determined with a guess work clearly prejudicial to the interest of the wife and daughter, who are striving hard and struggling in life to survive. Advancing such an argument, Mr. Mohanty, learned counsel submits that the husband is having handsome income, even admitted before the learned Judge, Family Court, Cuttack and therefore, the learned Courts below erred completely in allowing an interim maintenance of Rs.25,000/- and also produced a copy of the Staff Regulations and Staff Rules of World Health Organization (WHO) by claiming that he serves as a Medical Officer and held different prized posts under the WHO and currently being

posted as the Sub-Regional Team Leader (SRTL), WHO at Bhubaneswar. It is alleged that the order in W.P(C) No.3864 of 2022 towards interim measure with a remand of the matter for disposal by learned Judge, Family Court, Cuttack after a rehearing on interim maintenance has been misinterpreted.

9. In reply and response to the above, Mr. Dash, learned counsel for the husband submits that maintenance is being regularly paid to the wife as per the order of learned Judge, Family Court, Cuttack and with false allegations, learned Courts below have been misled, as a result of which, a further sum of Rs.25,000/- was allowed accepting the plea that the husband admitted gross salary of Rs.2,46,000/- a month and made the statement on oath in C.P. No.468 of 2021 in that regard. On the whole, denying any such income as claimed by the wife, in reply to the same, Mr. Dash, learned counsel would finally submit that the husband is on a consolidated remuneration with a contractual engagement, hence, a sum of Rs.25,000/- towards interim maintenance could not have been allowed over and above an amount of Rs.35,000/- directed in C.P. No. 468 of 2021.

10. The dispute relates to the income of the husband. On the one side, the wife claims that the salary of her husband is around of Rs.3,00,000/- per month and on the other hand, the same is denied by staking a claim that it is far less considering the net income besides having other liabilities to be borne by him. As earlier stated, the parties were directed to file affidavits vis-à-vis disclosure of assets and liabilities, to which the husband though complied it but on the objection of the wife and satisfaction of the Court, he was directed to file a fresh one but did not comply the same. In course of hearing, Mr. Mohanty, learned counsel for the wife submits that due to non-compliance of such a direction, the right to file affidavit was struck off by order dated 30th January, 2024 in D.V. Misc. Case No.162 of 2021. A copy of the said order is at Annexure-4 to the rejoinder affidavit with a submission by Mr. Mohanty, learned counsel that the affidavit filed on 8th March, 2022 on disclosure of assets and liabilities by the husband was rejected on 5th July, 2022 and it was followed by Annexure-4. Against the aforesaid backdrop, the moot point is, whether, the interim maintenance of Rs.25,000/- a month in favour of the wife and daughter to be justified? Whether, the order of maintenance directed against the husband needs enhancement? As to if, the plea of the husband against the interim maintenance under Section 23 of the D.V. Act is to accepted?

11. As regards, the jurisdiction of the Court of first instance to grant interim maintenance in spite of an order in C.P. No.468 of 2021, law is no more res integra that it can be entertained and allowed despite overlapping jurisdictions as has been summed up by the Apex Court in **Rajnesh** (supra). In other words, independent reliefs may be granted to an aggrieved wife under the D.V. Act besides other laws. A wife may claim maintenance interim or final under the D.V. Act besides other laws and as such, there is no bar with necessary adjustment made with a set off, if there is an order earlier by any of the Courts. In other words, any such order in C.P. No.468 of 2021 under Sections 18 and 20 of the Hindu Adoption and Maintenance

Act, 1956 in favour of the wife and minor daughter passed in I.A. No.52 of 2021 is not to foreclose such claim under Section 23 of the D.V. Act as it has been rightly held by learned Court below. The only requirement while considering the quantum of maintenance is that the latter Court allowing such maintenance under any of the laws is to direct set off to reconcile any such earlier orders, otherwise, it would result in granting the relief more than once causing severe prejudice to the husband. In the case at hand, an amount of Rs.35,000/- a month towards maintenance was modified in W.P.(C) No.3864 of 2022. In any view of the matter, an order of maintenance in C.P. No.468 of 2021 is in place and such further monetary relief as has been sought for against the husband and allowed by learned J.M.F.C., Cuttack in D.V. Misc Case No.162 of 2021 shall have to be with a set off. So, therefore, the conclusion of the Court is that the maintenance under the D.V. Act is payable to the wife even though she has been allowed maintenance in divorce proceeding and any such relief would not be foreclosed. The Apex Court in **Rajnesh** (supra) discussed in great detail while dealing with the question of overlapping jurisdictions, hence, the plea of the husband that he is not liable to pay any such amount of Rs.25,000/- on the ground advanced is misconceived but such payment shall be subject to the set off against the sum determined and payable as per the interim order in C.P. No.468 of 2021.

12. Furthermore, in **Rajnesh** (supra), the Apex Court held and concluded that affidavits of assets and liabilities are to be filed by the parties as per the Enclosures-I, II, & III even in respect of interim maintenance in all such proceedings including the proceedings pending before the Family Court, District Court, Magisterial Court, as the case may be. It has also been held therein that for non-payment of maintenance by the husband, the defence filed by him may even be struck off. In the case at hand, the right to file affidavit on disclosure of assets and liabilities by the husband is taken away by order dated 30th January, 2024 in D.V. Misc. Case No. 162 of 2021. The intent and purpose of such action by a Court is primarily to ensure recovery of maintenance at the earliest and to avoid prolonged litigation between the parties. In the present case, though not the defence but the right to file disclosure affidavit by the husband has been barred as the direction dated 5th July, 2022 of learned J.M.F.C., Cuttack was not complied with till January, 2024.

13. The next question is, whether, the affidavit of the wife was to be accepted without any exercise to ascertain the income of the husband? Mr. Mohanty, learned counsel for the wife submits that when the husband failed to file such an affidavit, learned J.M.F.C., Cuttack had no other option except to accept the disclosure made by the wife. The law decided in **Rajnesh** (supra) mandates the parties to file the affidavits disclosing the respective assets and liabilities. If it is avoided by one of the spouses, whether, the affidavit of the other is to be accepted straightaway? Whether, a Court is to base its decision on interim or final maintenance accepting the disclosure affidavit of the wife at its face value? An affidavit of the wife filed may be accepted but under such circumstances, it may so happen that the order of maintenance could unlikely be properly executable. Unless, the income of the husband is at least determined, even at such stage, while considering the interim

maintenance, it may possibly lead to a futile exercise, where she may not receive the full maintenance at all. Rather, in such a situation, a Court shall have to undertake an exercise to ascertain the income of the husband in directing the employer of the spouse and others to share all such information necessary. In the instant case, learned J.M.F.C., Cuttack declined to consider such a plea of the wife on the premise that any such direction to collect information from the employer and others to be impermissible as the law is that a Court cannot be used as a device to gather evidence. When such a request was made, it was required to be duly examined. It is not that the Court reached a dead end having no powers. Such an exercise calling for the records from other sources is definitely an option open for a Court and it is not absolutely barred. In the considered view of the Court, learned J.M.F.C., Cuttack could not have remained silent, as in such a situation, it would be the wife, who stands at a disadvantageous position, morefully when, the affidavit filed by her was again not accepted. It is reiterated that directly accepting the disclosure affidavit of the wife could unlikely to serve the purpose, as any such maintenance, even if interim, may not be realized, with an amount determined, which may go on the higher side, with the husband having no real means to comply and honour it. For a just decision, it would rather be a proper course for a Court to have a pragmatic approach to consider the materials made available by the wife and if not sufficient, on a subjective satisfaction reached at, to determine the quantum of maintenance even by undertaking an exercise demanding the employer and such other institutions including Bank to furnish relevant papers on the income and assets besides liabilities of the employee husband.

14. If the order dated 6th May, 2022 in D.V. Misc. Case No.162 of 2021 was without the participation of the husband, at least, the learned Court below, being the Court of facts and law, could have resorted to such an exercise. A Court cannot be a mute spectator in such a situation rather shall have to be proactive and participative in order to do complete justice. At the cost of repetition, it is stated that no worthy purpose would be achieved merely by striking off the right of the husband to file the disclosure affidavit, which, in the present case, has of course taken place later on. Rather, the endeavour of a Court should be to do justice to the parties. By not taking up any such exercise to call for the information regarding the income of the husband from such other sources available, an order of maintenance is to prejudice both. Neither, learned J.M.F.C., Cuttack considered the above aspect nor learned Court below, which has had the option to call for such information vis-à-vis income of the husband when his gross income was disclosed in C.P. No. 468 of 2021 being revealed by the wife. Necessary and a fruitful inquiry is always necessary, as according to the Court, even at the time of considering interim maintenance and the same cannot simply be avoided. As fixing an amount without due exercise being undertaken would substantially prejudice the wife, in particular, who is normally found to be at the receiving end. To hold that, only upon the evidence adduced by the parties in a proceeding, an amount of maintenance is to be determined and awarded without a detailed inquiry even for interim relief and when the spouses are

bound to furnish affidavits as per the decision in **Rajnesh** (supra), it would certainly lead to a situation, where the wife would struggle to make the ends meet. An aggrieved wife is to suffer a lot and it becomes more burdensome, when she is to look after a child and bear other responsibilities and to defer any such just and timely interim maintenance payable befitting her life style and social status would be disastrous, particularly where a Court fails to deal with it properly leaving a decision to be finally taken in the proceeding, disposal of which, normally takes a longer time. The very survival and sustenance would be at stake, if there is no proper interim maintenance from the very inception, hence, therefore, an onerous duty and responsibility lies with a Court to exercise powers in a manner that such a miserable situation is avoided. A husband of sound means and financial capacity in a domestic relationship cannot be allowed to shirk away from the marital obligation to maintain his better half as in the present case and therefore, learned Courts below had the responsibility to consider it with reference to the material evidence and if needed, by exploring the alternate option to call for the necessary information and documents on his income, assets and liabilities. Even after, it was claimed by the husband that he receives a consolidated remuneration of Rs.82,853/- per month and to bear such other liabilities, since it was to be confirmed and he also did not submit the disclosure affidavit, without any clear satisfaction being reached at considering the affidavit of the wife, in the humble view of the Court, learned Court below was required to undertake the exercise with requisitions issued to his employer and others to provide the relevant information to determine the net income and also the amount of just maintenance payable to the wife. As a salary may be attached under law to the extent permissible in order to recover the dues, hence, it was the bounden duty of the learned Courts below to call for the required information, when it was felt otherwise not to accept the disclosure affidavit of the wife right away and the husband failed to file a fresh affidavit. Having concluded so, the Court reaches at an irresistible conclusion that the impugned decision on interim maintenance payable to the wife is liable to be set aside with a direction to learned J.M.F.C., Cuttack to go for an exercise as suggested to determine the just interim maintenance payable to the wife and also to set it off against any such amount receivable by her pursuant to such orders in C.P. No.468 of 2021.

15. Hence, it is ordered.

16. In the result, the revisions stand disposed of. As a logical sequitur, for the reasons stated, the impugned decision of learned Court below dated 24th November, 2023 passed in CRLA Nos. 40 and 78 of 2022 by the learned 2nd Additional Sessions Judge, Cuttack, is hereby set aside with a consequential direction to the learned J.M.F.C., Cuttack to undertake the exercise directed as above in connection with D.V. Misc. Case No.162 of 2021, if the evidence on record is considered to be inadequate followed by a decision on interim maintenance. It is further directed that in case, the proceeding is at an advanced stage, the learned Court below shall examine the evidence in its entirety and to proceed to deal with the question of maintenance and whether, the same needs enhancement of course with the set off

applied and thereafter, to pass a final order as per and in accordance with law regard being had to the observations made and directions issued herein before.

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

Headnotes prepared by :
Shri Jnanendra Kumar Swain (Judicial Indexer)
(Verified by Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
CRLREV disposed of.

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2024 (III)-ILR-CUT-1139

UTTAM KUMAR DAS
V.
BISWAMBAR DAS & ORS.

(RSA NOS. 167 & 180 OF 2024)

09 OCTOBER 2024

[SASHIKANTA MISHRA, J.]

Issue for Consideration

Whether the provision U/s. 22 of Hindu Succession Act is applicable only to a proposed sale and not to a sale already executed.

Headnotes

HINDU SUCCESSION ACT, 1956 – Section 22 – The preferential right to acquire property – The property in question is ancestral joint family property of the plaintiff and defendant Nos. 2 to 5 – The property continues to be jointly held – There is no cogent proof of partition of the disputed property among the co-sharers prior to execution of the sale deed dated 21.11.2008 – Whether the provision U/s. 22 of 1956 Act is applicable only to a proposed sale and not to a sale already executed.

Held: No – It would be immaterial whether the sale has been already effected or not – In other words, only because the property in question has already been sold cannot take away the valuable right of pre-emption of the other co-sharers as any other interpretation would serve to nullify the provision itself – The intention of the legislature is clear and unequivocal i.e. to prevent a stranger to a family from purchasing a joint family property without obtaining prior permission of the co-heirs. (Para 20)

Citations Reference

Bijay Krushna Dwivedy v. Laxmi Dei, **1 2009 (1) C.L.R. 916**; Ganesh Chandra Pradhan vs. Rukmani Mohanty & Ors., **AIR 1971 Ori 65 – referred to.**

List of Acts

Transfer of Property Act, 1882; Hindu Succession Act, 1956; Specific Relief Act, 1963.

Keywords

The preferential right to acquire property, Joint family property, Right of pre-emption, Succession.

Case Arising From

Judgment and decree dated 07.03.2024 and 21.03.2024 respectively passed by learned District Judge, Balasore in R.F.A. No. 90/2018 & R.F.A. No. 7/2021.

Appearances for Parties

For Appellant : Mr. Swarup Kumar Patnaik
For Respondents: Mr. Amit Prasad Bose (Respondent No. 1)
Mr. Dwarika Prasad Mohanty (Respondent Nos. 4 to 6)

Judgment/Order

Judgment

SASHIKANTA MISHRA, J.

Both the appeals have been filed by the Plaintiffs and Defendant Nos.3 to 5 against the common judgment passed on 7.3.2024 followed by decree by learned District Judge, Balasore in R.F.A. No.90/2018 and R.F.A. No.7/2021. By such common judgment, the judgment dated 07.3.2024 followed by decree passed by learned Civil Judge (Sr. Division), Jaleswar in C.S. No.533/208 of 2010/2009 was partly confirmed.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. The Plaintiffs filed the suit exercising their right of pre-emption to repurchase the disputed property and for permanent injunction. The property described in 'kha' schedule of the plaint relates to the relief claimed for right of pre-emption and the property described under 'ga' schedule relates to the relief of permanent injunction. The Plaintiffs' case is that they and Defendant Nos.2 to 5 are related through their common ancestor Nrusingha Nath Das, who died leaving behind his two sons, Sambhunath and Gadadhar. The branch of Gadadhar became extinct in the absence of any heirs. The Plaintiffs and Defendant Nos. 2 to 5 represent the branch of Sambhunath. 'Ga' schedule land is claimed to be the ancestral undivided property comprising of a joint house and homestead of the parties. There is a residential house of the plaintiffs and a temple of the family deity, Goddes Durga on one of the plots. The Plaintiffs are occupying the said house and also worshipping the deity since the time of their ancestors. The father of the Plaintiff No.1 was also possessing the 'ga' schedule as the only surviving member of the family. After his death, the property devolved upon his legal heirs. Further, after

marriage of his daughter, Plaintiff No.1 and his deceased brother, Laxminarayan occupied the house. The property also stands recorded jointly in the M.S. R.O.R. After death of Laxminarayan, his widow Benilata Das (Plaintiff No.2) is possessing his share. Defendant Nos.2,3 and 4 executed an agreement in favour of Plaintiff No.1 for their undivided interest out of 'ga' schedule property on receipt of Rs.23,000/- and relinquished their share over such property. On 18.1.2009, Defendant No.1 came to the spot and attempted to cut the fence and trees from the land and tried to take forcible possession. On protest by the plaintiffs, he gave out that he had purchased a portion of 'ga' schedule land from Defendant No.2. On further inquiry, the plaintiffs came to know that on 20.2.2009, Defendant No.2 had executed a registered sale deed for 'kha' schedule and some other lands in favour of Defendant No.1 on 21.11.2009 vide R.S.D. No.2420. It is, however, alleged that said sale deed has never been acted upon in the absence of payment of consideration money and delivery of possession to the purchaser. It is also claimed that the Defendant No.2 could not have sold any property out of 'ga' schedule land to Defendant No.1 by executing an agreement in favour of Plaintiff No.1. Defendant No.1 being an imposter and stranger to the family of the Plaintiff and 'kha' schedule land being part of 'ga' schedule land, which is ancestral joint family property, has no right to possess any portion of the said land in view of the provisions under Section 44 of the Transfer of Property Act. It is further claimed that as per Section 22 of the Hindu Succession Act, the Plaintiffs have preferential right to purchase the share of Defendant No.2 in the event she proposed to transfer her share and interest out of joint family property. But prior to execution of the alleged sale Defendant No.2 never offered to sell the property to the Plaintiffs ignoring their preferential right. It is further stated that the Plaintiffs are ready to purchase the property at genuine market price. On such facts, the suit was filed to exercise the right of pre-emption with claim to repurchase the share of land sold by Defendant No.2 to Defendant No.1 out of the 'ga' schedule land and also to permanently injunct Defendant No.1 from entering into the property etc.

4. Defendant no.1 contested the suit by filing a written statement. It was claimed that 'ga' schedule land is not the undivided property of the Plaintiffs and Defendant Nos.2 to 5 as claimed. The agreement between them for relinquishment of share was also denied. It was specifically averred that one month before execution of the sale deed in question the vendor (Defendant No.2) came to her with her caretaker-Gajendra Mohanty and proposed to sell the suit land which was in her exclusive possession as she was in need of money for treatment by stating that she had got share in the property left by her father by way of amicable settlement between her, the Plaintiffs and Defendant No.2 to 4 by way of Gharoi Bantan Patra in the year 1996. As such she was not required to take any permission of the co-sharers before selling the property. Further, the plaintiff no.1 had himself sold the properties to other persons admitting the family partition. On being offered, the Plaintiffs and other Defendant No.3 to 5 refused to purchase the land for which he sold it to Defendant No.1 and since then, he has been possessing the suit land by making it fit for construction of house.

5. Defendant No.2 filed a written statement taking the stand that one month before executing the sale deed in favour of Defendant No.1, she had approached the Plaintiff No.1 with her caretaker and proposed to sell the suit land. Further, the suit land was allotted to her through an amicable settlement between the Plaintiff and Defendant Nos.2 to 4 in the year 1996. As such she has every right to sell the property. Since the Plaintiffs and Defendant Nos.3 to 5 refused to purchase the same, she sold it to Defendant No.1.

6. Defendant Nos.3,4 and 5 also filed a separate written statement, admitting more or less, the plaint averments. It is their case that the property in question being joint family undivided home, homestead and temple property has never been partitioned by metes and bounds. As such, Defendant No.2 has no saleable interest of any specific portion of the property. Further, she never intimated her intention to the Plaintiffs or Defendant Nos.3 to 5 before sale of the property. Therefore, they and the plaintiffs have preferential right under Section 22 of the Hindu Succession Act to repurchase the share of Defendant No.2.

7. Basing on such rival pleadings, the trial Court framed the following issues for determination;

(1) Is the suit of the plaintiffs maintainable ?

(2) Is there any cause of action available to the plaintiffs to file this suit?

(3) Are the plaintiffs entitled to repurchase the 'kha' schedule land sold by defendant no.2 to defendant no.1 vide R.S.D. No.2420 dt.21.11.2008 by exercising their right of pre-emption?

(4) Can the defendants be permanently injuncted from entering upon the suit 'ga' schedule land, from making any interference in the peaceful possession of the same by the plaintiffs and from doing any act of destruction in respect of the said property?

(5) What are the other reliefs available to the plaintiffs?

8. Taking up the Issue No.3 for consideration at the outset, the trial Court, after analyzing the oral and documentary evidence and the settled position of law was not inclined to hold that the sale deed executed by Defendant No.2 in favour of Defendant No.1 is void and illegal. Further, analyzing the evidence adduced by Defendant No.1, particularly that of D.W.2, the trial Court held that the Plaintiffs and Defendant Nos.3 to 5 had sufficient notice of the intention of Defendant No.2 to sell the property but did not offer to purchase the same by taking recourse to the provision of Section 22 of the Hindu Succession Act. As such, the trial Court refused to grant the relief of repurchase.

On Issue No.4, the trial court, after analyzing the evidence on record held that Defendant No.1 being a stranger purchaser to the family of the Plaintiffs and having purchased undivided share out of the schedule 'kha' land, which is part of Schedule 'ga' land, and the property being in the nature of, home, homestead and place of worship of family deity, is not entitled to have joint possession of the land along with the plaintiff and other members of his family until he carves out the specific area of his purchased land either in a suit for partition or through a registered

instrument or through mutual settlement and therefore, if at all he has come into possession, he has to be ejected from the suit land.

9. With the above findings rendered on the principal issues, the trial Court decreed the suit in part by refusing to grant relief of re-purchase to the Plaintiffs but injuncted Defendant No.1 from having joint possession of 'ga' schedule land with the plaintiffs and their co-sharers till he carves out his purchased land in a suit for partition or by agreement.

10. Being aggrieved, the Plaintiffs preferred R.F.A. No.7/2017 against refusal of the trial Court to grant the relief of repurchase. Defendant No.1 filed R.F.A. No.90/2018 challenging the decree in restraining him from having joint possession over the 'kha' schedule land. The 1st appellate court heard both the appeals together and disposed of the same by a common judgment. After analyzing the law relating to preferential right of co-charers to acquire the property as per Section 22 of the Hindu Succession Act, the 1st Appellate Court held that the said right is available to a class-1 heir until partition is effected among all the heirs. The 1st Appellate Court further held that the Hindu family is presumed to be joint unless the contrary is proved and that he who sets up the plea of previous partition has to substantiate the same by adducing cogent evidence. Referring to the plea taken by the Defendant Nos.1 and 2 regarding prior partition and the so-called admission of prior partition made in different sale deeds, the 1st Appellate Court held that there is absence of specific evidence as to the extent of the property put to partition, who got how much share and how such partition was effected. Thus, the plea of prior partition was disbelieved and it was held that the property was undivided joint family property of the Plaintiffs and Defendant Nos.2 to 5. It was further held that once the plea of previous partition failed, the right of the parties for pre-emption as per Section 22 of the Hindu Succession Act cannot be taken away. In this regard, analyzing the evidence on record that Defendant No.1 could not prove that Defendant No.2 had brought to the notice of the Plaintiffs and Defendant Nos.3 to 5 her intention to transfer the property in question, the findings of the Trial Court on this score was held to be unsustainable. It was also held that Defendant No.1 being a stranger to the family of Niranjan cannot have the right to joint possession of the purchased land along with plaintiffs and defendant Nos.2 to 5 without effecting partition. It was thus held that the trial Court had rightly injuncted Defendant No.1 from possessing the property. The appeal (RFA No.90/2018) filed by Defendant No.1 was thus dismissed. The appeal (RFA No.7/2017) filed by the plaintiffs was allowed by setting aside the decree passed by the trial Court in refusing the relief of preemption by decreeing the suit of the Plaintiffs to exercise their right of pre-emption and by directing Defendant No.1 to execute a sale deed conveying 'kha' schedule property on receipt of consideration money within two months.

11. Being further aggrieved, the Defendants have filed both the Second Appeals that have been admitted on the following substantial questions of law;

(i) Are the Courts below correct in their approach in decreeing the suit of the plaintiffs by ignoring the earlier partition of the joint family property and the separate individual alienations made basins upon the same by the different members of the joint family vide Exhibits-D T, U, V and W?

(ii) Are the Courts below justified in granting the relief of permanent injunction at the behest of some members of the family against the other members of such family in not recognizing the alienations of property through registered instrument of sale?

(iii) Are the Courts below right in their approach with the finding that a transferee remaining in possession of the purchased land being a member of the family of the transferor can be permanently injuncted to come upon his purchased land in operation of Section 38 of the Specific Relief Act?

12. Heard Mr. S.K.Pattnaik, learned counsel for the Defendant No.1-Appellant, Mr. A.P. Bose, learned counsel appearing for Plaintiff No.1-Respondent and Mr. D.P. Mohanty, learned counsel appearing for Defendant-Respondent Nos.3 to 5.

13. Mr. Pattnaik assails the impugned judgment and decree by submitting that the 1st Appellate Court committed manifest error in referring to the provision under Section 22 of the Hindu Succession Act thereby completely ignoring that the same relates to a situation antecedent to transfer and not post transfer. Since the suit to exercise preferential right was filed after execution of the sale deed, Section 22 has no application. Furthermore, the 1st Appellate Court erroneously ignored the clear-cut admission of the Plaintiffs regarding previous partition as reflected in the recitals of several sale deeds marked Ext. A, C, E, D, F, G, H etc.. Mr. Pattnaik further argues that Ext.D is a sale deed executed by the Plaintiff no.1 in respect of a portion of the suit land in favour of one Sitansu Mohanty admitting therein the fact of previous partition. He concludes his argument by contending that Defendant No.1 has been perpetually injuncted even though there was no breach of obligation by him vis-à-vis the Plaintiffs as envisaged under Section 38 of the Specific Relief Act.

14. Per contra, Mr. Bose would argue that the concurrent findings of fact arrived at by both the Courts below regarding absence of prior partition cannot be a substantial question of law for adjudication in the present appeals. Mr. Bose further argues that the 1st Appellate Court has rightly drawn adverse inference as Defendant No.2 neither stepped into the witness box to depose as a witness nor was summoned by her vendee (Defendant No.1). On the contrary, D.W.2 admitted that the property was undivided and joint family property. He further argues that Section 22 applies to any immovable property. In the absence of any cogent proof of prior partition, the presumption of jointness cannot be ignored, more so as the R.O.R. shows the property to be jointly recorded. Under the circumstances, the 1st Appellate Court rightly held that the Plaintiffs have preferential right of purchase over the suit property.

15. Mr. D.P.Mohanty, learned counsel appearing for Defendant Nos.3 to 5 supports the arguments made by Mr.Bose as above and further argued that as per the settled position of law, the right of pre-emption can be exercised also after transfer has been affected.

16. It would be apposite to first refer to Section 22 of the Hindu Succession Act, which is quoted hereunder;

> *"(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.*
>
> *(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.*
>
> *(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.*
>
> *Explanation - In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."*

In explaining the purport and object of the above provision, in Mulla Principles of Hindu Law, Twentieth Edition (page 463) the following has been observed:

> *"This Section (Section 22) appears to have been thought necessary as an antidote to the inconvenient effects sometimes resulting from transfer to an outsider by a co-heir of his or her interest in property simultaneously inherited along with other co-heirs. The right declared by the Section is an analogous to the right of preemption which tends to raise clogs and fetters on the full sale and purchase of property and is in general regarded as opposed to enquiry and good conscience. xxx xxx xxx xxx xxx. The preferential right to acquire property under the section is confined only to cases of devolution of property upon two or more heirs specified in Class-1 of the Schedule."*

17. There is no dispute that Plaintiff No.1 and Defendant Nos.2 to 5 are members of the joint family. The 1st Appellate Court, after analyzing the oral and documentary evidence on record has held, and according to this Court rightly so, that there is no cogent proof of partition of the disputed property among the co-sharers prior to execution of the sale deed dated 21.11.2008 executed by Defendant No.2 in favour of Defendant No.1. Further, the 1st Appellate Court has held that Defendant No.1 is a stranger to the family. Apart from the fact that these are pure questions of fact arrived at by the Courts below basing on evidence on record, nothing was demonstrated as to how these factual findings are incorrect or erroneous. This Court therefore, finds no reason to differ from the findings of fact rendered by the 1st Appellate Court as regards the plea of prior partition. The so-called admission made by the Plaintiff in some sale deeds in the absence of specific proof as regards material particulars such as, extent of property put to partition,

allotment of individual shares to the cosharers etc. is of no consequence as has been rightly held by the 1st Appellate Court. Therefore, the factual position that emerges is, the property in question is ancestral joint family property of the Plaintiffs and Defendant Nos.2 to 5. Secondly, the property continues to be jointly held. Thirdly, the plea of partition raised by the Defendant Nos.1 and 2 is found to be without any basis. In such a situation, the question that arises is, what would be the effect of Section 22 of the Hindu Succession Act.

18. As already stated, according to Mr. Pattnaik learned counsel for Defendant No.1, the provision under Section 22 is applicable only to a proposed sale and not to a sale already effected. Mr. Pattnaik draws attention of the Court to the specific language employed in the provision 'proposes to transfer'. Since in the instant case, the transfer had already been effected much before filing of the suit by the Plaintiffs, the provision would have no application.

19. Both Mr. Bose and Mr. Mohanty have countered the arguments by referring to a judgment rendered by this Court in the case of ***Bijay Krushna Dwivedy v. Laxmi Dei***[1]; Reading of the judgment cited reveals that reference was made therein to an earlier judgment of this Court rendered in the case of ***Ganesh Chandra Pradhan vs. Rukmani Mohanty and others;*** [2]AIR 1971 Ori 65. In the case of **Ganesh Chandra Pradhan** (supra), a learned single Judge of this Court, referring to the provision under Section 22 and several judgments and commentaries on Hindu law and interpretation of statutes held as follows;

> *"22. The history of the statute and the reason which led to the incorporation of the provisions in Section 22 and the mischief which it intended to suppress and the remedy it sought to provide clearly go to show that what was indeed contemplated was that strangers must be kept out and the integrity of the property may be maintained. With that end in view a preferential right in the remaining class I heirs was conferred. There is no doubt that this right is personal and possibly it does not run with the land. But a burden should have clearly been cast on the intending transferor heir to put the remaining class I co-heirs on notice of his intention to make the transfer and if there was no compliance with such notice the limitation or burden cast by the provision should have disappeared and the transferor should have been let free to give effect to his intention. Similarly a clear provision should have been made that if without giving notice of his intention to transfer an heir made the transfer of his interest, the transfer would be open to be impugned by the other class I coheirs even after the transfer had been completed. Apart from making the aforesaid two provisions, the procedure for giving effect to the right conferred under the section should also have been provided so that a complete machinery for the purpose would be found in the statute. To that extent certainly there seems to be some ambiguity.*
>
> *23. But in the words "proposes to transfer" appearing in sub-section (1) of the section, to my mind, there indeed appears to be a requirement that the transferor-heirs and it is only when they do not exercise their preferential right conferred under the section that he would be free to make the transfer to strangers not coming within the fold of the*

1. 2009 (1) C.L.R. 916 2. AIR 1971 Ori 65

section. Once it is held that such a statutory duty is cast on the transferor heir, where it is shown that the transferee has purchased the property without notice having been given to the remaining class I co-heirs, the transfer could still be impugned after it was completed. Such an interpretation would not only be in keeping with the true legislative intention, but it would also not work inequitably. Thereby the preferential right would be kept up, the transferor would not have an undue impediment on his right to transfer and the transferee should after being satisfied that the class I co-heirs have in spite of notice failed to exercise their preferential right of acquisition purchase the property and obtain the same free from the liability under Section 22 of the Act.

24. Expressed in other words, it would mean, when an heir proposed to transfer his or her interest in the property inherited the legal consequences which would necessarily emerge would be these:

(a) In the remaining co-heirs a right of preference to acquire such interest proposed to be transferred in preference to any other person accrues. Such right may be availed of or may be given up.

(b) A corresponding legal obligation on the intending transferor would stand imposed not to transfer the interest in violation of the preferential right of the other Class I co-heirs.

(c) A statutory notice is given to all intending transferees that class I co-heirs have a preferential right and until that is exhausted either by its exercise or by its non-exercise in spite of notice they are not free to take the transfer.

25. Unless such an interpretation is given to the provisions of Section 22(1) of the Act, the preferential right contemplated therein would really be an airy one and the true legislative intention cannot be given effect to. I would, therefore interpret sub-section (1) of Section 22 in the aforesaid manner and would hold that the transferor heir must propose or notify his intention to transfer to the other class I co-heirs and a transfer made without following that procedure would be vulnerable even after it is completed on proof by the coheir who has the preferential right that the transfer was made without notice of the proposal of transfer to him.

26. Such an interpretation of the section may be sufficient for the purposes of meeting the present problem in this case. But I think it proper to also indicate that such an interpretation could not solve the entire problem that arises on account of an imperfect provision in the section of the Act. I would recall the criticism offered by the commentator in Mulla's Hindu Law. If the intention is to put an embargo on strangers getting into possession what would be the justification to prohibit a simple mortgage? It is, therefore, proper that clarification be made by amendment clearly circumscribing the limit of the exercise of the preferential right. It may cover cases of sale, gift, or other forms of transfer which involve transfer of possession.

20. Thus, it is clear that the intention of the legislature is clear and unequivocal i.e. to prevent a stranger to a family from purchasing a joint family property without obtaining prior permission of the coheirs. To such extent therefore, it would be immaterial whether the sale has been already affected or not. In other words, only because the property in question has been already sold cannot take away the valuable right of pre-emption of the other co-sharers as any other interpretation would serve to nullify the provision itself. Reading of the impugned judgment reveals that the 1st Appellate Court has correctly appreciated the position of law and

applied the same to the facts of the case to hold that the right of the Plaintiffs of preemption cannot be denied.

21. For the foregoing reasons therefore, this Court finds no merit in the contentions advanced by the appellant so as to be persuaded to interfere with the impugned judgment. The substantial questions of law framed at the time of admission are therefore, answered against the Defendant No.1-Appelalnt.

22. In the result, the appeals fail and are therefore, dismissed. There shall be no order as to cost.

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

Result of the case :
Appeals dismissed.

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2024 (III) ILR-CUT-1148

BIRANCHI NAYAK
V.
STATE OF ORISSA

(CRLREV NO. 178 OF 2016)

27 NOVEMBER 2024

[A. K. MOHAPATRA, J.]

Issue for Consideration

Whether the sentence imposed by court below could be modified.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 357 & 401 – Petitioner has been found guilty for commission of offence punishable U/ss. 341, 323, 34 of IPC – Even though the independent witnesses have not supported the prosecution case, there are other materials on record which clearly establish the guilt of the present petitioner – The petitioner was on bail all throughout during trial as well as during pendency of the appeal before the Appellate Court – Whether remanding the petitioner to jail custody after expiry of three decades would be justified.

Held: No – While upholding the conviction of petitioner, the sentences modified to the extent that the simple imprisonment awarded by the learned Court below is hereby set aside – In lieu thereof the petitioner shall pay fine of Rs. 5,000/- – Further in exercise of power U/s. 357 of the Cr.P.C. it is directed that aforesaid fine amount be paid to the victim as compensation.

(Para 11)

List of Act/Rules/Codes

Code of Criminal Procedure, 1973; Indian Penal Code, 1860.

Keywords

Victim compensation, Modification of sentence.

Case Arising from

Judgment dated 08.12.2015 in Criminal Appeal No. 8 of 2010 passed by the learned Sessions Judge, Nayagarh.

Appearances for Parties

For Petitioner : Mr. D.P. Dhal, Sr. Adv.
For Opp.Party : Mr. Samaresh Jena, A.S.C.

Judgment/Order

Judgment

A.K. MOHAPATRA, J.

1. The present criminal revision application has been filed at the instance of the Petitioner against the judgment dated 08.12.2015 in Criminal Appeal No.8 of 2010 by the learned Sessions Judge, Nayagarh, thereby confirming the judgment dated 22.02.2010 passed by the learned Judicial Magistrate First Class, Daspalla, wherein the Petitioner has been found to be guilty for commission of offence punishable under Sections 341, 323, 34 of IPC and the Petitioner has been sentenced to undergo simple imprisonment for six months for commission of offences under Sections 323/34 of IPC. He has also been sentenced to undergo simple imprisonment for one month for commission of offence under Sections 341/34 of IPC. Both the sentences have been directed to run concurrently.

2. The prosecution case in brief is that on 09.10.1995, the OIC Gania P.S. received a written information from the Informant, namely, Narendra Kumar Parida, inter alia alleging that on 08.10.1995 at about 8 P.M. he was performing his duty as per the direction of the Forester and accordingly, proceeded to Manibhadra check gate to perform his duty. At that time, near Ganapateswar Mahadev Temple, which is situated on the road, the Petitioner along with other accused persons detained him and abused him in filthy language. It has also been alleged that the accused persons locked the Informant inside a room. The Informant was able to get out of the room when another person opened the door upon hearing the Informant's scream. When the Informant came out of the room, the accused Biranchi and three other persons assaulted him by fist blows and lathi. As a result, the Informant has sustained bleeding injuries. On the basis of the aforesaid allegation, the FIR was registered at Gania P.S. as P.S. Case No.23 of 1995. After conclusion of the investigation, charge-sheet was filed against four accused persons including the present Petitioner.

3. During the trial, the prosecution relied upon the evidence of six witnesses out of which P.W. Nos. 1 to 3 are independent witnesses. However, it appears that

the independent witnesses have not supported the prosecution case. Basing upon the evidence of the Informant as well as the medical evidence, the learned trial Court found the Petitioner guilty for commission of offence punishable under Sections 341, 323, 34 of IPC. Accordingly, he has been sentenced to undergo imprisonment as has been indicated hereinabove.

4. Being aggrieved by the judgment of the trial Court dated 22.02.2010, the Petitioner preferred a revision before the Appellate Court which was registered as Criminal Appeal No.8 of 2010. The learned Appellate Court vide judgment dated 08.12.2015, confirmed the judgment of the learned trial Court. Being aggrieved by the judgment of the learned Appellant Court confirming the judgment of the learned trial Court, the Petitioner has approached this Court by filing the present application.

5. Heard learned counsel for the Petitioner as well as the learned Additional Standing Counsel for the State. Perused the records.

6. Learned counsel for the Petitioner at the outset submitted that the judgments of both the Courts below are unsustainable in law, in as much as there is no material to implicate the present Petitioner in the alleged crime. He further elaborated that the independent witnesses, i.e. P.W. Nos.1 to 3 have not supported the case of the prosecution. However, the learned trial Court convicted the Petitioner on the basis of the evidence of the Informant as well as the medical evidence. He further contended that the Informant, being an interested witness, his evidence could not have been relied upon without it being corroborated by any of the independent witnesses. It was also contended that there are discrepancies in the medical evidence which has been brought out during the cross-examination of the doctor, who was examined as P.W. No.6. In the aforesaid background, learned counsel for the Petitioner contended that the conviction of the Petitioner under the alleged offences is unsustainable in law.

7. Learned counsel for the Petitioner further argued that the judgments of the learned Courts below have been challenged by the Petitioner on merits as well as on the ground that the alleged occurrence took place in the year 1995. As such, upholding the said judgments and sending the Petitioner back to custody, after a period of almost three decades, would not only destabilize the Petitioner and his family but also cause serious prejudice to them as they must have otherwise been established in the society with the passage of time. He further submitted that taking into consideration the seriousness and gravity of the allegation, further keeping in view the fact that no independent witnesses have supported the case of the prosecution, the impugned judgments of the trial Court as well as the Appellant Court be set aside and the Petitioner be set at liberty.

8. Learned counsel for the State on the other hand supported the judgments of the learned Courts below.

9. In course of his argument, learned counsel for the State submitted that the evidence of the Informant as well as the medical evidence, backed by the

examination of the doctor i.e. P.W.-6, support the judgments of the learned Appellate Court as well as the trial Court. It was also contended that even though the independent witnesses have not supported the prosecution's case, there are other materials to convict the present Petitioner in the alleged crime. Further, in reply to the contention of the learned counsel for the Petitioner that the independent witnesses have not supported the case of the prosecution, learned counsel for the State submitted that the evidence of the Informant as well as the supporting medical evidence is good enough to convict the Petitioner as well as the other accused persons for the commission of crime as alleged in the FIR. Therefore, it was contended that the trial Court has not committed any illegality in convicting the Petitioner under Section 341, 323 & 34 of IPC. Further, referring to the medical evidence, learned counsel for the State submitted that the injured has sustained bleeding injury. Therefore, no fault can be found with the judgments of both the Courts below. On such grounds, learned counsel for the State submitted that the revision petition is devoid of merit and accordingly the same should be dismissed.

10. Having heard the learned counsels appearing for the respective parties and on a careful examination of the materials on record, further upon a close scrutiny of the judgments delivered by the learned Courts below, this Court observes that it is a fact that the independent witnesses, i.e. P.W. Nos.1 to 3, have not supported the case of the prosecution. However, this Court is also of the considered view that a conviction can be sustained on the basis of the evidence of the Informant supported by the medical evidence. Particularly, when nothing has been elicited from the Informant during cross-examination. As such, the evidence of the Informant stands and on such basis the conviction can be sustained. Otherwise, also, even though the independent witnesses have not supported the prosecution case, there are other materials on record that clearly established the guilt of the present Petitioner. Accordingly, this Court is not inclined to interfere with the judgments of the learned Courts below.

11. However, taking into consideration the fact that the occurrence is of the year 1995, and that the Petitioner was on bail all throughout during trial as well as during the pendency of the appeal before the Appellate Court, this Court is of the view that remanding the Petitioner to jail custody after expiry of almost three decades would cause injustice to the family of the Petitioner and there is every likelihood that the Petitioner might be adversely affected. In view of the aforesaid consideration, this Court is inclined to take a lenient view, so far the sentences are concerned. Accordingly, the sentence of simple imprisonment is hereby modified to the extent that the Petitioner shall not undergo simple imprisonment. In lieu thereof he shall pay a fine of Rs.5,000/- (Rupees Five Thousand). Accordingly, while upholding the conviction of the Petitioner, the sentence is modified to the extent that the simple imprisonment awarded by the learned Courts below is hereby set aside. In lieu thereof the Petitioner shall pay a fine of Rs.5,000/- (Rupees Five Thousand). Further, in exercise of power under Section 357 of Cr.P.C., it is directed that the aforesaid fine amount be paid to the Victim as compensation.

12. With the aforesaid observations/directions, the CRLREV stands disposed of.

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

Result of the case :
CRLREV disposed of.

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2024 (III) ILR-CUT-1152

CHIRANJIBI SABARA @S. CHIRANJIBI
V.
STATE OF ODISHA

(CRLREV NO. 301 OF 2016)

27 NOVEMBER 2024

[A. K. MOHAPATRA, J.]

Issue for Consideration

Whether in absence of any independent witness the conviction U/s. 379 is sustainable.

Headnotes

INDIAN PENAL CODE, 1860 – Section 379 – There are no eye witnesses to the occurrence – The petitioner has been convicted relying upon circumstantial evidence – Some of the witnesses have been declared as hostile – Petitioner has been convicted only on the ground that stolen bicycle was recovered from the possession of the present petitioner and such recovery has been supported by some of the official witnesses – Whether the conviction of petitioner is sustainable.

Held: No – This Court of the view that the petitioner's conviction cannot be sustained merely on the basis of the fact that the stolen article was recovered from his possession – In the absence of any direct materials to implicit the petitioner in the alleged crime and in absence of any independent evidence of witnesses supporting the case of the prosecution, the conviction of the petitioner under the alleged offence appears to be based on weak evidence. (Paras 8 & 9)

List of Acts/Code

Indian Penal Code, 1860

Keywords

Absence of independent witness, Recovery, Hostile witness, Official witness.

Case Arising From

Judgment dated 30.03.2016 passed by the learned Sessions Judge, Gajapati at Paralakhemundi in Criminal Appeal No.13 of 2015 confirming the judgment dated 30.07.2015 passed by the learned S.D.J.M., Parlakhemundi in T.R. Case No.974 of 2011, arising out of G.R. Case No.243 of 2011.

Appearances for Parties

For Petitioner : M/s. Soubhagya Ku. Dash, S.K. Tripathy, D. Sethi
For Opp.Party : Smt. Siva Mohanty, A.S.C.

Judgment/Order

Judgment

A.K. MOHAPATRA, J.

1. Heard the learned counsel for the Petitioner as well as learned counsel for the State-Opposite Party. Perused the records as well as evidence recorded during trial.

2. The present criminal revision application is directed against the judgment dated 30.03.2016 passed by the learned Sessions Judge, Gajapati at Paralakhemundi in Criminal Appeal No.13 of 2015 confirming the judgment dated 30.07.2015 passed by the learned S.D.J.M., Parlakhemundi in T.R. Case No. 974 of 2011, arising out of G.R. Case No. 243 of 2011 wherein the Petitioner has been found guilty of the alleged offence and has been convicted for commission of offence under Section 379 of I.P.C. and he has been sentenced to undergo simple imprisonment for a period of one year.

3. The case of the prosecution, in brief, is that on 22.07.2011 at about 7.00 P.M., the Complainant lodged an F.I.R. before the IIC, Garabandha Police Station alleging that on 20.07.2011 at about 6.00 P.M. her son Hemanta Kumar Patra returned from his tuition and kept his bicycle in front of the shop of one S. Srinu. After purchasing some articles, when the son of the Complainant returned from the shop, he found that his bicycle is missing. After a prolonged search, the bicycle could not be found. Thereafter, an F.I.R. was lodged before the I.I.C., Garabandha Police Station which has been registered as P.S. Case No.21of 2011 for commission of offence under Section 379 of I.P.C. After completion of investigation, a charge sheet was filed against the present Petitioner and the Petitioner faced the trial. Learned trial court, after taking evidence, found the Petitioner guilty of the alleged offence. Accordingly, he has been sentenced to undergo simple imprisonment for one year.

4. Judgment of the learned trial court dated 30.07.2015 was challenged in appeal before the learned Sessions Judge, Gajapati at Parlakhemundi in Criminal Appeal No.13 of 2015 by the appellant-convict. Learned appellate court, vide his judgment dated 30.03.2016, found no infirmity in the judgment of the trial court. Accordingly, the judgment of the trial court has been confirmed by the appellate court.

5. Being aggrieved by the aforesaid two judgments, the Petitioner has approached this Court by filing the present Criminal Revision application.

6. Learned counsel for the Petitioner, at the outset, submitted that there are no eye witnesses to the occurrence. He further contended that the Petitioner has been convicted relying upon circumstantial evidence. He further stated that P.Ws. 1 to 4 and 8 are independent witnesses and the prosecution has declared them hostile. Therefore, there are no substantive evidence on record to sustain the conviction of the Petitioner for commission of a crime under Section 379 of the I.P.C. He further submitted that the entire judgment is based on surmises and conjectures. Therefore, the same is not sustainable in the eye of law.

7. Learned counsel for the State, on the other hand, supported the judgments delivered by the learned courts below. She further stated that on the basis of the materials available on record, no fault can be found with the judgment of the learned courts below thereby convicting the Petitioner for commission of a crime under Section 379 of I.P.C. Learned counsel for the State further contended that even though some of the witnesses were declared hostile, however, there are other materials on record to implicate the Petitioner. Furthermore, the evidence of the prosecution witnesses No.5, 6 and 9 are good enough to support the prosecution case and on such basis, the judgment of conviction and sentence cannot be questioned in the present criminal revision petition.

8. Having heard the learned counsels appearing for the respective parties, on a careful examination of the materials on record as well as the prosecution evidence and on a careful analysis of the judgments by both the courts below, this Court observes that although some of the witnesses have been declared hostile, however, prosecution witnesses No.5, 6 and 9 have supported the case of the prosecution. Further, on analysis of the judgments of both the courts below, this Court observes that the Petitioner has been convicted only on the ground that stolen bicycle was recovered from the possession of the present Petitioner and such recovery has been supported by some of the official witnesses.

9. On a careful consideration of the submissions made by the learned counsels appearing for the respective parties and on an analysis of the evidence, this Court is of the view that the Petitioner's conviction cannot be sustained merely on the basis of the fact that the stolen article was recovered from the possession of the Petitioner. In the absence of any direct materials to implicate the Petitioner in the alleged crime and in the absence of any independent evidence of witnesses supporting the case of the prosecution, the conviction of the Petitioner under the alleged section of I.P.C. appears to be based on weak evidence. In such view of the matter, the conviction of the Petitioner under Section 379 of I.P.C., vide impugned judgments, is hereby set aside. As a consequence, the sentence imposed is also set aside. Since the Petitioner is on bail, necessary consequential steps be taken by the learned trial court.

10. Accordingly, the Criminal Revision is allowed. There shall be no order as to cost.

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

Result of the case :
Criminal Revision allowed

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2024 (III)-ILR-CUT-1155

NILAKANTHA DASH
V.
REGISTRAR OF CO-OPERATIVE SOCIETIES, ODISHA & ORS.

[W.P.(C) NO. 31821 OF 2021]

04 NOVEMBER 2024

[V. NARASINGH, J.]

Issues for Consideration

(1) Whether the Writ Petition is maintainable against the Co-operative Bank.
(2) Whether the Writ Petition is maintainable in view of availability of alternative remedy.
(3) Whether Bank can withhold any retirement benefit.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of Writ Petition – Whether Writ Petition is maintainable against the Co-Operative Bank.

Held: Yes – When the claim is a constitutional right of a retired employee being protected under Article 300-A of the Constitution of India as a right to property, Writ Petition is maintainable confining the scope of interference only with respect to claim of the petitioner to retirement benefit such as encashment of unutilized salary. (Para 9)

(B) ALTERNATIVE REMEDY – Whether the Writ Petition is maintainable in view of availability of alternative remedial forum U/s. 68 of Orissa Co-Operative Act, 1962.

Held: Yes – There cannot be any absolute bar for entertaining writ petition when the authority violates the constitutional rights of a citizen in absence of any statutory provision. (Para 10)

(C) ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 R/W RULE 39(E) R/W 48 OF THE STAFF SERVICE RULES OF THE URBAN CO-OPERATIVE BANK LTD., 2003 – Whether the Bank can withhold the retirement benefit like encashment of leave salary on the ground of non-settlement of dues.

Held: No – It is settled law that leave encashment is a legal right of an employee akin to salary and cannot be denied in absence of any legal provision justifying such denial. (Para 15)

Citations Reference

Rohtas Industries Ltd., & Anr. vs. Rohtas Industries Staff Union & Ors., **(1976) 2 SCC 82**; Andi Mukta S.M.V.S.V.J.M.S. Trust & Ors. v. V.R. Rudani & Ors., **(1989) 2 SCC 691**; Executive Committee of Vaish Degree College Shamli & Ors. v. Lakshmi Narain & Ors., **(1976) 2 SCC 58**; Deepak Kumar Biswas vs. Director of Public Instruction, **(1987) 2 SCC 252**; Dwarkanath, H.U.E. vs. ITO, Special Circle Kappur & Anr. **(1965) 3 SCR 536**; Praga Tools Corporation vs. Shri C.A. Imanual & Ors., **(1969) 1 SCC 585**; Air India Statutory Corporation & Ors. vs. United Labour Union & Ors., **(1997) 9 SCC 377**; LIC vs. Escorts Ltd., **(1986) 1 SCC 264 at 344**; M.C. Mehta & Ors. vs. Union of India & Ors., **(1987) 1 SCC 395**; Sri Konaseema Co-operative Central Bank Ltd., Amalapuram & Anr. vs. N. Seetharama Raju, **AIR 1990 A.P. 171**; U.P.State Co-operative Land Development Bank Ltd. vs. Chandra Bhan Dubey and Ors., **1999 (1) SCC 741**; Ram Sahan Rai vs. Sachiv Samanaya Prabandhak & Anr., **(2001) 3 SCC 323**; Nayagarh Cooperative Central Bank Ltd. & Anr. vs. Narayan Rath & Anr., **(1977) 3 SCC 576**; State of Jharkhand & Ors. vs Jitendra Kumar Srivastava & Anr**, AIR 2013 SC 3383**; Deoki Nandan Prasad v. State of Bihar and Ors., **AIR 1971 SC 1409**; State of Madhya Pradesh v. Ranojirao Shinde and Anr., **AIR 1968 SC 1053**; State of West Bengal Vs. Haresh C. Banerjee and Ors., **(2006) 7 SCC 651– referred to.**

List of Acts & Rules

Constitution of India, 1950; Odisha Co-operative Societies Act, 1962; The Staff Service Rules of the Urban Co-operative Bank Ltd., 2003

Keywords

Writ Petition, Maintainability, Alternative remedy, Retirement benefit, Withheld.

Appearances for Parties

For Petitioner : Mr. U.K. Samal
For Opp.Parties : Mr. L. Kanungo (O.P.3)

Judgment/Order

Judgment

V. NARASINGH, J.

Background

1. The petitioner, retired from Urban Cooperative Bank Ltd., Cuttack as General Manager, filed W.P.(C) No.10140 of 2021 in this Court assailing the inaction of the authorities of the Urban Cooperative Bank Ltd., Cuttack (Opposite Party no.3), in releasing his leave salary encashment amount in terms of Rule 39(e) of the Staff Service Rules of the Urban Cooperative Bank Ltd., 2003 (hereinafter referred to as Rules, 2003 for brevity) despite his retirement on attaining the age of superannuation w.e.f. 31.08.2019.

Before approaching this Court in the aforesaid Writ Petition, the petitioner had submitted his grievance before the administrator (Opposite Party No.2) by his representation dated 27.01.2021 and taking cognizance of which this Court disposed of the said writ petition by order dated 08.04.2021 to consider his pending representation and to take a lawful decision in the matter keeping in view the averments of the writ petition as well as provision under Rule 39(e) of Rules, 2003.

In terms of such order of this Court representation of the Petitioner was disposed of by the impugned order dated 25.08.2021 at Annexure-9 observing that keeping in view the liability of the petitioner to the Bank already determined in some cases and seemingly latent others which are pending as of then, the representation submitted by the petitioner does not merit consideration.

2. Being aggrieved with such decision of the Administrator by impugned order dated 25.08.2021 (Annexure-9) the present writ petition has been filed.

For convenience of reference the impugned order dated 25.08.2021 at Annexure-9 and the "Prayer" in the writ petition is extracted hereunder:-

"Annexure-9

> WHEREAS Sri N.K. Dash, GM of the Bank retired from service since 31.08.2019 had laid W.P.(C) No.10140 of 2021 before the Hon'ble High Court impugning therein non-release of his post- retirement leave salary encashment amount wherein by ex parte disposal of the writ petition at the admission stage, the Hon'ble Court by order dt. 08.04.2021 has directed the O.P. No. 2, i.e., the Committee of Management represented by the Administrator of the bank to look into the grievance of the petitioner as under Annexure7 (representation dt. 27.01.2021) and to take a lawful decision in the matter keeping in view the averments of the writ ptn as well as provision under Rule 39(e) of the Staff Service Rules.
>
> AND WHEREAS Rule - 39(e) of the Staff Service Rules of the Bank provides that an employee of the Bank shall be entitled to encash the leave at his credit at the time of retirement subject to a maximum of 300days.
>
> AND WHEREAS Sri N.K. Dash, GM (Rtd) is observed to be frightfully entangled in D.P.(s) drawn as well as contemplated, surcharge proceedings awarded as well as pending, vigilance case, entailing horrendously insurmountable financial implications attributed mostly to acts of malfeasance and misfeasance in delivery of credit facilities.
>
> AND WHEREAS Sri N.K. Dash, GM has been allowed to superannuate from service on 31.08.2019 pending disposal of disciplinary proceeding drawn vide charge sheet No.

863/2003-04 dt.25.11.2003 and disciplinary proceeding contemplated on the basis of report dt.03.03.2012 in CTC Vigilance File No.46/2011 and this apart, Sri Dash is made liable in disposal of Surcharge Proceedings No.42/2001 (order dt.23.09.2005), 235/2002 (order dt.09.01.2006), 156/2003 (order dt.06.09.2006), 89/2004 (order dt.25.02.2006) and Surcharge Proceedings No.155/2003 & 07/2010 are pending for fixation of liability wherein he is arrayed as an opp. party.

AND WHEREAS Sri N.K. Dash, GM (Rtd) has superannuated from service of the bank leaving behind present outstanding of Rs.3,54,991,00 in Flexible Personal Advance (FPA) A/c No.13901240058 and present outstanding of Rs.1,26,198.00 in Personal Advance A/c No.13999578626 which he should have repaid before demitting office in the bank.

HENCE, after careful consideration of the representation dt.27.01.2021 of Sri N.K. Dash, GM (Rtd) vis-à-vis the writ petition (supra) and with due regard to the order of the Hon'ble Court, the undersigned is constrained to turn down the representation keeping in view the liabilities of the petitioner to the bank already determined in some cases and seemingly latent in some other cases that are pending as of now.

xxx xxx xxx"

"PRAYER

It is, therefore, most humbly prayed that this Hon'ble Court be graciously pleased to admit this writ application issue Rule Nisi calling upon the Opp. Parties to show cause as to why:

1. The order dt. 25.08.2021 passed by the O.P. No.2, i.e., A.D.M (General)-cum-Administrator of the Bank under Annexure-9 shall not be quashed/set aside,

2. A direction shall not be issued to the Opp. Parties directing them to release all consequential retirement service benefits be not paid to the petitioner along with delayed payment interest @12% P.A.

3. A direction shall not be issued to O.P. No.2 and O.P. No.3 to release and pay of Rs.7,10,350/- (Seven lakh ten thousand three hundred fifty) only with interest @ 7% per annum from 01.09.2019 as leave salary benefit to the petitioner within one month,

If the Opp. Parties fail to show any cause or show any insufficient cause, then the aforesaid Rule be made absolute by issuing an appropriate writ/writs and further be pleased to pass any other order/orders as would be deemed fit and proper in the facts and circumstances of the present case.

xxx xxx xxx "

Stand of the Petitioner

3. The contentions of the petitioner in impugning the order of Administrator (opposite party no.2) at Annexure-9 run thus :-

a) While working as Senior Branch Manager the petitioner was promoted to the rank of General Manager in October, 1992 and ultimately rank of the Chief Executive Officer and continued as such till his retirement on 31.08.2019, attaining the age of superannuation.

b) As per the provision of Rule 39(e) of the Rules, 2003 issued by Opposite Party No.1– Registrar of Cooperative Societies, Orissa, in exercise of power under Section-33-A of Orissa Cooperative Societies Act, 1962, the petitioner is entitled to

encash the leave subject to maximum of a 300 days at the time of his retirement. Since he has 300 days of leave to his credit at the time of his retirement he is entitled to get Rs.7,10,350/-.

Section-33-A of Orissa Cooperative Societies Act, 1962 reads as under:-

"**[33-A. Qualifications etc. of employees of Societies** - [(1) The Registrar shall –

(a) fix the number and designation of the employees to be employed by the Co-operative Societies; and

(b) make rules, regulating the qualification, remuneration, allowances and other conditions of service of such employees.]

[Provided that the qualification of the Chief Executive Officer of the State Co-operative Bank and Central Co-operative Banks shall be such as may be stipulated by the National Bank in consultation with the Reserve Bank of India];

[(2) Notwithstanding anything contained in Sub-section (1), the Registrar, in consultation with the National Bank may issue guidelines in the matter of personnel policy, staffing pattern, recruitment and fixation and revision of pay and allowances of the employees of the Co-operative Credit Society keeping in view the volume of business, viability and proûtability of such society.]"

c) The petitioner approached the authorities for release of the same but the authorities did not pay his legitimate dues although it is treated as a constitutional right of a retired employee as much as there is no legal provision justifying denial of such benefit in the Rule 2003 in force.

d) Since the Petitioner was deprived of his legitimate entitlement he had approached this Court in W.P.(C) No.10140 of 2021 which was disposed of by order dated 27.01.2021 with the following direction;

"xxx xxx xxx

Considering that this writ petition is filed seeking a direction for release of the leave salary encashment under Rule 39(e) of the Staff Service Rules and finding that on the selfsame issue a representation at the instance of the Petitioner vide Annexure-7 is still pending before the Opposite Party No.2, this Court, in disposal of the writ petition, directs the Opposite Party No.2 to look into the grievance of the Petitioner vide Annexure-7 and take a lawful decision in the matter taking into account the grounds stated in this writ petition so also the documents appended thereto and also keeping in view the provision at Rule-39(e) of the Staff Service Rules.

The entire exercise shall be completed within a period of eight weeks from the date of communication of a copy of this order by the Petitioner.

xxx xxx xxx"

And, the petitioner being aggrieved with non-compliance of the order within the period stipulated therein filed a contempt petition CONTC No.4835 of 2021.

During the pendency of the contempt petition the impugned order dated 25.08.2021 at Annexure-9 has been issued by the Administrator – Opposite Party No.2 disclosing the reason for turning down the request of the petitioner for release of amount equivalent to encashment of E.L of 300 days.

e) At the outset the petitioner has impugned such decision for the failure on the part of the Opposite Party No.2-Administrator, in not giving him an opportunity of hearing before negating his claim.

f) The petitioner has also referred to various correspondences in the Departmental Proceeding referred to in Annexure-9 to justify his allegation that management did not act diligently to complete the disciplinary proceedings in time which according to the petitioner was deliberate and was only done to deprive him from becoming permanent Chief Executive of the Bank, although the permanent Chief Executive retired w.e.f. 31.12.1998 and though the petitioner was the next senior most employee. Yet, was not promoted to the said rank rather the Bank utilized his service as in-charge Chief Executive Officer and in the process the petitioner was deprived from availing the benefits which would have enured to his benefits on regular promotion.

g) There is no provision in the staff service rule to continue disciplinary proceedings if already initiated against an employee before his retirement to post retirement or to initiate any proceeding after his retirement. As such the petitioner having retired w.e.f. 31.08.2019 on attaining the age of superannuation, there being no jural employer employee relationship between the petitioner and the Opposite PartiesBank the pending disciplinary proceedings are deemed to have been closed. It is submitted that disciplinary proceeding initiated on 25.11.2003 ought to have been closed within a reasonable period in view of the retirement of the Petitioner especially in the absence of any justification for the delay.

h) It is further submitted that admittedly the pendency of the proceeding was not a stumbling block for the petitioner to discharge his higher responsibility as Chief Executive after retirement of regular Chief Executive in different spells.

i) Referring to the impugned order at Annexure-9, it is stated that the authorities did not release the unutilized leave salary, in contemplation of disciplinary proceeding on the basis of a report dated 03.03.2012 received in connection with Cuttack Vigilance Case No.46 of 2011. Such contemplated proceeding since 2012 was not initiated till the date of his retirement and in absence of any provision in the Rule 2003 there is no scope for the authority to initiate such proceeding.

j) With respect to the different Surcharge Proceeding the petitioner has narrated in detail but most significantly took a stand that the leave salary and the unutilized encashment of leave salary admissible to an employee on his retirement cannot be encumbered by the authorities for adjustment of any liability.

The petitioner has relied upon Rule 48(iv) of Rules, 2003 which prescribes that only Income Tax can be deducted from leave salary encashment value and such fund shall not be liable for any other deduction on account of provident fund subscription, Insurance Premium, House Rent, Payment of Advance etc.

k) The petitioner further submits that in his representation dated 04.02.2020 addressed to the Chief Executive Officer of the Bank he had requested to credit Leave Salary Encashment value to his S.B. Account by further indicating that though he had availed some advances/loans from the Bank all such advances/loans except two were closed before his retirement being adjusted by monthly instalment from his salary.

With respect to two uncleared advances, though the Registrar of Cooperative Societies had informed the Bank since 09.12.2004 to fix the monthly installments to recover the advance and the interest thereon adjusting it, to recoup the same, before retirement of the petitioner but no steps were taken since 2004 till the retirement of the petitioner in the year 2019. It is contended that under no circumstances the liability of the petitioner to pay such amount can have any bearing on the encashment of leave salary of the petitioner after his retirement particularly in view of Rule 39(e) read with Rule 48(iv) of Rules, 2003.

Counter

4. On being noticed the Opposite Party No.3 filed a preliminary counter to justify the stand of Bank, in rejecting the grievance of the petitioner by Annexure-9, on different ground as under:-

a) In addition to the different departmental proceeding and vigilance proceeding against the Petitioner, it has been submitted that the petitioner was arrested on 25.08.2011, remanded to judicial custody till 20.09.2011. He was placed under suspension and thereafter reinstated in service.

b) Number of illegalities and irregularities were evidenced during the service period of the petitioner and in some cases investigations are still going on.

c) After superannuation of the petitioner on 31.08.2019, pending disposal of the departmental proceeding drawn against him and as per order dated 16.08.2021 of the Appellate Authority, the Bank has deposited the gratuity claim of the petitioner with the controlling authority under the Payment of Gratuity Act in T.G. Case No.1 of 2020 filed by the petitioner.

d) So far the unutilized leave salary benefit it is submitted that it is well within the jurisdiction and competence of the Opposite Party-Bank to withhold even forfeit the same against any financial liability accrued or anticipated qua the petitioner.

e) The petitioner has been allowed to superannuate leaving behind outstanding amount of Rs.4,07,108/- in flexible personal advance and outstanding amount of Rs.1,26,198/- in personal advance as much as there is a pending liability of Rs. 2,14,627/- as excess house rent allowance received by him in contravention of Rule 29(a) of Rules, 2003 which he is liable to deposit before claiming release of leave salary encashment.

f) The petitioner has submitted grievance before the authorities to disburse his leave salary encashment amount without clearing the dues like other retiree of the Bank. Since there was a direction to take a ‘lawful decision’ by this Court in W.P.(C)

No.10140 of 2021, the competent authority after taking into consideration all the aspects, rightly rejected his claim.

g) It is further urged that the petitioner has an alternative remedy for redressal of his grievance under Section 68 of the Orissa Cooperative Societies Act, 1962 and as such the writ petition is not maintainable. Section 68 of the Orissa Cooperative Societies Act, 1962 reads as under:-

> "**68. Disputes which may be referred to arbitration** :- (1) Not-withstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or the business of a society, other than a dispute required to be referred to the Tribunal and a dispute required to be adjudicated under the Industrial Disputes Act, 1947 (14 of 1947), [and a dispute relating to non-payment of contribution to the Co-operative Education Fund referred to in Sub-Section (3) of Section 56] shall be referred to the Registrar if the parties thereto are among the following, namely :-
>
> (a) the Society, its Committee, past Committee, any past or present Officer or office bearer, any past or present agent, any past or present servant, or the nominee, legal heir or representative or any deceased officer, office-bearer, deceased agent or deceased servant of the Society; or
>
> (b) a member, past member, or a person claiming through a member, past member or deceased member of the Society, or of a Society which is a member of the Society; or
>
> (c) a surety of a member , past member or a deceased member, whether such surety is or is not a member of the Society; or
>
> (d) any other Society.
>
> Explanation I - A claim in respect of any sum payable to or by a Society, by or to a person or Society mentioned in Clauses (a) to (d), shall be a dispute touching the business of the Society within the meaning of this Section, even in case such claim is admitted and the only points at issue are the ability to pay and the manner of enforcement of payment.
>
> Explanation II - A claim by a Financing Bank against a member of a Society which is a member of the Financing Bank and indebted to it for the recovery of dues payable by such member to the Society shall be a dispute touching the business of the Financing Bank within the meaning of this Section.
>
> Explanation III - The question whether a person is or was a member of a Society or not shall be a dispute within the meaning of this Section.
>
> Explanation IV - A claim by a surety for any sum or payment due to him from the principal borrower in respect of a loan advanced by a Society shall be a dispute within the meaning of this Section.
>
> Explanation V - The question whether a person or any one of his family members is carrying on any business prejudicial to the business or interests of the Society, or whether such family member has common economic interest with such person shall be a dispute within the meaning of this Section.]
>
> (2) Any person, Society, [or Financing Bank] referring a dispute to the Registrar under Sub-Section (1) shall deposit in advance such fees as may be prescribed.
>
> (3) No dispute referred to in this Section shall be entertained in any Civil Court and decision of the Registrar in this respect shall, subject to the provisions of Section 70, be final.

(4) If any question arises whether a dispute referred to the Registrar under this Section is a dispute touching the constitution, management or the business of a Society, the decision thereon of the Registrar shall be final and shall not be called in question in any Court.

(5) Nothing in this Section shall, where the dispute relates to the recovery of the dues of any Society from any of its members be construed to debar any Financing Bank of such Society from referring such dispute to the Registrar."

Rejoinder

5. That the petitioner asserting that the stand of Bank Authorities misguiding, submitted his rejoinder affidavit. In which, it is submitted that the allegations of the Opposite Party-Bank which are basically narration of factual aspects of events.

Additional affidavit by the Opposite Party-Bank

6. The Bank authorities also filed an Additional Affidavit on 20.08.2023 to strengthen their argument with respect to jurisdiction of this writ court to entertain the grievance of the petitioner as the Bank being a Cooperative Society and registered under the Odisha Cooperative Societies Act, 1962 does not qualify as an "authority" within the meaning of Article 12 of the Constitution of India. For which, the grievance of the petitioner is not amenable for redressal by this Court in exercise of its writ jurisdiction. Simultaneously it has been clarified that the criminal case instituted against the petitioner vide Vigilance P.S. Case No.46 of 2011 is still pending so also the Departmental Proceedings and only on conclusion of such proceedings the financial liability of the petitioner on account of his pending dues as well as actual loss caused to the Bank due to the act or omission on the part of the petitioner in terms of Rule 32 of the Rules, 2003 of the Opposite Party-Bank can be quantified. Only on such quantification amount towards petitioner's leave salary encashment can be disbursed.

From the aforesaid stand of the parties, the following issues emerge for adjudication:

Issues

A. Whether the present writ petition is maintainable against the Opposite Party-Co-Operative Bank ?

B. Whether the writ petition is maintainable in view of availability of alternative remedial forum under Section 68 of Orissa Cooperative Societies Act, 1962 ?

C. In case the writ petition is held to be maintainable, whether the impugned order is sustainable and whether the Bank can deny the benefits of leave encashment to the petitioner, on the ground of non-settlement of his dues when admittedly the petitioner has retired and under Rule 39 (e) read with Rule 48 of the Rules, 2003 there is no provision to deny such benefit and in the absence of any provision in the Service Rules governing the field authorising continuance of departmental proceeding against an employee after his retirement.

7. Learned counsel Sri Samal for the Petitioner and Sri Kanungo have relied upon several decisions to fortify their respective stands regarding maintainability of the present writ petition when it is a claim with respect to an employee of a Cooperative Bank, particularly, since the relief claimed in the present case relates to post retiral claim of the petitioner in the shape of encashment of unutilized leave salary.

7.1 It needs no emphasis that as such language of Article 226 does not admit of any limitation on the extraordinary powers of the High Court reinforced by judicial pronouncement.

7.2. In this context it would be apt to note a few landmark judgments of the Apex Court.

Rohtas Industries Ltd., & Anr. vs. Rohtas Industries Staff Union & Ors. [(1976) 2 SCC 82] it was submitted before the Constitution Bench that an award under Section 10A of the Industrial Disputes Act, 1947 was not amenable to correction under Article 226 of the Constitution. The Apex Court held as under:

> "The expansive and extraordinary power of the High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person even a private individual - and be available for any (other) purpose - even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Article 226 (1A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to any person by the expressive reference to one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop". The Hon‟ble Apex Court has spelt out wise extraordinary remedy and High Courts will not go beyond those monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights. Accordingly Apex court hold that the award here is not beyond the legal reach of Article 226, although this power must be kept in severely judicious leash." Apex court also relied upon another verdict
>
> "Article 226 under which a writ of certiorari can be used in an appropriate case, is, in a sense, wider than Article 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued courts or tribunals. Under Article 226(1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under Section 10A is not a tribunal under Article 136 in a proper cases.' a writ may lie against his award' under Article 226".

7.3 In Andi Mukta S.M.V.S.V.J.M.S. Trust & Ors. v. V.R. Rudani & Ors. [(1989) 2 SCC 691] a two Judge Bench of Apex Court was considering the question of "issue of a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or direction or order" directing the appellant Trust and its trustees to pay to the respondents their due salary and allowances etc. in accordance with the

Rules framed by the University and to pay them compensation under certain Ordinance of the University".

The High Court before which the issue was raised held in favour of the respondents. Apex Court noted that the essence of the attack on the maintainability of the writ petition under Article 226 by the appellant was that it being a trust registered under the Bombay Public Trust Act was managing the college where the respondents were employed, was not amenable to writ jurisdiction of the High Court. In other words, the contention was that trust being a private institution no writ of mandamus could be issued. In support of such contention, reliance was placed on the decisions in (i) Executive Committee of Vaish Degree College Shamli & Ors. v. Lakshmi Narain & Ors. (1976) 2 SCC 58 and (ii) Deepak Kumar Biswas vs. Director of Public Instruction [(1987) 2 SCC 252].

Apex Court, however distinguished those two decisions and held that the facts before it were different and that there was no plea for specific performance of contractual service by the Respondents. And, before the Hon‟ble Supreme Court, they were not seeking a declaration that they be continued in service and they were not asking for mandamus to put them back into the college. But claiming only the terminal benefits and arrears of salary payable to them and framed the question as to whether the trust could be compelled to pay by writ of mandamus?

The Apex Court noted the observations of Hon‟ble Subba Rao, J. in Dwarkanath, H.U.E. vs. ITO, Special Circle Kappur & Anr. [(1965) 3 SCR 536] as under :

> "This article is couched in comprehensive phraseology and it exfacie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself……."

The Court also noted the following observations in Praga Tools Corporation vs. Shri C.A. Imanual & others [(1969) 1 SCC 585]:

> "It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statutes under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for

the purpose of fulfilling public responsibilities. (Cf. Halsbury's Laws of England, 3rd Edn., Vol. II, p. 52 and onwards).

The analysis of the Hon‟ble Supreme Court regarding “authority” in Article 226 of the Constitution of India is respectfully quoted hereunder:

"The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights as well as non-fundamental rights. The words "any person or authority used in Article 226 are, therefore, used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

And finally the Apex Court held as under:

"Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226.We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

(Emphasised)

7.4 (Emphasised) In Air India Statutory Corporation and others vs. United Labour Union and others (1997) 9 SCC 377 Apex Court Speaking through a Bench of three Hon’ble Judges held :

"The public law remedy given by Article 226 of the Constitution is to issue not only the prerogative writs provided therein but also any order or direction to enforce any of the fundamental rights and "for any other purpose". The distinction between public law and private law remedy by judicial adjudication gradually marginalised and became obliterated. In LIC vs. Escorts Ltd. [(1986) 1SCC 264 at 344], this Court in paragraph 102 had pointed out that the difficulty will lie in demarcating the frontier between the public law domain and the private law field. The question must be decided in each case with reference to the particular action, the activity in which the State is engaged when performing the action, the public law or private law character of the question and the host of other relevant circumstances. Therein, the question was whether the for accepting the purchase of the shares? It was in that fact situation that this Court held that there was no need to state reasons when the management of the shareholders by resolution reached the decision. This Court equally pointed out in other cases that when the State's power as economic entrepreneur and allocator of economic benefits is subject to the limitations of fundamental rights, a private Corporation under the functional control of the state engaged in an activity hazardous to the health and safety of the community, is imbued with public interest which the State ultimately proposes to regulate

exclusively on its industrial policy. It would also be subject to the same limitations as held in M.C. Mehta & Ors. vs. Union of India & Ors. [(1987) 1 SCC 395]".

7.5 A Full Bench of the Andhra Pradesh High Court in Sri Konaseema Co-operative Central Bank Ltd., Amalapuram and another vs. N. Seetharama Raju [AIR 1990 A.P. 171] was considering the question whether a writ petition even lie against a cooperative society and if it does, under what circumstances. After examining various decisions and treatises on the subject it was held that even if a society could not be characterised as a 'State' within the meaning of Article 12 of the Constitution even so a writ would lie against it to enforce a statutory public duty which an employee is entitled to enforce against the society. In such a case, it is unnecessary to go into the question whether the society is being treated as a 'person', or an 'authority', within the meaning of Article 226 of the Constitution. What is material is the nature of the statutory duty placed upon it, and the Court is to enforce such statutory public duty.

7.6 In the case of U.P. State Co-operative Land Development Bank Ltd. vs. Chandra Bhan Dubey and Ors. 1999(1) SCC 741 wherein the writ petition was held to be maintainable principally on the ground that it had been created under the Act. The relevant extract of the said judgment is quoted hereunder :-

"In view of the fact that control of the State Government on the appellant is all pervasive and the employees had statutory protection and therefore the appellant being an authority or even instrumentality of the State would be amenable to writ jurisdiction of the High Court under Article 226 of the Constitution. It may not be necessary to examine any further the question if Article 226 makes a divide between public law and private law. Prima facie from the language of the Article 226 there does not appear to exist such a divide. To understand the explicit language of the Article it is not necessary for us to rely on the decision of English Courts as rightly cautioned by the earlier Benches of this Court. It does appear to us that Article 226 while empowering the High Court for issue of orders or directions to any authority or person does not make any such difference between public functions and private functions. It is not necessary for us in this case to go into this question as to what is the nature, scope and amplitude of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. They are certainly founded on the English system of jurisprudence. Article 226 of the Constitution also speaks of directions and orders which can be issued to any person or authority including, in appropriate cases, any Government. Under clause (1) of Article 367 unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372 apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. "Person" under Section 2(42) of the General Clauses Act shall include any company, or association or body of individuals, whether incorporation or not. Constitution in not a statute. It is a fountain head of all the statutes. When the language of Article 226 is clear, we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction. When any citizen or person is wronged, the High Court will step in to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a cooperative society or association or body of individuals whether incorporated or not, or even an individual. Right that is infringed may be under Part III

> of the Constitution or any other right which the law validly made might confer upon him. But then the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this court has laid down certain guidelines and self-imposed limitations have been put there subject to which High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances. High Court does not interfere when an equally efficacious alternative remedy is available or when there is established procedure to remedy a wrong or enforce a right. A party may not be allowed to by-pass the normal channel of civil and criminal litigation. High Court does not act like a proverbial 'bull in china shop' in the exercise of its jurisdiction under Article 226."

7.7 In Ram Sahan Rai vs. Sachiv Samanaya Prabandhak & Anr., (2001) 3 SCC 323, wherein the appellant was recruited by a Society constituted under the U.P. Cooperative Land Development, the status of the said bank is no doubt of a Co-operative Society, registered under the U.P. Cooperative Societies Act, 1965 and was constituted under the U.P. Cooperative Land Development Bank Act, 1964. But on examination of different provisions of the Rules, By-laws and Regulations, the Apex Court held that it unequivocally indicates that the State Government exercises all-pervasive control over the bank and its employees and the service conditions of such employees are governed by statutory rules, prescribing entire gamut of procedure of initiation of disciplinary proceedings by framing a set of charges and culminating in inflicting of appropriate punishment, after complying with the requirements of giving a show cause and an opportunity of hearing to the delinquent. Apex Court thus held that the Cooperative society was a held to be established under a statute and is amenable to Article 226 of the Constitution of India.

7.8 In Nayagarh Cooperative Central Bank Ltd. & Anr. vs. Narayan Rath & Anr., (1977) 3 SCC 576, relied upon by Opp. Party Bank, the Apex Court did not decide the question as to whether a writ petition could be maintained against a Cooperative Society. The Apex Court observed that such a decision was not strictly in accordance with the other decision of the Hon"ble Supreme Court and proceeded to hold that since in the given case, order passed by the Registrar was in purported exercise of powers conferred on him, the writ petition is maintainable.

8. In the instant case, as noticed above, the Registrar has not passed the impugned orders acting as a statutory authority in purported exercise of powers conferred on him by the Act or the Rules framed there under but such order has been passed by virtue of his having been named an authority to hear and decide appeals in the Service Regulations framed under the By-laws which have no force of law. As such the same cannot be held to be in exercise of statutory power but on account of the By-laws. 8.1. This question, essentially, touches upon the scope of power of the High Courts to issue certain writs as predicated in Article 226 of the Constitution of India.

It is well established position that the power of the High Courts under Article 226 is as wide as the amplitude of the language used therein, which can affect any person - even a private individual - and be available for any other purpose even one for which another remedy may exist (Ref: Rohtas Industries Ltd. (Supra)).

In the case of Praga Tools Corporation (supra), the Apex Court held that it was not necessary that the person or the Authority on whom the statutory duty is imposed need be a public official or an official body. And, that a mandamus can be issued even to an official or a Society to compel him to carry out the terms of the statute under or by which the Society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. Further, a mandamus would lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. While interpreting the amplitude of the term "Authority" used in Article 226 of the Constitution of India, the Apex Court observed that the words "any person or authority" used in Article 226 cannot be confined only to statutory authorities or state instrumentalities but will also cover any other person or body performing public duty irrespective of the form of body concerned.

9. Taking note of the judicial pronouncement as above this court is of the considered view that the present issue relates to a claim of terminal/ retirement benefit and not relating to employment or restoration of employment. The claim is also admittedly a constitutional right of a retired employee being protected under Article 300-A of Constitution of India as a right to property. As such after a clear denial of such benefit by the Opp. Parties in terms of the order passed by this Court in W.P.(C) No.10140 of 2021 without raising any issue of competence of this Court to pass such order, it is no longer open to the opp. Parties to raise the issue of maintainability of the writ petition.

Going by principle decided in Praga Tools Corporation (Supra), where the Apex Court held that it was not necessary that the person or the Authority on whom the statutory duty is imposed need be a public official or an official body rather a mandamus can be issued even to an official or a Society to compel him to carry out the terms of the statute under or by which the Society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings; this court is of the considered view that the present writ petition is maintainable confining the scope of interference only with respect to claim of the petitioner to retirement benefit such as encashment of unutilized leave salary which according to the decision of Hon"ble Apex court is a constitutional right of a retired employee.

The Issue 'A' with respect to maintainability of the writ petition is thus answered in favour of the petitioner.

10. Next issue relates to the maintainability of the writ petition vis-à-vis availability of alternative remedy. Law is no more res integra that there is and cannot be any absolute bar on this Court from entertaining writ petition under Article 226 of the Constitution of India.

Admittedly the petitioner has retired since 2019 and the claim is relating to retiral benefits i.e. encashment of unutilised leave salary, which is protected under

Rule 39 (e) of the Rules, 2003 of the Opposite partyBank, which has been denied by the Bank, in absence of any statutory provision is per se impermissible.

In this factual backdrop of the case at hand this Court is inclined to entertain the writ petition. Issue 'B' is answered accordingly.

11. Next issue is whether the impugned order is sustainable and whether the Bank can deny the benefits of leave encashment to the petitioner, on the ground of non-settlement of his dues when admittedly the petitioner has retired and under Rule 39(e) read with Rule 48 of the Staff Service Rules of the Urban Cooperative Bank Ltd., 2003 there is no provision to deny such benefit and in the absence of any provision in the Service Rules governing the field authorising continuance of departmental proceeding against an employee after his retirement.

12. In the case of State of Jharkhand & Ors vs Jitendra Kumar Srivastava & Anr reported in AIR 2013 SC 3383, the Apex Court held that the antiquated notion of pension being a bounty, a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been set at rest by the decision of the Constitution Bench decision of the Apex Court in Deoki Nandan Prasad v. State of Bihar and Ors. AIR 1971SC1409 wherein it was held that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension.

12A. It was further decided that the grant of pension does not depend upon any one"s discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules.

It is a hard-earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300-A of the Constitution of India. Article 300-A of the Constitution of India reads as under:-

> "**300-A. Persons not to be deprived of property save by authority of law.** – No person shall be deprived of his property save by authority of law."

12B. Apex Court in State of Madhya Pradesh v. Ranojirao Shinde and Anr. reported in AIR 1968 SC 1053 had to consider the question whether a "cash grant" is "property" within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. The Apex Court held that it was property, observing "it is obvious that a right to sum of money is property".

12C. In State of West Bengal Vs. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, Apex Court recognized that even after the repeal of Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty Fourth Amendment) Act, 1978 w.e.f.

20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Apex Court held that a person cannot be deprived of pension without the authority of law, which is the Constitutional mandate enshrined in Article 300 A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

12D. There is no cavil that the claim of encashment of unutilised leave salary qua the Petitioner is governed by Rule 39(e) and Rule 48 of the Staff Service Rules of the Urban Cooperative Bank Ltd, 2003.

Rule 39(e) and Rule 48 of the Staff Service Rules of the Urban Cooperative Bank Ltd, 2003 are quoted hereunder for ready reference:

> **"39. RETIREMENT/ TERMINATION OF SERVICE:**
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) xxx xxx xxx
> (d) xxx xxx xxx
> (e) An employee of the Bank shall be entitled to encash the leave at his credit at the time of retirement subject to maximum of 300 days.
> xxx xxx xxx
> **48. SURRENDER LEAVE (ENCASHMENT OF EARNED LEAVE):**
> (i) An employee of the Bank shall be allowed to encash a portion of his/her Earned Leave subject to the extent of conditions specified below once within the block period of two years commencing from 1st April as per programme drawn by the sanctioning authority.
> (ii) An employee who has got at least 120 days Earned Leave to his/her credit may be allowed to surrender Earned Leave upto a maximum of 30 days in lieu of leave salary and allowances for the period of leave surrendered.
> (iii) The leave salary and allowances admissible for the leave surrendered shall be equal to that which the employee would have received had he actually availed of the leave surrendered.
> (iv) The leave salary and allowances admissible for the leave surrendered shall not liable to be any deduction on account of Provident Fund subscription, insurance premium, house rent, payment of advance etc. <u>but shall be liable to deduction of income tax, in the income in the hands of employee is assessable to such tax</u>."

13. From a conjoint reading of Rule 39(e) and Rule 48 of the Rules, 2003, as quoted above it is clear that the petitioner is entitled to encash the leave subject to maximum of a 300 days at the time of his retirement and as per Rule 48(iv) only Income Tax can be deducted from leave salary encashment value and such amount shall not be liable for any other deduction on account of provident fund subscription, Insurance Premium, House Rent, Payment of Advance etc.

14. <u>The claim of the petitioner that he has 300 days of leave to his credit at the time of his retirement amounting to Rs.7,10,350/- has not been disputed by the Opposite parties</u>.

15. It settled law that leave encashment is a legal right of an employee akin to salary and cannot be denied in absence of any legal provision justifying such denial. If any employee has chosen to accumulate his earned leave to his credit, then encashment becomes his right. There is no doubt that any financial benefit accrued within the tenure of service career or after retirement can only be denied as per the rules and regulations in vogue.

No such authority in the Staff Service Rules justifying denial of leave encashment benefits has been pressed into service by the opposite party Bank.

16. As is evident from the impugned order at Annexure-9 the encashment of unutilized leave salary has been denied, in contemplation of disciplinary proceeding on the basis of a report dated 03.03.2012 received in connection with Cuttack Vigilance Case No.46 of 2011 and the stand of the Opposite party Bank that criminal case instituted against the petitioner vide Vigilance P.S. Case No.46 of 2011 is still pending so also the Departmental Proceedings. And that only on conclusion of such proceedings the financial liability of the petitioner on account of his pending dues as well as actual loss caused to the Bank due to the act or omission on the part of the petitioner in terms of Rule 32 of the Rules, 2003 of the Opposite Party-Bank can be quantified, and till then the benefit of leave encashment under Rule 39 (e) cannot be extended.

This Court finds that Staff Service Rule, 2003 do not envisage continuance of disciplinary proceedings if already initiated against an employee before his retirement to continue post retirement or to initiate any proceeding after his retirement.

When admittedly Rule 39(e) and Rule 48 of the Rules, 2003 do not empower the Opposite party Bank to deny such benefit on account of nonsettlement of other dues/financial liability, the unutilized encashment of leave salary admissible to an employee on his retirement cannot be encumbered by the authorities for adjustment of any other liability.

This Court finds force in the submission of the learned counsel, Mr. Samal, for the Petitioner that under no circumstances the liability of the petitioner to pay any amount can have any bearing on the encashment of leave salary of the petitioner after his retirement more so in view of Rule 39(e) read with Rule 48(iv) of the Rules, 2003.

17. In view of the discussion in the preceding paragraph, this court is of the considered view that the petitioner is entitled to succeed in this W.P.(C), as the right of encashment of leave salary could not have been rejected by the Bank and is thus persuaded to hold that Annexure-9 to the writ petition is not sustainable in the eye of law and liable to be quashed. Issue 'C' is thus answered.

Consequentially, keeping in view that there is no provision in the staff service Rule to initiate or to continue any disciplinary proceeding against its employee after retirement so also the above discussed settled position of law, the

Opposite Party Nos.2 and 3 are directed to pay to the petitioner an amount of Rs.7,10,350/- with interest @ 7% per annum w.e.f. 01.09.2019, towards his leave salary benefit, in terms of Rule 39(e) of the Staff Service Rules of the Urban Cooperative Bank Ltd., 2003 within a period of three months of the date of receipt/production of a copy of this Judgment.

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

Result of the case :
Writ petition is allowed.

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2024 (III) ILR-CUT-1173

DURGA PRASAD MOHANTY
V.
STATE ELECTION COMMISSION ODISHA, BBSR & ORS.

[W.P(C) NOS. 20381, 20292 & 20296 OF 2024]

08 OCTOBER 2024

[BIRAJA PRASANNA SATAPATHY, J.]

Issue for Consideration

Whether in case of casual vacancy arose to the post of Chairman in a Panchayat Samiti, the simultaneous election for the Samiti member as well as for the Chairman is necessary under the Odisha Panchayat Samiti Act & the Rule therein.

Headnotes

ODISHA PANCHAYAT SAMITI ACT, 1959 – Section 44-A r/w Odisha Panchayat Samiti Election Rules, 1991 – Rule 46 r/w Art. 243(O) of the Constitution of India – Casual vacancies arose in the office of Chairman/Vice-Chairman in one Panchayat Samiti of the District Kalahandi & one Panchayat Samiti of the District of Ganjam due to resignation and death – Fill up of such vacancies – Notification on 12.08.2024 issued by the Election Commission to fill up Chairman only, not for the post of Samiti Member – Challenging such notification Writ Petitions filed & the Hon'ble Court while issuing notice in the matter passed an interim order on 21.08.2024 restraining the Commission to hold the election of the Chairman – The petitioners pleaded that as per the provision contained under Rule-46, the Commission should have taken step to fill up both the posts of Samiti Member along with the post of Chairman – It also contended that in view of the interim order dated 21.08.2024, the notification with regard to schedule of bye-election has lost its force – So there is no impediment on the part of the

Commission to issue fresh notification simultaneously while filling up the vacancy of Samiti Member as well as the Chairman – On the other hand on behalf of the Commission it is contended that as per Section 44-A of the Act r/w Art. 243(O) of the Constitution, the Writ Petition is not maintainable – Only election petition is maintainable – Contentions of both the parties considered.

Held : In view of the interim order passed by this Court on 21.08.2024, the schedule of election prescribed in the Notification dated 12.08.2024 has lapsed and in order to conduct the election, a fresh Notification is required to be issued by the Commission by prescribing the schedule of election once again, placing reliance on the provisions contained under Rule-46 of the Rules, this Court while disposing all the 3 (three) Writ Petitions, direct the Commission to take step to fill up the vacancy arising out of the resignation and death of the Samiti Members of both the Panchayat Samiti in question as well as the casual vacancy to the post of Chairman. (Para 9.6)

Citation Reference

Boddula Krishnaiah & Anr. vs State Election Commissioner, A.P. & Ors., **AIR 1996 SC 1595;** N.P. Punnuswami v. Returning Officer, Namakkal Constituency & Ors., **1952 SCR 218**; Lakshmi Charan Sen and Ors. etc. v. A.K.M. Hassan Uzzaman & Ors. etc., **[(1985) Supp. 1 SCR 493] : (AIR1985 SC 1233)**; State of U.P. & Ors. v. Pradhan, Sangh Kshettra Samiti & Ors. **[(1995) Supp. 2 SCC 305 at 331]**; Meghraj Kothari v. Delimitation Commission, **[(1967) 1 SCR 400 : AIR 1967 SC 669]** - **referred to.**

List of Act & Rules

Odisha Panchayat Samiti Act, 1959; Odisha Panchayat Samiti Election Rules, 1991

Keywords

Casual vacancy, Election of chairman & Samiti member of Panchayat Samiti, Simultaneous election, Maintainability of Writ Petition, Election Petition.

Case Arising From

Order dated 12.08.2024 issued by the State Election Commission, Odisha.

Appearances for Parties

For Petitioner : Mr.G. Agarwal, Mr. P.K. Rath, Sr. Adv., Mr. P.K. Parhi
For Opp. Parties : Mr. B.K. Dash (for State Election Commission)
Mr. S.P. Mishra, Sr. Adv.

Judgment/Order

Judgment

B.P. SATAPATHY, J.

1. Since the issue involved in all the 3 (three) Writ Petitions are similar and challenge has been made to the notification dated 12.08.2024, so issued by the State Election Commission, Odisha (in short "the Commission") to fill up the casual vacancies occurred in the office of Chairman/Vice-Chairman of Narla Panchayat Samiti in the district of Kalahandi and Kukudakhandi Panchayat Samiti in the district of Ganjam, all were heard analogously and disposed of by the present common order.

2. Learned counsel appearing for the petitioners contended that petitioner in W.P.(C) No.20381 of 2024 is the Acting Chairman of Narla Panchayat Samiti. Similarly, petitioner in W.P.(C) No. 20292 of 2024 is the Samiti Member of Gurunthi Grama Panchayat under Kukudakhandi Panchayat Samiti and petitioners in W.P.(C) No.20296 of 2024 are the Samiti Member of Kukudakhandi Panchayat Samiti.

3. It is the case of the petitioners in all these 3 (three) Writ Petitions that pursuant to the last Grama Panchayat Election held in the year 2021, petitioners were elected as Samiti Members of Narla Panchayat Samiti and Kukudakhandi Panchayat Samiti. As per the provisions contained under the Odisha Panchayat Samiti Act, 1959 (in short Act), one Kamakhya Prasad Patra was elected as Chairman of Kukudakhandi Panchayat Samiti in the Election held on 12.03.2022. But the said Kamakhya Prasad Patra died on 08.06.2024 and thereby causing a casual vacancy as against the post of Chairman of Kukudakhandi Panchayat Samiti.

3.1. Similarly, in the last Grama Panchayat Election held in the year 2021, one Manorama Mohanty was elected as the Chairman of Narla Panchayat Samiti. But the said Manorama Mohanty when was elected as MLA of Narla Assembly Constituency in the last assembly election held in the month of June, 2024, she submitted her resignation from the post of Chairman of Narla Panchayat Samiti on 10.06.2024 and thereby causing vacancy as against the post of Chairman of Narla Panchayat Samiti.

3.2. Learned counsels appearing for the petitioners placing reliance on the provisions contained under the Odisha Panchayat Samiti Election Rules, 1991 (in short "the Rules") more particularly Rule-46 of the Rules, contended that casual vacancy in case of vacancy occurring on account of removal, resignation, death or otherwise of an elected member, Chairman or Vice Chairman of the Samiti, the Block Development Officer shall forthwith report the fact to the Commissioner through the Collector of the District, who shall fix a date as soon as convenient for holding a by-election to fill up the vacancy.

3.3. It is contended that due to the death of the Chairman of Kukudakhandi Panchayat Samiti in the district of Ganjam and election of the Chairman of Narla Panchayat Samiti and the resignation from the post of Chairman, matter was referred to the respective Collectors of the district by the concerned BDO.

3.4. Placing reliance on the provisions contained under Rule-46 of the Rules, it is contended that since in respect of Narla Panchayat Samiti the elected Chairman submitted her resignation due to her election as a member of the Legislative Assembly and in respect of the Kukudakhandi Panchayat Samiti, the elected Chairman died and thereby causing a casual vacancy as against the post of Chairman as well as Samiti Member, in view of the provisions contained under Rule-46 of the Rules, the Commission should have taken steps to fill up the casual vacancies not only against the post of Samiti Member but also as against the post of Chairman of the Panchayat Samiti.

3.5. But on the face of the clear provisions contained under Rule 46 of the Rules, the Commission when issued the impugned notification on 12.08.2024 to fill up the casual vacancy of Chairman only in respect of Narla Panchayat Samiti and Kukudakhandi PanchayatSamiti, action of the Commission in issuing such a notification is under challenge in the aforesaid 3 (three) Writ Petitions.

3.6. It is contended that in W.P.(C) No.20381 of 2024, this Court while issuing notice of the matter vide order dated 21.08.2024, passed an interim order restraining the Commission to hold the election of the Chairman of Narla Panchayat Samiti. This Court in W.P.(C) No.20292 of 2024, passed a similar order on dated 21.08.2024, restraining the Commission to hold the election of the Chairman of Kukudakhandi Panchayat Samiti. It is contended that by virtue of the interim order, so passed on 21.08.2024 in W.P.(C) No.20381 & 20292 of 2024, election to the post of Chairman of Narla Panchayat Samiti and Kukudakhandi Panchayat Samiti was not conducted in terms of the impugned Notification issued on 12.08.2024.

4. Mr. P.K. Rath, learned Sr. Counsel appearing for the petitioner in W.P.(C) No.20292 of 2024 and Mr. G. Agrawal, learned counsel appearing for the petitioner in W.P.(C) No.20381 of 2024 along with Mr. P.K. Parhi, learned counsel appearing in W.P.(C) No.20296 of 2024, vehemently contended that in view of the clear provisions contained under Rule-46 of the Rules, the Commission should have taken step to fill up both the post of Samiti Member along with the post of Chairman, which fell vacant due to the death of the Chairman in the case of Kukudakhandi Panchayat Samiti and due to the resignation of the Chairman in respect of Narla Panchayat Samiti. But the Commission only issued the impugned notification on 12.08.2024 to fill up the vacancy as against the post of Chairman of both the Panchayat Samiti. Being aggrieved by such action of the Commission, all the 3 (three) Writ Petitions have been filed.

4.1. It is also contended that as per the provisions contained under Rule-46(3) of the Rules, the provisions contained under part-2 to 6 of the Rules shall apply mutandis to such by-elections. As provided under the proviso to Rule-46(3) of the Rules, in case of by-election to the office of an elected member, the Electoral Role utilized at the time of election to such office shall be utilized and unless the Commission otherwise directs it shall not be necessary either to publish the electoral roll or to invite objection. Rule-46 of the 1991 Rules in its entirety reads as follows:

> ***"Filling up of the casual vacancies-(1)*** *Casual vacancy-In the case of a vacancy occurring on account of removal, resignation, death or otherwise of an elected member, Chairman or Vice-Chairman of the Samiti, the Block Development Officere shall forthwith report the fact to the Commissioner through the Collector of the district who shall fix a date as soon as convenient for holding a bye-election to fill up the vacancy.*
>
> *Provided that in case of bye-election to the office of an elected member, the electoral roll utilised at the time of election to such office shall be utilised and unless the Commissioner otherwise directs it shall not be necessary either to publish the electoral roll or to invite objections.*
>
> *Provided further that the Commissioner may, if the circumstances so warrant, fix up different dates for different stages of election proceedings to fill up casual vacancies."*

4.2. It is accordingly contended that since the post of Chairman of both the Panchayat Samiti along with the post of Samiti Member fell vacant due to the death and resignation in both the cases, the Commission instead of going for the election as against the post of Chairman by publishing the impugned Notification dated 12.08.2024, should have taken step to fill up the post of Samiti Member as well as post of Chairman of the Panchayat Samiti simultaneously.

4.3. It is also contended that taking into account the clear provisions contained under Rule-46 of the Rules, this Court not only passed the impugned order on 21.08.2024 but also in the meantime the schedule of election provided in the impugned notification has lost its force. The Commission in view of such lapse of the schedule is also required to issue a fresh notification by prescribing the schedule of Election once again. Therefore, there will be no impediment on the part of the Commission to fill up the vacancy of Samiti Member as well as Chairman of the Panchayat Samiti simultaneously with issuance of fresh notifications in that regard.

4.4. It is also contended that since the post of Member in both the Samiti fell vacant due to the death of Member/Chairman of Kukudakhandi Panchayat Samiti Page 9 of 24 and Resignation of the Member/Chairman of Narla Panchayat Samiti, unless the post of member is filled up by way of a bye-election, the said member will be deprived to participate in the Election to be held for the post of Chairman.

4.5. It is accordingly contended that the impugned notification dated 12.08.2024, so issued by the Commission requires interference of this Court with passing of appropriate order.

5. Mr. B.K. Dash, learned counsel appearing for the Commission on the other hand made his submission basing on the stand taken in the counter affidavit so filed in both the Writ Petitions. It is the main contention of the learned counsel appearing for the Commission that in view of the provisions contained under Section-44-A of the Act, the Notification issued by the Commission on 12.08.2024 can only be challenged by way of filing election-petition and not by filing of writ petition under Article-226 and 227 of the Constitution of India. Section 44-A of the Act reads as follows:

> ***"44-A. Election petitions-*** *No election of a person as a member of Samiti held under this Act shall be called in question except by an election petition presented in accordance with the provisions of this chapter."*

5.1. It is also contended that in view of the provisions contained under Article 243(O) of the Constitution of India, since the process of election to fill up the casual vacancy against the post of Chairman of Narla Panchayat Samiti and Kukudakhandi Panchayat Samiti was set in motion with issuance of the Notification dated 12.08.2024, the same is not liable for interference by Courts in exercise of the power under Article-226 of the Constitution of India. Article-243(O) of the Constitution of India reads as follows:-

> *"Article 243(O) {Bar to interference by courts in electoral matters} Notwithstanding anything in this Constitution, -*
>
> *a. the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243K, shall not be called in question in any Court;*
>
> *b. no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."*

5.2. In support of his submission, Mr. Dash, learned counsel for the Commission relied on a decision of the Hon'ble Apex Court reported in AIR 1996 SC 1595 in the case of ***Boddula Krishnaiah & Anr vs State Election Commissioner, A.P. & Ors*****.** Hon'ble Apex Court in Para-7 to 11 of the said decision has held as follows:-

> ***"7. Article 243(o)*** *of the Constitution envisages bar on interference by courts in election matters. Notwithstanding anything contained in the Constitution, under sub-clause (b) "no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State'. Thus there is a constitutional bar on interference with the election process except by an election petition, presented to an Election Tribunal as may be made by or under law by the competent legislature and in the manner provided thereunder, Power of the court granting stay of the election process is no longer res integra*
>
> *8. In N.P. Punnuswami v. Returning Officer, Namakkal Constituency & Ors. [1952 SCR 218] a Constitution Bench of this Court had held that having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted. In conformity with the principle, the scheme of the election law is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class which under the law by which elections are governed, would have the effect of vitiating the "election"; and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.*

9. The same principle was laid down in Lakshmi Charan Sen and Ors. etc. v. A.K.M. Hassan Uzzaman & Ors. etc.[(1985) Supp. 1 SCR 493] : (AIR1985 SC 1233) . In this case where the election process was set in motion the High Court granted ad-interim injunction of the further proceedings of the election to the State Legislature. A Constitution Bench of this Court had held thus:

"The High Court acted within its jurisdiction in entertaining the writ petition and in issuing a Rule Nisi upon it, since the petition questioned the vires of the laws of election. But it was not justified in passing the interim orders dated February 12, and 19, 1982 and in confirming those orders by its judgment dated February 25, 1982. Firstly, the High Court had no material before it to warrant the passing of those orders. The allegations in the Writ Petition are of a vague and general nature on the basis of which no relief could be granted. Secondly, though the High Court did not lack the jurisdiction to entertain the Writ Petition and to issue appropriate directions therein, no high Court in the exercise of its power under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked.

The High Courts must observe a selfimposed limitation on their power to act under Article 226, by refusing to pass orders or given directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of Article 329 [b] of the Constitution "

At page 497 it was further held that:

"Even assuming, that the preparation and publication of electoral rolls are not a part of the process of 'election' within the meaning of Article 329 [b], the High Court ought not to have passed the impugned interim orders, whereby it not only assumed control over the election process but, as a result of which, the Section to the Legislative Assembly stood the risk of being postponed indefinitely."

10. The same principle was reiterated when the election to the Gram Panchayat was sought to be stalled in State of U.P. & Ors. v. Pradhan, Sangh Kshettra Samiti & Ors. [(1995) Supp. 2 SCC 305 at 331]. The Court observed thus:

"What is more objectionable in the approach of the High is that although clause [a] of Article 243 [O] of the constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in Meghraj Kothari v. Delimitation Commission [(1967) 1 SCR 400 :AIR 1967 SC 669]. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of Sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under Sections 8 and 9 were not to be treated as

final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or Section 9 of the Delimitation Commission Act and that same position as a law made by Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-0 in place of Article 327 and Sections 2 [kk], II-F published under Section 10 [4] of Act puts such an order in the and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged nor the court could haveentertained such challenge except on the ground that before the delimitation no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31-8-1994."

11. Thus, it would be clear that once an election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with the election process giving direction to the election officer to stall the proceedings or to conduct the election process afresh in particular when election has already been held in which the voters were allegedly prevented to exercise their franchise. As seen, that dispute is covered by an election dispute and remedy is thus available at law for redressal."

5.3. It is also contended that similar issue was before this Court in W.P.(C) No.5872 of 2020. This Court in the said decision has held has follows:-

"It is seen that nowhere it has been provided that in case of vacancies appearing for the Member as well as President of the Zilla Parishad, the by-election in respect of Member is to be held first and after filing up of that casual vacancy, the process for filing up the casual vacancy for the President of Zilla Parishad is to be held so as to say that the State Election Commission is under the legal obligation to act accordingly for holding the elections."

5.4. Reliance was also placed to a decision of this Court reported in 2016 Suppl.-I, OLR -97. This Court in Para-14 of the judgment has held as follows:-

"14. True, the Commissioner of the Corporation sent intimation to the State Election Commissioner under Rule-90 of the Rules, about occurrence of the casual vacancy in the office of the Corporation in Ward No.21 with a request to take steps to hold bye-election to fill up such vacancy. There is no mandate of law that such byeelection to fill up the casual vacancy in the office of the Corporator must be filled up before election to the office of the mayor is held."

5.5. Similarly, reliance was also placed to a decision of this Court passed on 05.09.2003 in W.P.(C) No.5908 of 2003. This Court in the said decision has held as follows:-

"The petitioner is yet to get elected as Member of the Samiti and thus, has no right presently either to elect a Chairman of a Samiti or to contest in an election for Chairman of the samiti and the mere expectation of the petitioner that in the election that may be held for the vacancy in the office of the Member of the Samiti he may be elected cannot confer any locus standi on the petitioner to move this Court to stall the election to the office of the Chairman of the Samiti. On this ground alone, we are not

inclined to interfere in this writ petition with the election to the office of Chairman, K. Nuagaon Panchayat Samiti."

5.6. Mr. Dash, learned counsel for the Commission placing reliance on the provisions contained under Article 243(O) of the Constitution of India and the decisions cited supra, contended that since the process of election to fill up the casual vacancy of Narla Panchayat Samity and Kukudakhandi Panchayat Samity has already been set in motion with issuance of the Notification dated 12.08.2024 under Annexure-6, no interference can be made by this Court with regard to the said process of election notified on 12.08.2024. Not only that it is also contended that the only scope available to the petitioners is to file Election Petition as provided under Section-44-A of the Odisha Panchayat Samiti Act, 1959. It is accordingly contended that all the three writ petitions are not entertainable and liable for dismissal.

6. To the stand taken by the learned counsel appearing for the Commission, learned counsels for the petitioners contended that in view of the provisions contained under Section-44-L of the Act, since the election has not yet been held in terms of the Notification issued on 12.08.2024, no Election Petition is maintainable to declare the election as void. It also contended that since on the face of the interim order passed by this Court on 21.08.2024, election in terms of the impugned Notification dated 12.08.2024 has not been held and the schedule of election has lapsed, there is no impediment on the part of the Commission to go for the election to fill up the vacant post of Samiti Member along with the Election of the Chairman of the concerned Panchayat Samiti.

6.1. It is further contended that while election of Samiti Member is by virtue of direct election, election of Chairman is by way of indirect election and election of Chairman can only be made from amongst elected Samiti Members of the Panchayat Samiti.

6.2. It is accordingly contended that in view of the fact that the schedule of election so issued in the impugned Notification dated 12.08.2024 since has lapsed in the meantime, the Commission can go for election of Samiti Member as well as the Chairman by fixing the dates suitably and thereby enabling the Samiti Members of the Panchayat Samiti, which has fallen vacant due to the death and resignation respectively, can participate in the election to be held for the post of Chairman.

7. Mr. S.P. Mishra, learned Senior Counsel appearing for the private Opp. Parties in both the Writ Petitions on the other hand contended that in view of the provisions contained under Section 44-A of the Act r/w Section-44-L(e), an election petition is very well maintainable against the Notification issued by the Commission on 12.08.2024. It is also contended that if it is the case of the petitioners that provisions contained under Rule-46 has not been followed, an Election Petition is very well maintainable under Section-44-L(e) of the Act.

7.1. It is also contended that as provided under Rule51 of the Rules, any dispute arising out of any of the provisions of these rules except those contained in part-II-A and Rule-47, 48 & 49 shall be deemed to be an election dispute under the Act and

shall be decided by such authority and in such manner as provided in the Act. Since the petitioners claim non-compliance of Rule-46 of the Rules, in view of the provisions contained under Rule-51 read with Section-44-A r/w Section-44-L(e) of the Act, petitioners should have raised an election dispute instead of approaching this Court challenging the Notification dated 12.08.2024. Learned Senior Counsel also supported the contention raised by the learned counsel for the Commission with regard to the bar in entertaining such Writ Petitions in view of the provisions contained under Article-243(O) of the Constitution of India.

8. I have heard Mr. P.K. Rath, learned Senior Counsel appearing for the petitioner in W.P.(C) Nos.20292, Mr. G. Agrawal, learned counsel in W.P.(C) No.20381 of 2024, Mr. P.K. Parhi, learned counsel in W.P.(C) No.20296 of 2024 along with Mr. B.K. Dash, learned counsel appearing for the State Election Commission in all the 3 (three) cases and Mr. S.P. Mishra, learned Senior Counsel appearing for the private Opp. Parties. On the consent of learned counsels appearing for the parties and with due exchange of the pleadings, all the matters were heard at the stage of Admission and disposed of by the present common order.

9. Having heard learned counsel for the parties and considering the submissions made and the materials placed before this Court, it is found that post of Chairman of Narla Panchayat Samiti in the district of Kalahandi fell vacant due to the resignation of the Chairman on her election as a member of the State Legislative Assembly. The Chairman of Narla Panchayat Samiti was elected as Samiti member of Karmegaon Grama Panchayat and she was elected as Chairman subsequently. Similarly, the Chairman of Kukudakhandi Panchayat Samiti was earlier elected as Samiti Savya of Dengapadar Grama Panchayat.

9.1. As provided under Rule-46 of the 1991 Rules, casual vacancy in case of vacancy occurring on account of removal, resignation, death or otherwise of an elected member, Chairman/Vice-Chairman of the Samiti was required to be reported to the Commission by the BDO though the Collector of the district and the Commission shall fix a date as soon as convenient for holding a bye-election to fill up the vacancy. It is not disputed by either of the parties that post of Chairman of Narla Panchayat Samiti and Kukudakhandi Panchayat Samiti fell vacant due to the resignation and death of the concerned Chairman. Both the Chairman of the 2 (two) Panchayat Samiti were elected as Samiti Member of Karmegaon Grama Panchayat under Narla Panchayat Samiti and Dengapadar Grama Panchayat under Kukudakhandi Panchayat Samiti.

9.2. In view of the provisions contained under Rule-46 of the Rules, the Commission was required to take steps to fill up the vacancy to the posts of Samiti Member as well as Chairman of the Panchayat Samiti. But as found from the record, the impugned Notification dated 12.08.2024 was issued by the Commission only to fill up the casual vacancy to the post of Chairman of Narla and Kukudakhandi Panchayat Samiti.

9.3. In view of the clear provision contained under Rule-46 of the Rules, the Commission should have taken steps to fill up the vacancy arising out of death/resignation of the Samiti Member and consequential vacancy to the post of Chairman. But as found from the record, the impugned Notification was only issued to fill up the casual vacancy as against the post of Chairman.

9.4. It is also found that because of the interim order passed on 21.08.2024 in both the cases, the election in terms of the impugned Notification dated 12.08.2024 could not be held and the schedule of election indicated in the impugned notification has already lapsed.

9.5. It is also the view of this Court that in view of the provisions contained under Article-243(O) of the Constitution of India read with Section-44-A and Section-44-L(e) of the Act and Rule-51 of the Rules and the decisions relied on by the learned counsel for the Commission, the recourse open to the petitioners was to file an election dispute challenging the Notification dated 12.08.2024.

9.6. But since in view of the interim order passed by this Court on 21.08.2024, the schedule of election prescribed in the Notification dated 12.08.2024 has lapsed and in order to conduct the election, a fresh Notification is required to be issued by the Commission by prescribing the schedule of election once again, placing reliance on the provisions contained under Rule-46 of the Rules, this Court while disposing all the 3(three) Writ Petitions, direct the Commission to take step to fill up the vacancy arising out of the resignation and death of the Samiti Members of both the Panchayat Samiti in question as well as the casual vacancy to the post of Chairman.

9.7. This Court accordingly directs the Commission to issue 2 (two) separate notifications in such a manner that the Samiti Member to be elected to fill up the vacancy can participate in the election to the post of Chairman. This Court directs the Commission to take immediate step in the matter as directed.

10. All the Writ Petitions are accordingly disposed of with the aforesaid observation and direction.

Headnotes prepared by:
Shri Jnanendra Kumar Swain (Judicial Indexer)
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case :
Writ Petitions disposed of.

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2024 (III) ILR-CUT-1183

Dr. AMIYA RANJAN BARIK
V.
STATE OF ODISHA & ORS.

[W.P(C) NOS. 36125 OF 2023, 8115 & 8155 OF 2024]

13 NOVEMBER 2024

[B.P. SATAPATHY, J.]

Issue for Consideration

Whether the process of Selection to the post of Lecturer is sustainable in the eye of law.

Headnotes

SERVICE JURISPRUDENCE – Appointment – The State Selection Board issued Advertisement for the post of Lecturers in various discipline prescribing the qualification of 55% of mark in Master degree, in terms of the resolution issued by the government in the erstwhile Education and Youth Services Department on 25.07.1989 – The qualification prescribed by the Board is in contravention to the notification issued by University Grants Commission which has been accepted by the State Government vide resolution dated 31.12.1999 – Whether the process of selection in contravention to notification issued by U.G.C. is sustainable.

Held: No – In view of the resolution issued by the Department on 31.12.1999, the prescribed qualification for the post of Lecturer is not the qualification prescribed in the impugned advertisement – The process of selection initiated by the Board with the qualification so prescribed is not legal and justified. (Para 12.4)

Citations Reference

Gambhirdan K Gadhvi Vs. State of Gujarat & Ors., **Writ Petition (Civil) No.1525 of 2019** ; State of West Bengal Vs. Anindya Sundar Das & Ors., **Civil Appeal No. 6706 of 2022**; Professor (Dr). Sreejith P.S Vs. Dr. Rajasree M.S & Ors., **Civil Appeal No.7634-7635 of 2022**; Kunja Behari Panda & Ors. Vs. State of Odisha & Ors., **W.P(C) No. 33452 of 2020**; Neetu Sharma Vs. State of Punjab & Others, **AIR 2007 Supreme Court 758**; Girjesh Shri Vastava & Ors. Vs. State of Madhya Pradesh & Ors., **(2010) 10 SCC 707**; Hari Bansh Lal v. Sahodar Prasad Mahto **[(2010) 9 SCC 655]**; Jagdish Prasad Sharma & Ors. Vs. State of Bihar & Ors., **(2013) 8 SCC 633**; Kalyani Mathivanan Vs. K.V. Jeyaraj & Ors., **(2015) SCC 363**; Dr. J. Bijayan & Ors. Vs. State of Kerala & Ors., **Civil Appeal No.5037 of 2022**; Dr.(Major) Meeta Sahai Vs. State of Bihar & Ors., **Civil Appeal No.9482 of 2019**; Manish Kumar Shahi v. State of Bihar, **(2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256**; Madan Lal v. State of J&K, **(1995) 3 SCC 486 : 1995 SCC (L&S) 712**; Marripati Nagaraja v. State of A.P., **(2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68**; Dhananjay Malik v. State of Uttaranchal, **(2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005**; K.A. Nagamani v. Indian Airlines, (2009) 5 SCC 515 : (2009) 2 SCC (L&S) 57; Hansmina Kumari Das & Ors. Vs. State of Orissa & Ors., **W.P.(C) NO.1966 of 2017**; Kunja Bihari Panda & Ors. Vs. State of Odisha & Ors., **W.P.(C) No.33452 of 2020**; Asit Kumar Jenamani Vs. State of Odisha & Ors., **W.P.(C) No. 13666 of 2020 & batch**; Central

Council for Research in Ayurvedic Sciences & Anr. Vs. Bikartan Das & Ors., **Civil Appeal No.3339 of 2023**; Ujjal Mandal Vs. State of West Bengal & Ors., **WPA No. 9253 of 2015 – referred to.**

List of Rules

Orissa Education Service (College Branch) Recruitment Amendment Rules, 2012; University Grants Commission Regulations, 2009; University Grants Commission Regulations, 2016.

Keywords

Prescribed Qualification, Notification, University Grants Commission, Resolution, Post of Lecturer.

Appearances for Parties

For Petitioner : Mr. S. Swain, Mr. Sailesh Das
For Opp.Parties : Mr. B. Mohanty, A.G.A
Mr. S.K. Das, Mr. T.K. Satapathy,
Mr. B. Routray, Sr. Adv., Mr. S.D. Routray,
Mr. L. Mohanty (Intervenor)

Judgment/Order

Judgment

B.P. SATAPATHY, J.

1. Since the issue involved in all these three (3) Writ Petitions are identical, all were heard analogously and disposed of by the present common order.

2. For the sake of brevity, pleadings made in W.P.(C) No.36125 of 2023 was taken as the lead case for deciding the issue in question.

3. Writ petition in W.P.(C) No.36125 of 2023 has been filed challenging the advertisement issued by the State Selection Board (in short, "the Board") on 11.09.2023 under Annexure-1.Vide the said advertisement, the Board invited applications to fill up the post of Lecturers in various discipline including Physics in non-Government Aided Colleges of Odisha and the last date for making such application was fixed to 13.10.2023.

3.1 Learned counsel for the Petitioner contended that the advertisement so issued under Annexure-1 is the subject-matter of challenge inter alia on the ground that the educational qualification prescribed for the Post of Lecturer being contrary to the notification issued by the University Grants Commission (in short "Commission") on 18.07.2018 under Annexure-4, the process of selection so initiated by the Board for recruitment to the post of Lecturer in Physics is not sustainable in the eye of law.

3.2. It is contended that as provided in the notification issued by the Commission on 18.07.2018 under Annexure-4, the prescribed qualification for the post of Asst. Professor is as follows:

Assistant Professor:

Eligibility (A or B):

Good academic record, with at least 55% marks (or an equivalent grade in a point-scale wherever the grading system is followed) at the Master's degree in Yoga or any other relevant subject, or an equivalent degree from an Indian/foreign University.

Besides fulfilling the above qualifications, the candidate must have cleared the National Eligibility Test (NET) conducted by the UGC, CSIR or a similar test accredited by the UGC like SLET/SET or who are or have been awarded a Ph. D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of M.Phil./Ph.D. Degree) Regulations, 2009 or 2016 and their amendments from time to time.

OR

A Master's degree in any discipline with at least 55% marks (or an equivalent grade in a point-scale wherever the grading system is followed) and a Ph.D. Degree in Yoga in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of M.Phil./Ph.D. Degree) Regulations, 2009 or 2016 and their amendments from time to time as the case may be.

Note: Considering the paucity of teachers in the newly- emerging field of Yoga, this alternative has been provided and shall be valid only for five years from the date of notification of these Regulations."

3.3. It is contended that along with the qualification of 55% mark in the Master Degree, in the notification issued by the Commission under Annexure-4, the other qualification is the passing of the National Eligibility Test (NET) conducted by the U.G.C, CSIR or a similar test accredited by UGC like SLET/SET or those who are or have been awarded a Ph.D Degree in accordance with the Commission's Regulations 2009 or 2016. Since in the impugned advertisement so issued by the Board under Annexure-1, no such qualification of NET and/or Ph.D has been prescribed, the process of selection undertaken by the Board with the said qualification is illegal and unsustainable in the eye of law.

3.4. It is contended that since acquisition of NET qualification and/or Ph.D is a mandatory qualification for the post of Asst. Professor, the Board while issuing the impugned advertisement could not have prescribed the qualification i.e. Master Degree with at least 55% of mark only. It is accordingly contended that since the qualification prescribed in the impugned advertisement is not in consonance with the qualification prescribed by the Commission in its notification dated 18.07.2018 under Annexure-4, the process of selection so undertaken by the Board basing on Annexure-1 is vitiated.

3.5. It is also contended that while issuing similar nature of advertisement as against the post of Lecturer, Odisha Public Service Commission, (in short, "the OPSC") under Annexures-6 & 7 prescribed the qualification as has been prescribed by the Commission under Annexure-4. But the Board while issuing the impugned advertisementsince never followed the qualification prescribed by the Commission which is required to be followed by the Board, the process of selection initiated under Annexure-1 requires interference of this Court.

3.6. It is also contended that taking into account the stand taken in the Writ Petition, this Court passed an interim order on 09.02.2024 inter alia directing that no final selection be made with regard to the post of Lecturer in Physics pursuant to Annexure-1 till the next date and the said interim order was allowed to continue from time to time.

4. Mr. Sameer Kumar Das, learned counsel appearing for the Board on the other hand made his submission basing on the stand taken in the counter affidavit so filed by Opp. Party No.3.

It is contended that the advertisement under Annexure-1 was issued with the qualification so prescribed in terms of the resolution issued by the Government in the erstwhile Education and Youth Services Department on 25.07.1989 under Annexure-A/3. It is contended that in the resolution issued under Annexure-A/3, for recruitment of Lecturers in the affiliated colleges of the State, a candidate should secure 55% mark at the Master Degree Examination. Not only that, Government in the said Resolution also decided that candidates who have secured 54.5% marks or more but below 55% at the Masters Degree, may be rounded Upto 55%.

4.1. It is contended that since in the resolution so issued by the Government under Annexure-A/3, the prescribed qualification is a Masters Degree with 55% mark, the same was followed by the Board while issuing the advertisement under Annexure-1 with prescription of the qualification vide Para-4. It is accordingly contended that since the advertisement under Annexure-1 was issued in terms of the qualification prescribed by the Government under Annexure-A/3, no illegality or irregularity can be found with the said advertisement.

4.2. Placing reliance on the provisions contained under para-5 of the advertisement, learned counsel appearing for the Board contended that even though acquisition of NET qualification and/or Ph.D qualification was not a prescribed qualification as indicated in para-4 of the advertisement, but candidates with having NET qualification and Ph.D qualification were given preference for selection as against the post of Lecturer. It is accordingly contended that since candidates with having NET and Ph.D qualification were given extra mark towards Career Assessment, even if such a qualification is not prescribed for eligible candidates to make the application, but it cannot be treated that the Board has not followed the guideline issued by the Commission.

4.3. Learned counsel appearing for the Board also contended that qualification prescribed by the Commission under Annexure-4 is not a mandatory requirement to be followed by the Board while making the selection to the post of Lecturer pursuant to Annexure-1. It is also contended that by the time interim order was passed by this Court on 09.02.2024, process of selection had already been completed with recommendation of the candidates for their appointment in different branches and such selected candidates have already been provided with the appointment save and except the candidates recommended as against the discipline Physics.

4.4. Learned counsel appearing for Opp. Party No.3 also contended that the notification issued by the Commission under Annexure-4 is only applicable for the post of Asst. Professor (stage-I) but not for recruitment to the post of Lecturer. It is contended that since the advertisement under Annexure-1 has been issued for recruitment to the post of Lecturer and the guideline issued by the Commission under Annexure-4 is applicable for recruitment to the post of Asst. Professor (stage-1), the said guideline is not applicable for recruitment to the post of Lecturer for which the advertisement under Annexure-1 has been issued.

4.5. It is also contended that the Petitioner pursuant to Annexure-1 since made the application as against the post of Lecturer in physics, he is not permitted to challenge the stipulation contained in the advertisement. It is accordingly contended that since the qualification so prescribed in Annexure-1 is in terms of the resolution issued by the Government under Annexure-A/3, no illegality or irregularity can be found with the qualification so prescribed and the Writ Petition is liable for dismissal.

5. Mr. Buddhadev Routray, learned Sr. Counsel and Mr. Laxmikanta Mohanty, learned counsel appearing for some of the Intervenor-Petitioners/ selected candidates in the discipline Physics made similar submission as made by the learned counsel appearing for the Board.

5.1. It is contended that since the qualification prescribed in the impugned advertisement is in accordance with the resolution issued by the Government under Annexure-A/3, the same cannot be interfered with by this Court. It is also contended that prior to passing of the interim order by this Court, process of selection has already been completed with the appointment of the selected candidates in all other disciplines save and except the discipline Physics.

5.2. It is contended that since similarly situated candidates belonging to all other disciplines have not only been selected but also appointed, the selected candidates in the discipline Physics are required to get similar benefit of appointment. Because of the interim order passed, intervenor Petitioners who have qualified the recruitment process, have been deprived from getting the benefit of appointment.

6. To the stand taken in the counter affidavit so filed by the Board, learned counsel appearing for the Petitioner made further submissions basing on the stand taken in the rejoinder affidavit. Placing reliance on the further stand taken in the rejoinder affidavit, learned counsel appearing for the Petitioner contended that as provided under clause-3.6.1 of resolution dt.06.10.1989 under Annexure-9, which was issued subsequent to Annexure-A/3, Government in the erstwhile Education and Youth Services Deptt. held that the minimum qualification required for appointment to the post of Lecturers, Readers, Professors will be those prescribed by the Commission from time to time. It is also contended that similar view was also taken by the Government while issuing another resolution on 19.03.1990 under Annexure-10.

6.1. As provided under Para-2(2)(d) of the Resolution dt.19.03.1990 under Annexure-10, in order to be eligible for recruitment to the post of Lecturer, a candidate shall have a Master Degree in the relevant subject from a recommended University with at least 55% of mark or it is equivalent rate. But as provided under Para-2(2) (e), a candidate has to qualify the comprehensive test conducted for the purpose of selection of College Teachers by the U.G.C or the State Government in consultation with the U.G.C, as the case may be.

6.2. It is also contended that as provided under clause- (e), candidates possessing M.Phil or Ph.D Degree are not required to appear the comprehensive test conducted by the U.G.C. It is accordingly contended that since subsequent to Annexure-A/3 while issuing further resolution under Annexures-9 & 10, State Government decided to follow the qualification prescribed by the U.G.C for recruitment to the post of Lecturer and the same having not been followed by the Board while issuing the impugned advertisement under Annexure-1, the same is not sustainable in the eye of law.

6.3. It is also contended that Government in the Department of Higher Education while issuing another resolution dt.31.12.1999 under Annexure-11 clearly held that for direct recruitment to the post of Lecturers, the minimum requirement is of a good academic record, 55% of marks at the Master's level and qualifying in the NET or an accredited test. It was made optional for the University to exempt Ph.D holders from NET or to appear NET in their case. Not only that, vide Para 4.5 (b) of the Resolution under Annexure-11, State Government resolved that the minimum qualification for the post of Lecturer will be those as prescribed by the University Grants Commission from time to time. Para 4.5 (b) & (c) of the Resolution dt. 31.12.1999 so issued under Annexure-11 reads as follows:

> **4.5**. Recruitment and Qualifications:
>
> **(b)** The minimum qualifications required for the post of Lecturers, Readers, Professors, Principals, will be those as prescribed by the University Grants Commission from time to time.
>
> **(c)** The minimum requirements of a good academic records, 55% of the marks at the master's level and qualifying in the National Eligibility Test, or an accredited test, shall remain for the appointment of Lecturers. It would be optional for the University to exempt Ph. D. holders from NET or to require NET, in their case, either as a desirable or essential qualification for appointment as Lecturers in the University Departments and Colleges. The minimum requirement of 55% should not be insisted upon for Professors, Readers, for the existing incumbents who are already in the University system. However, these marks should be insisted upon for those entering the system from outside and those at the entry point of Lecturers."

6.4. It is accordingly contended that since subsequent to Annexure-A/3 while issuing the resolution dt. 31.12.1999 under Annexure-11 Government in the Department of Higher Education prescribed the minimum qualification for appointment of Teachers in the University and Colleges as prescribed by the Commission and as provided under Para 4.5(c), the minimum qualification so

prescribed is 55% in the Master's level with acquisition of qualification of NET and/or Ph.D, the Board was supposed to follow the subsequent resolution issued under Annexure-11 instead of acting on the resolution issued under Annexure-A/3, so issued on 25.07.1989.

6.5. Learned counsel for the Petitioner placing reliance on the notification issued by the Higher Education Deptt. on 14.09.2014 under Annexure-5 also contended that while amending Rule 4(2) of the relevant recruitment Rule i.e Orissa Education Service (College Branch) Recruitment Amendment Rules, 2012, clause(e) was substituted with the following clause.

> (ii) Clause (e) shall be substituted by the following clause, namely:-
>
> (i) NET shall remain the compulsory requirement for appointment as Lecturer for those with post- graduate degree, but the candidates having Ph.D. Degree in accordance with the provisions of the University Grants Commission (Minimum Standards and Procedure for award of Ph.D. Degree) Regulations, 2009 on the concerned subject shall be exempted from the requirement of the minimum eligibility conditions of NET/SLET/SET.
>
> (ii) The Commission shall consider and recommend the names of NET qualified candidates and Ph.D. Degree holders for such appointment after conducting viva-voce test".

6.6. It is also contended that as found from the resolution issued by the Higher Education Deptt. On 04.04.2016 under Annexure-3 series, post of Lecturer was redesignated as Asst. Professor (stage-I). It is contended that since post of Lecturer in terms of resolution dt.04.04.2016 was re-designated as Asst. Professor (stage-I), the stand taken by the Board that since the recruitment basing on Annexure-1 advertisement is for the post of Lecturer and the qualification prescribed under Annexure-4 is for the Post of Asst. Professor (Stage-I), the contention raised by the Board is not acceptable.

6.7. It is further contended that even though pursuant to the advertisement issued under Annexure-1, Petitioner made his application, but on finding that the qualification so prescribed is not in accordance with the qualification prescribed by the Commission, Petitioner never participated in the selection process.

6.8. In support of the stand taken in the Writ Petition and the rejoinder affidavit, learned counsel for the Petitioner relied on the following decisions:

> **1. Gambhirdan K Gadhvi Vs. State of Gujarat and others, Writ Petition (Civil) No.1525 of 2019, decided on 03.03.2022.**
>
> **2. State of West Bengal Vs. Anindya Sundar Das & Others, Civil Appeal No.No.6706 of 2022, decided on 11.10.2022.**
>
> **3. Professor (Dr). Sreejith P.S Vs. Dr. Rajasree M.S & Others, Civil Appeal No.7634- 7635 of 2022, decided on 21.10.2022.**
>
> **4. Kunja Behari Panda and others Vs. State of Odisha and Others, W.P(C) No.33452 of 2020 decided on 24.01.2022.**

In case of **Gambhirdan K Gadhvi**, Hon'ble Apex Court in para-15 & 16 of the said judgment has held as follows:

> **15.** *Thus, we find that the appointment of Respondent 4 is contrary to the UGC Regulations, 2018. Also, Respondent 4 has been appointed by a Search Committee, not constituted as per the UGC Regulations, 2018. Moreover, Respondent 4 does not fulfil the eligibility criteria as per the UGC Regulations, 2018, namely, having ten years of teaching work experience as a Professor in the university system. As observed hereinabove, by adopting the Scheme and having accepted 80% of the maintenance expenditure from the Central Government and when Respondent 4 is paid a fixed pay of Rs 75,000 along with a special allowance of Rs 5000 per month, which is prescribed as per the Scheme of 2008, the State and the universities thereunder are bound by the UGC Regulations, 2010 including the UGC Regulations, 2018.*
>
> *Therefore, when the appointment of Respondent 4 is found to be contrary to the UGC Regulations, 2018 and the UGC Regulations are having the statutory force, we are of the opinion that this is a fit case to issue a writ of quo warranto and to quash and set aside the appointment of Respondent 4 as the Vice- Chancellor of the SP University.*
>
> ***16.*** *It cannot be disputed that the UGC Regulations are enacted by the UGC in exercise of powers under Sections 26(1)(e) and 26(1)(g) of the UGC Act, 1956. Even as per the UGC Act every rule and regulation made under the said Act, shall be laid before each House of Parliament. Therefore, being a subordinate legislation, UGC Regulations becomes part of the Act. In case of any conflict between the State legislation and the Central legislation, Central legislation shall prevail by applying the rule/principle of repugnancy as enunciated in Article 254 of the Constitution as the subject "education" is in the Concurrent List (List III) of the Seventh Schedule to the Constitution. Therefore, any appointment as a Vice-Chancellor contrary to the provisions of the UGC Regulations can be said to be in violation of the statutory provisions, warranting a writ of quo warranto.*

In the case of **Anindya Sundar Das**, Hon'ble Apex Court in Para 55 & 56 has held as follows:

> ***55****. A "removal of difficulty clause" has been construed in Madeva Upendra Sinai v. Union of India [Madeva Upendra Sinai v. Union of India, (1975) 3 SCC 765 : 1975 SCC (Tax) 105] , which reads as follows : (SCC pp. 775-76, para 39)*
>
> *"39. To keep pace with the rapidly increasing responsibilities of a welfare democratic State, the Legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the Legislature and the endurance and skill of the draftsman, it is well-nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the Legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time- consuming amendatory process, the Legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal of*

difficulty clause", once frowned upon and nick-named as "Henry VIII clause" in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post-Independence era."

***56**. The State Government chose the incorrect path under Section 60 by misusing the "removal of difficulty clause" to usurp the power of the Chancellor to make the appointment. A Government cannot misuse the "removal of difficulty clause" to remove all obstacles in its path which arise due to statutory restrictions. Allowing such actions would be antithetical to the rule of law. Misusing the limited power granted to make minor adaptations and peripheral adjustments in a statute for making its implementation effective, to sidestep the provisions of the statute altogether would defeat the purpose of the legislation.*

In the case of Professor **(Dr). Sreejith P.S.,** Hon'ble Apex Court in **para-8, 8.2 to 8.4** of the said judgment has held as follows:

***8.** Identical question came to be considered by this Court in the case of Gambhirdan K. Gadhvi (supra) and Kalyani Mathivanan (supra). Now, the issue whether the UGC Regulations shall prevail vis-a- vis the State legislation/State Act, identical question came to be considered by this Court in the recent decision of this Court in the case of Gambhirdan K. Gadhvi (supra). While considering the appointment of the Vice Chancellor in the Sardar Patel University, Gujarat, it is specifically observed and held by this Court that the appointment of Vice Chancellor cannot be made dehors the applicable UGC Regulations, even if the State Act concerned prescribes diluted eligibility criteria, vis-a-vis the criteria prescribed in the applicable UGC Regulations. It is further observed and held by this Court in the aforesaid decision that the State Act if not on a par with the UGC Regulations, must be amended to bring it on a par with the applicable UGC Regulations and until then it is the applicable UGC Regulations that shall prevail. It is further observed and held that being a subordinate legislation, UGC Regulations become part of the Act. It is further observed and held that in case of any conflict between the State legislation and the Central legislation, the Central legislation, i.e., the applicable UGC Regulations shall prevail by applying the principle of repugnancy under Article 254 of the Constitution as the subject "education" is contained in the Concurrent List of Schedule VII of the Constitution.*

***8.2.** Even in the case of Kalyani Mathivanan (supra), it is observed in paragraph 53 that to the extent the State legislation is in conflict with the Central legislation including subordinate legislation made by the Central legislation under Entry 25 of the Concurrent List, the same shall be repugnant to the Central legislation and would be inoperative. It is also required to be noted that in the case of Kalyani Mathivanan (supra), this Court was considering the UGC Regulations, 2010, which were silent in regard to the post of Vice Chancellor.*

***8.3** The decision of this Court in the case of Gambhirdan K. Gadhvi (supra) has been subsequently followed by this Court in the recent decision of this Court in the case of Anindya Sundar Das & Ors (supra) while considering the appointment of the Vice Chancellor of Calcutta University. In the said decision, it is also observed and held in paragraph 56 that in view of the decision in the case of Gambhirdan K Gadhvi (supra), even if the provisions of the State Act allowed the appointment of the Vice Chancellor by the State government, it would have to be as per the UGC Regulations and any appointment of Vice Chancellor in violation of the UGC Regulations shall be void ab*

initio. It 12 is further observed that the UGC Regulations shall become part of the statute framed by Parliament and, therefore, shall prevail.

***8.4** In view of the above two binding decisions of this Court, any appointment as a Vice Chancellor made on the recommendation of the Search Committee, which is constituted contrary to the provisions of the UGC Regulations shall be void ab initio. If there is any conflict between the State legislation and the Union legislation, the Union law shall prevail even as per Article 254 of the Constitution of India to the extent the provision of the State legislation is repugnant. Therefore, the submission on behalf of the State that unless the UGC Regulations are specifically adopted by the State, the UGC Regulations shall not be applicable and the State legislation shall prevail unless UGC Regulations are specifically adopted by the State cannot be accepted.*

Similarly, in the case of **Kunja Behari Panda and others**, this Court in para 56 of the said judgment has held as follows:

*"**56**. A perusal of the above provisions show that the minimum qualifications for appointment of teaching staff as prescribed in the UGC Regulations 2018, have in fact been adhered to and not diluted. Section 21(2) of the amended Act, as set out, indeed requires such adherence. The OUA Act does not change the minimum qualifications for either the VC or the teaching staff. Only the method of their selection has been amended and this in no way affects the minimum standards of higher education*.

7. To the submission made by the learned counsel appearing for the Petitioner that pursuant to the advertisement, Petitioner though made his application but never participated in the selection process, learned counsel appearing for the Board fairly accepted the said contention. But with regard to the resolution issued by the Government on 31.12.1999 under Annexure-11, learned counsel appearing for the Board as well as learned Sr. Counsel appearing for the Intervenor-Petitioners contended that the stipulation contained in Resolution dt.31.12.1999 is only with regard to the revision of pay-scale and other related service benefits applicable to the existing teachers of non-Government aided colleges in respect of UGC Scale of Pay by 1.1.1986 so reflected under para-4.1 of the Resolution. Para-4.1 of the resolution reads as follows:

"Coverage-The revised scales of pay and other related service benefits shall be applicable to all the full-time teachers working in the Utkal University, the Berhampur University, the Sambalpur University, the Shree Jagannath Sanskrit Viswa vidyalaya, Puri, Government Colleges and Non-Government Aided Colleges who were in receipt of January, 1996. The scheme shall also be applicable to the full time teachers of the College of Acanantancy and Management Studies, Cuttack who were in receipt of U.G.C. Scales of pay as on 1st January, 1996."

7.1. It is contended that since resolution issued under Annexure-11 is only with regard to revision of pay scale, in view of the provisions contained under para 4.1, the qualification prescribed vide Para 4.5 (b) & (c) are not required to be followed and the stipulation contained in Annexure-A/3 still govern the field. It is also contended that since Petitioner pursuant to Annexure-1 made his application though not participated in the selection process, the Writ Petition at his instance is not maintainable.

7.2. In support of the aforesaid contention, learned counsel appearing for the Board relied on the decisions of the Hon'ble Apex Court in the case of ***Neetu Sharma Vs. State of Punjab & Others,*** reported in ***AIR 2007 Supreme Court 758.*** Hon'ble Apex Court in para10,12 & 13 has held as follows:

> ***10***. *Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, courts must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.*
>
> *xxx xxx xxx*
>
> ***12.*** *When a particular person is the object and target of a petition styled as PIL, the court has to be careful to see whether the attack in the guise of public interest is really intended to unleash a private vendetta, personal grouse or some other mala fide object.*
>
> ***13.*** *Therefore, as rightly submitted by learned counsel for the appellant, writ petition itself was not maintainable. To that extent the High Court's order cannot be maintained. But it appears that the official respondents have already initiated action as regards the caste certificate. Though PIL is not to be entertained in service matters, that does not stand in the way of the officials from examining the question in the right perspective. In the present case admittedly the officials have initiated action. What action will be taken in such proceedings is not the subject-matter of controversy in the present appeal. However, it shall not be construed as if we have expressed any opinion on the merits of the proceedings stated to be pending. The only issue which has been examined relates to the locus standi of the writ petitioner (Respondent 7) to file PIL.*

Reliance was also placed to a decision of the Hon'ble Apex Court in the case of ***Girjesh Shri Vastava & Others Vs. State of Madhya Pradesh & Others,*** reported in ***(2010) 10 SCC 707. Hon'ble Apex Court in para-14 & 19 has held as follows:***

> ***14***. *However, the main argument by the appellants against entertaining WP (C) No. 1520 of 2001 and WP(C) No. 63 of 2002 is on the ground that a PIL in a service matter is not maintainable. This Court is of the opinion that there is considerable merit in that contention. It is common ground that dispute in this case is over selection and appointment which is a service matter.*
>
> ***19.*** *In a recent decision of this Court delivered on 30-8- 2010, in Hari Bansh Lal v. Sahodar Prasad Mahto [(2010) 9 SCC 655] , it has been held that except in a case for a writ of "quo warranto", PIL in a service matter is not maintainable.*

7.3. It is also contended that the Regulation prescribed by the U.G.C though is mandatory, but it is not regulatory and the State is free to decide as to whether UGC Regulation is to be adopted by it or not or to take its own decision which has consequential financial implications.

In support of the aforesaid contention , reliance was placed to a decision of the Hon'ble Apex Court in the case of ***Jagdish Prasad Sharma and Others Vs. State of Bihar & Others, (2013) 8 SCC 633***. Hon'ble Apex Court in para 78 of the said judgment has held as follows:

> ***78.*** *We are then faced with the situation where a composite scheme has been framed by UGC, whereby the Commission agreed to bear 80% of the expenses incurred by the State if such scheme was to be accepted, subject to the condition that the remaining 20% of the expense would be met by the State and that on and from 1-4-2010, the State Government would take over the entire burden and would also have enhanced the age of superannuation of teachers and other staff from 62 to 65 years. There being no compulsion to accept and/or adopt the said Scheme, the States are free to decide as to whether the Scheme would be adopted by them or not. In our view, there can be no automatic application of the recommendations made by the Commission, without any conscious decision being taken by the State in this regard, on account of the financial implications and other consequences attached to such a decision. The case of those petitioners who have claimed that they should be given the benefit of the Scheme dehors the responsibility attached thereto, must, therefore, fail.*

It is also contended that Regulation issued by the Commission are partly mandatory and partly directory in view of the decision of the Hon'ble Apex Court in the case of ***Kalyani Mathivanan Vs. K.V. Jeyaraj and Others,(2015) SCC 363.*** Hon'ble Apex Court in Paragraph-20, 27, 62.3 & 62.4 and 62.5 of the said judgment has held as follows:

> ***20.*** *We have heard the learned counsel for the parties and the issues that arise for our consideration are: (i) whether the UGC Regulations, 2010 are mandatory in nature; and (ii) whether in the event of conflict between the University Act, the regulations framed thereunder and the UGC Regulations, 2010, the provisions of the UGC Regulations, 2010 would prevail or not; and (iii) whether the post of Vice-Chancellor of a university is to be considered as part of the teaching staff.*
>
> *xxx xxx xxx*
>
> ***27.*** *From the aforesaid provisions, we find that the University Grants Commission has been established for the determination of standard of universities, promotion and coordination of university education, for the determination and maintenance of standards of teaching, examination and researchin universities, for defining the qualifications regarding the teaching staff of the university, maintenance of standards, etc. For the purpose of performing its functions under the UGC Act (see Section 12) like defining the qualifications and standard that should ordinarily be required of any person to be appointed in the universities [see Sections 26(1)(e) & (g)] UGC is empowered to frame regulations. It is only when both the Houses of Parliament approve the regulation, the same can be given effect to. Thus, we hold that the UGC Regulations though a subordinate legislation has binding effect on the universities towhich it applies; and consequence of failure of the university to comply with the recommendations of the Commission, UGC may withhold the grants to the university made out of the fund of the Commission (see Section 14).*

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62.3. *The UGC Regulations, 2010 are mandatory to teachers and other academic staff in all the Central universities and colleges thereunder and the institutions deemed to be universities whose maintenance expenditure is met by UGC.*

62.4. *The UGC Regulations, 2010 are directory for the universities, colleges and other higher educational institutions under the purview of the State legislation as the matter has been left to the State Government to adopt and implement the Scheme. Thus, the UGC Regulations, 2010 are partly mandatory and is partly directory.*

62.5. *The UGC Regulations, 2010 having not been adopted by the State of Tamil Nadu, the question of conflict between the State legislation and the Statutes framed under the Central legislation does not arise. Once they are adopted by the State Government, the State legislation to be amended appropriately. In such case also there shall be no conflict between the State legislation and the Central legislation.*

7.4. It is contended that in the decision of the Hon'ble Apex Court rendered in the case of ***Dr. J. Bijayan & Others Vs. State of Kerala and others, Civil Appeal No.5037 of 2022, disposed of on 02.08.2022,*** it has been held that State is not bound to accept or follow the UGC Regulation.

7.5. It is also contended that decision relied on by the Page 28 of 50 Writ Petitioner that even after participating in the selection process, a candidate at the later stage can challenge the correctness of the selection and advertisement, the same is not permissible in view of the decision rendered in the case of ***Dr.(Major) Meeta Sahai Vs. State of Bihar & Others, Civil Appeal No.9482 of 2019, disposed of on 17.12.2019.*** In para 15 to 17 of the aforesaid judgment, it has been held as follows:

15*. Furthermore, before beginning analysis of the legal issues involved, it is necessary to first address the preliminary issue. The maintainability of the very challenge by the appellant has been questioned on the ground that she having partaken in the selection process cannot later challenge it due to mere failure in selection. The counsel for the respondents relied upon a catena of decisions of this Court to substantiate his objection.*

16*. It is well settled that the principle of estoppel prevents a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgments including Manish Kumar Shahi v. State of Bihar [Manish Kumar Shahi v. State of Bihar, (2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , observing as follows: (SCC p. 584, para 16) "16. We also agree with the High Court [Manish Kumar Shahi v. State of Bihar, 2008 SCC OnLine Pat 321 : (2008) 4 PLJR 93] that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The[appellant] invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition." [See also: Madan Lal v. State of J&K, (1995) 3 SCC 486 : 1995 SCC (L&S) 712, Marripati Nagaraja v. State of A.P., (2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68, Dhananjay Malik v. State of Uttaranchal, (2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005 and K.A. Nagamani v. Indian Airlines, (2009) 5 SCC 515 : (2009) 2 SCC (L&S) 57] The*

> *underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the hope of getting a second chance. 17. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process.*

7.6. It is also contended that since the Writ Petition has been filed without impleading the selected candidates, the Writ Petition is not maintainable. In support of the contention, reliance was placed on a decision rendered Page 30 of 50 by this Cout in the case of ***Hansmina Kumari Das & Others Vs. State of Orissa & Others, W.P.(C) NO.1966 of 2017, disposed of on 05.08.2022.*** In para-11 of the said judgment, it has been held as follows:

> ***11.*** *Secondly, only one private individual, who was allegedly disqualified for being appointed as a primary school teacher, has been impleaded as Opposite Party No.9. Although several names have been mentioned in Para-4 of the writ petition, the others have not been made as Opposite Parties. There is no convincing explanation given for this.*

8. Mr. Buddhadev Routray, learned Sr. Counsel appearing for the Intervenor-Petitioners and Mr. Laxmikant Mohanty, learned counsel appearing for some other intervenor-Petitioners also placed reliance on the decisions cited by the learned counsel appearing for the Board in the case of ***Jagadish Prasad Sharma*** as well as ***Kalyani Mathivanan***. Further reliance was placed on a decision of this Court in the case of ***Kunja Bihari Panda & Others Vs. State of Odisha & Others, W.P.(C) No.33452 of 2020, decided on 24.01.2022*** and ***Asit Kumar Jenamani Vs. State of Odisha & Others, W.P.(C) No.13666 of 2020 & batch,*** decided on ***20.04.2020.***

In the case of ***Jagadish Prasad Sharma***, Hon'ble Apex Court in para 2, 35, 67 to 72, 77 & 79 has held as follows:

> ***2****. The common thread running through all these various matters is the question as to whether certain regulations framed by the University Grants Commission had a binding effect on educational institutions being run by the different States and even under the State enactments.*
>
> ***35.*** *Appearing for the State of Kerala, Ms Bina Madhavan, learned Advocate, contended that under Article 309 of the Constitution, the State Government is empowered to frame its own rules and regulations in regard to service conditions of its employees. Furthermore, Section 2 of the Kerala Public Service Commission Act, 1968, empowers the State Government to make rules either prospectively or retrospectively to regulate the recruitment and conditions of service for persons appointed to the public services and posts in connection with the affairs of the State of Kerala. Ms Madhavan submitted that under the Kerala Service Rules, 1958, enacted by the State Government under the proviso to Article 309 of the Constitution, the age of retirement of teachers in colleges*

has been fixed to be 55 years. Subsequently, however, by G.O.P. No. 170/12/Fin. dated 22-3-2012, the age of compulsory retirement was enhanced to 56 years and the age of superannuation has been enhanced to 60 years. Ms Madhavan urged that having regard to the UGC Regulations dated 30-62010, a decision was taken to revise the scales of pay and other service conditions, including the age of superannuation in the Central universities and other institutions maintained and funded by the University Grants Commission, strictly in accordance with the decision of the Central Government. However, the revised scales of pay and age of superannuation, as provided under Para 2.1.10 and under Para 2.3.1, will also be extended to universities, colleges and other higher educational institutions coming under the purview of the State Legislature and maintained by the State Governments, subject to the implementation ofthe Scheme as a composite one as contemplated in the Regulations.

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***67**. One of the common submissions made on behalf of the respondents was whether the aforesaid Scheme would automatically apply to the Centrally-funded institutions, to the State universities and educational institutions and also private institutions at the State level, on account of the stipulation that the Scheme would have to be accepted in its totality. As indicated hereinbefore in this judgment, the purport of the Scheme was to enhance the pay of the teachers and other connected staff in the State universities and educational institutions and also to increase their age of superannuation from 62 to 65 years. The Scheme provides that if it was accepted by the State concerned, UGC would bear 80% of the expenses on account of such enhancement in the pay structure and the remaining 20% would have to be borne by the State. This would be for the period commencing from 1-12006 till 31-3-2010, after which the entire liability on account of revision of pay scales would have to be taken over by the State Government. Furthermore, financial assistance from the Central Government would be restricted to revision of pay scales in respect of only those posts which were in existence and had been filled up as on 1-1-2006. While most of the States were willing to adopt the Scheme, for the purpose of receiving 80% of the salary of the teachers and other staff from UGC which would reduce their liability to 20% only, they were unwilling to accept the Scheme in its composite form which not only entailed acceptance of the increase in the retirement age from 62 to 65 years, but also shifted the total liability in regard to the increase in the pay scales to the States after 1-4-2010.*

***68**. Another anxiety which is special to certain States, such as the States of Uttar Pradesh and Kerala, has also come to light during the hearing. In both the States, the problem is one of surplusage and providing an opportunity for others to enter into service. On behalf of the State of Kerala, it had been urged that there were a large number of educated unemployed youth, who are waiting to be appointed, but by retaining teachers beyond the age of 62 years, they were being denied such opportunity. As far as the State of U.P. is concerned, it is one of job expectancy, similar to that prevailing in Kerala. The State Governments of the said two States were, therefore, opposed to the adoption of the UGC Scheme, although, the same has not been made compulsorily applicable to the universities, colleges and other institutions under the control of the State authorities. State of U.P. is concerned, it is one of job expectancy, similar to that prevailing in Kerala. The State Governments of the said two States were, therefore, opposed to the adoption of the UGC Scheme, although, the same has not been made compulsorily applicable to the universities, colleges and other institutions under the control of the State authorities.*

***69.** To some extent there is an air of redundancy in the prayers made on behalf of the respondents in the submissions made regarding the applicability of the Scheme to the*

State and its universities, colleges and other educational institutions. The elaborate arguments advanced in regard to the powers of UGC to frame such regulations and/or to direct the increase in the age of teachers from 62 to 65 years as a condition precedent for receiving aid from UGC, appears to have little relevance to the actual issue involved in these cases. That the Commission is empowered to frame regulations under Section 26 of the UGC Act, 1956, for the promotion and coordination of university education and for the determination and maintenance of standards of teaching, examination and research, cannot be denied. The question that assumes importance is whether in the process of framing such regulations, the Commission could alter the service conditions of the employees which were entirely under the control of the States in regard to State institutions?

70. *The authority of the Commission to frame regulations with regard to the service conditions of teachers in the Centrally-funded educational institutions is equally well-established. As has been very rightly done in the instant case, the acceptance of the Scheme in its composite form has been left to the discretion of the State Governments. The concern of the State Governments and their authorities that UGC has no authority to impose any conditions with regard to its educational institutions is clearly unfounded. There is no doubt that the Regulations framed by UGC relate to Schedule VII List I Entry 66 to the Constitution, but it does not empower the Commission to alter any of the terms and conditions of the enactments by the States under Article 309 of the Constitution. Under List III Entry 25, the State is entitled to enact its own laws with regard to the service conditions of the teachers and other staff of the universities and colleges within the State and the same will have effect unless they are repugnant to any Central legislation.*

71*. However, in the instant case, the said questions do not arise, inasmuch as, as mentioned hereinabove, the acceptance of the Scheme in its composite form was made discretionary and, therefore, there was no compulsion on the State and its authorities to adopt the Scheme. The problem lies in the desire of the State and its authorities to obtain the benefit of 80% of the salaries of the teachers and other staff under the Scheme, without increasing the age of retirement from 62 to 65 years, or the subsequent condition regarding the taking over of the Scheme with its financial implications from 1-4-2010.*

72. *As far as the States of Kerala and U.P. are concerned, they have their own problems which are localised and stand on a different footing from the other States, none of whom who appear to have the same problem. Education now being a List III subject, the State Government is at liberty to frame its own laws relating to education in the State and is not, therefore, bound to accept or follow the Regulations framed by UGC. It is only natural that if they wish to adopt the Regulations framed by the Commission under Section 26 of the UGC Act, 1956, the States will have to abide by the conditions as laid down by the Commission.*

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77*. We are inclined to agree with such submission mainly because of the fact that in the amended provisions of Section 67(a) it has been categorically stated that the age of superannuation of non-teaching employees would be 62 years and, in no case, should the period of service of such non-teaching employees be extended beyond 62 years. A difference had been made in regard to the teaching faculty whose services could be extended up to 65 years in the manner laid down in the University Statutes. There is no ambiguity that the final decision to enhance the age of superannuation of teachers within a particular State would be that of the State itself. The right of the Commission to*

frame regulations having the force of law is admitted. However, the State Governments are also entitled to legislate with matters relating to education under List III Entry 25. So long as the State legislation did not encroach upon the jurisdiction of Parliament, the State legislation would obviously have primacy over any other law. If there was any legislation enacted by the Central Government under List III Entry 25, both would have to be treated on a par with each other [Ed.: But see Articles 254(1) and 246 of the Constitution.] . In the absence of any such legislation by the Central Government under List III Entry 25, the regulations framed by way of delegated legislation have to yield to the plenary jurisdiction of the State Government under List III Entry 25. 79. However, within this class of institutions there is a separate group where the State Governments themselves have taken a decision to adopt the Scheme. In such cases, the consequences envisaged in the Scheme itself would automatically follow.

In the case of Kalyani Mathivanan, Hon'ble Apex Court in paragraph-62 has held as follows:

***62**. In view of the discussion as made above, we hold:*

***62.1**. To the extent the State legislation is in conflict with the Central legislation including subordinate legislation made by the Central legislation under Entry 25 of the Concurrent List shall be repugnant to the Central legislation and would be inoperative.*

***62.2**. The UGC Regulations being passed by both the Houses of Parliament, though a subordinate legislation has binding effect on the universities to which it applies.*

***62.3**. The UGC Regulations, 2010 are mandatory to teachers and other academic staff in all the Central universities and colleges thereunder and the institutions deemed to be universities whose maintenance expenditure is met by UGC.*

***62.4**. The UGC Regulations, 2010 are directory for the universities, colleges and other higher educational institutions under the purview of the State legislation as the matter has been left to the State Government to adopt and implement the Scheme. Thus, the UGC Regulations, 2010 are partly mandatory and is partly directory.*

***62.5.** The UGC Regulations, 2010 having not been adopted by the State of Tamil Nadu, the question of conflict between the State legislation and the Statutes framed under the Central legislation does not arise. Once they are adopted by the State Government, the State legislation to be amended appropriately. In such case also there shall be no conflict between the State legislation and the Central legislation.*

In the case of ***Kunja Bihari Panda***, this Court in Paragraph-41, 57 & 63 has held as follows:

***41**. The other decision relied on by the Petitioners is Annamalai University v. Information and Tourism Department (supra). There the focus was on maintaining minimum standards of education. Although it was held that the State Legislation to the extent it was in conflict with the Central Legislation, including a subordinate legislation like the UGC Regulations, would be inoperative, but as explained in Kalyani Mathivanan v. K.V. Jeyaraj (supra), unless the UGC Regulations are adopted by the State Government and implemented, the question of repugnancy would not arise.*

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***57**. The Court's attention was drawn to Article 309 of the Constitution of India which empowers the 'appropriate legislature' to regulate the 'recruitment' and 'conditions of service' of persons appointed to public services and posts in connection with the affairs of the state or the Union as the case may be. The method of selection and appointment is*

a sub-set of 'recruitment' and the State legislature can enact a law to regulate it. In Jagdish Prasad Sharma v. State of Bihar (supra), the Supreme Court reminded that: "Under Entry 25 of List III, the State is entitled to enact its own laws with regard to the service conditions of the teachers and other staff of the universities and colleges within the State and the same will have effect unless they are repugnant to any central legislation." In the same decision, it was further emphasised that in the absence of legislation by the central government under Entry 25 List III, the subordinate legislation under Entry 66 List I will have to yield to the 'plenary jurisdiction of the State Government under List III Entry 25."

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63. *In the present case, the UGC Regulations 2018 do not affect the power of the State to determine the process and method of selection of the VCs and the teaching staff. The UGC Regulations 2018 cannot be said to occupy the entire field in relation to the said issue.*

In the case of ***Dr. Asit Kumar Jenamani***, this Court in paragraph 24 & 25 has held as follows:

24. *Indeed fixing the age of superannuation of an employee is an essential part of the service condition and a decision in that regard has to be taken on rational basis by an employer. Whether it should be 60 or 65 years is entirely for the employer to decide. Merely because the Government of Odisha has decided not to implement the UGC Regulations in this regard would not make Rule 19 of the 1974 Rules ultra vires the UGC Regulations or unconstitutional. Page 14 of 16 W.P.(C) No.13666 of 2020 and batch.*

25. *It is pointed out how the notification dated 31st December 2008 of the MHRD which provides for payment of central assistance for implementation of the scheme is subject to the condition that the entire scheme of revision of pay scales together with all the conditions laid down in UGC would be implemented by the State Government in Universities. The Government of Odisha, it is pointed out, had never exercised the option of adopting such a composite scheme and never presented any proposal to the Government of India to avail any central assistance for implementing the scheme. It has implemented the scheme only in a limited context of revision of pay scales following the revision of pay scale of Central Government employees recommendations of the 6th CPC.*

8.1. It is also contended that since the selected candidates pursuant to Annexure-1 in all other disciplines have got the benefit of appointment on the ground of equity, the selected candidates in the discipline Physics be also extended with similar benefit.

In support of such submission, reliance was placed on the decision of the Hon'ble Apex Court in the case of ***Central Council for Research in Ayurvedic Sciences & Another Vs. Bikartan Das & Others, Civil Appeal No.3339 of 2023*** as well as in the case of ***Ujjal Mandal Vs. State of West Bengal & Others, WPA No.9253 of 2015***, disposed of ***on 27.07.2022.***

In the case of ***Central Council for Research in Ayurvedic Sciences,*** Hon'ble Apex Court in para-51 of the said judgment has held as follows:

51. *The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not.*

In the case of ***Ujjal Mandal***, High Court of Calcutta in para-26,42 & 43 of the said judgment has held as follows:

26. *Part III of the Constitution of India provides for the Fundamental Rights, which the citizens enjoy. Article 19 (1)(g) which is an integral part of Part III of the Constitution of India, inter alia, gives a guarantee and constitutional mandate to a citizen to carry on and thereby to ensure any occupation. Such being a valuable Fundamental Right guaranteed under the constitution could not be taken away by the respondents State authorities without following the established procedure of law. Slightest illegality, unfairness, mala fide and arbitrary exercise of its authority by the State should be construed to be as an intolerable Act on the part of the State, if it infringes a fundamental right of a citizen. The primary duty of a constitutional court exercising power and jurisdiction under article 226 of the Constitution of India is to correct any error or illegality or mala fide and any arbitrary act committed by the state authority and in such regard it can be safely be said that, the constitutional court does so in exercise of its overwhelming plenary powers. This court is also not unmindful as to the proposition that, such plenary power of a constitutional court in exercise of its jurisdiction under Article 226 of the Constitution of India must be exercised judiciously, reasonably and of course within the four corners of law and equity.*

42. *The reliefs granted by a constitutional court in exercise of its high prerogative writ jurisdiction under Article 226 of the constitution is equitable in nature. The writ court shall exercise such equitable jurisdiction judiciously, to afford complete justice to the parties. When a valuable constitutional right or a legal right alleged to be infringed by a citizen before a constitutional court alleging any arbitrary, illegal or wrongful act of an Article 12 authority or illegal, wrongful or arbitrary exercise of any discretion by an Article 12 authority, the writ court with its plenary jurisdiction and power in exercise of its equitable jurisdiction under Article 226 of the of the Constitution of India intervenes.*

43. *Under Article 226 of the Constitution of India, writ remedy is an equitable remedy and discretionary. Writ Court exercises equity jurisdiction. Though scope of power of Writ Court to undertake judicial review of administrative actions is very wide, its exercise is subjected to self-imposed restraint. It will be exercised only in furtherance of manifest justice and not merely on the making out of a legal point. It must be exercised with great caution and only in furtherance of public interest to set right grave illegality and manifest injustice. It is equally true that, writ court may refuse to grant relief in a case where justice and larger public interest require denial of such relief as compared*

to grievance of an individual, even assuming there is breach of natural justice/statutory prescription and decision is arbitrary.

9. Mr. T.K. Satapathy, learned counsel appearing for Opp. Party No.4-Commission on the other contended that UGC Act being a Central Act, it has got precedence over State Regulation and State Act. In the notification issued by the Commission under Annexure-4, qualifications has been prescribed as against the post of Asst. Professor and as reflected in para 4.5-(b) of Annexure-11, State has decided to follow the UGC guideline. Therefore, while issuing the impugned advertisement under Annexure-1, the qualification prescribed by the Commission under Annexure-4 should have been prescribed as the qualification for the post of Lecturer.

9.1. It is also contended that post of Lecturer for which the advertisement in question had been issued has already been re-designated as Asst. Professor(Stage-1) vide Resolution issued by the Government under Annexure-3 series. It is forcefully contended that the qualification prescribed by the Board under Annexure-1 is not the qualification so prescribed by the Commission in its notification under Annexure-4.

9.2. Learned counsel appearing for the UGC placing reliance on the notification issued by the Commission on 24.12.1998 contended that as provided under para-3 of the said notification, the minimum requirement for the post of Lecturer is a good academic record, 55% of the marks at the Master's level and qualifying in the National Eligible Test, or an accredited test. It would be optional for the University to exempt Ph.D holders from NET or to acquire NET, in their case, either as a desirable or essential qualification for appointment as Lecturers in the University Departments and Colleges. It is accordingly contended that since issuance of the notification on 24.12.1998, the practice for recruitment of a Lecturer is required to be made in terms of the qualification prescribed by the Commission and the said qualification was also reiterated in the notification issued under Annexure-4.

10. Mr. B. Mohanty, learned Addl. Govt. Advocate placing reliance on the affidavit filed by the Department contended that since the qualification prescribed by UGC under Annexure-4 has not yet been accepted by the State, with issuance of any resolution, the qualification so prescribed by UGC under Annexure-4 cannot be made applicable for selection to the post of Lecturer for which the Board has issued the advertisement under Annexure-1. Stand taken in para10 of the affidavit reads as follows :

10. *That, in view of the above, the true spirit and intent of Clause-4.5 of Resolution dated 31.12.1999 is that one has to satisfy the qualifications mentioned in the said clause to avail the U.G.C Scale of pay. Since in the Universities and Government Colleges U.G.C Scale of pay to fresh recruits is extended after satisfying the required period of service, the qualifications stipulated in the said clause is only applicable to Teaching Staffs of Universities and Government Colleges. Since U.G.C Scale of pay is not extended to the Teaching Staffs of Non-Government Aided Colleges those who entered into the direct payment of Grant-in-Aid fold after the cut-off date i.e. 1.4.1989, the said clause is not applicable to the fresh recruits after the cut-off date 01.04.1989 in*

the non Govt. Aided Colleges. As the new recruits of NonGovernment Aided Colleges are not entitled for U.G.C Scale of Pay, as such, the clause-4.5 is not applicable to Teaching Staffs of Non-Government Aided Colleges. IN view of that, there is no reference to Teaching Staffs of Non-Government Aided Colleges in Clause-4.5 of the Resolution dated 31.12.1999.

11. I have heard Mr. S. Swain, learned counsel appearing for the Petitioner, Mr. B. Mohanty, learned Addl. Govt. Advocate appearing on behalf of Opp. Party Nos.1 & 2, Mr. Sameer Ku. Das, learned counsel appearing on behalf of Opp. Party No.3, Mr. B. Routray, learned Sr. Counsel along with Mr. S.D. Routray, learned counsel appearing on behalf some of Intervenor Petitioners, Mr. L. Mohanty, learned counsel appearing on behalf of Intervenor-Petitioners and Mr. T.K. Satapathy, learned counsel appearing on behalf of Opp. Party No.4. With due exchange of pleadings, the matter was heard at the stage of admission and disposed of by the present order.

12. Having heard learned counsel appearing for the parties and considering the submission made, this Court finds that the advertisement under Annxure-1 was issued by the Board for recruitment to the post of Lecturers in different discipline in Non-Government Aided Colleges of Odisha. The qualification for the post in various discipline for recruitment to the post of Lecturer as prescribed vide Para-4 is Master's Degree with at least 55% mark or its equivalent.

12.1. As found from the resolution issued by the Higher Education Department on 04.04.2016 under Annexure-3 series, post of Lecturer was re-designated as Asst. Professor (stage-1). It is further found from the notification issued by the Commission on 18.07.2018 under Annexure-4, the minimum qualification for appointment of Teachers in Universities and Colleges is Master Degree with 55% of mark along with qualification of NET and/or PH.D. The qualifications prescribed by the Commission under Annexure-4 as found has been followed by the Odisha Public Service Commission while issuing advertisement for recruitment to the post of Lecturers in different disciplines of Orissa Education Service (College Branch) under Annexures 6 & 7.

12.2. It is also found that subsequent to the resolution issued under Annexure-A/3 on 25.07.1989 while issuing the resolution dt.31.12.1999 under Annexure-11, the prescribed qualification for recruitment to the post of Lecturer is Master's Degree with 55% mark and qualification of NET and/or PH.D. As further found from Para 4.5 (b) of the resolution issued under Annexure-11, State Government has accepted to implement the guideline issued by the Commission with regard to the minimum qualification for appointment of teachers in Universities and Colleges.

12.3. In view of the resolution issued under Annexure-11 on 31.12.1999 and the qualification prescribed for recruitment to the post of Lecturer being Master Degree with NET qualification and/or PH.D, the qualification prescribed in the impugned advertisement dt. 11.09.2023 under Annexure-1, basing on Annexure A/3, as per the considered view of this Court is not the prescribed qualification for recruitment to the post of Lecturer. This Court is unable to accept the contention raised by the

learned counsel appearing for the Board that Annexure-11 only deals with the revision of pay scale and it has no applicability with regard to the qualification prescribed for the post of Lecturer, in view of the provisions contained under Para-4.5 (b) & (c) of the Resolution issued under Annexure-11.

12.4. Since the post of Lecturer has already been re-designated as Asst. Professor (stage-1) vide Resolution dt.04.04.2016 under Annexure-3 series, and as per the subsequent Resolution issued by the Department on 31.12.1999 under Annexure-11, the prescribed qualification for the post of Lecturer is not the qualification prescribed in the impugned advertisement, as per the considered view of this Court, the process of selection initiated by the Board with the qualification so prescribed is not legal and justified.

12.5 However, considering the fact that the selection and appointment in all other disciplines have been made basing on Annexure-1 advertisement, this Court on the ground of equity and placing reliance on the decisions of the Hon'ble Apex Court in the case of ***Central Council for Research in Ayurvedic Sciences*** as well as in the case of ***Ujjal Mandal*** is inclined to allow the Board to complete the selection process as against the post of Lecturer in Physics. However, this cannot be treated as a precedent and the Board is required to follow the qualification prescribed in Annexure-11 coupled with the notification issued by the Commission under Annexure-4 for recruitment to the post of Lecturer/Asst.Professor (Stage-1).

12.6. Since the process of selection which is the subject matter of dispute in W.P.(C) Nos. 8155 of 2024 has not yet been completed and the qualification prescribed in the impugned advertisement in those Writ Petition is not in consonance with the qualification reflected in Annexure-11 and the notification issued by the Commission under Annexure4, this Court is inclined to allow the prayer in W.P.(C) Nos.8115 and 8155 of 2024. While allowing both the Writ Petitions, this Court is inclined to quash the advertisement issued by the Board vide Advertisement No.04 of 2024, which is the subject matter of dispute in W.P.(C) Nos.8115 and 8155 of 2024. This Court grants liberty to the Commission to issue a fresh advertisement by prescribing the qualification as reflected in Annexure-11 read with Annexure-4 notification issued by the Commission.

All these three (3) Writ Petitions are accordingly disposed of with the aforesaid observation and direction. Photocopy of the judgment be placed in the connected cases.

Headnotes prepared by:
Shri Jnanendra Kumar Swain (Judicial Indexer)
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case:
Writ Petitions disposed of

—— o ——

2024 (III) ILR-CUT-1206

ORISSA STATE FINANCIAL CORPORATION, CUTTACK
V.
JYOTI PRAKASH DAS

(CRP NO. 30 OF 2023)

11 NOVEMBER 2024

[MURAHARI SRI RAMAN, J.]

Issue for Consideration

Whether without challenging the decree, objection can be raised in Execution proceeding.

Headnotes

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 47 – Plaintiff/ Opp.Party filed execution case pursuant to Judgment dated 24.12.2011 passed by the 2nd Additional Senior Civil Judge, Cuttack – The petitioner/defendant/Judgement debtor filed petition U/s. 47 of the Code before the Executing Court with a prayer to drop the execution proceeding – Whether there is any scope for the Judgment debtor/ petitioner to challenge the decree before the Executing Court.

Held: No – In absence of any challenge to the decree, no objection can be raised in execution proceeding – When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of the Act. (Para 12)

(B) INTERPRETATION OF STATUTES :–

(i) Principle of Estoppel and Waiver – Discussed and enumerated with reference to case laws. (Para 8)

(ii) Doctrine of Merger – Explained and case laws discussed. (Para 7)

Citations Reference

Jyotiprakash Das Vrs. IPICOL & Ors., **RSA No. 373 of 2013 (dt. 08.09.2016)**; Sobhabati Devi Vrs. Voona Bhimayya Subudhi, **1974 (1) CWR 72**; Chandi Prasad Vrs. Jagdish Prasad, **(2004) 8 SCC 724**; Amba Bai Vrs. Gopal, **AIR 2001 SC 2003**; Hindustan Aluminium Corporation Limited Vrs. Commissioner of Income Tax (Central), **1988 SCC OnLine Cal 357**; Utkal Galvanisers Pvt. Ltd. Vrs. Assistant Commissioner of Income Tax, **105 (2008) CLT 533 (Ori)**; Hope Plantations Ltd. Vrs. Taluk Land Board, **(1999) 5 SCC 590**; Municipal Corporation of Greater Bombay Vrs. Hakimwadi Tenants' Association, **AIR 1988 SC 233**; State of Odisha Vrs. Mamata Mohanty, **(2011) 2 SCR 704)**; Buli Jena Vrs. Bishnu Charan Sutar, **2017 (II) ILR-CUT-1125**; Krishnadevi Malchand Kamathia Vrs. Bombay Environmental

Action Group, **(2011) 3 SCC 363**; Power Control Appliances Vrs. Sumeet Machines Pvt. Ltd., **(1994) 1 SCR 708 = (1994) 2 SCC 448**; Rahul S. Shah Vrs. Jitendra Kumar Gandhi, **(2021) 4 SCR 279**; Pradeep Mehra Vrs. Harijivan J. Jethwa, **(2023) 14 SCR 123**; Merla Ramanna Vrs. Nallaparaju, **AIR 1956 SC 87 = (1955) 2 SCR 938**; State of Punjab Vrs. Mohinder Singh Randhawa, **AIR 1992 SC 473 = (1993) Supp.(1) SCC 49**; Century Textiles Industries Ltd. Vrs. Deepak Jain, **(2009) 5 SCC 634 = (2009) 4 SCR 750**; Kanwar Singh Saini Vrs. High Court, Delhi, **(2011) 15 Addl. SCR 972 = (2012) 4 SCC 307 – referred to.**

List of Acts

Code of Civil Procedure, 1908

Keywords

Execution proceeding, Objection without challenging the decree, Estoppel, Waiver, Merger.

Case Arising From

Order dated 15.07.2023 passed in CMA No.145 of 2021 (arising out of Execution Petition No.03 of 2012) by the learned 2nd Additional Senior Civil Judge, Cuttack.

Appearances for Parties

For Petitioner : M/s. Abinash Routray, J. Bhuyan, A. Routray & P.K. Jena

For Opp.Party : M/s. Darpahari Dhal, Khetra Mohan Dhal, Manoj Kumar Sahoo, Amiya Kumar Satpathy, Budhimanta Swain & Nityabrata Behuria.

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

Questioning the legality and propriety of the Order dated 15.07.2023 passed in CMA No.145 of 2021 (arising out of Execution Petition No.03 of 2012) by the learned 2nd Additional Senior Civil Judge, Cuttack rejecting the prayer of the petitioner-the judgment debtor (defendant No.5), namely, Orissa State Financial Corporation (for convenience, "OSFC") to drop the execution proceeding, this civil revision petition has been filed craving to exercise power under Section 115 of the Code of Civil Procedure, 1908, ("CPC", for short) with the following prayer(s):

> *"The petitioner, therefore, prays that this Hon'ble Court may be graciously pleased to admit the revision, call for the records from the Court below and upon hearing the impugned Order dated 15.07.2023 passed in CMA No.145 of 2021 be set aside and the revision be allowed with cost throughout."*

Facts:

2. The case in nutshell is that the opposite party herein as plaintiff filed a suit bearing TMS No. 747 of 1989 for grant of decree for an amount of Rs.1,70,000/-

along with *pendente lite* interest and future interest at the rate of 18% per annum in his favour against the following defendants:

> *"1. M/s. Trimurti Hotel Limited,*
> *having its Regd. Office and Hotel Building at Link Road,*
> *Badambadi, P.S.: Madhupatana, District: Cuttack.*
>
> *2. Pitchu Iyer Appa Durai,*
> *Son of late Pitchu Durai*
> *Permanent resident of 24, R.N. Mukharjee Road., Calcutta-700001,*
> *At/Pr. residing at Trimurti Hotel Building,*
> *At: Link Road, Badambadi, Cuttack*
> *One of the Directors of Trimurti Hotels Limited, Defendant No.1, representing the said defendant No.1.*
>
> *3. Trinath Choudhury,*
> *At present residing at Panda Colony,*
> *Engineering School Chhak, Lanjipali*
> *Berhampur, District Ganjam, Orissa,*
> *One of the Directors of Trimurti Hotel Limited,*
> *Representing the defendant No.1.*
>
> *4. Hotels Virgo Private Limited,*
> *having its office at present*
> *At Trimurti Hotel Building,*
> *At: Link Road, Badambadi, Cuttack*
> *Represented through its one of the Directors, Pitchu Iyer Appa Durai @ Appa Duari, Son of Late Pichu Iyer of*
> *24, R.N. Mukharjee Road, Calcutta-700001, West Bengal,*
> *At/Pr. Trimurti Hotel Building,*
> *At Link Road, Badambadi, Cuttack.*
>
> *5. Orissa State Financial Corporation,*
> *Incorporated under the Orissa State Financial Corporation Act*
> *having Office at O.M.P. Square, Cuttack-3*
> *Cuttack, represented through Managing Director*
> *having his Office in the above address.*
>
> *6. Industrial Promotion and Investment Corporation of Orissa Limited,*
> *having its Office at Janapath, Bhubaneswar, District: Puri*
> *represented through its Managing Director*
> *having his office in the above Address."*

2.1 In the proceeding while all the defendants were set *ex parte* except defendant Nos.5-OSFC and 6 (Industrial Promotion and Investment Corporation of Orissa Limited) who participated and contested and judgment and decree dated 24.12.2011 were passed by the learned 2nd Additional Senior Civil Judge, Cuttack with the following order:

> *"The suit, be and the same, is decreed on contest against the defendants and under the circumstances the defendants are liable to pay litigation cost of Rs.20,000/- at the least to the plaintiff.* ***The defendants are also liable jointly and severally to pay Rs.1,70,000/- with 15% commercial interest along with Pendente lite Interest & Future Interest***

> ***from the date of the last part supply made in 1983-84 till its realisation to the plaintiff in three equal monthly instalments within three months hence.*** *The other prayer to recover back the goods supplied and installed in defendant's unit by the plaintiff is also allowed as an alternative remedy. In case of failure by the defendants to make payment of the dues to the plaintiff as directed above, the plaintiff can realise the same or enforce the alternative remedy through the process of the Court. Pleaders' fee be assessed at the contested scale."*

2.2 The defendant No.6, namely, Industrial Promotion and Investment Corporation of Orissa Limited (IPICOL) preferred an appeal under Section 96 of the CPC, registered as RFA No.34 of 2012, before the Court of the learned District Judge, Cuttack which came to be disposed of *vide* Judgment dated 19.07.2013. The appellate Court in paragraph 5 of the said judgment took note of fact that the learned trial Court had framed as many as five issues, out of which one of the issues, *viz.*, issue No.3, was "*whether the defendants are jointly and severally liable to pay the outstanding amount of the plaintiff with interest including pendente lite interest and future interest?"*.

2.3 At paragraph No.6 of the said judgment, the observation of the appellate Court was as follows:

> *"6. While answering issue No.3, the trial Court has mostly relied on the following facts.*
>
> *(i) One of the officials of Industrial Promotion and Investment Corporation of Orissa Limited was the Director (Finance) in defendant No.1's Company.*
>
> *(ii) The Industrial Promotion and Investment Corporation of Orissa Limited has directly paid Rs.30,000/- to the Plaintiff acknowledging him as sundry creditor.*
>
> *(iii) The Director (Finance), S.B. Satpathy who was an Officer of Industrial Promotion and Investment Corporation of Orissa Limited vide Exts.11 and 12 had acknowledged the dues of the plaintiff outstanding against "Trimurti Hotels Limited" and had assured to clear the dues after financial arrangement.*
>
> *(iv) A sub-committee comprising the members from defendant No.1, defendant Nos.5 & 6 was constituted to finalize the scrutinization process to make payment of sundry creditors, but no scrutinization was made to finalize the dues of sundry creditors and,* ***therefore, the Orissa State Financial Corporation and Industrial Promotion and Investment Corporation of Orissa Limited did not discharge their duty properly resulting in financial loss to the sundry creditors.***
>
> *(iv)* ***The defendant Nos.5 and 6 were controlling the affairs of "Trimurti Hotels Ltd." and, therefore, though there was no express contract between the sundry creditors and defendant Nos.5 and 6, but still then they are liable to clear the unpaid dues of the sundry creditors and the plaintiff is one of the sundry creditors.***
>
> *(vi) The defendant No.5 has not stated at what price the auction sale was made or finalized through One Time Settlement and how the balance amount, if any, was utilized to protect the interest of the sundry creditors and the defendant Nos.5 and 6 have acted arbitrarily."*

2.4 Having taken cognizance of findings recorded by the trial Court, the appellate Court in RFA No.34 of 2012 *vide* Judgment dated 19.07.2013 came to the following conclusion:

*"****

7. Learned counsel for the appellant has submitted that Industrial Promotion and Investment Corporation of Orissa Limited is a wholly owned Government of Orissa Undertaking incorporated under the provisions of the Companies Act with the main object of promoting and financing large and medium scale Industries in the State. Both the Orissa State Financial Corporation and Industrial Promotion and Investment Corporation of Orissa Limited had financed the defendant No.1 i.e., M/s. Trimurti Hotels Limited for setting up the Hotel at Link Road, Cuttack and the project started in 1978 and by March, 1983 partial operation of the Hotel had started, but thereafter the defendant No.1 again requested for additional finance assistance of term loan to discharge the dues of the sundry creditors and to complete the balance work. While sanctioning the term loan in the month of August, 1983, the appellant stipulated that one of his Officer-nominee will be in the Board of Directors of the Hotel to function as the Director (Finance) and shall be the joint signatory to operate the Bank account of defendant No.1 and this arrangement was made to safeguard the interest of Industrial Promotion and Investment Corporation of Orissa Limited to secure, refund of loan advanced to defendant No.1. By August, 1983, the plaintiff-respondent No.1 had already supplied electrical goods and installation of hotel and by then, the official of Industrial Promotion and Investment Corporation of Orissa Limited was not the Director (Finance) of the Hotel. Only on the basis of Resolution dated 18.10.1983 of the Board of Directors of the Hotel, Industrial Promotion and Investment Corporation of Orissa Limited had paid Rs.30,000/- directly to the Indian Commercial complex, i.e., the plaintiff on 01.11.1983 out of the additional term loan, but, that does not mean that he had acknowledged to clear the entire outstanding dues of the plaintiff. ***A sub-committee was constituted with the members of defendant Nos.1, 5 and 6 to finalize the amount payable to sundry creditors, but due to lack of interest shown by the promoter-directors of the Company, the amount payable to the sundry creditors could not be finalized.*** *He has further submitted that Exts.11 and 12, on which the respondent No.1 is relying, were not issued by S.B. Satpathy, Director (Finance), as an official of Industrial Promotion and Investment Corporation of Orissa Limited, but those were issued in the letter pad of "Trimurti Hotels Limited" as the Finance Director of the said Hotel and it will not bind Industrial Promotion and Investment Corporation of Orissa Limited in any way to discharge the dues of the plaintiff, I find these submissions of the learned counsel for the appellant to be correct.*

8. It is in the evidence that in spite of the additional financial assistance given by Industrial Promotion and Investment Corporation of Orissa Limited, the Hotel became sick and could not discharge the debt of Orissa State Financial Corporation and Industrial Promotion and Investment Corporation of Orissa Limited and, therefore, ultimately on 11.09.1985, Orissa State Financial Corporation seized the Hotel Unit under Section 29 of the State Financial Corporation Act, 1951 and the Disposal Advisory Committee of Orissa State Financial Corporation decided in favour of offer for sale of the property to M/s. Virgo International Private Limited. The Industrial Promotion and Investment Corporation of Orissa Limited and Orissa State Financial Corporation are secured creditors of Respondent No.2 and all the assets and materials of the unit was hypothecated in their favour and, therefore, after sale of the unit under Section 29 of the S.F.C. Act, 1951, the sale proceeds were apportioned by the Orissa State Financial Corporation and Industrial Promotion and Investment Corporation of Orissa Limited and nothing was left for payment to the sundry creditors. Plaintiff has admitted that there was no contract between the plaintiff and the defendant Nos.5 and 6, i.e., Orissa State Financial Corporation and Industrial Promotion and Investment

Corporation of Orissa Limited while electrical goods and installation were supplied to the defendant No.1 M/s. Trimurti Hotels Limited. One Officer of Industrial Promotion and Investment Corporation of Orissa Limited was functioning as the Director (Finance) of M/s. Trimurti Hotels Limited only after the additional financial assistance in shape of term loan given by Industrial Promotion and Investment Corporation of Orissa Limited and he had only supervisory authority, so that the finance made by Industrial Promotion and Investment Corporation of Orissa Limited to M/s. Trimurti Hotels Limited is secured. He had not acknowledged or assured the plaintiff to clear the outstanding dues as an Officer of Industrial Promotion and Investment Corporation of Orissa Limited, but vide Exts.11 and 12, he had assured the Plaintiff to clear his dues after obtaining finance from the financial institutions, as finance Director of M/s. Trimurti Hotels Limited. There is no evidence on record to show that Industrial Promotion and Investment Corporation of Orissa Limited was controlling the financial affairs of defendant No.1's Company. ***There was no privity contract between the plaintiff and the defendant Nos.5 and 6 when he supplied the electrical goods to M/s. Trimurti Hotels Limited and, therefore, the appellant cannot be held jointly and severally liable to clear the outstanding dues of the plaintiff.*** *Accordingly, the appeal preferred by the appellant succeeds. Hence, it is ordered.*

ORDER

The appeal is allowed on contest against the respondent No.1 and ex parte against the other respondents. The judgment and decree passed against the present appellant is only set aside, but will remain as such against the other defendants. *In the facts and circumstances of the case, the parties are to bear their own costs."*

2.5 Against the said judgment of the Appellate Court setting aside the judgment and decree passed against the IPICOL, the present opposite party (Jyoti Prakash Das) invoking provisions of Section 100 of the Code of Civil Procedure, 1908, approached this Court by filing second appeal bearing RSA No.373 of 2013, which came to be disposed of *vide* Judgment dated 08.09.2016, wherein this Court observed as follows:

*"****

6. Learned counsel for the appellant (Jyoti Prakash Das-present opposite party) submits that the followings are the substantial questions of law:

(1) Whether the learned lower appellate Court has committed gross error of law in arriving at a conclusion that ***the defendant No.6 is only the supervisory authority*** *in view of the fact that the evidence on record show that* ***IPICOL was controlling the financial affair of the company****?*

(2) Whether the learned lower appellate Court committed gross error of law by holding that Ext.11 and 12 cannot be treated as an acknowledgement of the liability ***on the part of the defendant No.6 to clear the outstanding dues of plaintiff.***

(3) Whether the learned lower appellate Court committed gross error of law by not holding that the plaintiff being a creditor, by the resolution of the Board of Directors, defendant No.6 is liable to pay the outstanding dues?

*****

8. Admittedly, by August, 1983 the plaintiff had supplied electrical goods and done the electric installation work in the hotel and by then the official of this defendant No.6 was not the Director of Finance of the company running the hotel. Similarly, the payment said to have been made by this defendant No.6 is by virtue of a resolution of the Board

of Directors passed on 18.10.1983 and that too the said amount has been paid from out of the additional term loan sanctioned to the company running the hotel. So, this cannot be taken to be an acknowledgment of the liability for payment of the outstanding dues of the plaintiff by defendant No.6, the financer.

Facts remain that despite additional financial assistance given by the financier, hotel still remained sick and failed to discharge the debt of defendant Nos.5 & 6. Therefore, action under section 29 of the State Financial Corporation Act has been taken and ultimately there has been the sale of the unit. All the assets and materials of the unit having remained hypothecated in favour of defendant nos.5 & 6, the sale proceeds obtained by sale of the unit has been accordingly apportioned.

There was no contract between the plaintiff and this defendant No.6 for supply of electrical goods and for entrustment of the work of electrical installation in the hotel. The position of this defendant No.6 being that of a financer, in my considered view, has nothing to do with the liability of the plaintiff in making payment of outstanding dues for supply of electrical goods and doing the electrical installations in the said hotel which was then being not run by it.

9. Thus, I find that the lower appellate Court has addressed the questions raised in so far as the liability of the defendant No.6 is concerned in accordance with law in rightly holding that the defendant No.6 has no liability in the matter of payment of money to the plaintiff. ***The lower appellate court is thus found to have rightly allowed the appeal filed by this defendant No.6*** *and to the extent as aforesaid.*

The submission of the learned counsel for the appellate in view of above discussion and reason is not accepted. This Court thus finds that there arises no substantial question of law in this appeal for being answered. The appeal thus does not merit admission.

10. The appeal is accordingly dismissed. No order as to cost."

2.6 After disposal of the said RSA No. 373 of 2013 a petition, being Misc. Case No. 950 of 2016, filed at the instance of the opposite party for modification/ clarification of the Judgment dated 08.09.2016, got disposed of by this Court *vide* Order dated 15.11.2017 with the following order:

"This application has been filed by the appellant for modification/clarification of the judgment dated 08.09.2016 passed in RSA No.373 of 2013 in so far as the liabilities of defendants other than defendant No.6 are concerned.

Heard learned counsel for the appellant. Gone through the judgment of this Court as well as the first appellate court in RFA No.34 of 2012 arising out of the judgment and decree passed by the trial Court in TMS No.74 of 1989.

The first appeal had been filed by the defendant No.6 and the judgment and decree passed by the trial court had been set aside in so far as the liability of the defendant No.6, the appellant therein is concerned which appears to have been stated in the said judgment in clear terms.

The second appeal had been filed by the plaintiff questioning said finding and decision of the first appellate court particularly in respect of the declaration that the defendant No.6 has no liability in the matter of the claim of the plaintiff. ***The appeal has been dismissed by this Court holding the first appellate court to have rightly allowed the appeal preferred by the defendant No.6 holding it to be having no liability.***

The subject matter of challenge in the second appeal was that of exoneration of defendant No. 6 from its liability in satisfying the claim of the plaintiff as decreed. *So*

when the second appeal has been dismissed holding that it does not merit admission, I am unable to find out any reason behind the move for such further modification/clarification in the matter.

It is needless to say that the second appeal since has been dismissed without admission, the judgment and decree as passed by the first appellate court which has marched over the judgment and decree passed by the trial court to the extent as found therein, holds the field.

The Misc. Case stands accordingly disposed of with the above observation. Issue urgent certified copy as per rules."

2.7 Before the executing Court in connection with the decree pursuant to judgement dated 24.12.2011 of the 2nd Additional Senior Civil Judge, Cuttack, the judgment-debtor (OSFC) filed CMA No.145 of 2021 with prayer to drop the execution proceeding by contending that being similarly situated as that of the IPICOL (financier), identical benefit must be extended to it in terms of the judgment dated 08.09.2016 of this Court in RSA No.373 of 2013 wherein it was observed that the IPICOL as Financier has nothing to do with the liability of the opposite party (plaintiff-decree holder) with respect to supply of electrical goods and execution of electrical installation in M/s. Trimurti Hotels Limited.

2.8 Before the executing Court, refuting the claim of the petitioner, the opposite party urged that had the OSFC been sanguine about its right and prejudice, it would have approached by way of an appeal, as was done by the IPICOL, or made an application for review under Order LXVII of the CPC or in the alternative, it could have moved a petition under Order IX, Rule 13 of the CPC. It is pleaded that decree cannot be ignored merely because it is claimed to be contrary to law on the basis of principle as set at rest that the executing Court cannot go behind the decree unless a decree is declared to be nullity by a competent Court of law.

2.9 It is specifically objected to by the opposite party that the judgment-debtor, having participated in the suit as defendant No.5 and contested by participating in the proceeding, it can at no stretch of imagination be conceived that the judgment and decree of the trial Court was not within its knowledge.

2.10 Refuting the allegations made by the judgment-debtor, the decree holder (opposite party herein) submitted that it is fallacious ground to raise objection that the decree is inexecutable. It is stated that it is too late in the day to raise dispute with regard to judgment and decree passed by the 2nd Additional Senior Civil Judge, Cuttack.

2.11 Considering the factual position with regard to finality attached to the judgment and decree passed by the learned 2nd Additional Senior Civil Judge, Cuttack in the suit *qua* the defendant No.5 (OSFC), as it did not choose to assail before the appellate Court. Therefore, the petitioner is required to discharge its liability as per the decree. The learned 2nd Additional Senior Civil Judge, Cuttack has made the following observation:

*"****

4. Heard, from both the sides. Perused the case record. The present petitioner has prayed to drop the execution proceeding against him on the ground that as the present petitioner is nowhere liable to pay. The present petitioner has filed this CMA under Section 47 of CPC going to the merits of the case. Both in the judgments passed in TMS No.747/1989 and RFA No.34/12, the present petitioner has been held liable.

It is the settled principle of law that,

'Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties there under. It is only in the limited cases where the decree is by a Court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus in-executable. An erroneous decree cannot be equated with one which is a nullity. It can be challenged on the ground of jurisdiction infirmity, voidness or the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree inexecutable after its passing.' [2018 (I) CLR 546]

In the present case at hand, the petitioner has prayed to drop the execution proceeding on the ground that the present petitioner is not liable and hence the decree cannot be executed against the present petitioner. The execution is not challenged on any ground of infirmity as discussed above.

In view of the discussion made above, the execution cannot be dropped against the present petitioner in absence of any infirmity in the decree already passed. Hence, ordered:

ORDER

The CMA be and the same is dismissed on contest against the OP but under the circumstances without any cost."

2.12 Aggrieved thereby, the petitioner-OSFC has preferred this civil revision petition before this Court invoking Section 115 of the CPC.

Hearing:

3. Pleadings being completed and exchanged, on consent of counsel for the respective parties, this matter is taken up for final hearing at the stage of admission.

3.1 Heard Sri Abinash Routray, learned Advocate for the petitioner and Sri Khetra Mohan Dhal, learned counsel appearing for the opposite party and the matter stood reserved for preparation and pronouncement of order.

Submissions and arguments:

4. Sri Abinash Routray, learned counsel for the petitioner submitted that the petitioner has raised pertinent question touching the jurisdiction of the executing Court to proceed with the execution of the decree inasmuch as the same is not executable against the present petitioner in the teeth of the judgment dated 08.09.2016 rendered by this Court in RSA No.373 of 2013 filed by the present opposite party *(Jyotiprakash Das Vrs. IPICOL and others)*.

4.1 It is vehemently contended by the learned counsel for the petitioner that in the aforesaid judgment, inasmuch as this Court absolved the IPICOL from discharging liability in terms of decree in the suit in absence of privity of contract

between the IPICOL (arrayed as opposite party No.6 in the suit) and the present opposite party, thereby no liability could be fastened to IPICOL, in the similar fashion the petitioner-OSFC for supply of electrical goods and execution of installation works in the hotel cannot be compelled to discharge liability as contained in the same decree. It is submitted that the liability of the hotel (remained sick) for work executed by the opposite party could not be shifted on to the defendant No.5 (OSFC) and No.6 (IPICOL), which renders the decree a void one.

4.2 He drew attention of this Court to the finding reflected by this Court in the said judgment in RSA No.373 of 2013 to the effect that action under Section 29 of the State Financial Corporation Act was taken against the hotel and ultimately the unit was sold. Therefore, all the assets and materials of the unit having remained hypothecated in favour of defendant Nos.5 and 6, the sale proceeds on account of sale of the unit have accordingly been apportioned.

4.3 Expanding his argument further, learned counsel for the petitioner submitted that since this Court aptly held that the IPICOL, being financier, cannot be fastened with liability to make payment of money to the plaintiff-decree holder, the executing Court should have gone into the aspect whether the decree, if at all, is capable of being executed against the OSFC inasmuch as the IPICOL has already been adjudged as having no liability to discharge towards decree in favour of the opposite party. Accordingly the executing Court should have dropped the execution proceeding.

5. Sri Khetra Mohan Dhal, learned Advocate appearing for the opposite party-plaintiff in trial Court, *per contra,* opposed such a contention of the learned counsel for the petitioner and proceeded to submit that the executing Court was justified in dismissing the petition seeking for dropping the execution proceeding. The trial Court while concluding the suit held that the defendants including the OSFC, which was the contesting defendant in the suit before the trial Court, was liable to pay Rs.1,70,000/- along with 15% commercial interest along with *pendente lite* and future interest from the date of the last part supply made in 1983-84 till its realisation. Having not questioned the veracity of such judgment and decree passed by the learned 2nd Additional Senior Civil Judge, Cuttack, *qua* the present petitioner *vis-à-vis* the opposite party, the terms of decree in TMS No.747 of 1989 has attained finality between the OSFC and the opposite party by virtue of judgment dated 19.07.2013 of the learned District Judge, Cuttack in RFA No.34 of 2012, wherein it has categorically been stated that "the judgment and decree passed against the present appellant (IPICOL) is only set aside but will remain as such against the other defendants".

5.1 He submitted that since the judgment of the appellate Court was assailed before this Court in RSA No.373 of 2013 at the behest of decree-holder (present opposite party) as against the IPICOL, the said appeal got dismissed with reasons *vide* Judgment dated 08.09.2016. Since the first appeal was at the instance of the IPICOL, but not by the OSFC, the dismissal of second appeal arising out of judgment

dated 19.07.2013 passed in RFA No.34 of 2012 by the learned District Judge, Cuttack can be said to have merged so far as it related to IPICOL. As the OSFC remained fence sitter, no relief before the executing Court can be claimed at this belated stage.

5.2 It is also submitted by Sri Khetra Mohan Dhal, learned counsel for the opposite party that the OSFC was also arrayed as party in both the appeals.

Legal aspects as set forth by Courts:

6. Scope to challenge the decree before the Executing Court:

(i) Sobhabati Devi Vrs. Voona Bhimayya Subudhi, 1974 (1) CWR 72 [Orissa High Court]:

*"9. *** It is fundamental that an executing Court cannot go behind the decree unless the decree is a nullity. A decree cannot be ignored merely because it is wrong or contrary to law. To render a decree a nullity, the Court which passed it must have lacked inherent jurisdiction to try the suit in which the decree was passed. So long as the Court had inherent jurisdiction to try the suit, a decree passed by it cannot be ignored merely on the ground that it is illegal and contrary to law.*

10. Their Lordships of the Supreme Court examined the powers of the executing Court to challenge the effect of a decree in Hira Lal Patni Vrs. Shri Kali Nath, AIR 1962 SC 199. The ground on which the validity of the decree was challenged is that the suit instituted on the original side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and therefore the award that followed on the reference between the parties and the decree of the Court under execution were all null and void. After pointing out that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case and that while competence of a Court to try a case goes to the very root of jurisdiction and where it is lacking it is a case of inherent lack of jurisdiction, that an objection to local jurisdiction of a Court can be waived, and this principle has been given a statutory recognition in Section 21 of the Code of Civil Procedure. His Lordship the Chief Justice speaking for the Court stated thus in paragraph 4:

'The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to the jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.'

A similar matter came up for consideration before the Supreme Court in Ittyavira Mathai Vrs. Varkey Varkey, AIR 1964 SC 907. In that case, the validity of a decree was challenged on the ground that it is a nullity having been passed in a suit which was barred by time. Rejecting the contention, their Lordships stated in para 8 thus:

'Even 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.'*

*11. In the present case, the trial Court which passed the impugned decree had the jurisdiction to try the suit. ***"*

(ii) Haryana Vidyut Parsaran Nigam Limited Vrs. Gulshan Lal, (2009) 8 SCR 937:

"16.The learned Judge in no uncertain terms held that no interest shall be payable thereupon. Denial of payment of interest, in our opinion, is significant and the same leads to the conclusion that the court was conscious of the fact that not only plaintiffs-respondents were entitled to a declaration but also to a mandatory injunction. ***But for the purpose of construction of a judgment, it must be read as a whole.*** *The issues framed in that behalf assumes great significance. We have noticed, hereinbefore, that both the issues framed by the learned Trial Judge had correlation with the reliefs claimed for.*

In U.P. State Road Transport Corporation Vrs. Assistant Commissioner of Police (Traffic), Delhi 2009 (2) SCALE 526, this Court held:

'A decision is an authority, it is trite, for which it decides and not what can logically be deduced therefrom. This wholesome principle is equally applicable in the matter of c construction of a judgment. A judgment is not to be construed as a statute. It must be construed upon reading the same as a whole. For the said purpose, the attending circumstances may also be taken into consideration.'

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18. This court furthermore in State of MP Vrs. Mangilal Sharma, (1998) 2 SCC 510 categorically held as under:

'6. A declaratory decree merely declares the right of the decree holder vis-a-vis the judgment debtor and does not in terms direct the judgment-debtor to do or refrain from doing any particular act or thing. ***Since in the present case decree does not direct reinstatement or payment of arrears of salary the executing court could not issue any process for the purpose as that would be going outside or beyond the decree.*** *Respondent as a decree holder was free to seek his remedy for arrears of salary in the suit for declaration. The executing court has no jurisdiction to direct payment of salary or grant any other consequential relief which does not flow directly and necessarily from the declaratory decree. It is not that if in a suit for declaration where the plaintiff is able to seek further relief he must seek that relief though he may not be in need of that further relief. In the present suit the plaintiff while seeking relief of declaration would certainly have asked for other reliefs like the reinstatement, arrears of salary and consequential benefits.* ***He was however, satisfied with a relief of declaration knowing that the Government would honour the decree and would reinstate him.*** *We will therefore assume that the suit for mere declaration filed by the respondent-plaintiff was maintainable, as the question of maintainability of the suit is not in issue before us.'*

However in that case as the decree for reinstatement and back wages had not been granted, the court opined that the Executing Court cannot grant a further relief. Herein,

however, as noticed, the respondents not only had prayed for a declaratory decree but also decree for mandatory injunction.

*19. *** in Bhawarlal Bhandari Vrs. Universal Heavy Mechanical Lifting Enterprises, (1999) 1 SCC 558. Therein the decree was passed by a court lacking inherent jurisdiction and in that situation this court considered as to whether a decree passed by a court wholly without jurisdiction would be a nullity to hold:*

'10. The aforesaid decision of this Court squarely applies to the facts of the present case. ***This is not a case in which the award decree on the face of it was shown to be without jurisdiction.*** *Even if the decree was passed beyond the period of limitation, it would be an error of law or at the highest a wrong decision which can be corrected in appellate proceedings and not by the executing court which was bound by such decree.* ***It is not the case of the respondent that the Court which passed the decree was lacking inherent jurisdiction to pass such a decree.*** *This becomes all the more so when the respondent did not think it fit to file objection against the award which was sought to be made rule of the court.'*

**** Whether by reason of the decree the respondents would be getting some amount by way of back wages for a period of more than three years would depend upon the facts of each case. It would also depend upon the date on which the cause of action of suit arose.*

20. As indicated hereinbefore, for the purpose of allowing an objection filed on behalf of a judgment debtor under Section 47 of the Code of Civil Procedure, it was incumbent on him to show that the decree was ex facie nullity. For the said purpose, the court is precluded from making an in-depth scrutiny as regards the entitlement of the plaintiff with reference to not only his claim made in the plaint but also the defence set up by the judgment-debtor. ***As the judgment of the Trial Court could not have been reopened, the correctness thereof could not have been put to question. It is also well-known that an Executing Court cannot go behind the decree.*** *If on a fair interpretation of the judgment, Order and decree passed by a court having appropriate jurisdiction in that behalf, the reliefs sought for by the plaintiff appear to have been granted, there is no reason as to why the Executing Court shall deprive him from obtaining the fruits of the decree. In Deepa Bhargava Vrs. Mahesh Bhargava, 2008 (16) SCALE 305, this Court held as under:*

*'11 **** ***An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is.*** *A default clause contained in a compromise decree even otherwise would not be considered to be penal in nature so as to attract the provisions of Section 74 of the Indian Contract Act.'*

21. It is also not a case where this Court can exercise its jurisdiction under Article 142 of the Constitution of India to mould an order. ***The decree passed by the learned Trial Court has attained finality. Whether rightly or wrongly, the judgment ... of the learned Trial Judge has been affirmed by this Court.*** *It is one thing to say that no right having crystalised in favour of a party to the lis, this Court can mould the relief appropriately, but it is another thing to say that despite the decree being found to be an executable one, this Court will refuse to direct execution thereof.*

22. We are not oblivious of the fact that the respondents legally would not have been entitled to the reliefs prayed for by them. However, as a decree has been passed, we do not intend to go behind the same. ***The Executing Court shall, it goes without saying, execute the decree strictly in terms thereof.*** *"*

7. Doctrine of merger:

(i) Chandi Prasad Vrs. Jagdish Prasad, (2004) 8 SCC 724:

"9. A decree is defined in Section 2(2) of the Code to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. As against a judgment and decree unless otherwise restricted, a first appeal would be maintainable under Section 96 of the Code and a second appeal under Section 100 thereof. A decree within the meaning of Section 2(2) of the Code would be enforceable irrespective of the fact whether it is passed by the trial court, the first appellate court or the second appellate court.

23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. (P) Ltd. Vrs. CIT, (2000) 5 SCC 373 = AIR 2000 SC 1623].

25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed Vrs. State of Kerala, (2000) 6 SCC 359 wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating: (SCC p. 383, paras 41-43)

'41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. 'To merge' means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.'

26. In Kunhayammed, (2000) 6 SCC 359 it was observed: (SCC p. 370, para 12)

*'12. *** **Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below.** However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.'*

27. The said decision has been followed by this Court in a large number of decisions including Union of India Vrs. West Coast Paper Mills Ltd., (2004) 2 SCC 747.

28. However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply. [See Raja Mechanical Co. (P) Ltd. Vrs. CCE, ILR (2002) 1 Del 33]."

(ii) Amba Bai Vrs. Gopal, AIR 2001 SC 2003:

*"11. If the judgment or order of an inferior court is subjected to an appeal or revision by the superior court and in such proceedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court. **The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject-matter and the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the superior court. In the course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is continuation of the suit, came to be gradually extended to other proceedings like revisions and even the proceedings before quasi-judicial and executive authorities.***

12. This Court in State of Madras Vrs. Madurai Mills Co. Ltd., AIR 1967 SC 681 = (1967) 19 STC 144 observed as under: (AIR Headnote)

*'**The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.** ' ***"*

(iii) Hindustan Aluminium Corporation Limited Vrs. Commissioner of Income Tax (Central), 1988 SCC OnLine Cal 357:

*"10. In the case of Amritlal Bhogilal, (1958) 34 ITR 130, the Supreme Court dealt with a case where the Income-tax Officer **had passed a composite order of assessment**.*

One part of the order related to registration of the firm, which was the assessee in that case. The other part related to computation of the income of the firm. ***There was no appeal on the aspect of registration of the firm. In fact, that part of the order was not appealable at all. The Supreme Court held that in such a case, it could not be said that the entire order of the Income-tax Officer had merged in the order of the Appellate Assistant Commissioner.***

11. The question, however, is whether, in a case where the entire order is appealable but the grounds of appeal are confined to only some of the points involved in the order and the appellate order is also confined only to those aspects which have been taken in the grounds of appeal, it can be said that the issues that were neither raised in the grounds of appeal nor considered by the Appellate Assistant Commissioner had merged in the order of the Appellate Assistant Commissioner.

This question directly came up for consideration before the Supreme Court in the case of State of Madras Vrs. Madurai Mills Co. Ltd., (1967) 19 STC 144. In this case, in the sales tax assessment for the year 1950-51, the Deputy Commercial Tax Officer, Madurai, determined the net turnover of the dealer at Rs. 15,44,09,109-3-11. In the appeal before the appellate authority, it was contended on behalf of the respondents that a sum of Rs. 1,44,294-14-4 was wrongly included by the assessing authority in the purchase value of cotton as that amount only represented the commission paid by it to Comorin Investment Trading Company Limited. It was also contended that another sum of Rs.81,546-0-1, which represented sale proceeds realised by selling empty drums, was not a realisation in the course of its business. The appellate authority upheld the first contention in respect of the payment of commission and rejected the second contention with regard to sale of empty drums.

12. A revision petition was thereafter presented before the Deputy Commissioner of Commercial Taxes by the dealer and the only objection raised was that it should not have assessed to tax on the amounts collected by it by way of tax amounting to Rs.6,57,971-4-9. By his order dated August 21, 1954, the Deputy Commissioner of Commercial Taxes dismissed the revision petition holding that the respondent was not entitled to raise the contention for the first time. It was further held that even otherwise, the statute permitted the inclusion of tax in the taxable turnover of the dealer.

13. Thereafter, on August 4, 1958, the Board of Revenue issued a notice to the dealer stating that it proposed to revise the assessment made by the Deputy Commercial Tax Officer, Madurai, by including in the net turnover a sum of Rs.7,74,62,706-1-6 as the amount had been wrongly excluded by the assessing authority. The dealer objected to the proposed revision on the ground that the proceeding was barred by limitation. Moreover, there was no wrong exclusion by the Deputy Commercial Tax Officer as alleged. The Board of Revenue, however, overruled both the objections and revised the taxable turnover by including the said amount of Rs.7,74,62,706-1-6.

14. Thereafter, the case went to the Madras High Court which held that the revision proceedings were barred by limitation. The State of Madras thereafter appealed to the Supreme Court. The question of law that fell for determination in that case was:

Whether the order of the Board of Revenue dated August 25, 1958, was illegal because there was a contravention of the rule of limitation laid down by section 12(3)(i) of the Madras General Sales Tax Act inasmuch as the order of the Board of Revenue was made after a period of 4 years from the date on which the order of the Deputy Commercial Tax Officer was communicated to the assessee.

15. On the basis of the principles laid down by the Supreme Court in the case of CIT Vrs. Amritlal Bhogilal and Co., (1958) 34 ITR 130, it was contended on behalf of the State of Madras that the order passed by the Deputy Commercial Tax Officer had merged in the appellate order of the Deputy Commissioner of Commercial Taxes passed on August 21, 1954, which was the operative order. The Board of Revenue was competent to revise that order within the period of four years of passing of that order. The Supreme Court rejected this contention in the following words (at p. 149 of 19 STC):

'But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior tribunal and the other by a superior tribunal, passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. For example, in Amritlal Bhogilal and Co.'s case, (1958) 34 ITR 130 (SC), it was observed by this court that the order of registration made by the Income-tax Officer did not merge in the appellate order of the Appellate Commissioner, because the order of registration was not the subject-matter of appeal before the appellate authority. It should be noticed that the order of assessment made by the Income-tax Officer in that case was a composite order, viz., an order granting registration of the firm and making an assessment on the basis of the registration. The appeal was taken by the assessee to the Appellate Commissioner against the composite order of the Income Tax Officer. It was held by the High Court that the order of the Income-tax Officer granting registration to the respondent must be deemed to be merged in the appellate order and that the revisional power of the Commissioner of Income-tax cannot, therefore, be exercised in respect of it. The view taken by the High Court was overruled by this court for the reason that the order of the Income-tax Officer granting registration cannot be deemed to have merged in the order of the Appellate Commissioner in an appeal taken against the composite order of assessment... In the circumstances of the present case, it cannot be said that there was a merger of the order of assessment made by the Deputy Commercial Tax Officer dated November 28, 1952, with the order of the Deputy Commissioner of Commercial Taxes dated the 24th August, 1954, because the question of exemption of the value of yarn purchased from outside the State of Madras was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes. The only point that was urged before the Deputy Commissioner was that the sum of Rs.6,57,971-4-9 collected by the respondent by was of tax should not be included in the taxable turnover. This was the only point raised before the Deputy Commissioner and was rejected by him in the revision proceedings. On the contrary, the question before the Board of Revenue was whether the Deputy Commercial Tax Officer, Madurai, was right in excluding from the net taxable turnover of the respondent the sum of Rs. 7,74,62,706-1-0 which was the value of cotton purchased by the respondent from outside the State of Madras. We are, therefore, of opinion that the doctrine of merger cannot be invoked in the circumstances of the present case.'

16. If this principle is applied to the instant case, it will be seen that the subject-matter of appeal before the Appellate Assistant Commissioner or the Tribunal was not concerned in any way with the question of exchange fluctuation. Whether the loss occasioned by exchange fluctuation was a capital loss or revenue loss was a question that was not raised, gone into or decided by the Appellate Assistant Commissioner or the Tribunal.

17. Therefore, if the principle laid down by the Supreme Court in the case of State of Madras Vrs. Madurai Mills Co. Ltd., (1967) 19 STC 144 is applied, it will clearly appear that the entire order of the Income-tax Officer had not merged with the appellate order.

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29. The principles enunciated by the Supreme Court in the case of State of Madras Vrs. Madurai Mills Co. Ltd., (1967) 19 STC 144 leave no room for doubt that what merges in the order of the appellate or revisional authority is not the entire appealable order of the lower authority but only that part of the order of the lower authority which was under consideration of the higher authority in revision or in appeal. It is also to be noted from the judgment of the Supreme Court that for the purpose of application of the doctrine, of merger, no distinction can be made between an order passed in revision and an order passed in appeal.

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35. The question of merger was examined in extenso by the Supreme Court in the case of Gojer Bros. (P.) Ltd. Vrs. Shri Ratan Lal Singh, (1974) 2 SCC 453 = AIR 1974 SC 1380. In that case, the Supreme Court, after referring to its earlier decision in the case of State of Madras Vrs. Madurai Mills Co. Ltd., (1967) 19 STC 144, observed (at pp.1388, 1389):

'These observations cannot justify the view that in the instant case there can be no merger of the decree passed by the trial court in the decree of the High Court. The court, in fact, relied on Amritlal Bhogilal's case, (1958) 34 ITR 130 = (1959) SCR 713 = AIR 1958 SC 868, while pointing out that if the subject-matter of the two proceedings is not identical, there can be no merger. Just as in Amritlal Bhogilal's case, (1958) 34 ITR 130 (SC), the question of registration of the assessee-firm was not before the appellate authority and, therefore, there could be no merger of the order of the Income-tax Officer in the appellate order, so in the case of Madurai Mills, (1967) 19 STC 144 = (1967) 1 SCR 732 = AIR 1967 SC 681, there could be no merger of the assessment order in the revisional order as the question regarding exclusion of the value of yarn purchased from outside the State was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes.

In the instant case, the subject-matter of the suit and the subject-matter of the appeal were identical. The entire decree of the trial court was taken in appeal to the first appellate court and then to the High Court… We are, accordingly, of the opinion that the decree of the trial court dated November 24, 1958, merged in the decree of the High Court dated January 8, 1969.

36. ***The aforesaid observation makes it clear that unless the subject-matter of the suit and the subject-matter of the appeal were identical, there could not be any merger of the decree of the trial court in the decree of the appeal court entirely.****"*

(iv) Utkal Galvanisers Pvt. Ltd. Vrs. Assistant Commissioner of Income Tax, 105 (2008) CLT 533 (Ori):

"In the case of India Tin Industries P. Ltd. (1987) 166 ITR 454 their Lordships of the Karnataka High Court came to hold that sub-section (1A) of section 154 specifically provides that any matter which has not been considered and decided in any proceeding by way of appeal or revision, may be amended by the authority passing such an order in exercise of its power under section 154(1). Their Lordships further came to hold that ***the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by an inferior Tribunal and the other by***

a superior Tribunal passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject-matter of the appeal. *The order of assessment made by the Income-tax Officer merges in the order of the Commissioner in so far as it relates to items considered and decided by the Commissioner.* ***That part of the order of assessment, which relates to items not forming the subject-matter of the appellate order and left untouched does not merge in the order of the Commissioner.*** *Even after an appeal from an order of assessment is decided by the Commissioner, a mistake in that part of the order of assessment which was not the subject-matter of the appeal and was thereafter left untouched by the Commissioner, can be rectified by the Income-tax Officer."*

8. Estoppel and waiver:

(i) Hope Plantations Ltd. Vrs. Taluk Land Board, (1999) 5 SCC 590:

"26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. ***Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong.*** *When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it.* ***They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation.*** *These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined.* ***Their only remedy is to approach the higher forum if available.*** *The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."*

(ii) Municipal Corporation of Greater Bombay Vrs. Hakimwadi Tenants' Association, AIR 1988 SC 233:

*"In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case. ***"*

(iii) Bashehar Nath Vrs. Commissioner of Income Tax, AIR 1978 SC 1351:

*"*** I may refer in this connection to the provisions in Part XIII[1] which relate to trade, commerce and intercourse within the territory of India. These provision also impose certain restrictions on the legislative powers on the Union and of the States with regard to trade and commerce.* ***As these provisions are for the benefit of the general public and not for any particular individual, they cannot be waived, even though they do not find place in Part III of the Constitution.*** *Therefore, the crucial question is not whether*

1. Constitution of India

> *the rights or restrictions occur in one part or other of the Constitution.* ***The crucial question is the nature of the rights given: is it for the benefits of individuals or is it for the general public?****"*

The issue:

9. With the aforesaid perspective of law as set forth by the Courts, on the facts and in the circumstances, the issue involved in this matter revolves around narrow compass, *viz*.,

> WHETHER, on dismissal of second appeal filed by the decree-holder (opposite party herein) against the one of the defendants before the trial Court in the suit (IPICOL), and the judgment of the appellate Court holding that the financier-IPICOL is not liable to discharge the decree inasmuch as the finding that there is no privity of contract between the financier (judgment debtor) and the opposite party (decree holder) attained finality, the decree is enforceable as against other defendants namely the OSFC, which chose not to prefer appeal questioning the decree?

Analysis and discussion:

10. With the factual matrix being not disputed, this Court now proceeds to examine the effect of decree and appellate order(s) *qua* the opposite party-Jyoti Prakash Das and the petitioner-OSFC.

10.1. In the suit, TMS No.747 of 1989, while the petitioner herein was arrayed as defendant No.5, the IPICOL was defendant No.6 and the opposite party herein was plaintiff. By the judgment dated 24.12.2011 passed in the said suit it was held that the defendant Nos.5 and 6 are jointly and severally liable to pay to the plaintiff.

10.2. It is admitted position that the petitioner has not preferred any appeal. However, the defendant No.6 preferred appeal, bearing RFA No.34 of 2012, before the learned District Judge, Cuttack. The judgment dated 19.07.2013, disposing of said RFA reflects as follows:

> *"The judgment and decree passed against* ***the present appellant*** *(the Industrial Promotion and Investment Corporation of Orissa Limited) is* ***only*** *set aside, but will* ***remain as such against the other defendants****."*

10.3. The present opposite party, being dissatisfied with the judgment dated 19.07.2013, so far as the order contained *qua* the defendant No.6 is concerned, preferred second appeal, being RSA No.373 of 2013, which was dismissed *vide* Judgment dated 08.09.2016 with the specific observation that,

> *"There was* ***no contract*** *between* ***the plaintiff*** *(Jyoti Prakash Das) and* ***this defendant No.6*** *(the Industrial Promotion and Investment Corporation of Orissa Limited) for supply of electrical goods and for entrustment of the work of electrical installation in the hotel. ... Thus, I find that the lower appellate Court has addressed the questions raised* ***insofar as the liability of the defendant No.6*** *is concerned in accordance with law in rightly holding that* ***the defendant No.6 has no liability in the matter of payment of money to the plaintiff****."*

10.3. Said judgment dated 08.09.2016 passed in RSA No.373 of 2013 has been further clarified in Order dated 15.11.2017 passed in Misc. Case No.950 of 2016 filed by Jyoti Prakash Das (plaintiff). It has been clarified thus:

> *"It is needless to say that the second appeal since has been dismissed without admission, the judgment and decree as passed by the first appellate Court which has marched over the judgment and decree passed by the trial Court* ***to the extent as found therein****, holds the field."*

10.4. With the conspectus of judicial pronouncements it can be culled out that a decree against a party becomes final, if not appealed against, and the benefit of an appeal by another party cannot be extended to the party who has chosen not to appeal, unless the circumstances of the case make it inevitable to do so.

10.5. Thus, the above judgments/orders would make it clear that the petitioner having not questioned the propriety of judgment and decree of the learned trial Court before the higher Court(s), as is unequivocally stated by the learned District Judge that the judgment and decree is set aside *qua* the defendant No.6 (IPICOL) only. Therefore, the entire judgment and decree of the learned 2nd Additional Senior Civil Judge, Cuttack cannot be construed to have been merged with the judgment of the appellate Court(s).

11. Pleadings and particulars are required to enable the Court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the Court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (*Vide*: *State of Odisha Vrs. Mamata Mohanty, (2011) 2 SCR 704).*

11.1. It is urged by the learned counsel for the petitioner that in view of challenge against the judgment dated 19.07.2013 of the learned District Judge, Cuttack in RFA No.34 of 2012 by the opposite party being not admitted by this Court in the second appeal, the appellate order, by virtue of which the judgment and decree passed by the 2nd Additional Senior Civil Judge, Cuttack has been set aside, being operative, the relief should have been granted to the petitioner (OSFC) as it is identically positioned. A *non est* judgment and decree cannot be executed as it is void.

11.2. In *Ashok Malhotra Vrs. Union of India, 2005 SCC OnLine Del 1216* position with respect to void order or invalid order and its enforceability has been discussed in the following manner:

> *"17. Dealing with the question of invalidation of an order, H.W.R. Wade and C.F. Forsyth have in their treatise Administrative Law—Eighth Edition observed:.*
>
> *'The truth is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity'*

and 'void' but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of legal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results.'

18. We may also at this stage refer to the following passage from the decision in Smith Vrs. East Elloe Rural District Council, (1956) AC 736, where Lord Radcliffe has emphasised the need for resorting to legal proceedings to establish the cause of invalidity of an order and to have it quashed for otherwise the order remains valid:

*'**An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.**'*

19. As to what is void and what is voidable, has been the subject matter of numerous judicial pronouncements but before we refer to some of those decisions, we may usefully extract the following passage from De Smith, Woolf and Jowell in their treatise Judicial Review of Administrative Action, Fifth Edition, para 5-044, where the concept of void and voidable has been summarised as follows:

'Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problems arose from the premise that if an act, order or decision is ultra vires in the sense of outside jurisdiction, it was said to be invalid, or null and void. If it is intra vires it was, of course, valid. If it is flawed by an error perpetrated within the area of authority or jurisdiction, it was usually said to be voidable; that is, valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record.'

20. A careful reading of the above would show that what distinguishes an order that is void from another that is voidable essentially lies in whether the order in question is outside the jurisdiction of the authority making the same. On the other hand, if it is an order that is within the jurisdiction of the authority making the same but the order suffers from an error or irregularity that falls within the jurisdictional sphere of the authority making the order, it is voidable.

21. In Winona Oil Co. Vrs. Barnes, 200 P.981, 985, 83 Okl. 248, the Court held that a judgment is void if it falls short of jurisdictional elements on three counts, which were summed up as under:

'A judgment is "void" when it affirmatively appears from the inspection of the judgment roll that any one of three following jurisdictional elements are absent:

First, jurisdiction over the person;
Second, jurisdiction of the subject-matter; and,
Third, judicial power to render the particular judgment.'

22. To the same effect is the decision in New York Casualty Co. Vrs. Lawson, 24 S.W. (2d) 881, 883, 160 Tenn. 329, where the Court observed:

'A "void judgment" is one which shows on the face of record a want of jurisdiction in court assuming to render judgment, which want of jurisdiction may be either of the person or of the subject-matter generally, or of particular question attempted to be decided or relief assumed to be given.'

23. In Ittyavira Mathai Vrs. Varkey Varkey, AIR 1964 SC 907, the court was dealing with the question whether a decree in a suit which was barred by time would fall within the realm of nullity. ***Answering the question in the negative, the Court observed that while passing a decree in a suit that is time barred, the Court may be committing an illegality, but since the Court has the jurisdiction to decide right or to decide wrong, the decree would not be a nullity even if the decision was wrong.*** *The following passage is, in this connection, relevant:*

'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.'*

24. It is, therefore, evident that expressions "void" and "voidable" have more than one facet. Transactions and decrees which are wholly without jurisdiction are void ab initio and no declaration may be necessary for avoiding the same. Law does not take any notice of such acts, transactions or decrees which can be disregarded in collateral proceedings or otherwise. There are, however, transactions, which will remain good unless declared to be otherwise. For instance, transactions against a minor without being represented by a next friend may be voidable at the instance of the minor in appropriate proceedings in which case it becomes void from the beginning. The third category may be the cases where an act or transaction is good unless declared to be void. Such a transaction is voidable because the apparent state of affairs is the real state of affairs and a party who alleges otherwise, shall have to prove it. For instance, if the document is forged and fabricated, a declaration to that effect is necessary for otherwise the document is legally effective."

11.3. This Court in *Buli Jena Vrs. Bishnu Charan Sutar, 2017 (II) ILR-CUT 1125* held that,

"In State of Kerala Vrs. M.K. Kunhikannan Nambiar, AIR 1996 SC 906, the apex Court held that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. ***Ordinarily, such an order will, in fact be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word 'void' is not determinative of its legal impact.*** *The word 'void' has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise."*

11.4. In *Krishnadevi Malchand Kamathia Vrs. Bombay Environmental Action Group, (2011) 3 SCC 363* it has been laid down as follows:

"16. ***It is a settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void.*** *In State of Kerala Vrs. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil, (1996) 1 SCC 435 = AIR 1996 SC 906, Tayabbhai M. Bagasarwalla Vrs. Hind Rubber Industries (P) Ltd., (1997) 3 SCC*

443 = AIR 1997 SC 1240, M. Meenakshi Vrs. Metadin Agarwal, (2006) 7 SCC 470 and Sneh Gupta Vrs. Devi Sarup, (2009) 6 SCC 194, this Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.

17. In State of Punjab Vrs. Gurdev Singh, (1991) 4 SCC 1 = AIR 1991 SC 2219 this Court held that ***a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him.*** *****

18. In Sultan Sadik Vrs. Sanjay Raj Subba, (2004) 2 SCC 377 = AIR 2004 SC 1377, this Court took a similar view observing that once an order is declared non est by the court only then the judgment of nullity would operate erga omnes i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/ competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity."

11.5. It is not the case of the petitioner that the learned 2nd Additional Senior Civil Judge, Cuttack had no jurisdiction over the subject-matter or the parties concerned. The decree, though alleged to be erroneous one in terms of judgment dated 08.09.2016 passed in second appeal of the opposite party, cannot be said to be void one and inexecutable inasmuch as the same has been clarified to remain intact as against all defendants excluding the defendant No.6 (IPICOL) *vide* the Order dated 15.11.2017 passed in Misc. Case No.950 of 2016 (arising out of RSA No.373 of 2013).

11.6. As is manifest from the aforesaid factual position, it is clear as broad day light that the second appeal at the behest of Jyoti Prakash Das before this Court got dismissed as against the defendant No. 6, *i.e.*, Industrial Promotion and Investment Corporation of Orissa Limited. Therefore, the Order dated 15.11.2017 of this Court clarifying the judgment dated 08.09.2016 affirming the judgment/order dated 19.07.2013 of the learned District Judge, Cuttack so far as the subject-matter related to IPICOL attained finality. Since the said judgment cannot be construed to be a judgment *in rem*, and the OSFC, defendant No.5, did not choose to assail the judgment and decree passed by the 2nd Additional Senior Civil Judge, Cuttack, even if it is alleged to be wrong or invalid, unless the same is set aside/quashed by competent Court in a properly constituted *lis* instituted by OSFC, the same continues to have binding force *qua* the petitioner and the opposite party. Thus, the contention of the petitioner that the decree is not executable under Section 47 is misnomer and misconceived.

11.7. A reference to following observation made in *Banarsi Vrs. Ram Phal, (2003) 9 SCC 606* throws light on the legal position as to who is required to file appeal and cross-objection being aggrieved by decree:

"6. The appeals raise a short but interesting question of frequent recurrence as to the power of the appellate court to interfere with and reverse or modify the decree appealed against by the appellants in the absence of any cross-appeal or cross-objection by the

respondent under Order 41 Rule 22 CPC and the scope of power conferred on the appellate court under Rule 33 of Order 41 CPC.

8. Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, ***it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree.*** *Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. (See Phoolchand Vrs. Gopal Lal, AIR 1967 SC 1470 = (1967) 3 SCR 153, Jatan Kumar Golcha Vrs. Golcha Properties (P) Ltd., (1970) 3 SCC 573 and Ganga Bai Vrs. Vijay Kumar, (1974) 2 SCC 393.)* ***No appeal lies against a mere finding.*** *It is significant to note that* ***both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment.***

9. ***Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him.*** *Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging the finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of the defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross-objection.* ***A right to file cross-objection is the exercise of right to appeal though in a different form.*** *It was observed in Sahadu Gangaram Bhagade Vrs. Special Dy. Collector, Ahmednagar, (1970) 1 SCC 685 = (1971) 1 SCR 146 that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby.* ***Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree.*** *A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him.* ***Appeal and cross-objection— both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment.*** *This was the well-settled position of law under the unamended CPC.*

10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). ***In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC.*** *In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.*

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[2]*15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court.* ***While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court.*** *The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the*

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[2] [Ed.: Para 15 corrected as per Official Corrigendum No. F.3/Ed.B.J./65/2003]

portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.

16. Panna Lal Vrs. State of Bombay, AIR 1963 SC 1516 = (1964) 1 SCR 980 so sets out the scope of Order 41 Rule 33 in the widest terms:

'The wide wording of Order 41 Rule 33 was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. ***It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as 'the case may require'. If there was no impediment in law the High Court in appeal could, therefore, though allowing the appeal of the defendant-appellant by dismissing the plaintiff's suits against it, give the plaintiff-respondent a decree against any or all the other defendants who were parties to the appeal as respondents.*** *While the very words of the rule make this position abundantly clear the Illustration puts the position beyond argument.'*

The suit was filed by the plaintiff impleading the State Government and the Deputy Commissioner seeking recovery of compensation for the work done under a contract and the price of the goods supplied. The trial court held that the State was liable as it had beyond doubt benefited by the performance of the plaintiff. The suit was decreed against the State. ***The State preferred an appeal in the High Court. The plaintiff and other defendants including the Deputy Commissioner were impleaded as respondents.*** *Disagreeing with the trial court, the High Court held that the contract entered into by the Deputy Commissioner was not binding on the State Government; that the Deputy Commissioner signed the contract at his own discretion; and further, that the contract not having been entered into in the form as required under Section 175(3) of the Government of India Act, 1935, was not enforceable against the State Government. The High Court also held that the Government could not be held to have ratified the action of the contract entered into by the Deputy Commissioner. The State was held also not to have benefited by the performance of the plaintiff. On this finding, the High Court set aside the trial court's decree passed against the State Government. In an appeal to this Court, the Constitution Bench held that it was a fit case for the exercise of jurisdiction under Order 41 Rule 33 CPC.* ***On the findings arrived at by the High Court, while setting aside the decree against the State, the High Court should have passed a decree against the Deputy Commissioner.*** *It was not necessary for the plaintiff to have filed any cross-objection and the Illustration appended to Order 41 Rule 33 was enough to find solution.*

17. In Rameshwar Prasad Vrs. Shambehari Lal Jagannath, AIR 1963 SC 1901 = (1964) 3 SCR 549 the three-Judge Bench speaking through Raghubar Dayal, J. observed that:

'Rule 33 really provides as to what the appellate court can find the appellant entitled to. It empowers the appellate court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order insofar as it affects the rights of the appellant. It further empowers the appellate court to pass or make such further or other decree or order as the case may require. The court is thus given a wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.' (vide AIR p. 1905, para 17)

18. In Harihar Prasad Singh Vrs. Balmiki Prasad Singh, (1975) 1 SCC 212 the following statement of law made by Venkatarama Aiyar, J. (as His Lordship then was) in the Division Bench decision in Venukuri Krishna Reddi Vrs. Kota Ramireddi, AIR 1954 Mad 848 was cited with approval which clearly brings out the wide scope of power contained in Rule 33 and the Illustration appended thereto, as also the limitations on such power: (SCC p. 236, para 36)

'Though Order 41 Rule 33 confers wide and unlimited jurisdiction on courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well-defined principles in accordance with which that jurisdiction should be exercised. ***Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41 Rule 33****.*

But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the class of cases in which courts could interfere under Order 41 Rule 33. Such an enumeration would neither be possible nor even desirable.'

19. In the words of J.C. Shah, J. speaking for a three-Judge Bench of this Court in Nirmala Bala Ghose Vrs. Balai Chand Ghose, AIR 1965 SC 1874 = (1965) 3 SCR 550 the limitation on discretion operating as bounds of the width of power conferred by Rule 33 can be so formulated: (AIR p. 1884, para 22)

'The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the court to adjust the rights of the parties. Where in an appeal the court reaches a conclusion which is inconsistent with the opinion of the court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. ***The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from.****'*

20. A Division Bench decision of the Calcutta High Court in Jadunath Basak Vrs. Mritunjoy Sett, AIR 1986 Cal 416 = (1986) 2 CHN 44 may be cited as an illustration. The plaintiff filed a suit for declaration that the defendant had no right or authority to run the workshop with machines in the suit premises and for permanent injunction restraining the defendant from running the workshop. The trial court granted a decree consisting of two reliefs: (i) the declaration as prayed for, and (ii) an injunction permanently restraining the defendant from running the workshop except with the terms of a valid permission and licence under Sections 436 and 437 of the Calcutta Municipal Act, 1951 from the Municipal Corporation. The defendant filed an appeal. The Division Bench held that in an appeal filed by the defendant, the plaintiff cannot challenge that part of the decree which granted conditional injunction without filing the cross-objection. ***The Division Bench drew a distinction between the respondent's right to challenge an adverse finding without filing any appeal or cross-objection and the respondent seeking to challenge a part of the decree itself without filing the cross-objection.*** *The Division Bench held that the latter was not permissible. We find ourselves in agreement with the view taken by the High Court of Calcutta.*

[3]21. In the case before us, the trial court found the plaintiff (in his suit) not entitled to decree for specific performance and found him entitled only for money decree. In addition, a conditional decree was also passed directing execution of sale deed if only the defendant defaulted any paying or depositing the money within two months. Thus to the extent of specific performance, it was not a decree outright; it was a conditional decree. Rather, the latter part of the decree was a direction in terrorem so as to secure compliance by the appellant of the money part of the decree in the scheduled time-frame. In the event of the appellant having made the payment within a period of two months, the respondent would not be, and would never have been, entitled to the relief of specific performance. The latter decree is not inseparably connected with the former decree. The two reliefs are surely separable from each other and one can exist without the other. Nothing prevented the respondent from filing his own appeal or taking cross-objection against that part of the decree which refused straight away a decree for specific performance in his favour based on the finding of comparative hardship recorded earlier in the judgment. The dismissal of appeals filed by the appellant was not resulting in any inconsistent, iniquitous, contradictory or unworkable decree coming into existence so as to warrant exercise of power under Rule 33 of Order 41. ***It was not a case of interference with the decree having been so interfered with as to call for adjustment of equities between the respondents inter se. By his failure to prefer an appeal or to take cross-objection the respondent has allowed the part of the trial court's decree to achieve a finality which was adverse to him.****"*

11.8. In the present case, from the Order dated 15.11.2017 passed by this Court while disposing of Misc. Case No.373 of 2016 - in connection with Judgment dated 08.09.2016 passed in RSA No.373 of 2013 *(Jyoti Prakash Das Vrs. Industrial Promotion and Investment Corporation of Odisha Ltd.)* wherein the present petitioner was arrayed as one of the respondents-opposite parties (respondent No.6-defendant No.5) - it can be perceived that the judgment in second appeal is confined to *inter se Jyoti Prakash Das* and *Industrial Promotion and Investment Corporation of Odisha Ltd.*, and the appellate order dated 19.07.2013 of the District Judge, Cuttack in RFA No. 34 of 2012 does hold the field. Perusal of the appellate order

[3] [Ed.: Para 21 corrected as per Official Corrigendum No. F.3/Ed.B.J./65/2003]

dated 19.07.2013 indicates that the judgment and decree passed against the appellant therein (defendant No.6-IPICOL before learned trial court) "is only set aside, but will remain as such against the other defendants". Under such premise, there is no scope for the learned Executing Court to reopen the issue, but to proceed in accordance with the judgment and decree which remained intact as against present petitioner-OSFC, which was the defendant No.5 before the trial Court-respondent No.6 before the appellate Court and respondent No.6 in the second appeal before this Court.

11.9. Having not taken the judgment and decree in further proceeding by availing remedial measure under the CPC, the petitioner-OSFC has acquiesced with the same, whereas other defendant, *viz.*, IPICOL, had preferred appeal. Even though it was pleaded as party before the appellate Court and has knowledge about the order dated 19.07.2013 passed by the learned District Judge, Cuttack in RFA No.34 of 2012, it is believed on the facts borne on record that the OSFC has acquiesced with the judgment and decree dated 24.12.2011 passed by the 2nd Additional Senior Civil Judge, Cuttack. Therefore, at the stage of execution under Section 47 of the CPC, it is unwholesome for it to question the validity of said judgment and decree dated 24.12.2011.

11.10. Acquiescence must be made applicable in a case where the order has been passed and accepted without raising any objection. Estoppel follows acquiescence. It has been elaborately discussed in *Power Control Appliances Vrs. Sumeet Machines Pvt. Ltd., (1994) 1 SCR 708 = (1994) 2 SCC 448* as follows: (extracted from SCC)

> *"26.* ***Acquiescence is sitting by, when another is invading the rights and spending money on it.*** *It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In Harcourt Vrs. White, (1860) 28 Beav 303 = 54 ER 382, Sr. John Romilly said:*
>
> ***'It is important to distinguish mere negligence and acquiescence.'***
>
> *Therefore, acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in Mouson (J.G.) & Co. Vrs. Boehm, (1884) 26 Ch D 406. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in Rodgers Vrs. Nowill, (1847) 2 De GM&G 614 = 22 LJ KCH 404.*
>
> *27. The law of acquiescence is stated by Cotton, L.J. in Proctor Vrs. Bannis, (1887) 36 Ch D 740 as under:*
>
> *'It is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title.'*
>
> *In the same case Bowen, L.J. said:*
>
> *'In order to make out such acquiescence it is necessary to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and means to assert such rights.'*

28. In Devidoss and Co., AIR 1941 Mad 31 at pages 33 and 34 the law is stated thus:

'To support a plea of acquiescence in a trade mark case it must be shown that the plaintiff has stood by for a substantial period and thus encouraged the defendant to expend money in building up a business associated with the mark. In Rowland Vrs. Michell, (1896) 13 RPC 464, Romer J. observed:
'If the plaintiff really does stand by and allow a man to carry on business in the manner complained of to acquire a reputation and to expend money he cannot then after a long lapse of time, turn round and say that the business ought to be stopped.' '

In the same case, but on appeal Lord Russel, C.J. said Rowland Vrs. Michell, (1897) 14 RPC 37, 43 at p. 43:

'Is the plaintiff disentitled to relief under that head by injunction because of acquiescence? Of course it is involved in the consideration of that that the plaintiff has a right against the defendant and that the defendant has done him a wrong and the question is whether the plaintiff has so acted as to disentitle him from asserting his right and from seeking redress from the wrong which has been done to him. Cases may occasionally lay down principles and so forth which are a guide to the court, but each case depends upon its own circumstances.

Dealing with the question of standing by in Codes Vrs. Addis and Son, (1923) 40 RPC 130, 142 at p. 142, Eve, J. said:

'For the purpose of determining this issue I must assume that the plaintiffs are traders who have started in this more or less small way in this country, and have been continuously carrying on this business. But I must assume also that they have not, during that period, been adopting a sort of ***Rip Van Winkle policy of going to sleep and not watching what their rivals and competitors in the same line of business were doing.*** *I accept the evidence of any gentleman who comes into the box and gives his evidence in a way which satisfies me that he is speaking the truth when he says that he individually did not know of the existence of a particular element or a particular factor in the goods marketed by his opponents.* ***But the question is a wider question than that : ought not he to have known : is he entitled to shut his eyes to everything that is going on around him, and then when his rivals have perhaps built a very important trade by the user of indicia which he might have prevented their using had he moved in time, come to the Court and say :***

'Now stop them from doing it further, because a moment of time has arrived when I have awakened to the fact that this is calculated to infringe my rights.'

Certainly not. He is bound, like everybody else who wishes to stop that which he says is an invasion of his rights, to adopt a position of aggression at once, and insist, as soon as the matter is brought to Court, it ought to have come to his attention, to take steps to prevent its continuance; it would be an insufferable injustice were the Court to allow a man to lie by while his competitors are building up an important industry and then to come forward, so soon as the importance of the industry has been brought home to his mind, and endeavour to take from them that of which they had legitimately made use; every day when they used it satisfying them more and more that there was no one who either could or would complain of their so doing. *The position might be altogether altered had the user of the factor or the element in question been of a secretive or surreptitious nature; but when a man is openly using, as part of his business, names and phrases, or other elements, which persons in the same trade would be entitled, if they took steps, to stop him from using, he gets in time a right to sue*

them which prevents those who could have stopped him at one time from asserting at a later stage their right to an injunction.'

In Mc. Caw Stevenson & Orr Ltd. Vrs. Lee Bros., (1960) 23 RPC 1 acquiescence for four years was held to be sufficient to preclude the plaintiff from succeeding. In 1897 the plaintiffs in that case registered the word 'glacier' as a trade mark in respect of transparent paper as a substitute for stained glass. As the result of user the word had become identified with the plaintiffs' goods. In 1900 the defendants commenced to sell similar goods under the name 'glazine.' In 1905 the plaintiffs commenced an action for infringement. The defendants denied that the use of the word 'glazine' was calculated to deceive and also pleaded acquiescence. A director of the plaintiff company admitted that he had known of the use of the word 'glazine' by the defendants for four years— he would not say it was not five years. ***It was held that the plaintiffs failed on the merits and by reason of their delay in bringing the action.***

Delay simpliciter may be no defence to a suit for infringement of a trade mark, but the decisions to which I have referred to clearly indicate that where a trader allows a rival trader to expend money over a considerable period in the building up of a business with the aid of a mark similar to his own he will not be allowed to stop his rival's business. If he were permitted to do so great loss would be caused not only to the rival trader but to those who depend on his business for their livelihood. A village may develop into a large town as the result of the building up of a business and most of the inhabitants may be dependent on the business. No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark. As pointed out in Rowland Vrs. Michell, (1897) 14 RPC 37, 43 each case must depend on its own circumstances, but obviously a person cannot be allowed to stand by indefinitely without suffering the consequence.'

29. This is the legal position. Again in Halsbury's Laws of England, Fourth Edn., Vol. 24 at paragraph 943 it is stated thus:

'943. Acquiescence.—
An injunction may be refused on the ground of the plaintiff's acquiescence in the defendant's infringement of his right. The principles on which the court will refuse interlocutory or final relief on this ground are the same, but a stronger case is required to support a refusal to grant final relief at the hearing. [Patching Vrs. Dubbins, (1853) Kay 1 = 69 ER 1; Child Vrs. Douglas, (1854) 5 De GM&G 739 = 43 ER 1057; Johnson Vrs. Wyatt, (1863) 2 De GJ&Sm 18 = 46 ER 281; Turner Vrs. Mirfield, (1865) 34 Beav 390 = 55 ER 685; Hogg Vrs. Scott, (1874) LR 18 Eq 444; Price Vrs. Bala and Festiniog Rly. Co., (1884) 50 LT 787]

The reason is that at the hearing of the cause it is the court's duty to decide upon the rights of the parties, and the dismissal of the action on the ground of acquiescence amounts to a decision that a right which once existed is absolutely and for ever lost: Johnson Vrs. Wyatt, (1863) 2 De GJ&Sm 18 = 46 ER 281 at 25; and see Gordon Vrs. Cheltenham and Great Western Union Rly. Co., (1842) 5 Beav 229, 233 : 49 ER 565 per Lord Langdale MR."

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32. Amritdhara Pharmacy Vrs. Satyadeo Gupta, (1963) 2 SCR 484 = AIR 1963 SC 449 is a case where Halsbury was quoted with approval. However, on the facts of that case it was held that the plea of acquiescence had not been made out."

11.11. Regard be had to *The Chairman, State Bank of India Vrs. M. J. James, (2021) 7 SCR 373*, wherein it has been enunciated as follows:

> *"29. Before proceeding further, it is important to clarify distinction between 'acquiescence' and 'delay and laches'.* ***Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain.*** *[See Prabhakar Vrs. Joint Director, Sericulture Department and Another, (2015) 15 SCC 1. Also, see Gobinda Ramanuj Das Mohanta Vrs. Ram Charan Das and Suyamal Das, AIR 1925 Cal 1107.]*
>
> *In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance,[4] which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention.[5] Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance.[6] However, acquiescence will not apply if lapse of time is of no importance or consequence.*
>
> *30. Laches unlike limitation is flexible.* ***However, both limitation and laches destroy the remedy but not the right. Laches like acquiescence is based upon equitable considerations, but laches unlike acquiescence imports even simple passivity.*** *On the other hand, acquiescence implies active assent and is based upon the rule of estoppel in pais.* ***As a form of estoppel, it bars a party afterwards from complaining of the violation of the right. Even indirect acquiescence implies almost active consent, which is not to be inferred by mere silence or inaction which is involved in laches.*** *Acquiescence in this manner is quite distinct from delay. Acquiescence virtually destroys the right of the person.[7]*
>
> *Given the aforesaid legal position, inactive acquiescence on the part of the respondent can be inferred till the filing of the appeal, and not for the period post filing of the appeal. Nevertheless, this acquiescence being in the nature of estoppel bars the respondent from claiming violation of the right of fair representation."*

11.12 The record evinces that having participated in the suit proceeding and being impleaded as party in both the appeals, the petitioner-OSFC had the knowledge about the judgment and decree against it. At the stage of execution proceeding, it seeks to avail the benefit that has been held out in favour of the one of the defendants, namely IPICOL. Clear acquiescence being manifest from the conduct of the petitioner, it cannot be granted any relief at this distance of time to protract litigation any further. Reference can be had to caveat issued in *Rahul S. Shah Vrs. Jitendra Kumar Gandhi, (2021) 4 SCR 279.*

11.13 Referring to said reported judgment in *Rahul S. Shah (supra)* further observations are made in *Pradeep Mehra Vrs. Harijivan J. Jethwa, (2023) 14 SCR 123*, wherein it has been stated thus:

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4 See Vidyavathi Kapoor Trust Vrs. Chief Commissioner Tax, (1992) 194 ITR 584.

5 See Krishan Dev Vrs. Smt. Ram Piari AIR 1964 HP 34.

6 See "Introduction", UN Mitra, Tagore Law Lectures– Law of Limitation and Prescription, Volume I, 14TH Edition, 2016.

7 Vidyavathi Kapoor Trust Vrs. Chief Commissioner Tax, (1992) 194 ITR 584.

"5. A bare perusal of the aforesaid provision[8] *shows that all questions between the parties can be decided by the executing court.* ***But the important aspect to remember is that these questions are limited to the "execution of the decree". The executing court can never go behind the decree. Under Section 47, CPC the executing court cannot examine the validity of the order of the court which had allowed the execution of the decree in 2013, unless the court's order is itself without jurisdiction. More importantly this order (the order dated 12.02.2013), was never challenged by the tenants/judgment debtors before any forum.*** *The multiple stages a civil suit invariably has to go through before it reaches finality, is to ensure that any error in law is cured by the higher court. The appellate court, the second appellate court and the revisional court do not have the same powers, as the powers of the executing court, which are extremely limited. This was explained by this Court in Dhurandhar Prasad Singh Vrs. Jai Prakash University and Others, (2001) 6 SCC 534, in para 24, it had stated thus:*

*'24. *** The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus, it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing.'*

This Court noted further:

*'*** The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.' "*

6. The reality is that pure civil matters take a long time to be decided, and regretfully it does not end with a decision, as execution of a decree is an entirely new phase in the long life of a civil litigation. The inordinate delay, which is universally caused throughout India in the execution of a decree, has been a cause of concern with this Court for several years.

In Rahul S. Shah Vrs. Jinendra Kumar Gandhi and Others (2021) 6 SCC 418, this Court had observed that a remedy which is provided for preventing injustice (in the Civil Procedure Code) is in fact being misused to cause injustice by preventing timely implementation of orders and execution of decrees. Then, it had observed as under:

*'23. *** The execution proceedings which are supposed to be a handmaid of justice and subserve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.'*

The above judgment is an important judgment in respect of Section 47 as well as Order XXI, CPC as the three Judge Bench decision of this Court not only condemned the abuse of process done in the garb of exercise of powers under Section 47 read with Order XXI, CPC, but also gave certain directions to be followed by all Civil Courts in their exercise of powers in the execution of a decree. It further directed all the High Courts to update and amend their Rules relating to the execution of decrees so that the

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[8] Section 47 of the Code of Civil Procedure, 1908.

decrees are executed in a timely manner. As far as Section 47 is concerned, this Court had stated as under:

'24. In respect of execution of a decree, Section 47 CPC contemplates adjudication of limited nature of issues relating to execution i.e. discharge or satisfaction of the decree and is aligned with the consequential provisions of Order 21 CPC. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind. Firstly, the question must be the one arising between the parties and secondly, the dispute relates to the execution, discharge or satisfaction of the decree. Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, executing court must not go beyond the decree. ***However, there is steady rise of proceedings akin to a retrial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour.*** *Experience has shown that various objections are filed before the executing court and the decree-holder is deprived of the fruits of the litigation and the judgment-debtor, in abuse of process of law, is allowed to benefit from the subject-matter which he is otherwise not entitled to.*

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the courts first issue show-cause notice asking the judgment-debtor as to why the decree should not be executed as is given under Order 21 Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgment-debtor sometimes misuses the provisions of Order 21 Rule 2 and Order 21 Rule 11 to set up an oral plea, which invariably leaves no option with the court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely.'

This Court then gave certain directions, which were to be mandatorily followed by all Courts dealing with civil suits and execution proceedings. Two of its directions were as follows:

*'42. ****

*42.8. The court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant. ****

42.12.The executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

*42.13. ***'*

It further directed all the High Courts to update their Rules relating to execution of decrees. It was as under:

'43. We further direct all the High Courts to reconsider and update all the Rules relating to execution of decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC, within one year of the date of this order. The High Courts must ensure that the Rules are in consonance with CPC and the above

> *directions, with an endeavour to expedite the process of execution with the use of information technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable.'*
>
> *We have referred to the above decision of this Court only to highlight the slow process in the execution of a decree and the concern of this Court, and its efforts in the past, to improve this situation."*

11.14 Such being the anxious consideration of the Hon'ble Supreme Court of India, it may be observed that the suit was for payment of an amount of Rs. 1,70,000 pertaining to supply of electrical goods and installation work undertaken by the opposite party during the year 1983-84. Though the judgment and decree were passed way back in 2011, the petitioner-OSFC did not question the legality before any higher court till date even as it was impleaded as party in the appeal filed by IPICOL and the second appeal, at the behest of the opposite party.

Conclusion:

12. For the fact that the opposite party having not questioned the validity of judgment and decree passed by the 2nd Additional Senior Civil Judge, Cuttack in TMS No.747 of 1989, the petitioner cannot hide behind the screen of judgment dated 19.07.2013 of the District Judge, Cuttack in RFA No.34 of 2012.

12.1 The Supreme Court in *Merla Ramanna Vrs. Nallaparaju, AIR 1956 SC 87 = (1955) 2 SCR 938* has observed that for Section 47 of the Code of Civil Procedure, 1908, to apply the following conditions must be satisfied:

> *(i)* The questions must be one arising between the parties to the suit in which the decree is passed, or their representatives; and
>
> *(ii)* It must relate to the execution, discharge or satisfaction of the decree.

12.2 In *State of Punjab Vrs. Mohinder Singh Randhawa, AIR 1992 SC 473 = (1993) Supp.(1) SCC 49*, it has been laid down that in the absence of any challenge to the appellate decree in further proceedings, in execution this is not open to challenge.

12.3 There is no quarrel with the general proposition of law and indeed, it is unexceptionable that a court executing a decree cannot go behind the decree; it must take the decree according to its tenor; has no jurisdiction to widen its scope and is required to execute the decree as made. [*Century Textiles Industries Ltd. Vrs. Deepak Jain, (2009) 5 SCC 634 = (2009) 4 SCR 750*].

12.4 Said principle has been reiterated in *Kanwar Singh Saini Vrs. High Court, Delhi, (2011) 15 Addl. SCR 972 = (2012) 4 SCC 307* and it has been held that it is a settled legal proposition that the executing court does not have the power to go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, that performance cannot be enforced in any other manner.

Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act.

12.5 Thus, the condition for the applicability of Section 47 is that the question must relate to execution, discharge or satisfaction of the decree. Any question, which hinders or in any manner affects execution of the decree, is covered by Section 47 of the CPC.

13. The question posed herein above with respect to issue involved in the case at hand, can be answered to the effect that on dismissal of second appeal filed by the decree-holder (opposite party herein) against the one of the defendants before the trial Court in the suit (IPICOL), and the judgment of the appellate Court holding that the IPICOL is not liable to discharge the decree inasmuch as there was no privity of contract between the IPICOL-defendant No.6 and the opposite party (plaintiff-decree holder) attained finality, the decree is enforceable as against other defendants namely the OSFC-defendant No.5, which did choose not to prefer appeal questioning the decree or judgment of the 2nd Additional Senior Civil Judge, Cuttack.

14. In the light of the above discussion taking note of factual details and arguments as put forth by counsel for respective parties and reasons ascribed to *supra*, this Court finds no merit in the present civil revision petition. The petitioner has failed to demonstrate any jurisdictional error, perversity, or substantial illegality in the findings of the learned 2nd Additional Senior Civil Judge that would entail indulgence in exercise power of conferred under Section 115 of the CPC on this Court to invoke revisional jurisdiction.

15. In the result, the Order dated 15.07.2023 passed in CMA No.145 of 2021 by the learned 2nd Additional Senior Civil Judge, Cuttack does not warrant interference; as a consequence thereof, the civil revision petition, accordingly, stands dismissed with no order as to costs.

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

Result of the case :
CRP stands dismissed.

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2024 (III)-ILR-CUT-1242

BIRLA INSTITUTE OF MANAGEMENT TECHNOLOGY (BIMTECH), BHUBANESWAR
V.
M/s. FIBERFILL INTERIORS & CONSTRUCTIONS, U.P.

[W.P.(C) NO. 4189 OF 2024]

16 JULY 2024

[SANJAY KUMAR MISHRA, J.]

Issues for Consideration

(i) Whether the Executing Court has failed to exercise its power entrusted upon it under Section 36(2) of the Arbitration and Conciliation Act, 1996.

(ii) Whether the Court below was justified to reject the application filed by the Petitioner under Section 36(2) of the Act, 1996.

(iii) Whether the impugned order passed by the Commercial Court in Execution Petition No. 367 of 2023 needs to be set aside and further proceeding in the said case, pending before the Commercial Court, Bhubaneswar, needs to be stayed till the Arbitral Award attains finality.

Headnotes

(A) ARBITRATION AND CONCILIATION ACT, 1996 – **Section 36(2) – R/w Code of Civil Procedure, 1908 – The Petitioner filed petition U/s. 36(2) of the Act for stay of execution proceeding – The Learned Court below rejected the petition filed U/s. 36(2) – Whether the executing Court should exercise its discretion while deciding the application U/s. 36(2) of the Act.**

Held: No – Section 36(2) of the Act is not applicable to execution proceeding initiated U/s. 36(1) of the Act, and application for stay operation of arbitral award can only be filed before the court during pendency of the application filed U/s. 34 of the Act.

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Section 36(1) 36 (2), 37 r/w Order 21 Rule 26(1) of CPC – Law regarding applicability of Section 36(2) of the Act so also Civil Procedure Code to execution proceeding initiated U/s. 36(1) of the Act and power of the executing as well as Appellate Court to stay the execution proceeding during pendency of an Appeal preferred U/s. 37 of the Act, 1996 – Discussed.

(Para 11)

Citations Reference

National Buildings Construction Corporation Ltd. vs. Lloyds Insulation India Ltd.), **(2005) 2 SCC 367**; Premlal Khande vs. Ashok Leyland Finance, **AIRONLINE 2021 CHH 575**; Nepa Limited through its Senior Manager (Legal) vs. Manoj Kumar Agrawal, **AIRONLINE 2022 SC 1277;** National Building Construction Corporation Ltd. Vs. Llpyds Insulation India Ltd., **(2005) 2 SCC 367**; Pam Developments Private Limited Vs. State of West Bengal, **(2019) 8 SCC 112**; Board of Control for Cricket in India Vs. Kochi Cricket Private Limited & others, **(2018) 6 SCC 287**– **referred to.**

List of Acts & Rules

Arbitration & Conciliation Act, 1996; Code of Civil Procedure, 1908

Keywords

Arbitration proceeding, Execution, Arbitral award, Discretion, Applicability of Civil Procedure to execution of Arbitral award.

Case Arising From

Order dated 23.12.2023 passed by the Court of Senior Civil Judge (Commercial Court), Bhubaneswar in Execution Petition No. 367 of 2023.

Appearances for Parties

For Petitioner : Mr. Ramachandra Panigrahy
For Opp.Party : Mr. Santosh Dwibedy

Judgment/Order

Judgment

S.K. MISHRA, J.

1. The Writ Petition has been preferred challenging the order dated 23.12.2023 passed by the Court of Senior Civil Judge (Commercial Court), Bhubaneswar, in Execution Petition No.367 of 2023, vide which the Petition dated 02.12.2023 filed under section 36(2) of the Arbitration & Conciliation Act, 1996, shortly, hereinafter "the Act, 1996", by the Petitioner, being the Judgment Debtor, stood rejected and the matter was posted for hearing on Execution Petition.

2. The brief background facts, which led to filing of the present Writ Petition, are that the Petitioner issued a Letter of Intent (LOI) in favour of the Opposite Party for execution of civil construction, furnishing and interior design of various buildings at the premises of the Petitioner situated at Birla Institute of Management and Technology, IDCO Plot No.2, Gothapatna, Bhubaneswar, Odisha.

Pursuant to the same, a formal agreement was executed between the parties, wherein it was, inter alia, agreed that the Opposite Party will complete the work by 15.11.2012 for a contract value of Rs.18,00,00,000/- (Rupees Eighteen Crores) only. Several correspondences were addressed by the Petitioner to the Opposite Party, inter alia, pointing out the defects, poor workmanship and slow pace with which the work was being undertaken by the Opposite Party. As the work was perpetually delayed and the Opposite Party failed to fulfil its contractual obligation and committed material breach of the said agreement, the Petitioner, vide e-mail, asked the Opposite Party to vacate the site by 30.07.2014 as the Petitioner had decided to get the work finished by employing other contractors. Even if suffering loss at the hands of the Opposite Party, the Petitioner without taking any coercive step, chose to adhere to the terms of the agreement. Accordingly, in accordance with Clause 10-B of the agreement, the Opposite Party was communicated through e-mail about the defects/poor workmanship observed in the work done by it and was asked to rectify the same.

Since the Opposite Party failed to take any step for either removing the defects or completion of the incomplete work, the Petitioner gave a notice to the Opposite Party, inter alia, calling upon it to take corrective steps. As the Opposite

Party failed to take any corrective step, considering the academic session had commenced, the Petitioner issued various work orders to third-party contractors for completion of defective and incomplete work. Consequently, since the disputes had arisen between the parties, the Petitioner invoked the arbitration clause in the agreement against the Opposite Party. In response, the Opposite Party, vide its letter addressed to the Petitioner, raised several frivolous and unjustified demands. Pursuant thereto, the process of constitution of the Arbitral Tribunal commenced and both the parties appointed their respective nominee Arbitrators, and both the nominee Arbitrators appointed the Presiding Arbitrator. Pursuant to the same, the statement of claim was filed by the Petitioner along with the cost of assessment certificate and experts evidence duly accompanied with their affidavits regarding the work done by the third-party contractors, inter alia, raising claims to the tune of Rs. 3,76,35,234/- (Rupees Three crore seventy six lakh thirty five thousand two hundred and thirty four) only and Rs.90,00,000/- (Rupees Ninety Lakh) only. Counter claims were made by the Opposite Party to the tune of Rs.6,21,60,618/- (Rupees six crore twenty one lakh sixty thousand six hundred and eighteen) only. The Petitioner also filed its Reply to the Counter Claims before the Arbitral Tribunal.

Similarly, the Opposite Party also filed its Reply to the Statement of Claim filed by the Petitioner. Ultimately, an arbitral Award was passed on 02.09.2019 by the Arbitral Tribunal, whereby the claim of the Petitioner was partly allowed to the tune of Rs.1,00,00,000/- (Rupees one crore) only. On the other hand, the Counter Claim of the Opposite Party was allowed to the tune of Rs.6,21,60,618/- (Rupees six crore twenty one lakh sixty thousand six hundred and eighteen) only.

Being aggrieved by the said Award, the Petitioner filed two separate applications under section 34 of the Act, 1996, which were registered as ARB(P) No.80 of 2019 and ARB(P) No.86 of 2019, before the Court of District Judge, Khordha at Bhubaneswar, one challenging the arbitral Award to the extent it had allowed the Counter Claim of Rs.6,21,60,618/- in favour of the Opposite Party and the other challenging the arbitral Award to the extent it had disallowed the claim of the claimant to the tune of Rs.3,76,35,234/-.

The District Judge, Khordha, passed a common judgment on 16.04.2022 dismissing both the Applications filed by the Petitioner under section 34 of the Act, 1996. Being aggrieved by the said common judgment, the Petitioner filed two Appeals before this Court i.e. ARBA No.26 of 2022, arising out of ARB(P) No.80 of 2019 and ARBA No.28 of 2022, arising out of ARB(P) No.86 of 2019. This Court, vide order dated 28.07.2022, allowed the ARBA No.26 of 2022 and set aside the part of the arbitral award to the extent it had allowed the counter claim filed by the Opposite Party on the sole ground that it was barred by limitation. So far as other Appeal i.e. ARBA 28 of 2022, which is arising out of ARB(P) No.86 of 2019 preferred under section 37 of the Act, 1996, is still pending adjudication before this Court.

It is further case of the Petitioner that, being aggrieved by the said order dated 28.07.2022 passed in ARBA No.26 of 2022, the Opposite Party preferred SLP (C) No.17438 of 2022, which was later numbered as Civil Appeal No.3058 of 2023, before the Supreme Court. The Supreme Court, vide order dated 24.04.2023, set aside the said order passed by this Court holding that counter claim filed by the Opposite Party was not barred by limitation. Operative portion of the said order is extracted below for ready reference.

> *"Applying the law laid down by this Court in the aforesaid two decisions to the facts of the case on hand and as observed hereinabove, communication dated 07.04.2017 which as such was reply to notice given by the respondent, the same can be said to raising the counter claim as well as for praying for referring the dispute to arbitration and 27.07.2014 was the final bill,* ***the High Court has committed a very serious error in holding that the counter claim was barred by limitation.***
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> *In view of the above and for the reasons stated hereinabove, the impugned judgment and order passed by the High Court is erroneous and unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. The Award passed by the learned Arbitral Tribunal, confirming the proceedings under Section 34 of the Act is hereby restored."* ***(Emphasis supplied)***

It is further case of the Petitioner that neither this Court vide its order dated 28.07.2022 passed in ARBA No.26 of 2022 nor the Supreme Court vide its order dated 24.04.2023 passed in Civil Appeal No.3058 of 2023 decided anything on merit of the case and the issue raised by the Petitioner in ARBA No.26 of 2022, save and except the point as to whether the counter claim was time barred. Thereafter, the Petitioner filed CMAPL No.480 of 2023 in ARBA No.26 of 2022 before this Court, inter alia, seeking revival / restoration of the ARBA No.26 of 2022 for adjudication of all other grounds / issues raised in the said Appeal, save and except the limitation issue, which had been conclusively decided by the Supreme Court. However, this Court vide order dated 25.07.2023 disposed of the said Application, inter alia, holding that the Supreme Court did not make any reservation of bifurcating the contention raised by the Petitioner in section 37 Appeal and had restored the arbitral award itself. The said order passed in CMAPL No.480 of 2023 is extracted below:

> *"1. Mr. Mohapatra, learned senior advocate appears on behalf of applicant and submits,* ***his client's appeal under section 37 in Arbitration and Conciliation Act, 1996 was disposed of on preliminary point regarding bar of limitation against the counter claim raised by respondent in the appeal****. His client was successful here but said respondent preferred appeal to the Supreme Court. Said Court by order dated 24th April, 2023 restored the award. In the circumstances,* ***the application is for restoration of the appeal in respect of other grounds taken therein apart from limitation and to tag the same with the other pending appeal of his client (ARBA no.28 of 2022) preferred against rejection of challenge to short award on his client's case.***
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> *2. Mr. Rana, learned advocate appears on behalf of respondent in the reference. He has not been called upon to answer.*
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> *3. There is no requirement for respondent to answer because by order dated 24th April, 2023 the Supreme Court did not make any reservation of bifurcating contention raised by applicant in ARBA no. 26 of 2022. In the circumstances, this Bench will not venture*

with the further with the appeal disposed on the order set aside by the Supreme Court, restoring the award.

4. The CMAPL is disposed of." ***(Emphasis supplied)***

Being aggrieved by the said order dated 25.07.2023 passed in CMAPL No.480 of 2023, the Petitioner challenged the same before the Supreme Court in SLP (C) No.20662 of 2023 and also filed Miscellaneous Application No.2028 of 2023 in Civil Appeal No.3058 of 2023, seeking clarification of the order dated 24.04.2023. However, so far as SLP (C) No.20662 of 2023, the same was dismissed as withdrawn recording the submission made by the Petitioner that the Review Petition would be filed by it. Thereafter, the Miscellaneous Application No.2028 of 2023 in Civil Appeal No.3058 of 2023 was also dismissed without any clarification. The said order passed in M.A. No.2028 of 2023 is extracted below:

"Though the letter has been circulated by the applicant for adjournment, we have heard this application seeking clarification/direction of the order dated 24.04.2023 passed in SLP(C) N. 17438/2022.

Having heard learned counsel for the parties and looking into the exposition of law by this Court in Delhi Administration v. Gurdip Singh Uban & Ors. [(2000) 7 SCC 296], as also the substance of this application, we do not find any reason to entertain this application, because it is nothing, in substance, but a clever move for review. Consequently, the Miscellaneous Application and I.A. No. 182704/2023 are dismissed."

Pursuant to the said order, the Petitioner filed Review Petition before the Supreme Court on 02.11.2023, vide Diary No.45932 of 2023 and the same is still pending for adjudication.

Since the Opposite Party filed Execution Petition No.367 of 2023 before the Senior Civil Judge, (Commercial Court), Bhubaneswar for execution of the arbitral Award, being noticed, the Petitioner filed an application under section 36(2) of the Act, 1996 in the said execution proceeding praying therein to stay the execution proceeding till the arbitral Award attains finality, on the ground that it has moved an application for review on 02.11.2023 before the Supreme Court vide Diary No.45932 of 2023 and the same is still pending adjudication.

Since, normally the Review Petitions are being heard in Chamber and not in open Court, the Petitioner (Judgment Debtor in the execution proceeding) is unable to ascertain the exact outcome of the Review Petition. But in the website of the Supreme Court, it is still showing as pending and if its Review Application is allowed, the entire execution proceeding would fail. Hence, a prayer was made to stay the execution proceeding. However, the Court below rejected the said Petition on the ground that on perusal of the case record and all orders passed by this Court as well as Supreme Court, the Petitioner (Judgment Debtor) has not obtained any stay order from any Court and under such circumstances, the Court is not inclined to allow the petition. Hence, this Writ Petition.

3. Being noticed, the Opposite Party has filed a Counter Affidavit reiterating the facts as detailed above. That apart, it has been stated in the Counter that the

judgment relied upon by the Petitioner reported in (2005) 2 SCC 367 (**National Buildings Construction Corporation Ltd. vs. Lloyds Insulation India Ltd.**) is of the year 2005, which is prior to the amendment in the Arbitration & Conciliation Act, 1996 and was made by Act 3 of 2016 for section 36 of the Act (w.e.f. 23.10.2015). The award was passed in the year, 2019 in the arbitration proceeding. Therefore, on the face of it, the judgment relied upon by the Petitioner, which is of the year 2005, is not applicable to the facts of the present case.

It has further been stated in the Counter that the Petitioner sought for a clarification in the matter before the Supreme Court and also moved an application before this Court, which got dismissed. Therefore, the said issue has come to an end and the Petitioner is liable to pay the entire amount awarded to the Opposite Party in terms of order dated 02.09.2019, which has been finally upheld by the Supreme Court on 24.04.2023. It has also been stated in the Counter that the plea of the Petitioner as to pendency of the Review Petition is of no use and the same has been filed to delay the execution proceeding, as the Petitioner has submitted that the same is pending since 02.11.2023. It has further been stated in the Counter that this Court, after order of the Supreme Court, passed an order on 25.07.2023, wherein it has been said that the Supreme Court did not make any reservation of bifurcating contention raised by the applicant in ARBA No.26 of 2022 and did not pass any order stating that the Supreme Court has restored the Award. Since the Supreme Court has restored the entire Award, which includes the issue of claim and the counter claim without any bifurcation of the two, the Petitioner is now trying to agitate the same issue again and again, which has been finally set to rest by the Supreme Court and such attempt is with a malafide intention not to pay the legitimate outstanding dues of the Opposite Party, which has been awarded by the Arbitral Tribunal vide Award dated 02.09.2019 and the same has been upheld by the Supreme Court.

4. In response to the Counter filed by the Opposite Party, the Petitioner has filed a Rejoinder Affidavit indicating therein that the Petitioner, in this Writ Petition, has raised pertinent questions of law i.e.

> *"(i) Whether the executing Court should exercise its discretion while deciding the Application under section 36(2) of the Arbitration and Conciliation Act, 1996, and*
>
> *(ii) Whether the said discretion is mandatory."*

Apart from denying the assertions made in various paragraphs of the Counter, the contentions and allegations made in Paragraphs from 1 to 12 of the Counter have been denied to be false and frivolous stating that the Petitioner filed an application seeking clarification from the Supreme Court with regard to the order dated 24.04.2023 passed by it. But the said application was dismissed with an observation that the Petitioner wants to review the order dated 24.04.2023. Consequent thereto, the Petitioner filed a Review Petition before the Supreme Court, being Diary No.45932 of 2023, which is still pending for adjudication. It has also been stated in the Rejoinder that the claim and counter claim are separate and

distinct proceedings though permitted to file in a single proceeding. Even though there may be a single judgment on the suit / claim and or counter claim, there were two separate Appeals and, out of the said two Appeals, ARBA No.28 of 2022 is pending before this Court.

Referring to the order dated 25.09.2023 passed in SLP(C) No.20662 of 2023 filed by the Petitioner, it has been stated in the Rejoinder that the issues of the parties are still open before the Supreme Court and it is wrong on the part of the Opposite Party to say anything contrary and otherwise. It has further been reiterated that since the order dated 24.04.2023 passed by the Supreme Court is under challenge in the Review Petition, the allegation of choosing a new device to initiate further round of litigation is incorrect. Rather, it is a continuation of the same litigation which is still open. Hence, it has been contended in the Rejoinder that since the executing Court failed to exercise its discretion under section 36(2) of the Act, 1996, the Petitioner is justified to challenge the legality of the said order.

5. Mr. Panigrahy, learned Counsel for the Petitioner, reiterating the stand taken in the Writ Petition so also Rejoinder, submitted that the impugned order dated 23.12.2023 passed by the executing Court in Execution Petition No.367 of 2023 is arbitrary, capricious, unreasoned and has been passed ignoring the settled principles of law. Mr. Panigrahy further submitted that when one of the Appeals i.e. ARBA No.28 of 2022, preferred under section 37 of the Act, 1996 against the order passed under section 34 of the Act, 1996, challenging part of the arbitral Award, is pending before this Court so also the Review Petition is also pending before the Supreme Court, the said arbitral Award cannot be and should not be executed during pendency of the Appeal under section 37 of the Act, 1996, so also Review Petition before the Supreme Court.

Mr. Panigrahy further submitted that the Court below failed to appreciate that the arbitral Award, based on which the said execution proceeding has been initiated, is yet to attain finality and though the Court below is empowered under section 36(2) of the Act, 1996 to exercise its discretionary power to stay the execution proceeding by imposing any condition, as it deems fit and proper, it failed to exercise its power delegated under Section 36(2) of the Act, 1996, deserving interference by this Court with the said impugned order dated 23.12.2023, which resulted in travesty of justice. Unless it is interfered with, the ARBA No.28 of 2022 so also Review Petition pending before the Supreme Court shall be completely redundant, nugatory and otiose and the Court below erred in law to reject its Petition under section 36(2) of the Act, 1996 on the ground that the Petitioner (Judgment Debtor) has not obtained any stay order from any Court.

To substantiate his submission, Mr. Panigrahy relied upon judgments reported in AIRONLINE 2021 CHH 575 (**Premlal Khande vs. Ashok Leyland Finance**) and AIRONLINE 2022 SC 1277 (**Nepa Limited through its Senior Manager (Legal) vs. Manoj Kumar Agrawal**) and (2005) 2 SCC 367 (**National Building Construction Corporation Ltd. Vs. Llpyds Insulation India Ltd.**)

6. So far as the **National Building Corporation Ltd.** (supra), cited by the learned Counsel for the Petitioner, facts of the said case is slightly different from the present case, as the Counter Claimant/Respondent challenged part of the composite Award and its application under Section 34 of the Act, 1996 was pending, when the execution case was initiated by the Respondent. However, paras-2, 5 & 6 of the said judgment, being relevant, are extracted below:

> *"2. The parties had entered into an agreement under which the respondent was to supply certain material and make construction. Disputes arose between them. The disputes were referred to arbitration.* ***Claims and counterclaims were made by the parties before the arbitrator. Ultimately, the arbitrator, by an award dated 9-1-2001, held that an amount of Rs. 13,97,072.24 was due to the respondent and an amount of Rs 9,85,316 was due to the appellant. In the circumstances, the arbitrator held that ultimately the respondent was entitled to recover a sum of Rs 4,11,756 being the amount of Rs 13,97,072.24 less Rs 9,85,316 from the appellant****. Accordingly, the award was passed directing the appellant to pay the respondent the said sum together with interest at 12% from the date of the award till payment.*
>
> *5. The learned counsel appearing on behalf of the respondent has submitted that in fact there were two separate awards : one which allowed the respondent's claim up to Rs. 13,97,072.24 and the second which allowed the appellant's counterclaim for Rs.9,85,316.*
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> ***It is contended that since the respondent alone had challenged the award in favour of the appellant, it was open to the respondent to execute that portion of the award which was in the respondent's favour and against which no application under Section 34 was pending.***
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> *6.* ***We are of the view that the award clearly states that after an adjustment of accounts, the only amount payable by the appellant to the respondent was Rs 4,11,756.*** *How the arbitrator arrived at this figure is not for us to see. For the purposes of Section 36 of the Act, the court cannot be called upon to go behind the awarded amount and deal with the processes by which the amount was arrived at.* ***There is on record only one award for the amount of Rs 4,11,756. Even though the respondent claims that the application under Section 34 was filed in respect of part of the award, it is in fact only a process by which the arbitrator has arrived at the awarded amount. This would mean that the award as a whole cannot be enforced under Section 36 of the Act.*** *As held by this Court in National Aluminium Co. Ltd. [(2004) 1 SCC 540] : (SCC p. 546, para 10)*
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> *"... the mandatory language of Section 34 (Section 36) of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible."* ***(Emphasis supplied)***

7. In response to the submission made by Mr. Panigrahy, Mr. Dwibedy, learned Counsel for the Opposite Party submitted that even though the Petitioner sought for clarification before the Supreme Court in Civil Appeal No.3058 of 2023 by filing M.A. No.2028 of 2023 so also moved application before this Court by filing CMAPL for restoration of ARBA No. 26 of 2022, the said applications were dismissed. Therefore, the said issue has come to an end and the Petitioner is thus,

liable to pay the entire impugned award vide order dated 02.09.2019, which has been finally upheld by the Supreme Court vide its order dated 24.04.2023.

Mr. Dwibedy further submitted that pursuant to order passed by the Supreme Court, this Court also passed an order on 25.07.2023 in the disposed of Appeal i.e. ARBA No.26 of 2022, holding that the Supreme Court did not make any reservation of bifurcating contentions raised by Applicant in ARBA No.26 of 2022. Mr. Dwibedy further submitted that since the Supreme Court has restored the entire award, which includes the issue of the claim and the counter claim without any bifurcation, the said issue has set to rest and the Petitioner is avoiding to act in terms of the arbitral Award on the plea of pendency of ARBA No.28 of 2022 so also application for review before the Supreme Court and thereby, there being no infirmity in the impugned order passed by the executing Court, the Writ Petition being devoid of any merit, deserves to be dismissed in limine with exemplary cost.

8. In view of the pleadings made so also argument advanced by the learned Counsel for the Parties, the issues, which emerge to be answered by this Court are:

(i) Whether the executing Court has failed to exercise its power entrusted upon it under Section 36(2) of the Act, 1996 ?

(ii) Whether the Court below was justified to reject the Application filed by the Petitioner under section 36(2) of the Act, 1996?

(iii) Whether the impugned order passed by the Commercial Court in Execution Petition No.367 of 2023 needs to be set aside and further proceeding in the said case , pending before the Commercial Court, Bhubaneswar, needs to be stayed till the Arbitral Award attains finality?

9. Before answering the issues emerged, as detailed above, it would be apt to deal with and reproduce below sections 35, 36 and 37 of the Act, 1996, so also relevant provisions of the Code of Civil Procedure, 1908 (5 of 1908)

9.1. "The Arbitration & Conciliation Act, 1996

Finality and enforcement of arbitral awards

35. Finality of arbitral awards. - Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. Enforcement. - (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), ***such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.***

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

Provided further that where the Court is satisfied that a prima facie case is made out that, -

(a)the arbitration agreement or contract which is the basis of the award; or
(b)the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 of the award.

APPEALS

37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;
(b) granting or refusing to grant any measure under section 9;
(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal –

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

'(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

9.2. "Code of Civil Procedure, 1908

107. *Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power- (a) to determine a case finally; (b) to remand a case; (c) to frame issues and refer them for trial; (d) to take additional evidence or to require such evidence to be taken. (2) Subject as aforesaid,* ***the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.***

Order 21, Rule 26

26. When Court may stay execution.—(1) The Court to which a decree has been sent for execution shall, ***upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution****, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.*

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Power to require security from, or impose conditions upon, judgment-debtor.—Before making an order to stay execution, or for the restitution of property or the

discharge of the judgment debtor, 1[the Court shall require] such security from, or impose such condition upon, the judgment-debtor as it thinks fit.

Order 41, Rule 1(3), 4 & 5

1. Form of appeal What to accompany memorandum-

(1) xxx xxx xxx
(2) xxx xxx xxx
(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.]

4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.—*Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants,* ***any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.***

5. Stay by Appellate Court.—(*I) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree;* ***but the Appellate Court may for sufficient cause order stay of execution of such decree.***

[Explanation.—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.]

(2) ***Stay by Court which passed the decree.—****Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.*

(3) ***No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—***

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) ***that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.***

(4) 1[Subject to the provision of sub-rule (3),] the Court may make an ex parte order for stay of execution pending the hearing of the application.

[(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.]"

(Emphasis supplied)

10. As is evident from sub-section (1) of section 36 of the Act, 1996, where the time for making application to set aside the arbitral award under section 34 has expired, subject to provisions of sub-section 2, such award shall be enforced in accordance with the provisions of Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court.

It is also amply clear from sub-section 2, read with sub-section 3 of section 36 of the Act, 1996 that where an application to set aside the arbitral Award has been filed in the Court under section 34 of the Act, 1996, the filing of such application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral Award in accordance with the provisions of sub-section (3), on a separate application made for that purpose and upon filing of such an application under sub-section (2) for stay of the operation of the arbitral Award, the Court may, subject to such conditions, as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing.

Proviso under sub-section (3) of section 36 the Act, 1996 also provides that, while considering the application for grant of stay in the case of an arbitral Award for payment of money, the Court shall have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

The 2nd Proviso under sub-section (3) of section 36 of the Act, 1996 provides that where the Court is satisfied that a prima facie case is made out to the effect that arbitration agreement or contract, which is the basis of the award or making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the Award.

In **Pam Developments Private Limited Vs. State of West Bengal**, reported in (2019) 8 SCC 112, the Supreme Court held as follows:

> *"19. In this backdrop, we have now to consider the effect of Section 36 of the Arbitration Act, vis-à-vis the provisions of Order 27 Rule 8-A CPC.* ***Sub-section (3) of Section 36 of the Arbitration Act mandates that while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit****. The said sub-section clearly mandates that the grant of stay of the operation of the award is to be for reasons to be recorded in writing "subject to such conditions as it may deem fit". The proviso makes it clear that the Court has to "have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure".* ***The phrase "have due regard to" would only mean that the provisions of CPC are to be taken into consideration, and not that they are mandatory****. While considering the phrase "having regard to", this Court in Shri Sitaram Sugar Co. Ltd. v. Union of India [Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223] has held that : (SCC p. 245, para 30)*
>
> *"30. The words "having regard to" in sub-section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory".*

> *20. In our view, in the present context, the phrase used is "having regard to" the provisions of CPC and not "in accordance with" the provisions of CPC. In the latter case, it would have been mandatory,* ***but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. the Arbitration Act) itself.*** *It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act,* ***the provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act."***
>
> ***(Emphasis supplied)***

In **Board of Control for Cricket in India Vs. Kochi Cricket Private Limited & others**, reported in (2018) 6 SCC 287, the Supreme Court held as follows:

> *"60. This brings us to the manner of enforcement of a decree under CPC. A decree is enforced under CPC only through the execution process (see Order 21 of the Code of Civil Procedure).* ***Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order 41 Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, "Stay of Proceedings and of Execution". This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order 21 and Order 41 Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards****. This being the case, we need to refer to some judgments in order to determine whether execution proceedings and proceedings akin thereto give rise to vested rights, and whether they are substantive in nature."*
>
> ***(Emphasis supplied)***

11. The main ground to assail the order dated 23.12.2023 passed by the Commercial Court in Execution Petition No.367 of 2023 is that it failed to exercise power conferred on it under section 36(2) of the Act, 1996 and it could have imposed any condition in terms of section 36(3) of the Act, 1996 to stay the execution proceeding. Hence, before dealing with the issues as detailed above, from the admitted facts on record and settled position of law, I would like to express my views regarding applicability of section 36(2) of the Act, 1996 so also C.P.C. to Execution Proceeding initiated under section 36(1) of the Act, 1996 and power of the Executing as well as Appellate Court to stay the Execution Proceeding during pendency of an Appeal preferred under section 37 of the Act, 1996.

> *i) The phrase used in the proviso under sub-section-3 of Section 36 of the Act, 1996 "****have due regard to the provisions of grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)****" only mean that the provisions of C.P.C. are to be taken into consideration and not that they are mandatory.*
>
> ***(Emphasis supplied)***
>
> *ii) The provisions of the Act, 1996 are essentially to be first applied, whereas the provisions of C.P.C. for execution are to be followed as a guidance.*

iii) An application for execution of arbitral award in terms of section 36(1) of the Act, 1996 can only be filed after expiry of the time for making an application to set aside the arbitral Award under section 34 of the Act, 1996.

iv) Section 36(2) of the Act, 1996 is not applicable to execution proceeding initiated under Section 36(1) of the Act, 1996 and such application for stay operation of arbitral Award can only be filed before the Court during pendency of the Application filed under Section 34 of the Act, 1996.

v) In terms of sub-section (3) of section 36 of the Act, 1996, upon filing of an Application under sub-section(2) for stay of the operation of the arbitral Award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such Award for reasons to be recorded in writing.

vi) There is no such specific provision under the Act, 1996 to file application before the executing Court to stay the operation of execution proceeding. Hence, provisions under the C.P.C. are to be followed for the said purpose.

vii) The Judgment Debtor has to move an application under Order 21 Rule 26(1) of C.P.C. for staying the execution of decree. On moving so, the executing Court may stay the execution for a reasonable time to enable the Judgment Debtor to apply to the Court by which the decree was passed or to the Court having appellate jurisdiction.

viii) As prescribed under sub-rule (2) of Rule 5 under Order 41 of CPC, before expiration of the time allowed for appeal against the order passed on an application under Section 34 of the Act, 1996, if an execution proceeding is initiated, the Judgment Debtor may move before the concerned Court, which passed the decree, for stay of the execution proceeding.

Ix)If the Judgment Debtor prefers an Appeal under Section 37 of the Act, 1995 against the order passed by the Commercial Court in a Section 34 proceeding, he/it may move an application under Order 41 Rule 5(1) before the Appellate Court for stay of execution of decree, as there is no such specific provision under the Act, 1996, alike section 36(2), for stay of the impugned order passed by the Commercial Court.

x) In view of the provisions enshrined under sub-rule (3) of Rule 5 under Order 41 of CPC , no order for stay of execution of an appealable decree shall be made by the Court under sub-rule (1) or sub-rule (2) unless it is satisfied-

a) that substantial loss may result to the party applying for stay of execution unless the order is made;
b) that the application has been made without unreasonable delay; and
c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

12. As is revealed from the facts detailed above, admittedly the Award dated 02.09.2019 passed by the Arbitral Tribunal is a composite Award and the Arbitral Tribunal ordered to pay Rs.5,21,60,618/- to the present Opposite Party-Counter Claimant after adjusting Rs.1,00,00,000/- allowed in favour of the Petitioner-Claimant. The coordinate Bench allowed ARBA No.26 of 2022 preferred by the present Petitioner by setting aside the part of the said composite Award with regard to allowing the Counter Claim of the present Opposite Party to the tune of Rs.6,21,60,618/- on the ground of limitation only without entering into the merits of the said Appeal. ARBA No.28 of 2022, vide which part of the said composite Award is under challenge, is still pending for adjudication. But the Judgment passed by the

coordinate Bench in ARBA No.26 of 2022 being challenged, the Supreme Court, vide order dated 24.04.2023 passed in S.L.P(C) No.17438 of 2022, which was subsequently numbered as Civil Appeal No.3058 of 2023, set aside the said order passed by the coordinate Bench with an observation that counter claim by the present Opposite Party was not barred by limitation. On being so ordered, the Petitioner filed application for restoration of ARBA No.26 of 2022 instead of filing an application for review of the said order dated 28.07.2022, which was registered as CMAPL No.480 of 2023. However, the coordinate Bench disposed of CMAPL No.480 of 2023 on the ground that the Supreme Court did not make any reservation of bifurcating the contention raised by the Appellant in ARBA No.26 of 2022.

13. In view of the Judgment of the Supreme Court in **National Building Corporation Ltd.** (supra) and admitted facts on record, this Court is of the view that the Award impugned in ARBA No.28 of 2022 and ARBA No.26 of 2022 is a composite Award. Since ARBA No.28 of 2022 is still pending before this Court and the issue involved in the said Appeal is regarding legality of the part of the said composite Award, vide which Petitioner's claims of Rs.3,76,35,234/- and Rs.90,00,000/- were reduced to Rs.1,00,00,000/-, the Petitioner should have moved an application for review of the order/judgment passed in ARABA No.26 of 2022 instead of filing CMAPL No.480 of 2023 for restoration of the said Appeal, as the said Appeal was never dismissed for non-prosecution. Rather, the said Appeal preferred by the present Petitioner was allowed solely on the ground that the counter claim made by the present Opposite Party before the Arbitral Tribunal is barred by limitation and the coordinate Bench admittedly never adjudicated ARBA No.26 of 2022 on merit with regard to legality of the Award allowing the counter claim by the Arbitral Tribunal in favour of the present Opposite Party.

14. As it revealed from the order dated 24.04.2023 passed by the Supreme Court in S.L.P(C) No.17438 of 2022, while passing the said order, it was not brought to the notice of the Supreme Court regarding pendency of ARBA No.28 of 2022 before this Court.

15. Admittedly, the Petitioner has taken a specific stand in the present Writ Petition so also before the Court below as to pendency of ARBA No.28 of 2022 before this Court, which is arising out of same award, challenging reduction of its claim to the tune of Rs.1,00,00,000/- so also Review Petition before the Supreme Court, which was presented on 02.11.2023 vide Diary No.45932 of 2023, which is still pending and the said facts have not been disputed by the Opposite Party. Hence, this Court is of the view that the Petitioner, instead of filing application under section 36(2) of the Act, 1996 in Execution Petition No.367 of 2023, could have moved an application for stay of further proceeding in Execution Petition No.367 of 2023 under Order 41, Rule 5(1) of C.P.C. in ARBA No.28 of 2022, vide which part of the composite Award is under challenge and the same is now pending before this Court for final adjudication.

16. In view of provisions enshrined under Order 21 Rule-26 C.P.C., this Court is of further view that the scope to stay the execution proceeding by the executing Court being limited, which is only an interim arrangement enabling the party to obtain stay order from the appropriate Court, including the Appellate Court, as ARBA No.28 of 2022 is now pending before this Court, the Commercial Court could not have stayed the Execution Proceeding exercising its power under Order 21, Rule 26 of C.P.C. or under section 36(2) of the Act, 1996, which is not applicable to execution proceeding, as held above. All the issues emerged, as detailed above, are answered accordingly.

17. There being no infirmity in the impugned order dated 23.12.2023 passed by the Senior Civil Judge (Commercial Court), Bhubaneswar in E.P. No. 367 of 2023, the Writ Petition stands dismissed.

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

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2024 (III) ILR-CUT-1258

ANSUPRIYA SATAPATHY
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 10634 OF 2023]

10 SEPTEMBER 2024

[SANJAY KUMAR MISHRA, J.]

Issue for Consideration

Whether the cancellation of Letter of Authorization and the confirmation of the same by the Appellate Authority is valid as per the Control Order, 1985.

Headnotes

FERTILIZER (INORGANIC, ORGANIC OR MIXED) CONTROL ORDER, 1985 – Clauses 19, 31 & 32-A – Petitioner is a proprietorship at Biragobindapur, Sakhigopal, Puri – The Firm being an authorized licensee/dealer under the Order, is engaged in the process of manufacturing of organic fertilizers and supplies the same to the Department of Agriculture & Farmers' Empowerment – In the present case petitioner challenges the action of the Authority cancelling the Letter of Authorization and confirmation of the same by the Appellate Authority – The petitioner pleaded that the fertilizer inspector on 11.09.2022 all of a sudden visited the factory & collected two samples

for testing – Thereafter the entire premises consisting of the factory, laboratory, godown etc was sealed on the ground of mixing of charcoal & chemicals in the manufacturing of organic fertilizers – The action of the authority challenged on the ground that without waiting the result of test report, the authority cannot seal the firm only mere on assumption of adulteration – On the other hand the test report does not indicate any kind of adulteration – Contentions of the parties considered – Whether the cancellation of Letter of Authorization and the confirmation of the same by the Appellate Authority is valid as per the Control Order, 1985.

Held: No – The Notified Authority has acted contrary to the provisions under the Control Order, which was erroneously confirmed by the Appellate Authority, as the test report does not indicate use of charcoal powders and chemicals as raw materials **–** Hence, both the orders passed by the Notified Authority so also by the Appellate Authority are set aside and quashed.

(Para 22)

Citation Reference

Babu Verghese Vs. Bar Counsel of Kerala, **1999 SC 1281**; Niranjan Tripathy Vs. State of Orissa & Ors., **2012 (I) OJR 325 – referred to.**

List of Order

Fertilizer (Inorganic, Organic or Mixed) Control Order, 1985

Keywords

Cancellation of Letter of Authorization, Control Order, Contravention of the Order, Adulteration, Notified Authority, Laboratory,Test Results, Charcoal Powders and Chemicals.

Case Arising From

Order of Cancellation dated 22.09.2022 of the Letter of Authorization of Petitioner's Firm & Confirmation Order dated 29.09.2022 by the Appellate Authority (O.P.3).

Appearances for Parties

For Petitioner : Mr. N.K. Mishra, Sr. Adv.
For Opp.Parties : Mr. P.K. Rout, A.G.A

Judgment/Order

Judgment

S.K. MISHRA, J.

1. The Writ Petition has been preferred for quashing of the order of cancellation dated 29.09.2022(Annexure-8) of the Letter of Authorization, shortly, 'LoA', of Petitioner's Firm so also proceedings of the Appeal dated 09.12.2022

(Annexure-10), vide which the said cancellation order dated 29.09.2022 was confirmed by Appellate Authority (O.P.3), with further prayer to restore the LoA of the Petitioner firm.

2. The factual matrix of the case is that the Petitioner firm namely, M/s. Glare Chemicals India, is a proprietorship situated at Biragobindapur, Sakhigopal, Puri. The said firm, being an authorized licensee/ dealer, is engaged in the process of manufacturing organic fertilizers in its own unit and supplies the same as a State Dealer of organic fertilizers since last sixteen years. The Petitioner's unit has also been duly issued with Memorandum of Acknowledgement, shortly, "MOA", by the Department of Agriculture and Farmers' Empowerment, Odisha (O.P.1) as per provisions under Fertilizer (Inorganic, Organic or Mixed) Control Order, 1985, shortly, "Control Order, 1985", having valid ISO Certificate vide Annexure 1 & 2. The Petitioner's firm has been producing and supplying Bio and Organic Fertilizers to the Government Departments under valid process for about one and half decades without any complaint from any quarter till date and except supplying to the Govt. departments through tender process, the Petitioner firm does not make any retail sale of the fertilizers.

On 11.09.2022, the Assistant Agriculture Officer, acting as Fertilizer Inspector, along with Tahsildar, Satyabadi and Police, came to the unit of the Petitioner and collected two samples each of Vermi Compost and raw materials for Vermi Compost and one sample of Bio Fertilizer for testing purpose, which was the left-over stock from the previous year's supply orders of Bio fertilizer, kept in the premises for disposal and not for supply. Thereafter, the entire premises, consisting of the factory, laboratory, godown, workers' quarters and two trucks used for transportation, being inside the premises, was sealed.

3. The action of sealing the premises was challenged in W.P. (C) No.24100 of 2022, which was disposed of by quashing the order of sealing of the unit, such action of the authority being arbitrary and in contravention of the Control Order, 1985 so also directing for opening of the seal. Further, an F.I.R against the Petitioner was also lodged by the B.A.O, which was challenged in CRLMC No.4082 of 2022 and interim stay of the GR Case has been granted by this Court.

On 15.09.2022, the Notified Authority-Cum-Joint Director of Agriculture (O.P.2) issued an order suspending the LoA of the Petitioner firm and communicated the same through e-mail due to alleged attempt by the Petitioner to contravene clause 19(a)/19(c) of the Control Order, 1985. On 27.09.2022, a letter was issued to the Petitioner through e-mail for personal hearing, in terms of Clause 31 of the Control Order, 1985. Though the Petitioner appeared and filed his written statement regarding suspension of his LoA without any basis or test report of the samples, the Opposite Party No.2 cancelled the LoA of the Petitioner's Firm vide order dated 29.09.2022, which was challenged by the Petitioner by preferring an appeal under clause 32 of the Control Order, 1985 before the Addl. Director of Agriculture (Extension)-Cum-Appellate Authority (O.P.3). The said Appeal was

disposed of by the Opposite Party No.3 vide order dated 09.12.2022 upholding the order of cancellation of LoA dated 29.09.2022. Hence, this Writ Petition.

4. The said orders have been challenged on the grounds that the suspicion of non-conforming to the standard of the Control Order, 1985 for alleged mixing of charcoal and chemicals to manufacture organic fertilizer is proved to be baseless from the Laboratory Test Reports of the samples so also non-application of mind by the Appellate Authority for ignoring the reasons of cancellation, while upholding the cancellation of LoA on a different ground.

The observation of the Appellate Authority as to adulteration of the fertilizer, basing upon various factors such as absence of authentic records, documents, materials like stocking of bio-degradable waste/cow dung to be used in the process of vermi compost, is incomprehensible and is untenable. Further, the Laboratory Test Reports showing the samples to be of prescribed standard were already available to be verified, being so referred to in the appeal memo by the Petitioner, which would have rendered the cancellation order bad. However, the Appellate Authority deliberately referred to extraneous issues, which were not the reasons of cancellation of LoA, ignoring the allegation of suspicion that the fertilizers are not of prescribed standard, which was the sole reason of cancellation.

A further ground has been taken by the Petitioner that the entire action of the Opposite Parties from raid of its premises to uphold the cancellation of the LoA, despite positive result of Laboratory Reports, gives rise to reasonable belief that the Opposite Parties are acting at the behest of some rival party in order to put the Petitioner out of business, as once the test results have shown the samples to be of prescribed standard, the order of cancellation becomes bad. Thus, the order passed in the Appeal so also the order of cancellation of the LoA of the Petitioner's Unit, are liable to be quashed.

In addition to the said grounds, it has also been pleaded that due to the illegal, arbitrary and mala fide action of the Opposite Parties, the supply of the fertilizers already manufactured in the unit of the Petitioner, in conformity with the standard prescribed in the Control Order, 1985, has been stopped, as a result of which a huge quantity of stock is left over and wasted, causing a huge financial loss to the Petitioner.

5. A Counter Affidavit has been filed by the StateOpposite Party No.1 taking a stand therein that as per the Report of Chief District Agriculture Officer(CDAO), Puri, the bags printed with Vermi Compost (Soil Vita) and Bio Fertilizer (Soil Gold) were being filled with Charcoal like substances or black coloured soil like substances by 15 to 20 labourers engaged in the site. Also, basing upon the observation and interrogation, the materials, being packed, were suspected to be spurious, for which the entire stock was seized.

It is the stand of the Opposite Party No.1 that though the Petitioner appeared before the Opposite Party No. 2 for hearing along with his Legal Adviser, in

pursuance of the order dated 27.09.2022, his clarification regarding cancellation of his LoA vide Order No. 32325 dated 29.09.2022 was not found to be satisfactory. Further, reasons for cancellation of LoA has also been communicated to the Petitioner by the Opposite Party No.2 vide Memo no.32774 dated 07.10.2022.

Further, it is the stand of the Opposite Party No.1 that the ingredients used in the raw materials used for preparation of Vermi Compost as well as Bio-Fertilizer had made a prima facie reason to believe that the BioFertilizers & Vermi-Compost manufactured is not of prescribed standard/ adulterated, which contravenes the Clause 19(a)/19(c) of the Control Order, 1985, for which the LoA of Petitioner's firm has been cancelled immediately.

6. In response to the Counter Affidavit filed by the Opposite Party No.1, a Rejoinder has also been filed by the Petitioner reiterating the stand taken in the Writ Petition so also stating therein that neither the Petitioner was aware about any alleged report of Chief District Agriculture Officer, Puri nor such report was referred to in the proceedings before Opposite Party No.2 or Opposite Party No.3.

It is also the stand of the Petitioner that the whole case against the Petitioner is based on prima facie assumptions and not on any evidence to substantiate the allegations of adulteration and/or of products, not meeting the prescribed standard.

Further, it is the stand of the Petitioner that despite positive result of the Test Report, the Opposite Parties have not considered the same deliberately and cancelled the LoA of the Petitioner in a most unfair and arbitrary manner.

7. Learned Senior Counsel for the Petitioner submitted that the entire action of suspension and cancellation of LoA so also rejection of Appeal, being in violation of Clause 19, 31 and 32-A of the Fertilizer Control Order, 1985, are unjust, illegal, invalid and without jurisdiction, for which the Petitioner has been significantly victimized and is entitled to be granted adequate compensation for loss of business avocation for two years.

It was further submitted that the allegations made by the Opposite Parties against the Petitioner as to alleged attempt to manufacture adulterated fertilizer, having not been established in the Test Reports, as at Annexure-11 series, the entire action of the Opposite Parties should be declared as a mistake of fact and illegal and there is no such provision under the Control Order, 1985 to cancel LoA of a dealer for an attempt to manufacture adulterated fertilizer.

Learned Senior Counsel for the Petitioner, drawing attention of this Court to test results on record, further submitted that the said Test Results, being in conformity with the specifications of Bio-Fertilizers (Para 4 of Part-A, and Para 1 of Part-B, in Schedule-III), question of any cancellation, much less suspension of the license of the Petitioner did not arise at all.

Learned Senior Counsel for the Petitioner further submitted that the crux of the matter in the present case is otherwise covered by the observation made by the coordinate Bench vide the judgment dated 25.11.2022 in W.P.(C) No.24100 of 2022

and it is a clear case, where the Petitioner has been significantly victimized by passing arbitrary, unilateral, unjust and invalid orders by the Opposite Parties, which is contrary to the provisions under the Fertilizer Control Order, 1985.

8. To substantiate his submissions, learned Senior Counsel for the Petitioner relied on the judgment of the Supreme Court in **Babu Verghese Vs. Bar Counsel of Kerala** reported in AIR 1999 SC 1281 so also Judgment of this Court in **Niranjan Tripathy Vs. State of Orissa & Others** reported in 2012 (I) OJR 325.

9. In response to the submissions made by the learned Senior Counsel for the Petitioner, learned State Counsel, reiterating the stand taken in the Counter Affidavit so also drawing attention of this Court to the brief statement of reasons for cancellation of LoA of the Petitioner, as at Annexure-A/1, submitted that the ingredients used as raw materials for preparation of Vermi-Compost as well as Bio-Fertilizer had made prima facie reason to believe that the Bio-Fertilizers & VermiCompost manufactured by the Petitioner is not of prescribed standard or adulterated, which contravenes the Clause 19(a) /19(c) of the Control Order, 1985, for which the LoA issued in favour of the Petitioner has been rightly cancelled.

10. In view of the pleadings on record so also submissions made by the learned Counsel for the parties, the following points emerge to be dealt in the present Writ Petition.

> i) Whether the Notified Authority-Cum-Joint Director of Agriculture (O.P.2) was justified to cancel the LoA of the Petitioner firm?
>
> ii) Whether the order passed by the Appellate Authority (O.P.3), thereby confirming the order passed by the Notified Authority, is legal and justified?

11. As the said points are related, the same are dealt with and answered together for the sake of brevity and clarity. While dealing with the said points, first it would be apt to reproduce below the relevant paragraphs from the brief statement of the reasons for cancellation of LoA of the Petitioner, which forms part of one of the impugned orders dated 29.09.2022, as at Annexure-8.

> ***"3****. During the raid as per the way of packaging, observed by the enforcement officials and statements of Sri Ajay Kumar Mishra, husband of the proprietor and statements of Sri Pinku Rajak, labour it was revealed that the dealer prepares the Biofertilizers as well as Vermicompost by combining Charcoal Powder and Chemicals as raw materials.*
>
> ***4.*** *It is pertinent to mention that, Vermicompost is the result or the end product of earthworm digestion and decomposition of organic materials (typically plant & animal wastes). Similarly, Biofertilizer is a substance that contains living micro- organisms which, promotes growth by increasing the supply or availability of primary nutrients to the host plant.*
>
> *5*. ***Hence, the way of packaging and raw materials used for preparation of Vermicompost as well as Bio fertilizers had made a reason on prima facie to believe that the Biofertilizers & Vermicompost, manufactured by the manufacturer is not of prescribed standard / adulterated, which contravenes the Clause 19 (a)/19 (c) of the aforementioned order.***

6. *Hence, as per the clause 28 (d) of the aforementioned order, the stock of the dealer has been seized by the enforcement officials.* ***Also the sample of the above products has been drawn for sending to the Laboratory to confirm whether the fertilizers are as per FCO specification or not. The final test report from the lab is pending".***

(Emphasis Supplied)

12. Similarly, the Appellate Authority, while passing the impugned order dated 09.12.2022, as at Annexure-10, observed as follows:

"Extract from the proceedings of Appeal held under Clause-32 of the Control Order, 1985.

It is found that, M/s. Glare Chemicals India, Satyabadi has not properly displayed and not able to produce the standard of the Vermi compost & Biofertilizer at the time of inspection to the team and keeping in view the quantum of business handled by the firm, ***the depot, go-down or other places used by the Firm was not properly explained to the team by the Glare Chemical which has created question on the specific standard of the fertilizer (Vermi compost & Bio-fertilizer).***

More over any fertilizer which is deemed to be adulterated and if it contains any substances the addition of which is likely to be eliminated or decreased its nutrient content or make the fertilizer not confirming the specific standard ***deem to be considered adulterated in absence of sufficient evidence as it was observed during the visit of the team like absence of authentic records, documents, materials like stocking of bio degradable waste/ cow dung which could normally be used in the process of Vermi compost. Rather the question of mixing charcoal in vermin compost is a matter of question. So the FCO 19-C is uphold for cancellation of the LOA.***

It is to be clearly mentioned here that, the sole purpose of issue of licence is to make available quality products to the farmers by the Govt. through issue of LOA, so that the manufacturer/ marketer will produce fertilizer as per the required section of FCO and distribute through their dealer network as per the provision of LOA. This will ensure that quality Inputs are made available to the public.

Considering the record and statement it is observed that, the statement of reason of cancellation of LOA could not be considered contradictory until all the records and documents are produced before the enquiry team for their verification.

As regards receipt of no complain from any quarter regarding the quality of Vermi compost /Bio-fertilizer, it is to be made clear that, in no circumstances Glare Chemicals India has produced any previous test report before the competent authority as proof their quality of the product. It is the prime duty of the company to prove its worth at manufacture, storage and marketing whether any complaint received or not.

As the appellant is the producer as well as marketing the same products, ***so without the authentic quality certificate it is not possible to allow such a huge amount of the products to be sold for the purpose of agricultural use under the FCO.*** *Here the question of allowing 30 days is not permissible. Under the above circumstances the appellant authority is of the opinion that,* ***steps for opening of the premises should be taken on expedious basis so that appellant could able to produce all the relevant documents, records information regarding their stock, place of stock, depot, go-down which are used by the firm for the purpose of storage, sale of the said vermin compost and Biofertilizer under question.*** *The Fertilizer Inspector, Licensing Authority and CDAO, Puri are requested to take appropriate steps to open the unit which was sealed previously following codal procedure and disposed the case in a time bound process through the enquiry committee.*

The appeal is disposed accordingly." ***(Emphasis Supplied)***

13. Admittedly, the test results, all dated 10.10.2022, were communicated to the Petitioner on 11.10.2022, whereas the Appeal preferred by the Petitioner was disposed of vide proceedings dated 09.12.2022 i.e. much after availability of the test results regarding the samples collected from the Petitioner's Firm. Though the Petitioner referred to those test results in her Memorandum of Appeal, which was preferred on 04.03.2023 on various grounds, including Ground No.E & J regarding analysis report, but the Appellate Authority has not dealt with most of the grounds, including the grounds regarding the Laboratory Test Report. Ground No.E and relevant portion of Ground No.J of the Memorandum of Appeal, preferred under Clause-32-A(1) of the Fertilizer Control Order, 1985, being relevant, are extracted below:

> ***"E****. It is most humbly submitted that the standard of the raw materials, fertilizers etc. in question can only be ascertained after obtaining the analysis report from the accredited laboratory.* ***But the Respondent has passed the impugned order prior to receiving the analysis report merely upon collection of samples and recording of statements.***
>
> *Presently the analysis report is available with the authority as well as the Appellant (discussed supra). More particularly 4 out of 5 nos. of analysis reports relating to samples of raw materials and finished products of Vermicompost vide. Sample Code No.BioFert/SKL/1/2022-23, Bio-Fert/SKL/2/2022-23, Bio-Fert/SKL/3/2022-23 and BioFert/SKL/4/2022-23 (as indicated by inspector) were remarked by the testing laboratory as* ***"The sample is according to FCO specifications based on above test result." So there is no question of attempt to contravene and/or contravention of Clause 19(a)/19(c) of Order, 1985 by the Appellant and the raw materials and finished FCO, 1985 specification. (Copy of the relevant pages for Schedule-III of Order, 1985 is annexed hereto as Annexure-7)"***
>
> ***J****. XXXXXX Whereas the analysis report of Bio Fertilizer i.e Soil Gold (PSB) vide. Sample Code No.Bio-Fert/SKL/5/2022-23 (as indicated by inspector) has been remarked by the testing laboratory as "The sample is not according to specification and fails in Contamination level & VCC parameters". Moreover at N.B which needs special attention it has been stated that "Expiry date is not mentioned upper margin of the packet received as per Schedule-III, Part-C, FCO, 1985".* ***In reference to analysis report of this sample, the sample has passed all the parameters of FCO specification except Viable Cell Count and Contamination level. The sample is declared substandard only in Viable Cell Count which is reported as 1 x 107-cell/g of carrier material and presence of contamination at 105-dilution. It is most humbly submitted here that this sample reached expiry date at the time of sampling (also evident from statement at "N.B."), which is missed by the inspector while taking sample from the manufacturing unit. Inspite of expiry, sample was having 1x107 counts in the laboratory test. This clearly indicates that the product was of good quality and meeting FCO, 1985 standards, when it was not expired. Slowly as expiry date passed, the contamination level in carrier material increases and viable cell decreased, which is still under tolerance limits prescribed in Part-B, Schedule-III, FCO, 1985. Further it clearly indicates that the product was good, users got good results of its application and there is no complaint of the product from the field also. The test report of the laboratory also support the claim of the Appellant, as even after expiry of the product the Viable Cell Count was present within tolerance limit as per Part-B, Schedule-III,***

deteriorated. However the Respondent has not taken these facts into consideration."
(Emphasis Supplied)

14. That apart, paragraph Nos.18 & 19 of the Writ Petition, with regard to test results communicated to the Petitioner, being relevant, are also extracted below:-

> ***"18.*** *That it is pertinent to submit that* ***before the appeal was disposed of the test results of the samples taken during the raid were already available with the officials, and the petitioner and was in the knowledge of the Appellate Authority in as much as the petitioner had referred to the test results in the appeal memo itself.***
>
> ***The test results communicated to the petitioner by the Asst. Agriculture Officer, Satyabadi on 11.10.2022 showed that all four samples of vermicompost and its raw materials were as per standard prescribed which is contrary to the allegations on the basis of which the LOA was cancelled.***
>
> *However, it may be clarified here that the single sample of bio-fertilizer (Solid Gold), passed all the parameters of FCO specification except viable cell count and contamination level. As mentioned earlier this product was left over from the previous year supply and was past the expiry date and was kept for disposal. This sample should not have been taken for testing in the first place,* ***however, it may be noted that even after expiry this sample was having 1x107 counts in the laboratory test which indicates that the product before expiry was of good quality and meeting the FCO standard.***
>
> *(Copies of sample test results are annexed hereto as Annexure-11 Series)*
>
> ***19.*** *That the order of cancellation of LOA by O.P No.2 is not sustainable for the reason that the sole ground of suspicion of non-conforming to the FCO standard for alleged mixing of charcoal and chemicals in organic fertilizer is proved to be totally baseless by the laboratory test reports of the samples."* ***(Emphasis Supplied)***

15. However, in response to the said averments made in the Writ Petition, in the Counter, the said averments made in the Writ Petition have not been dealt with or denied. Rather, in para-6 of the Counter, it has been stated that as per the report of the Chief District Agriculture Officer, CDAO, the materials being packed, were suspected to be spurious. Hence, the entire stock was seized at that point of time.

16. In view of the allegations made by the authority concerned regarding adulteration, this Court is of the view that the decisive factor to determine the said allegation of adulteration is the test result/report. Despite taking a specific stand in the Memorandum of Appeal regarding the test result, as has been extracted above, the Appellate Authority admittedly did not deal with the said grounds and vaguely disposed of the said Appeal with the observation, as has been extracted above.

17. As there is an allegation of attempt to contravene the provisions under Clause-19(a) and 19(c) of the Fertilizer Control Order, 1985, as has been mentioned vide one of the impugned orders dated 29.09.2022, as at Annexure-8, it would be apt to reproduce below the said clauses for ready reference:-

> ***"19. Restriction on manufacture/import, sale and distribution of fertilisers***
>
> *No person shall himself or by any other person on his behalf:-*

(a) ***manufacture/import for sale, sell, offer for sale, stock or exhibit for sale or distribute any fertlliser which is not of prescribed standard;***

*(b) manufacture/import for sale, sell, offer for sale, stock or exhibit for sale, or distribute any mixture of fertilisers, which is not of prescribed standard** (subject to such limits of permissible variation as may be specified from time to time by the Central Government) or special mixture of fertilisers which does not conform to the particulars specified In the certificate of manufacture granted to him under this Order in respect of such special mixture.*

(c) sell, offer for sale, stock or exhibit for sale or distribute:-

(i) any fertiliser the container whereof is not packed and marked in the manner laid down In this Order

(ii) any fertiliser which is an [imitation of or] a substitute for another fertiliser under the name of which it is sold;

(iii) ***Any fertilizer which is adulterated;***

Explanation:- A fertiliser shall be deemed to be adulterated, if it contains any substance the addition of which is likely to eliminate or decrease its nutrient contents or make the fertiliser not conforming to the prescribed standard.

(iv) any fertiliser the label or container whereof bears the name of any individual firm or company purporting to be manufacturer/Importer of the fertiliser, which individual, firm or company is fictitious or does not exist.

(v) any fertiliser, the label or container whereof or anything accompanying therewith bears any statement which makes a false claim for the fertiliser of which is false or misleading in any material particular.

(vi) any substance as a fertiliser which substance is not, in fact, a fertiliser; or

(vii) any fertilizer without exhibiting the minimum guaranteed percentage by weight of plant nutrient." ***(Emphasis Supplied)***

18. Admittedly, the Notified Authority under the Control Order, 1985, while passing one of the impugned orders dated 29.09.2022, as at Annexure-8, vide which the LoA of the Petitioner stood cancelled with immediate effect, ordered so due to alleged attempt by the Petitioner to contravene Clause-19(a)/19(c) of the Control Order, 1985. The brief statement of reasons for cancellation of LoA attached to the said order dated 29.09.2022, also indicates as to preparation of bio-fertilizers as well as vermin-compost allegedly combining charcoal powder and chemical as raw materials and seizing of the stock of the dealer so also drawing sample of the said products for sending the same to the laboratory for confirmation to ascertain as to whether the fertilizers are as per FCO specification or not and pendency of final test report from the laboratory, as on the date of passing of the said order.

19. In the present case the Notified Authority followed the provisions under sub-clause (2) of Clause-31 of the Control Order, 1985, while suspending LoA of the Petitioner, which was followed by the impugned order of cancellation dated 29.09.2022 in terms of 1st Proviso in sub-clause (2) of Clause 31 of the Control Order,1985, alleging there in an attempt made by the Petitioner to contravene the aforesaid provisions of the Control Order, 1985. The 2nd Proviso under sub-clause (2) of Clause 31 of the Control Order, 1985 mandates, where no final order is passed within the period of fifteen days from the date of issue of order of suspension in

terms of 1st Proviso under the said Clause, the order of interim suspension shall be deemed to have been revoked. However, such deemed revocation of suspension order is without prejudice to any further action, which the Registering Authority or the Notified Authority or, as the case may be, the Controller may take against the affected person under sub-clause (1) of Clause 31. As it seems from the conduct of the Notified Authority, even though it observed in the statement of reasons for cancellation of LoA that the test results are awaiting, in order to avoid the deeming provision of vacation of suspension order, without waiting for the test results/reports, the said order was passed hurriedly merely on the allegation of an attempt to contravene certain provisions of the Control Order, 1985.

20. On perusal of Clause-31 of the Control Order, 1985, under which the Notified Authority/Registering Authority can suspend the authorization letter or certificate or debar the dealer from carrying on business of fertilizers, it is established that there is no such provision under the said Clause to do so on the ground of alleged attempt made by the dealer to contravene any of the provisions under the Control Order, 1985. Besides the said Clause, there is also no such provision under the Control Order, 1985, like the provisions under Indian Penal Code (repealed and replaced by the Bharatiya Nayay Sanhita), prescribing legal action for an attempt made by the authorized dealer or the holder of the certificate of registration/certificate of manufacture under the Control Order, 1985 for committing an offence. Rather Clause-31 provides for suspension, cancellation or debarment only on contravention or non-fulfillment of provisions of the Control Order, 1985 or any terms and conditions of memorandum of intimation or certificate of registration or certificate of manufacture, as the case may be.

21. Hence, this Court is of the view that the Notified Authority was not justified to pass the impugned order dated 19.09.2022, thereby cancelling the LoA of the Petitioner on the ground of alleged attempt made by the Petitioner Firm to contravene Clause-19(a)/19(c) of the Control Order, 1985. This Court is of further view that, as the Notified Authority was of prima facie view of adulteration; such action of cancellation of LoA could only have been taken after receiving the test report, as the samples drawn by the Inspector were sent to the accredited laboratory in terms of Clause-29 of the Control Order, 1985 for testing.

22. In the present case, admittedly the Notified Authority has acted contrary to the provisions under the Control Order, 1985, as detailed above, which was erroneously confirmed by the Appellate Authority also. In view of the legal provisions under the Control Order, 1985, read with the reports of the test result of the accredited laboratory, as at Annexure-11 series, there being no finding or indication in the said reports as to use of charcoal powders and chemicals as raw materials to manufacture the Organic-Fertilizer and Bio-Fertilizer, as observed in the statement of reasons to cancel the LoA, this Court is of the view that the impugned order dated 29.09.2022, as at Annexure-8, which was passed with an observation that the Petitioner made an attempt to contravene certain provisions

under the Control Order, 1985, so also the confirming order dated 09.12.2022 passed by the Appellate Authority, as at Annexure-10, where admittedly there is no such discussion about the test reports agitated vide Ground Nos.H & J in the Appeal Memo preferred by the Petitioner/Appellant, are bad and liable to be set aside. Both the points, as detailed above, are answered accordingly.

23. Accordingly, both the said orders passed by the Notified Authority, as at Annexure-8, so also the Appellate Authority, as at Annexure-10, are set aside and quashed. However, it is made clear that this order will not be a bar for the Notified Authority to act in terms of the request made by the Appellate Authority vide the concluding para of the impugned order dated 09.12.2022. It is made further clear that, while acting in terms of the said request, the authorities concerned shall take into consideration the test results of the accredited laboratory, as at Annexure-11 series, so also other grounds agitated by the Petitioner, by giving her chance of personal hearing so also to be represented through her legal advisor.

24. The Notified Authority (O.P.2) is directed to restore the LoA of the Petitioner immediately, preferably within a period of two weeks from the date of communication of the certified copy of this order.

25. With the said observation and direction, the Writ Petition stands allowed and disposed of. No order as to cost.

Headnotes prepared by:
Shri Jnanendra Ku. Swain, Judicial Indexer
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case :
Writ petition allowed and disposed of.

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2024 (III)-ILR-CUT-1269

RAINA MALIK & ORS.
V.
KAILASH MALIK & ORS.

(SAO NO.18 OF 2023)

20 NOVEMBER 2024

[G. SATAPATHY, J.]

Issue for Consideration

Whether the Order of remand passed by the Appellate Court without assigning any reason is valid.

Headnotes

CODE OF CIVIL PROCEDURE, 1908 – Order XLI, Rule 23, 23-A, 24, 25 – Remand of case by Appellate Court – Scope and limitation – Plaintiffs have claimed for partition of 41 plots, but separate note of possession was reflected in respect of 6 plots only – The learned First Appellate Court has not differed with the findings of the learned trial court to the extent of land possessed by the predecessor-in-interest of the plaintiffs – The learned First Appellate Court having held that all six plots are liable for petition has not proceeded further to determine the share of the parties and has not discussed anything of the evidence on record to find out the share of parties – Whether the remand order of the First Appellate Court is sustainable.

Held: No – The impugned Judgment of the learned First Appellate Court is erroneous because it has not come to any finding that the conclusion so arrived by the learned Trial Court on different issues are wrong and it is unable to pronounce Judgment for want of evidence and it has not at all assigned any reason to remit the matter back to the learned Trial Court for fresh disposal. (Para 10)

Citations Reference

Pallabgunjan Satpathy & Ors. Vrs. Banchha @ Banchhanidhi Palei & Ors., **2014 (II) CLR 339**; Surjeet Singh & Anr. Vrs. Sadhu Singh & Ors., **2018 SAR (Civil Supp.II) 865**; Jayaprakash & Anr. Vrs. T.S. David & Ors., **2018 SAR (Civil) 418**; Hiya Associates & Ors. Vrs. Nakshatra Properties Pvt. Ltd., **2018 SAR (Civil Supp.II) 535** – **referred to.**

List of Acts/Code

Code of Civil Procedure, 1908

Keywords

Remand, Scope of remand, Limitation of Court, Remission.

Case Arising From

Judgment passed on 16.08.2023 in RFA No.02 of 2008 by the learned Additional District Judge, Jajpur.

Appearances for Parties

For Appellants : Mr. B. Muduli.
For Respondents : Mr. S. Rath.

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This appeal under Order-XLIII Rule-1(u) r/w Sec. 105 of the Code of Civil Procedure, 1908 (in short "the CPC") is directed against the reversing judgment

passed on 16.08.2023 in RFA No.02 of 2008 by which the learned Additional District Judge, Jajpur, while setting aside the judgment and decree dated 05.10.2007 and 12.10.2007 passed by the learned Civil Judge, (Sr. Division), Jajpur in T.S. No. 233 of 1996 dismissing the suit of the Plaintiffs, has remitted the aforesaid suit to the learned Sr. Civil Judge for fresh disposal in the light of observation made in the judgment passed in the first appeal.

For clarity and better appreciation, the parties in this appeal from the order (SAO) are referred to as they were in the original suit in T.S. No. 233 of 1996.

2. The short facts involved in this case in precise are that one late Mahendra Malik and Dibakar Malik who were the predecessors in interest of the principal Respondents in this present appeal had instituted the suit against the present Appellants and Proforma Respondents in the Court of learned Civil Judge(Sr. Division), Jajpur in T.S. No. 233 of 1996 for partition of suit schedule properties morefully described in schedule-A, B and C of the suit constituting altogether 41 plots. According to the original Plaintiffs, the suit schedule properties are their undivided joint family property, but the CS ROR has been wrongly prepared. The original Plaintiffs had claimed that they were the sons of Yudhistira, but their sister Michhu being the daughter of Yudhistria had relinquished her interest in their favour before her death, though the Defendants Nos. 18 & 19 are her LRs. The original Plaintiffs had also claimed right over schedule "C" land which is Sikkim tenant Property by alleging that Tauli and Chintei, the predecessors-in-interest of the Defendants had managed to record the Sikkim plots more in their favour. It is their further claim that they are entitled to ½ share in the suit properties, but when the Defendants did not agree for a partition of the suit properties, they filed the suit for partition.

3. The Defendant Nos. 1 to 5, 7 to 10 and 14 filed their joint written statement denying the claim of the Plaintiffs by *inter-alia* questioning the maintainability suit for want of cause of action and disputing the genealogy appended to the plaint. According to the answering Defendants, the original Plaintiffs were only entitled 1/3rd share and the note of possession over schedule "B" property is the outcome of partition by metes and bounds and thereby, they alternatively pleaded for allotment of 2/3rd share in their favour in respect of suit schedule "A" land which was acquired by Tauli, Chintei and Kapila from the Jamindar with 1/3rd share each. It is the further pleading of the Defendants that Kapila died in the year 1935, but Sec. 236 of Orissa Tenancy Act came into force after 1935 and, thereby, the Plaintiffs were not entitled to any share as Sikkim tenant and they (answering Defendants) being the successors of Tauli and Chintei are entitled to 1/3rd share. It is the further case of the the answering Defendants that Yudhistira being the father of the Plaintiffs had filed O.L.R. Case No. 1360/76 against Srinath Samal and Khageswar Samal admitting his share as 7 Anna in schedule "C" land for which they are estopped to raise any contrary claim. While praying to dismiss the suit, the answering Defendants had claimed possession over 2/3rd of the suit schedule properties by advancing alternative

plea of adverse possession and plea of ouster. On the other hand, Defendants Nos. 18 to 21 filed their separate joint written statement, but supporting the stand taken by the Plaintiffs.

4. On the basis of rival pleadings, the learned trial Court framed necessary issues and proceeded to adjudicate the suit by dismissing it. Accordingly, Plaintiffs challenged the judgment and decree passed on 05.10.2007 and 12.10.2007 by the learned Civil Judge, (Sr. Division), Jajpur in T.S. No. 233 of 1996 by preferring an appeal before the learned Additional District Judge, Jajpur in RFA No. 02 of 2008, wherein learned Additional District Judge after hearing the parties and on going the pleadings and evidence on record formulated the following two points:-

(i) Whether Arta Malik is the common ancestor of the parties?

(ii) Whether the suit schedule properties are liable for partition?

In consideration of the aforesaid two points, the learned ADJ, Jajpur by the impugned judgment has answered the points in favour of the Plaintiffs, but remitted the matter back to the learned trial Court for fresh disposal in accordance with law by holding that the suit properties are in joint possession of the parties and have not been partitioned among the parties by metes and bounds and the suit properties are thereby liable for partition. The aforesaid findings of the learned First Appellate Court are under challenge in this appeal from order by the unsuccessful Respondents who were contesting Defendants in the suit.

5. Mr. B. Muduli, learned counsel appearing for the Appellants, has submitted that although the Plaintiffs have claimed for partition over 41 plots, but separate note of possession was not reflected in respect of 6 plots only, however, the learned First Appellate Court has not differ with the findings of the learned trial Court to the extent of land possessed by the predecessor-in interest of the Plaintiffs which was to the extent of Ac 2.45 decimal and which comes to 1/3rd of the suit properties, but the learned First Appellate Court remitted the matter back to the learned trial Court after long lapse of 15 years without determining the share of the Plaintiffs to the extent of 1/3rd of the suit properties in plot Nos. 195,2182,1007,1972,1990 and 2093. He has further submitted that assuming the aforesaid suit plots to be in joint possession of the parties and have not been partitioned among the parties by metes and bound, the Appellate Court should not have remitted the matter back to the trial Court for fresh adjudication in respect of the whole suit properties, instead it should have calculated the share of the parties in respect of the aforesaid suit plots. Mr. Muduli has accordingly prayed to allow the appeal by setting aside the impugned judgment of the First Appellate Court by restoring the findings of the learned trial Court.

5.1. On the other hand, Mr. S. Rath, learned counsel appearing for the contesting Respondents has submitted that the learned First Appellate Court has rightly passed an order by setting aside the impugned judgment and decree of the learned Civil Judge, Sr. Division in the suit because there is unity in possession of the suit land and the same having not been partitioned by metes and bound, the learned First

Appellate Court has no other option, but to direct for partition by setting aside the impugned judgment of the learned trial Court. On the aforesaid submission, the learned counsel appearing for the Respondents has prayed to dismiss the appeal. Further, in support of his contention, Mr. Rath has also relied upon the decisions in (i) ***Pallabgunjan Satpathy and others Vrs. Banchha @ Banchhanidhi Palei and others; 2014 (II) CLR 339, (ii) Surjeet Singh and another Vrs. Sadhu Singh and others; 2018 SAR (Civil Supp.II) 865, (iii) Jayaprakash and another Vrs. T.S. David and others; 2018 SAR (Civil) 418 and (iv) Hiya Associates and others Vrs. Nakshatra Properties Pvt. Ltd.; 2018 SAR (Civil Supp.II) 535.***

6. After having considered the rival submissions upon perusal of record, there appears no dispute about the learned First Appellate Court setting aside the impugned judgment of the learned trial Court by answering point Nos.(i) and (ii) in favour of the Appellants therein who are Respondents herein, but strangely enough, the learned First Appellate Court after holding the suit property to be liable for partition in answering point no.(ii) has remitted the matter back to the learned trial Court for its fresh disposal. It is not understood as to under what circumstance the learned First Appellate Court has remitted the matter back for fresh disposal. For better clarity, the relevant findings of the learned First Appellate Court on point no.(ii) is extracted here under:-

> *"When the properties are in joint possession of the parties and have not been partitioned among the parties by metes and bound, it can be definitely said that the unity of title over the land under Khata No. 2 & 70 so also the land under plot Nos. 1007,1972,1990 and 2093 under C.S. Khata No. 90 still exists. Under such circumstances, the properties under Khata Nos. 2 & 80 and the properties under plot Nos. 1007,1972,1990 and 2093 under C.S. Khata No. 90 are liable for partition. Therefore, the findings of the learned trial Court on that aspect is not acceptable."*

7. Having held that the aforesaid suit plots are liable for partition, the learned First Appellate Court has not proceeded further to determine the share of the parties nor has discussed anything or evidence on record to find out the share of the parties. Why the learned First Appellate Court has not proceeded further to determine the share or interest of the parties is not understood, but the law on this point has been couched in the latin maxim "Interest republicae ut sit finis litium" which means that it is in the best interest of the State to put an end to the litigation. Although the learned First Appellate Court has overturned the findings of the learned trial Court, but it has not proceeded further to determine the share or interest of the parties and remitted the matter back for fresh disposal which is contrary to the law. It is not the case where the learned 1st Appellate Court has stated that the evidence is deficient to decide the share or interest of the parties.

8. The responsibility on a Judicial Officer is manifold, but his primary duty is to decide the case in accordance with law on the existing materials/evidence on record, but leaving or shirking away from such responsibility is not conformity with the judicial discipline which a judicial Officer has to follow. In the context of the

present judgment, there appears absolutely no reasoning as to why the learned First Appellate Court remitted the matter back for fresh disposal in accordance with law, especially when it has not been concluded in the impugned judgment that the evidence is deficient to determine the share or interest of the parties, but the findings of the learned First Appellate Court has driven the parties to this Court for seeking redressal of their grievance which is not in the interest of justice. The contesting Appellants in this appeal has also stated in their written notes that the learned First Appellate Court could have determined the share of the parties by declaring the share of the Plaintiffs to be 1/3rd in the suit property.

9. Be that as it may, the scope and limitation of remand has been outlined in Order XLI, Rule 23 to 25 of the CPC including Rule 23-A, but Rule 23, 23-A and 25 clearly refers to remand to the Court from whose decree, the appeal is preferred. Out of the aforesaid three contingencies, Order XLI, Rule 23 of the CPC refers to remand of the suit decided upon a preliminary suit, but it is not the case at hand. The second contingency i.e. Order XLI, Rule 23-A of the CPC categorically lays down that where the Court from whose decree an appeal is preferred has disposed of the suit otherwise than on a preliminary point and the decree is reversed in the appeal, but a retrial is considered necessary, in such contingency, the Appellate Court shall have the power to remand the suit for fresh adjudication and the last contingency is that where the Court from whose a decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of facts, which appears to the Appellate Court essential to the right decision of the suit on merits, the Appellate Court may, if necessary, frame issues and refer the same for the trial to the Court from whose decree the appeal is preferred and in such case, it shall also direct such Court to take the additional evidence required.

10. On a careful conspectus of the impugned judgment passed by the learned First Appellate Court, it appears that the learned First Appellate Court has made an open remand to the learned trial Court for fresh adjudication in the matter which in the circumstance the learned Appellate Court deems to have resorted to Order XLI, Rule 23-A of the CPC which is contrary to the principle of remand. Since the learned First Appellate Court has not come to a finding that the evidence on record is deficient so as to enable it to determine the share of the parties or it is unable to pronounce the judgment on the existing evidence and thus, the remand order as passed by the learned First Appellate Court in this case being contrary to law is liable to be set aside. Further, public policy demands that litigation should be concluded finally as far as possible. Further, the impugned judgment of the learned First Appellate Court is erroneous not only on the above premises but also for the following reasons that it has not come to any finding that the conclusion so arrived at by the learned trial Court on different issues are wrong and it is unable to pronounce judgment for want of evidence and it has not at all assigned any reason to remit the matter back to the learned trial Court for fresh disposal. Further, it has not been clarified by the learned First Appellate Court whether the evidence is deficient

or there is lack of issue, but on the other hand, it appears to this Court that there is no such infirmity or deficiency of evidence on record. It clearly appears from the impugned judgment that the learned First Appellate Court has simply avoided to decide the *lis* finally by determining the share of the parties, but it has driven the parties to litigate again and again by remitting the matter back to the learned trial Court without deciding it finally. In the event, the learned First Appellate Court has decided the issue by determining the share or interest of the parties, it would have given more precise meaning to the parties to decide further either to challenge such finding of the learned First Appellate Court or not.

11. No doubt learned counsel for the Respondents has relied upon the decision in ***Pallabgunjan Satpathy(supra)***, but it is not applicable to the case at hand since the learned First Appellate Court had not reversed judgment and decree of the learned trial Court by considering that a retrial is necessary nor the First Appellate Court has concluded that the learned trial Court has omitted to frame or try any issue to determine any question of facts. Similarly, the ratio in ***Surjeet Singh(supra)*** is distinguishable from the facts of the present case inasmuch as therein a remand of suit was considered necessary by the High Court of Himachal Pradesh to decide the first appeal and cross objection afresh on merits in accordance with law, but herein the learned First Appellate Court has not whispered a single word as to whether the retrial or remand of the suit is necessary. Moreover, the decision as relied on by the Respondents in ***Jayaprakash and another(supra)*** is considered respectively, but found distinguishable from the facts of the present case inasmuch as the exparte decree passed therein was set aside without noticing the Defendants and the trial Court again decreed the suit exparte against such Defendants, but in the present case there is absolutely no mention as to why the retrial is considered necessary in this case, rather the learned First Appellate Court has proceeded to hold that the suit property is liable for partition, but it has withheld to determine the share/interest of the parties which is contrary to law.

12. It is also well settled that remand of a case to the Court from whose decree the appeal is preferred is considered necessary when the superior Court/Appellate or Revisional Court finds such Court to have failed to decide some material issues in the original case or there is some procedural lacuna noticed in the trial which is not only adversely affected the rights of the parties, but also cannot be rectified without a retrial or when some additional evidence is considered necessary to decide the rights of the parties which was not before the trial Court and, therefore, the remand of the case for suit should not be considered lightly, rather it should be passed on sound exercise of principle in conformity with the provisions of law. In this case, the learned First Appellate Court has not only remitted the matter in contravention to the provisions of law, but also has failed to record any finding as to why retrial or remand is necessary only to determine the share/interest of the parties. Consequently, such observation/finding of the learned trial Court being unsustainable is liable to be set aside and it is, accordingly, set aside. It is, however,

made clear that the findings of the remand of suit back to the learned trial Court for fresh disposal is hereby set aside and the learned First Appellate Court is hereby directed to decide this appeal on merits afresh in accordance with law by determining the share and interest of the parties on the basis of analysis of evidence on record. This Court has, however, not expressed any opinion with regard to findings of the learned First Appellate Court on point nos. (i) & (ii) which may be further subject to challenge by any of the parties, if not satisfied with the result of the first appeal.

13. In the result, the present appeal from order stands allowed on contest, but to the extent indicated above, however, no order as to costs. The appeal is remitted back to the learned First Appellate Court for fresh disposal in the light of observation made hereinabove.

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

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2024 (III)-ILR-CUT-1276

PRAVAT KUMAR MOHAPATRA
V.
PRADYUT PRIYADARSHAN MOHAPATRA

(RPFAM NO. 312 OF 2023)

22 NOVEMBER 2024

[G. SATAPATHY, J.]

Issue for Consideration

Whether father is liable to pay monthly maintenance of ₹ 10,000/- per month for a child of two years.

Headnotes

FAMILY COURTS ACT, 1984 ─ Section 19(4) r/w Section 401 of Cr.P.C. ─ Quantum of maintenance ─ Interference of Court ─ The petitioner/ father challenges the order of learned Judge, Family Court, Puri where the learned Court directed to pay a sum of ₹ 10,000/- per month to Opp. Party child towards monthly maintenance ─ Whether ₹ 10,000/- is exorbitant for maintenance of child of two years and such order of maintenance should be interfered with.

Held: No ─ Children are to be maintained as per the standard of their parents ─ The father is not absolved of his duty to maintain his son, but when the father and mother both are earning, the expenses of the child has

to be borne by both of them – The learned Judge, Family Court has assessed the monthly requirement of the child at ₹ 25,000/- per month and since mother is getting more salary than father, learned Judge, Family Court accordingly calculated the share of the father at ₹ 10,000/-, which does not appear to be erroneous or arbitrary or illegal. (Paras 7 & 8)

Citations Reference

Rajnesh Vrs. Neha & anr, **(2021) 2 SCC 324;** Neha Tyagi Vrs. Lieutenant Colonel Deepak Tyagi**, (2022) 3 SCC 86 ─ referred to.**

List of Acts & Codes

The Family Courts Act, 1984; Code of Criminal Procedure, 1973

Keywords

Quantum of maintenance, Maintenance to son, Assessment.

Case Arising From

Judgment dated 29.07.2023 passed in CRP No.92 of 2021 by the learned Judge, Family Court, Puri.

Appearances for Parties

For Petitioner : Mr. P. Das
For Opp.Party : --

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This revision is directed against the impugned judgment dated 29.07.2023 passed in CRP No.92 of 2021 by which the learned Judge, Family Court, Puri has directed the revisional-petitioner to pay a sum of Rs.10,000/- per month to the OP-minor child towards monthly maintenance w.e.f 01.12.2021.

2. It is undisputed that the OP-minor son is the legitimate son of the revisional-petitioner and his wife Saibismita Priyadarshini Aich under whose custody the child resides, but she does not claim any maintenance for herself. Due to dissension, the wife and husband (revisional-petitioner) although married, are living separately, but the son-OP is staying with his mother. Both husband and wife are employed and are serving as Assistant Manager in Punjab National Bank and Manager in Canara Bank respectively. On the aforesaid background, an application for maintenance for the son being represented by his mother guardian has been filed, which came to be registered in CRP No.92 of 2021 which was accordingly allowed and the learned Judge, Family Court, Puri by assessing the requirement of the son to be at Rs.25,000/- directed the revisional petitioner to pay a sum of Rs.10,000/- as his share for the maintenance of his son. Being aggrieved with such order, the present revision has been filed by the revisional-petitioner-cum-father of OP.

3. In the course of hearing of the revision, Mr. Parsuaram Das, learned counsel for the petitioner by highlighting the age of the petitioner submits that it is quite exorbitant to award a sum of Rs.10,000/- for the maintenance of a child aged about two years, but the learned Judge, Family Court, Puri irrationally has awarded such amount to the OP-son and that too, the mother guardian being the Manager of Canara Bank and drawing salary more than what the petitionerfather is drawing has claimed maintenance in the guise of maintenance to the son only to harass the revisonal petitioner. Accordingly, Mr. Das prays to set aside the impugned order.

4. After hearing the learned counsel for the petitioner upon perusal of record, it cannot be forgotten that the age of the child must be around four years since his age was two years at the time of filing of application in the year 2021. It is also an admitted fact that both mother and father are Bank employees and drawing good salary. The learned trial Court, has, however, by taking into account the admission of the revisional-petitioner assessed his monthly gross salary at Rs.65,334/-. What is more important is the determination of the requirement of the OP-son for maintenance, who is admittedly a dependent child and whose mother is also employed with whom he is residing.

5. In deciding the maintenance for a child, one should not forget the mode or manner in which maintenance is to be assessed for child was considered by the Apex Court in its judgment in ***Rajnesh Vrs. Neha and another; (2021) 2 SCC 324***, wherein the criteria was laid down for determining the quantum of maintenance for minor children in paragraphs-91 and 92 thereof which are extracted as under:-

> *"**91**. The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extracurricular/coaching classes, and not an overly extravagant amount which may be claimed.*
>
> ***92**. Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties."*

6. The issue with regard to maintenance of minor child had also been come up before the Apex Court in ***Neha Tyagi Vrs. Lieutenant Colonel Deepak Tyagi; (2022) 3 SCC 86***, wherein while upholding the decree of divorce granted by the learned trial Court, it is held by the Apex Court that even after the divorce, the husband is not absolved of his liability and responsibility to maintain child/son till he attains the age of majority. In a dispute between the husband and wife, the child should not be made to suffer. In the aforesaid decision, the Apex Court has further held in paragraph-6 as under:

> *"However, at the same time, the respondenthusband cannot be absolved from his liability and responsibility to maintain his son Pranav till he attains the majority. Whatever be the dispute between the husband and the wife, a child should not be made*

to suffer. The liability and responsibility of the father to maintain the child continues till the child/son attains the age of majority. It also cannot be disputed that the son Pranav has a right to be maintained as per the status of his father. Xx xx"

7. It is, therefore, clear that the father is not absolved of his duty to maintain his own son, but when the father and mother are both earning, the expenses of the child has to be borne by both of them. This Court, however, wishes to address to the submission as advanced for the petitioner that Rs.10,000/- is too high for a child of two years for its maintenance requirement, but the child in this case must be around four years or more. Further, law is equally settled that the children are to be maintained as per the standard of their parents. It cannot be disputed while taking into account the standard of the parents in this case, that the child may be admitted in a private school where the tuition fees would not be less than Rs.5,000/-, besides its requirement for other things like food, clothing, medical expenses, extra coaching classes so also training for extracurricular activities and in that event, the child would require more amount.

8. In the present case, the learned Judge, Family Court, Puri has assessed the monthly requirement of the child at Rs.25,000/- per month for schooling, health, food and clothing etc., but since mother is getting more salary than the father, the learned Judge, Family Court, Puri accordingly calculated the share of father at Rs.10,000/- out of the amount of Rs.25,000/- required for maintenance of the child by directing the father to contribute Rs.10,000/- per month to his son as monthly maintenance of the child w.e.f. 01.12.2021 till the child attains the age of majority. Hence, the direction to the revisional petitioner to pay such amount to his minor son in the circumstance does not appear to be erroneous or arbitrary or illegal.

9. In the result, the revision petition being devoid of merit stands dismissed, but without any costs.

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

Result of the case :
Review Petition dismissed

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2024 (III)-ILR-CUT-1279

DILLAR MOHALLIK
V.
PRAMILA DAS

(CRLA NO.324 OF 2017)

18 NOVEMBER 2024

[G. SATAPATHY, J.]

Issue for Consideration

Whether the complaint under Section 138 of the Negotiable Instruments Act is maintainable without condonation of the delay.

Headnotes

(A) NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 r/w proviso of sub section (b) to Section 142 – The learned JMFC acquitted the accused from the charge U/s. 138 of Act clearly on the ground of delay in presenting the complaint before the concerned court without delay being condoned – Whether the acquittal is sustainable.

Held: No – In order to overcome the technicality of limitation period, the proviso has been inserted in the Act which came into force on 06.02.2003 by the legislature – It would, therefore, definitely be the duty of the Court to examine the issue of limitation in a proceeding under N.I. Act pragmatically in the interest of justice in-as-much as people approach the Court with a hope and trust to get justice and the Court is not there to perpetuate illegality committed by one or other party on the basis of technicality and that too, when special provision is there. (Para 6)

(B) NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 142 proviso to sub-section (b) – Limitation – Whether a complaint is maintainable after the prescribed period of limitation of 30 days.

Held: Yes – The Court is not powerless to condone the delay in view of proviso appended to Section 142(b) of the Act, which prescribe that cognizance of a complain may be taken by the Court after the prescribed period of limitation of 30 days, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period. (Para 6)

(C) GENERAL CLAUSES ACT, 1897 – Section 27 – Effective date – The accused received the information from the postal authority on 23.04.2013 – The signature of postal authority below the endorsement with date is 30.04.2013 – Which is the effective date for presumption as to service of demand notice for calculation of limitation of fifteen days?

Held: The demand notice was presumed to be served on the respondent/ accused on 30.04.2013 by invoking Section 27 of the General Clauses Act, 1897. (Paras 5 & 8)

Citations Reference

State of Maharastra Vrs. Sharadchandra Vinayak Dongre: **(1995) 1 SCC 42– referred to.**

List of Acts

Negotiable Instruments Act, 1881; Negotiable Instruments (Amendments and Miscellaneous Provisions) Act, 2002; General Clauses Act, 1897

Keywords

Condonation of delay; Limitation, Satisfaction of Court, Presentation of Complaint, Effective date, Service of Demand Notice.

Case Arising From

Judgment dated 21.03.2016 passed by the learned JMFC-Civil Judge (Jr. Divn), Rourkela in 1CC No. 455 of 2013.

Appearances for Parties

For Appellant : Mr. M.K. Mishra
For Respondent : Mr. H.B. Dash

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This appeal against acquittal under Section 378(4) of the CrPC is directed against the impugned judgment dated 21.03.2016 passed by the learned JMFC-Civil Judge (Jr. Divn), Rourkela in 1CC No.455 of 2013 acquitting the accused Respondent herein of the charge under Section 138 of the Negotiable Instruments Act, 1881 (in short, "the Act") clearly on the ground of delay in presenting the complaint before the concerned Court and that too, without delay being condoned.

2. In the course of hearing, neither the counsel for the appellant nor the Respondent dispute the aforesaid factual aspect of acquittal of the accused on the ground of delay of one day, but Mr. Malaya Kumar Mishra, learned counsel for the appellant submits that in fact no delay has been occasioned in filing the complaint, in view of the Ext.7 which discloses that the demand notice was returned by the postal authority after keeping it for seven days which came to the knowledge of the complainant on 30.04.2013, but by taking into account a stray admission made by the complainant in his Examination-in-Chief that the accused received the information from the postal authority on 23.04.2013, the learned trial Court erroneously calculating the period of limitation to present the complaint has returned with the finding that the complaint was filed beyond the prescribed period of limitation, which is contrary to the law and weight of evidence and thereby, such impugned judgment needs to be set aside.

3. On the contrary, Mr. H.B. Dash, learned counsel for the Respondent vehemently opposes and submits that not only the appellant has admitted about the fact that the demand notice was received by the Accused-Respondent on 23.04.2013, but also no application for condonation of delay has been filed to condone the delay in presenting the complaint and, therefore, the impugned judgment does not appear to be contrary to the provisions of law. Mr. Dash accordingly prays to dismiss the appeal.

4. In view of the rival submission, the only disputed question remains to be solved is whether the demand notice was served on the Accused-Respondent on 23.04.2013 or 30.04.2013, but it is an admitted fact that the paragraph-5 of the Examination-in-Chief of the complainant contains a statement that the accused received the information from the postal authority on 23.04.2013, but fact remains that Ext.7, the certified copy of which is produced before this Court by Mr. Malaya Kumar Mishra, learned counsel for the appellant indicates the endorsement of the postal authority "Addressee not available after deposit seven days. Hence, it return to sender" with signature of the postal authority superscribed below such endorsement with date 30.04.2013. Further, the learned trial Court at paragraph-12 of the impugned judgment has presumed that the notice has been served on the addressee (Respondent), but on perusal of such document under Ext.7, the learned trial Court has found that the notice was returned because the addressee was not available even after deposit of such notice by the postal authority for seven days.

5. In view of the aforesaid facts and taking into account the provision of Section 138(c) of the Act, which prescribes that unless the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque **within fifteen days of the receipt of the said notice**, it can be well said that the "limitation of fifteen days" for payment of the cheque amount as aforesaid would start to run after receipt of the demand notice by the drawer of the cheque. In this case, if we take Ext.7 into consideration, it would suggest that the demand notice cannot be presumed to have been served on the drawer of the cheque till 30.04.2013, on which date the presumption as to service of demand notice can be made by invoking Sec. 27 of the General Clauses Act, 1897 and in that event, there would be no delay in presenting the complaint before the learned trial Court and, therefore, the impugned judgment on that score is liable to be set aside inasmuch as the learned trial Court by taking the date of receipt of demand notice to be "23.04.2013" has erroneously considered and calculated the starting point of limitation for filing complaint from the date 08.05.2013, but the same should have been 15.05.2013 to calculate the prescribed period of limitation of one month for filing the complaint in terms of Sec. 142(b) of the Act and, thereby, the limitation to file the complaint should be 14.06.2013. Hence, the impugned judgment in the aforesaid context is liable to be set aside.

6. Be that as it may, the cognizance has been taken in this case without taking into account any delay in filing the complaint, but even after in a case, if there is a delay, the Court is not powerless to condone the delay in view of the proviso appended to Section 142(b) of the Act, which prescribes that the cognizance of a complaint may be taken by the Court after the prescribed period of limitation of 30 days, if the complainant **satisfies the Court** that he had sufficient cause for not making a complaint within such period. The aforesaid proviso does not refer to filing of any petition for condonation of delay, but it only lays stress emphasis on the "satisfaction of the Court" for believing the inability of the complainant to institute the complaint within the prescribed period of limitation for sufficient cause and,

thereby, if the Court is satisfied that the delay occasioned is due to sufficient cause to be shown by the complainant, such delay can be condoned. Accepting, but not admitting the delay of one day in the present case, for the sake of argument, since substantial right of the complainant is involved and the complainant has come to the Court seeking redressal of his legitimate grievance, the Court should not throw the complaint out rightly on the ground of delay, especially when it has already entertained the complaint by taking cognizance of offence without condoning the delay and has thereupon taken evidence till the stage of judgment without giving an opportunity to the party to satisfy the Court about the delay in filing the complaint. In such situation, by taking into account the statement of objects and reasons appended to the Negotiable Instruments (Amendments and Miscellaneous Provisions) Act, 2002 which introduces and incorporates the proviso to Sub-Section (b) to Sec. 142 of the Act, it can be well said that in order to overcome the technicality of limitation period, the proviso has been inserted in the act which came into force on 06.02.2003 by the legislature. It would, therefore, definitely be the duty of the Court to examine the issue of limitation in a proceeding under N.I. Act pragmatically in the interest of justice inasmuch as people approach the Court with a hope and trust to get justice and the Court is not there to perpetuate illegality committed by one or other party on the basis of technicality and that too, when special provision is there. Had there been no provision to condone the delay in NI Act, the Court would be justified to throw the complaint of the complainant by observing that the delay occasioned in filing the complaint cannot be condoned.

7. It is not in dispute that the proviso to Sec. 142(b) of the N.I. Act confers power on the court taking cognizance of the offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that the complainant was prevented for sufficient cause for not making the complaint within the prescribed period. Obviously, therefore in respect of the offence U/S. 138 of the N.I. Act for which a period of limitation has been provided for entertaining a complaint in Section 142(b) of the Act, power has been conferred on the court taking cognizance of offence to extend the said period of limitation to present the complaint, where a proper and satisfactory explanation of the delay is made out by the complainant. The aforesaid discretion conferred on the Court has to be exercised judicially and on well recognized principle to overcome the mere technicality. This view of this Court is fortified by the decision in ***State of Maharastra Vrs. Sharadchandra Vinayak Dongre (1995) 1 SCC 42***, wherein the Apex Court has held thus:

> *"5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However,* ***having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial Court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court, however, did not adopt that course***

and proceeded further to hold that the trial Court could not have taken cognizance of the offence *in view of the application filed by the prosecution seeking permission of the Court to file a supplementary charge-sheet on the basis of an incomplete charge-sheet and quashed the order of the CJM dated 21.11.1986 on this ground also.* ***This view of the High Court, in the facts and circumstances of the case is patently erroneous."***

8. However, in this case, it appears to the Court that there was no delay in view of the fact that the demand notice was presumed to be served on the Respondent-cum-Accused on 30.04.2013, which has been erroneously presumed and held by the learned trial Court that the demand notice has been served on the Accused-Respondent on 23.04.2013. In view of the aforesaid discussion of facts and provision of law, so also the principle laid down by the Apex Court in the decision referred to above, the impugned judgment being unsustainable in the eye of law is required to be set aside and interest of justice would be best served, if the matter is remitted back to the concerned Court for fresh disposal in accordance with law. Accordingly, the impugned judgment is hereby set aside and the complaint in 1CC Case No. 455 of 2013 is remitted back to the learned trial Court for fresh disposal in accordance with law.

9. Resultantly, the appeal succeeds and stands allowed on contest to the extent indicated above, but there is no order as to costs.

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

Result of the case :
Appeal allowed.

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2024 (III) ILR-CUT-1284

ANIL KUMAR MANTRI
V.
STATE OF ORISSA & ANR.

(CRLMC NO. 2358 OF 2024)

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether the criminal proceeding initiated under the offences of Penal Code as well as under the POCSO Act can be quashed in view of the settlement between the parties.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Criminal proceeding initiated against the petitioner for the offences punishable under section 354-A of the I.P.C. r/w Section 10 of the POCSO Act –

During pendency of the case there is a settlement between the parties – The petitioner and the Opposite Party No. 2 jointly prayed for quashing of the criminal prosecution initiated against the petitioner on the ground of settlement – Whether the criminal proceeding can be quashed in view of settlement between the parties.

Held : Yes – Both the parties prayed for quashing of the criminal prosecution – Hence, this is a fit case, where this Court should exercise the inherent jurisdiction contemplated U/s. 482 Cr.P.C. subject to deposit of cost of ₹ 1,00.000/- in the name of the victim girl. (Paras 7 & 9)

Citation Reference

Rojalin Rout & anr vrs. State of Odisha, **CRLMC No.3460 of 2023**, Gian Singh vs. State of Punjab & anr. **2012 (10) SCC 303;** B.S. Joshi & ors. vs. State of Haryana & anr. **(2003) 4 SCC 675 – referred to.**

List of Code

Code of Criminal Procedure, 1973

Keywords

Quashing of criminal proceeding, Settlement between parties, Exercise of inherent power.

Case Arising From

Order dated 25.04.2024 passed by the learned Adhoc Additional District and Sessions Judge (F.T.S.C), Keonjhar in Special Case No. 06 of 2024.

Appearances for Parties

For Petitioner : Mr. P.K. Samantray, Adv.
For Opp.Parties : Mr. B.K. Ragada, A.G.A.,
Mr. A.K. Raut (O.P.2)

Judgment/Order

Judgment

SIBO SANKAR MISHRA, J.

1. The petitioner by invoking the inherent jurisdiction of this Court under Section 482 of the Cr. P.C. is seeking quashing of the order dated 25.04.2024 passed by the learned Adhoc Additional District and Sessions Judge (F.T.S.C), Keonjhar in Special Case No. 06 of 2024, whereby the learned Court below has framed the charges for the offences punishable under Section 354-A of the I.P.C. read with Section 10 of the POCSO Act against the accused petitioner.

2. The matter was taken up by this Court on 23.08.2024 and the following order was passed:-

> "This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

2. Mr. Ajit Kumar Raut, learned counsel enters appearance on behalf of the informant/ opposite party no.2 by filing Vakalatnama in Court today, which is taken on record.

3. Heard learned counsel for the petitioner, learned counsel for the State and learned counsel for the opposite party no.2.

4. The petitioner is an accused in connection with Keonjhar Sadar P.S. Case No.66 of 2024 registered under Section 376(1) of the IPC read with Section 4 of the POCSO Act corresponding to Special Case No.6 of 2024 pending in the Court of learned Ad hoc Additional District & Sessions Judge (FTSC), Keonjhar.

5. The prosecution case is that the petitioner was working as Headmaster in Narasinghpur Primary School in which, the victim was studying. On 08.01.2024, the petitioner asked the victim to come to his office room and when she came, the petitioner touched and kissed her private part. The petitioner/accused had forced the victim to keep physical relationship with him and further told the victim not to disclose the same. On the basis of such allegation, the F.I.R. was lodged.

6. In this case, after investigation, charge sheet has been submitted and subsequent thereto, charges have been framed against the petitioner. At this stage, the petitioner has entered into a settlement with opposite party no.2. Therefore, on the ground of settlement, the petitioner seeks indulgence of this Court to quash the entire proceeding.

7. The petitioner and opposite party no.2 are present in Court today through their respective counsel. They have filed their self-attested photocopies of their Aadhar Cards to establish their identity, which are taken on record. They have also filed a joint affidavit dated 23.08.2024, inter alia, stating that due to misunderstanding, the F.I.R. came to be registered against the petitioner and now to maintain the peace and tranquility, on the intervention of the family members and well-wishers of both the parties, they have arrived at a settlement. Therefore, the opposite party no.2 is not willing to prosecute the petitioner any more. The affidavit is taken on record.

8. Mr. Ragada, learned Additional Government Advocate submits that he does not have the case diary to assist this Court. Hence, he seeks for an adjournment to obtain the same.

9. List this matter on 3rd of September, 2024. In the meantime, learned counsel for the State shall obtain the case diary. 10. In view of the peculiarity of the present case, the further proceeding in Special Case No.6 of 2024 pending in the Court of learned Ad hoc Additional District & Sessions Judge (FTSC), Keonjhar shall remain stayed till the next date of hearing."

3. Pursuant to the said order, the petitioner as well as the opposite party No.2 along with the victim girl are present in Court today and they are being represented by their respective counsels. They have also filed their self-attested copies of their Aadhaar Cards to establish their identity.

4. The matter was taken up in camera. This Court separately interacted with the victim girl, her mother and the father of the victim girl. The victim girl *inter alia* stated that she was not sexually exploited by the petitioner. The father of the victim girl stated that due to misunderstanding, the case was filed against the petitioner. The mother of the victim also retorted in the similar line.

5. I have perused the materials on record. It reveals from the materials form part of the charge-sheet that the victim girl was indeed not subjected to penetrative

sex. The petitioner has only outraged the modesty of the victim girl by asking her to denude and also alleged to have touched her private parts. That is the reason, although the police had filed the charge-sheet for the alleged offences under Sections 376(3) of I.P.C. read with Section 6 of the POCSO Act, but the trial Court after evaluating the evidence, has framed the charges against the petitioner for the alleged offences punishable under Sections 354-A of the I.P.C. read with Section 10 of the POCSO Act. When the matter stood thus, the parties stated to have settled their dispute.

6. A joint affidavit dated 23.08.2024 has been filed by the petitioner and the opposite party No.2, the father of the victim girl. In the said affidavit, they *inter alia* stated as under:-

> "4. That at the intervention of family members and well-wishers of both the parties the matter has been amicably settled outside the court.
>
> 5. That upon such amicable settlement there is a good relationship is continuing between them. The possibility of conviction is remote and bleak and the continuation of the criminal case against the petitioner would put both the parties to great oppression, prejudice and extreme injustice would be caused to them if criminal proceeding is continued any further.
>
> 6. That the opp. Party no.2/informant does not want to proceed any further with the criminal proceeding vide Keonjhar Sadar P.S. Case No.66/2024, corresponding to Special Case No.06/2024, pending in the Court of the learned Adhoc. Additional District & Sessions Judge (FTSC), Keonjhar.
>
> 7. That all the parties concerned i.e. petitioner and opp. Party no.2/informant are swearing this affidavit out of their free and sweet will and without any threat, coercion, influence, promise and pressure."

7. The petitioner and the opposite party No.2 jointly prayed for quashing of the criminal prosecution initiated against the petitioner on the ground of settlement by relying upon the judgment of this Court in the case of ***Rojalin Rout and another vrs. State of Odisha*** *in* ***CRLMC No. 3460 of 2023*** and batch. Learned counsel for the petitioner submitted that the case was in fact filed due to sheer misunderstanding, no offence has been committed by the petitioner. The opposite party No.2 has now realized his mistake and came forward to settle the dispute. Hence, this is a fit case, where this Court should exercise the inherent jurisdiction contemplated under Section 482 Cr.P.C. It is well settled by the judgments of the Hon'ble Supreme Court in the case of ***Gian Singh vs. State of Punjab and another*** *reported in* ***2012 (10) SCC 303*** and ***B.S. Joshi & others vs. State of Haryana & another*** *reported in* ***(2003) 4 SCC 675***, if the Court at any stage finds that subjecting the petitioner to the rigors of criminal trial would be a futile exercise and there is a bleak chance of securing conviction, the proceeding could be quashed by exercising the jurisdiction under Section 482 Cr.P.C.

8. Perusal of the materials available on record coupled with the affidavit sworn by the parties and placed before this Court makes out a definite case for quashing of the F.I.R. However, this Court is alive to the fact that the victim girl has been

subjected to the trauma of facing police interrogation and subsequently appearing before the trial Court as well as before this Court. Even if it is inferred that the case was filed against the petitioner on sheer misunderstanding, the fact remains that the minor girl has been subjected to appear before the police as well as the Courts, which undoubtedly is traumatic for an innocent child of her age. Therefore, although I am inclined to allow this petition for quashing of the entire criminal prosecution against the petitioner keeping in view the entirety of the attending circumstances and the judgments cited by the parties at the bar, but this Court imposed a cost of Rs.1,00,000/- (Rupees One Lakh) on the petitioner. The petitioner has indeed agreed, rather volunteered to deposit the amount. Therefore, the petitioner is directed to deposit Rs.1,00,000/- (Rupees One Lakh) in a nationalized Bank on fixed terms in the name of the victim girl and the said amount shall be utilized for the purpose of education of the victim girl. The same shall be done within four weeks.

9. Subject to the petitioner depositing cost of Rs.1,00,000/- in the name of the victim girl as directed, the impugned order dated 25.04.2024 passed by the learned Adhoc Additional District & Sessions Judge, (F.T.S.C), Keonjhar in Special Case No.06 of 2024 arising out of Keonjhar Sadar P.S. Case No.66 of 2024 and the consequential proceeding arising therefrom are quashed.

10. With this aforesaid observation, the CRLMC is disposed of.

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

Result of the case :
CRLMC disposed of.

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2024 (III) ILR-CUT-1288

Dr. SUBHANARAYAN MOHAPATRA
V.
STATE OF ORISSA

(CRLA NO. 21 OF 2006)

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether mere acceptance of bribe is sufficient to fasten the guilt on the accused.

Headnotes

CRIMINAL TRIAL – Offence U/s. 7 of the Prevention of Corruption Act, 1988 – Trap Case – Acceptance/recovery of illegal gratification – Presumption – Accused failed to discharge the burden of proof that he

has accepted the tainted money as legal remuneration – But the prosecution failed to prove the demand of bribe – Order of conviction challenged – Whether mere acceptance of bribe is sufficient to fasten the guilt on the accused.

Held: No – In a trap case, mere receipt of bribe money by the accused is not sufficient to fasten guilt on the accused, in the absence of any other evidence with regard to the demand of the illegal gratification. (Para 14)

Citations Reference

Hazari Lal v. State (Delhi Administration), **(1980) 2 SCC 390;** T. Shankar Prasad v. State of A.P., **(2004) 3 SCC 753**; Raghubir Singh v. State of Haryana, **(1974) 4 SCC 560;** Neeraj Dutta v. State (Govt. of NCT of Delhi, **(2021) 17 SCC 624;** V. Sejappa v. State, **(2016) 12 SCC 150 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Prevention of Corruption Act, 1988.

Keywords

Trap case, Acceptance of illegal gratification, Receipt of bribe money, Tainted money, Burden of proof, Proof of demand of bribe.

Case Arising From

Judgment and Order dated 24.12.2005 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.87 of 1999.

Appearances for Parties

For Appellant : Mr. R.K. Pattanaik
For Respondent : Mr. M.S. Rizvi, A.S.C

Judgment/Order

Judgment

S.S. MISHRA, J.

The present Criminal Appeal filed by the appellant under Section 374(2) of the Cr.P.C. is directed against the judgment and order dated 24.12.2005 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.87 of 1999, whereby the learned trial Court has convicted the accused-appellant of the offence under Section 7 of the Prevention of Corruption Act, 1988 and sentenced him to undergo imprisonment for a period of six months and to pay a fine of Rs.1,000/-, in default, to undergo further imprisonment for one month.

2. The prosecution case, in short, is that, on 07.10.1996, one Sarat Kumar Rout, hereinafter referred to as the complainant, presented a written report before the O.I.C., Vigilance Police Station, Cuttack Division, *inter alia*, alleging therein that, on 28.09.1996, he had taken his son and daughter to the hospital for their treatment. The appellant, after examining both the children, demanded Rs.20/- each and the

complainant protested to the same, but eventually, paid the amount. Subsequently, when the complainant further wanted to take his daughter for treatment, the appellant again demanded Rs.20/- to prescribe medicines. Being aggrieved, the complainant presented the written report before the Inspector of Vigilance, Bhubaneswar. After registration of the F.I.R., as per the direction of the S.P., Vigilance, Cuttack Division, a legal trap was arranged and after giving demonstration, report was prepared. The trap was successful, the appellant was caught red-handed and subsequently he was arrested. Thereafter, the detection report was prepared. After the completion of investigation, charge sheet was submitted under Sections 13(2) read with Section 13(1)(d) and Section 7 of the P.C. Act against the appellant.

3. During the trial, the prosecution, in order to substantiate the charges, examined seven witnesses, including the complainant as P.W.2, and exhibited 16 documents. On the other hand, the defence presented a plea of complete denial, false implication, and examined three witnesses in support of his defence.

4. Out of 7 witnesses examined by the prosecution, P.W.1 was the Magisterial witness, who accompanied the raiding party to the hospital. P.W.2 was the complainant, P.W.3 was the overhearing witness, and P.W.4 was the witness to prove the writing and signature of the accused in the prescription. P.W.6 was the Scientific Officer and P.W.7 was the I.O. of the case.

5. The learned trial Court, upon appreciation of the evidence, found that the evidence of P.W.3, the over-hearing witness, got corroborated with the testimony of P.W.2, the complainant, with respect to the demand of the bribe by the accused. Additionally, the evidence of P.W.7, the I.O., proved the recovery of the tainted money from the accused. Moreover, the defence failed to show that the amount of Rs.20/- was a legal remuneration that the appellant was entitled to receive.

6. The learned trial Court, after analyzing the entire evidence on record, came to a conclusion that the prosecution successfully proved its case beyond reasonable doubt with respect to the offence under Section 7 of the P.C. Act, and thereby sentenced the accused/appellant to undergo imprisonment for six months and to pay a fine of Rs.1,000/-, and in default, to undergo further imprisonment for one month. However, due to lack of relevant evidence, the learned trial Court acquitted the accused of the offence under Section 13(1)(d) read with Section 13(2) of the P.C. Act.

7. PW.1 and P.W.3 being the magisterial witness and the overhearing witness respectively, have reneged on their statement recorded under Section 161 of Cr.P.C., and did not support the prosecution case. In that scenario, the prosecution has been left with the evidence of P.W.2, who was the decoy/complainant in the present case. With regard to the demand of bribe by the present accused, P.W.2, in his statement, has given a shaky account, which does not inspire confidence. The statement of

P.W.2 is the backbone for the prosecution case and has been dealt with by the learned trial Court in the following manner:

> *"8. As indicated above P.W.2's evidence is the solitary evidence on the question of demand of Rs.20/- by the accused for treatment of his daughter namely "Baby" pending consideration of the credibility or genuineness of his version, certain admitted facts made by the accused himself in that regard deserves consideration as the admitted fact need not be proved. In his evidence the accused has admitted that he has issued two prescriptions Exts.12/1 and 12/2 on 8.10.96 in the name of Sarat Rout and Babi respectively. They are the complainant and his daughter. It is the consistent claim of the complaint that the accused demanded Rs.20/- in respect of his daughter "Baby' and not in respect of himself or his son. However, the fact remains that the accused has issued the prescription Ext.12/2 in respect of daughter of the complainant on the concerned day. As such that part of the fact stated by P.W.2 can safely believed to find that the accused has attended the daughter of the complainant on the concerned day.*
>
> *9. With regard to the alleged demand of Rs.20/- by the accused at the hospital attending her, the contents the F.I.R. Ext.11 does not clearly speak about it, as the complainant too in his evidence has not specifically told about demand of the accused at the spot. P.W.2 (complainant) has not disclosed in his evidence if at all he contacted the accused that he would bring his daughter to the accused for her treatment on 8.10.96 and that the accused raised the demand of Rs.20/-. The evidence of the I.O. (P.W.7) and that of P.W.3 also is silent on his subtle, who have simply stated that the accused demanded and collected Rs.20/- from each patient as per the version of P.W.2 received during the preparation of the trap. As such, it is undoubtedly the fact that the F.I.R has been lodged by P.W.2 without any specific demand of Rs.20/- on or before 8.10.96 by the accused and under the impression that the accused would take Rs.20/- from P.W.2 as usual on 8.10.996 for treatment of the daughter of P.W.2."*

8. It is immaterial as to whether the demand was made earlier or at the spot instantly because all that is required to prove the guilt of the accused is that there be a demand and an acceptance of the bribe money, which is not due to him in discharging his duties as public servant. As indicated above, one part of the claim of the complainant about treatment of his daughter by the accused has been believed for the admission of the accused to have issued the prescription marked as Ext.11/2 on the relevant day after attending the daughter of P.W.2. Secondly, though the evidence of P.W.2 about demand and acceptance of Rs.20/- has not been completely corroborated by the testimony of the overhearing witness (P.W.3), but the plea has been taken by the accused that he received the money from P.W.2 not at the hospital, but on the way to home, the onus shifts on the defence to prove the same. Since there is no controversy that the currency notes recovered from the accused are the tainted money itself, the plea of the accused amounts to an admission limited to the factum of receipt of the money by him. In that case, the accused has the heavy burden on him to prove that it was received for some other purpose and not as bribe. In this connection, evidence of overhearing witness (P.W.3), the evidence of the I.O. (P.W.7), the detection report (Ext.2) and the seizure list Ext.5 and the fact that hand wash of the appellant had positively reacted in sodium carbonate solution are overwhelming evidence against the accused to establish the fact that he received the

tainted money at the spot and not elsewhere. The evidence of P.W.3 on this aspect and P.W.1 not supporting the prosecution version, no more affects the bonafides of the prosecution case on the aspect of receipt of tainted money, in view of the admission of the accused and recovery of money from his possession. Therefore, the prosecution could prove the factum of "Acceptance".

9. However, analysis of the evidence by the learned trial Court indicates that the prosecution has indeed failed to prove the factum of the "demand". I am completely in agreement with the findings of the learned trial Court insofar as failure of the prosecution to prove the factum of demand is concerned.

10. Mr. Rizvi, learned Additional Standing Counsel for the Vigilance Department, submitted that even if the factum of demand is not proved, the conviction recorded by the Court below under Section 7 of the P.C. Act against the petitioner could be sustained. There is no requirement to have direct evidence regarding the factum of demand, suffice to have circumstantial evidence. He further submitted that enough material has come on record to prove that the accused has accepted the bribe during the trap. Therefore, the presumption under Section 20 of the P.C. Act operates against him. The prosecution, in these circumstances, is only required to prove that the accused has accepted or agreed to accept the gratification, even though there may not be having any direct evidence of demand. Even if the direct evidence of demand is absent, conviction can be made by judicial scrutiny of circumstantial evidence and material evidence with the aid of Section 20 of the P.C. Act. He relied upon various judgments, starting from the judgment reported in **(1980) 2 SCC 390** in the case of **Hazari Lal v. State (Delhi Administration),** to the judgment reported in **(2004) 3 SCC 753** in the case of **T. Shankar Prasad v. State of A.P.** He further submits that, in the present case, the chemical wash of both the hands and shirt pocket of the accused was all positive. The examination report from the State Forensic Science Laboratory vide Ext.15 further fortifies the factum of acceptance. He also submitted that it is a settled principle of law that very fact that the accused was in possession of tainted GC notes against an allegation that he demanded and received the amount is res ipsa loquitor. He has relied upon the judgment of the Hon'ble Supreme Court reported in **(1974) 4 SCC 560** in the case of **Raghubir Singh v. State of Haryana** and submitted that presumption under Section 20 of the P.C. Act is obligatory against the accused. In the present case, the accused has miserably failed to rebut the presumption that the money recovered was received as legal remuneration and as such, it could be presumed that the money received by the accused was for a motive or reward other than legal remuneration. He further submitted that though the appellant had taken a plea of defence that the money received from the complainant was the loan given by the appellant to the complainant to purchase medicines, such plea is per se inadmissible and not plausible at all. This was outrightly rejected by the learned Court below, which is, in fact, the right appreciation of the evidence.

Relying upon the judgment of the Constitutional Bench of the Hon'ble Supreme Court passed in **Neeraj Dutta v. State (Govt. of NCT of Delhi,** reported in **(2021) 17 SCC 624,** Mr. Rizvi submitted that the conviction recorded by the learned Court below cannot be questioned merely because of the fact that the alleged demand made by the accused could not be proved. The Constitution Bench has held that, in absence of the evidence of the complainant (direct/primary, oral/ documentary evidence), it is permissible to draw an inferential deduction of the culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the P.C. Act based on other evidence adduced by the prosecution on receipt of the tainted money.

11. Mr. Rizvi in nutshell submitted that in the instant case, the prosecution has sufficiently proved the factum of acceptance and the accused has failed to discharge his burden of proof that he has accepted the said tainted money as legal remuneration. Therefore, under the aid of Section 20 of the P.C. Act, the petitioner has been rightly convicted.

12. It is no more res integra that demand and acceptance, both are prime ingredients to establish the offence under Section 7 of the P.C. Act. Section 7 of the Act deals with the offences relating to public servants. The contours of the Act and the specific provisions, i.e., Sections 7, 9 and 13 and their interplay demonstrates that to prosecute any public servant for the offence of bribery, the condition precedent of invoking Section 7 of the Act is to prove that he has made a demand. In other words, without there being any proof of demand, there can be no conviction under Section 7 of the P.C. Act. It is also no more res integra that a mere recovery of the alleged tainted/bribe money from the accused cannot be a ground to convict the accused without there being specific proof of demand of bribe.

13. The Hon'ble Supreme Court in the Case of ***V.Sejappa v. State,*** reported in ***(2016) 12 SCC 150,*** has held as under:-

> *"20. In State of Kerala v. C.P. Rao [State of Kerala v. C.P. Rao, (2011) 6 SCC 450 : (2011) 2 SCC (Cri) 1010 : (2011) 2 SCC (L&S) 714], it was held that mere recovery of tainted money is not sufficient to convict the accused and there has to be corroboration of the testimony of the complainant regarding the demand of bribe.*
>
> *21. While dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it illegal gratification and that the prosecution has a further duty to prove that what was paid was an illegal gratification, reference can be made to the following observation in Mukut Bihari v. State of Rajasthan[Mukut Bihari v. State of Rajasthan, (2012) 11 SCC 642 :(2013) 1 SCC (Cri) 1089 :(2013) 1 SCC (L&S) 136], wherein it was held as under : (SCC pp. 645-46, para 11).*
>
> *"11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount*

as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person."

14. In view of the aforementioned settled principle of law, in a trap case, mere receipt of bribe money by the accused is not sufficient to fasten the guilt on the accused, in the absence of any other evidence with regard to the demand of the illegal gratification.

15. I have perused the evidence on record as well as the finding recorded by the learned Court below. It is ample to prove on record that the prosecution could not prove the factum of allegation of demand made by the accused beyond all reasonable doubts. Therefore, even if the factum of acceptance is proved by the prosecution, the liability under Section 7 of the P.C. Act cannot be affixed. Hence, the accused/appellant is entitled to benefit of doubt.

16. Accordingly, the conviction of the accused/appellant recorded by the learned Special Judge (Vigilance), Bhubaneswar vide judgment dated 24.12.2005 passed in T.R. Case No.87 of 1999 is set aside. He is set free and the bail bond is discharged.

17. The Criminal Appeal is accordingly allowed and disposed of.

Headnotes prepared by:
Jnanendra Ku. Swain, Judicial Indexer
(Verified by Shri Pravakar Ganthia, Editor- in-Chief)

Result of the case :
Appeal allowed.

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2024 (III) ILR-CUT-1294

RABINDRA MAJHI@ RABI
V.
STATE OF ODISHA

(CRLA NO. 1298 OF 2023)

08 NOVEMBER 2024

[ANANDA CHANDRA BEHERA, J.]

Issue for Consideration

Whether rejection of bail of CICL without considering the social investigation report is valid as per law.

Headnotes

(A) JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 – Section 12 – Bail – Learned Special Judge (POCSO)-cum-Additional Sessions Judge refused bail of the Appellant on the grounds that the allegations are grave and serious in nature and in case of release of the CICL on bail, there is likelihood of his fleeing away from justice and chances of his interference with the witnesses, when the social investigation report as stated above does not reveal that the appellant was subjected to any form of abuse or was a victim of any incident earlier at any point of time – Whether the rejection of bail without considering the social investigation report is sustainable.

Held : No **–** The reasons assigned by the learned Special Judge (POCSO)-cum-Additional Sessions Judge are not fulfilling any of the criteria of the proviso to Sub-section (1) of Section 12 of the J.J.(CPC) Act, 2015 and when the mother guardian of the CICL is available in the house to look after him for the betterment of his future and when the bail has been refused without taking into the social investigation report and when there are inherent fundamental defects in the refusal order of bail of the appellant passed by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, the same cannot be sustained under law. (Para 13)

Citations Reference

State of Tamil Nadu vrs. Union of India and others, **2020 (2) OJR-73(S.C.)**; Pankaj Kumar Malik vrs. State of Odisha, **2016 (1) CLT Crl. (Supp.)-Criminal-17**; Vigneshwaran @ Vignesh Ram vrs. State, **2016 (4) Crime-78 (Madras)**; Amit Yadav Alias Monu Alias Bebo vrs. State of U.P. and Anr, **2016(4) Crime-188(Allahabad)**; A Juvenile vrs. State of Orissa, **2009 Cr.L.J. 2002 (Orissa)**; Ankit Upadhyaya and others vrs. State of Chhatisgarh, **JJ (C&P) 2013(3) Crimes-252 (Chhatisgarh);** Manish Kumar vrs. The State of Jharkhand, **2011(4) Crimes-204 (Jharkhand)**; Shahnawaz Hussain vrs. The State of Jharkhand, **2023(1) Crimes-406 (Jharkhand)**; Vishvas vrs. State of Punjab (dated 08.02.2021), **CRR 53 of 2021 (O&M) (P&H) – referred to.**

List of Acts

Juvenile Justice (Care & Protection of Children) Act, 2015

Keywords

Rejection of bail, CICL, Social Investigation report.

Case Arising from

Order of bail passed on 16.08.2023 by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar in C.T. No.220 of 2023.

Appearances for Parties

For Appellant : Mr. Manas Kumar Chand
For Respondent : Mr. G. Mohanty, S.C, Mr. A.K. Sahoo (for the informant)

Judgment/Order

Judgment

A.C. BEHERA, J.

This is an appeal under Section 101(5) of the Juvenile Justice (Care and Protection) Act, 2015 (in short „the JJ (C&P) Act, 2015), which has been preferred by the appellant (CICL) challenging the rejection order of his bail passed on dated 16.08.2023 by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar in C.T. No. 220 of 2023.

2. The factual backgrounds of this appeal under Section 101(5) of the J.J.(C&P) Act, 2015, which prompted the CICL for preferring the same is that, he(CICL) was brought before the Principal Magistrate, Juvenile Justice Board, Khordha on dated 11.04.2023 relating to his involvement in an incident that, he(CICL) along with others had participated in that incident on dated 10.04.2023 near his house and in such incident, one person died. Thereafter, the said matter was reported at Nirakarpur Police Station and on the basis of such report, Nirakarpur P.S. Case No.95 of 2023 was registered by the police and the police proceeded with that matter and brought the CICL and produced him (CICL) on dated 11.04.2023 before the learned Principal Magistrate, Juvenile Justice Board, Khordha, but, the learned Principal Magistrate, Juvenile Justice Board, Khordha sent the CICL to the place of safety refusing his prayer for bail. Then, the said matter was sent to the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar, wherein the same was registered as C.T. No.220 of 2023, The learned Special Judge(POCSO)-cum-Additional Sessions Judge, Bhubaneswar also refused the prayer for bail of the CICL on dated 16.08.2023 assigning the reasons that,

> "the allegations are grave and serious in nature and in case of release of CICL on bail, there is yet likelihood of his fleeing away from the justice and there is chance of his interference with the witnesses in the matter."

So, the CICL challenged the said refusal order of his bail passed by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar preferring this appeal under Section 101(5) of the J.J. (C&P) Act, 2015.

3. I have already heard from the learned counsel for the appellant, the learned Standing Counsel for the State and the learned counsel for the informant.

4. During the course of hearing of this appeal, the learned counsel for the (CICL/appellant) contended that, the CICL (appellant) has passed +2 Arts and he is

very much interested for his higher study and there is no material in the record to show that, his release on bail, shall bring him (CICL/appellant) into association with any known criminal or shall expose him to moral, physical and psychological danger, for which, the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar should not have refused his prayer for bail, to which, learned Standing Counsel for the State and the learned counsel for the informant countered stating that, the reasons assigned above by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar for the refusal of bail of the CICL are not improper or unreasonable, for which, there is nothing to interfere with the same.

5. As per the provisions of law envisaged in the proviso to Subsection(1) of Section 12 of the J.J.(C&P) Act, 2015, a CICL can be denied with the privilege of bail, only if, the court of the opinion that,

> (i) there appears reasonable grounds for believing that, the release of CICL on bail shall bring him into association with any known criminal or
>
> (ii) shall expose him to moral, physical and psychological danger or that his such release would defeat the ends of justice and

6. The necessary essentials/criterias indicated above in (i) and (ii) of the proviso to Sub-section(1) of Section 12 of J.J.(C&P) Act, 2015 must be there in the record to make out any of the above grounds out of two, which may persuade the court not to release the CICL on bail.

7. As per the J.J. (C&P) Act, 2015, the nature and gravity of the allegations has no significance or bearing in the matter of consideration of bail of a CICL. So, a CICL has to be released on bail irrespective of the nature and gravity of allegations, if the necessary criterias indicated in the proviso to Sub-section (1) of Section 12 of the J.J.(C&P) Act, 2015 for the refusal of the same are not fulfilled.

8. The J.J. (C&P) Act, 2015 is a beneficial legislation, which has been enacted/ drafted to reform the child. The object of the J.J.(C&P) Act, 2015 is, to achieve the betterment of the child including CICL. It has a reformative approach. If it is found that, the ends of justice would be benefited or the, desired goals of the legislation can be achieved by detaining a CICL in a Juvenile Home or place of safety, only in that case, the bail of the CICL can be denied.

9. Therefore, as per the mandate of the provisions of Section 12 of the J.J. (C&P) Act, 2015, a CICL has to be released on bail, irrespective of the nature of allegations, because, bail for the CCL is the rule and refusal is an exception. The right of privilege of bail of the CICL can be denied, only on the basis of sufficient materials with clear and valid reasons for the same, i.e., enlargement on bail to the CICL shall be detrimental to the interest of the CICL or the refusal of his bail would benefit the ends of justice.

10. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) ***2020(2) OJR-73(S.C.) : Exploitation of Children in Orphanages in the State of Tamil Nadu vrs. Union of India and others***— J.J.(C&P) Act, 2015— Sections 10 & 12—Bail—The only embargo created for bail of the CICL is that, (i) in case the release of the child likely bring into association with known criminals or (ii) expose the child to moral, physical or psychological danger or where the release of the child would defeat the ends of justice.

(ii) ***2016(1) CLT Crl. (Supp.)-Criminal-17 : Pankaj Kumar Malik vrs. State of Odisha***— J.J.(C&P) Act, 2015—Sections 12 & 53—Bail—Release on bail of the CICL is a rule, but refusal is an exception, which can only be done in the existence of circumstances detrimental to the interest of the CICL or if the same would defeat the ends of justice—Heinousness and seriousness of an offence has got nothing to do in consideration of the prayer for bail of the CICL.

(iii) ***2016(4) Crime-78(Madras) : Vigneshwaran @ Vignesh Ram vrs. State***— J.J.(C&P) Act, 2015— Section 12—Bail—So far as juveniles are concerned, grant of bail is the rule and non-grant of bail is only an exception.(Para-7)

(iv) ***2016(4) Crime-188(Allahabad): Amit Yadav Alias Monu Alias Bebo vrs. State of U.P. and Anr***.— J.J.(C&P) Act, 2000—Section 12—Bail—If there are no imminent chances of his repeating the crime, bail to a juvenile should not be ordinarily refused.

(v) ***2009 Cr.L.J.: A Juvenile vrs. State of Orissa 2002(Orissa)***

"A Juvenile needs parental protection and guidance to bring him back to the main-stream of the society from which he has strayed. Thus, his release on bail would aid the ends of justice rather than defeat it."

(vi) ***Suo Motu Writ Petition (Civil) No.04 of 2020 (S.C.)***

The JJBS and Children"s Court shall consider in taking steps to release all children on bail, unless there are clear and valid reasons for the application of the proviso to Section 12 Act, 2015 for the refusal of their bails.

(vii) ***JJ(C&P) 2013(3) Crimes-252(Chhatisgarh): Ankit Upadhyaya and others vrs. State of Chhatisgarh)— J.J.(C&P) Act, 2015— Section 12—Bail***—When the report of the P.O., i.e., social investigation report is positive to the effect that, release of the CICL on bail would be in his best interest, then, he(CICL) deserves to be released on bail.

(viii) ***2011(4) Crimes-204(Jharkhand) : Manish Kumar vrs. The State of Jharkhand— J.J.(C&P) Act, 2015— Section 12—Bail***—Bail to Juvenile is rule and refusal is an exception.

When the case of the CICL does not come within proviso to Section 12, then the CICL is deserved for bail.

(ix) ***2023(1) Crimes-406(Jharkhand) : Shahnawaz Hussain vrs. The State of Jharkhand— J.J.(C&P) Act, 2015— Section 12—Bail***—When the CICL has no criminal history and the possibility of the CICL in coming with association of any known criminal is very remote, then the CICL is to be granted on bail.

(x) ***CRR 53 of 2021(O&M) (P&H) : Vishvas vrs. State of Punjab (dated on 08.02.2021) Para-16—J.J. (C&P) Act, 2015—Section 12—Bail***—An application under Section 12 of the Act for bail of the CICL cannot be decided without taking into consideration to the social investigation report submitted by the probation officer.

11. Here, in this matter at hand, the bail of the CICL(appellant) has been refused on dated 16.08.2023 in C.T. No.220 of 2023 by the learned Special Judge(POCSO)-cum-Additional Sessions Judge, Bhubaneswar on the grounds that,

> "the allegations are grave and serious in nature and in case of release of the CICL on bail, there is likelihood of his fleeing away from the justice and chances of his interference with the witnesses."

12. It is forthcoming from the copy of the social investigation report submitted by the learned Standing Counsel for the State at the time of hearing that,

> "the CICL belongs to middle class family. He is an average student and he usually spends his time in studies. He has passed +2 Arts and interested for his higher studies and his approach and behaviour is girlish in nature, for which, he does not mix with boys, so, he has very less number of friends in the locality and usually he spends lot of time at home and he used to participate in drama and danda nacha in the locality. He has no previous bad conduct. He may have involved in the circumstances without knowing the consequence thereof and he (CICL) is worried about his carrier."

13. When the social investigation report as stated above does not reveal that, "the CICL (appellant) was subjected to any form of abuse or was a victim of any incident earlier at any point of time or he was with any of his bad association earlier and when the said social investigation report reveals that, he (CICL) always spends his time in his studies and he is interested for his higher studies and he has not any bad associate in his locality and he may have involved in the circumstances without knowing the consequences thereof and when the said report does not reveal about the possibility of his involvement with any incident in future after his release on bail or there is any reasonable apprehension of his fleeing away from the process of justice after his release on bail and when the CICL is worried about his career and when the reasons assigned by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar for the refusal of the bail of the CICL are not fulfilling any of the criterias of the proviso to Sub-section(1) of Section 12 of the J.J.(C&P) Act, 2015 and when the mother guardian of the CICL is available in the house of CICL to look-after him (CICL) for the betterment of his future and when the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar has refused the bail of the CICL (appellant) without taking into account to the social investigation report submitted by the Probation Officer, Khordha, though as per law, the bail of any CICL cannot be decided without taking into consideration to the social investigation report and as such, when there are inherent fundamental defects in the refusal order of bail of the CICL passed by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar, at this juncture, in view of the principles of law enunciated in the ratio of the decisions referred to (supra) in para no.10, the order of refusal of bail of the CICL (appellant) passed on dated 16.08.2023 in C.T. No. 220 of 2023 by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar cannot be sustainable under law. For which, there is justification under law for making interference with the same through

this appeal preferred by the CICL (appellant) under Section 101(5) of J.J.(C&P) Act, 2015.

14. Therefore, there is merit in the appeal of the appellant (CICL). The same must succeed.

15. In result, the appeal preferred by the CICL (appellant) is allowed on merit.

16. The impugned order dated 16.08.2023 passed in C.T. No.220 of 2023 by the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar is set aside.

17. The prayer for bail of the CICL (appellant) is allowed.

18. The learned Special Judge(POCSO)-cum-Additional Sessions Judge, Bhubaneswar is directed to release the CICL (appellant) on bail with required bail bond/bonds imposing lawful conditions as it deems fit and proper with a compulsory condition that:-

> the mother guardian of the CICL shall furnish an undertaking that, she will not allow the CICL to come in contact with his any bad association and the CICL shall not indulge with any unlawful/illegal activities.

19. Accordingly, this appeal is disposed of finally.

Registry is directed to transmit the copies of this judgment to the learned Special Judge (POCSO)-cum-Additional Sessions Judge, Bhubaneswar in reference to C.T. No.220 of 2023 forthwith for information and lawful compliances on the basis of this judgment.

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

Result of the case :
Appeal disposed of.

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2024 (III)-ILR-CUT-1300

CICL (CHILD IN CONFLICT WITH LAW)
V.
STATE OF ODISHA.

[CRLREV NO. 379 OF 2024]

14 NOVEMBER 2024

[A.C. BEHERA, J.]

Issue for Consideration

Whether social investigation report should be supported by reasons/ materials.

Headnotes

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2015 ─ Section 102 r/w Sections 10 and 12 ─ The Additional Juvenile Justice Board, Rourkela rejected the bail application ─ The Appellate Court also confirmed the order of rejection – Both the Courts assigned the reasons for such rejection – Whether bail can be granted to the petitioner.

Held: Yes ─ When opinion of social investigation report is not supported by any substantive materials/reasons, only on the basis of presumptions surmises/influences and guess works, the rejection of bail cannot be sustained under law. (Para 14)

Citations Reference

State of Tamil Nadu vrs. Union of India & Ors., **2020 (2) OJR-73 (S.C.)**; Pankaj Kumar Malik vrs. State of Odisha, **2016(1) CLT Crl.(Supp.)-Criminal-17**; Vigneshwaran @ Vignesh Ram vrs. State, **2016 (4) Crimes-78 (Madras)**; Amit Yadav Alias Monu Alias Bebo vrs. State of U.P. and Anr., **2016 (4) Crimes-188 (Allahabad)**; A Juvenile vrs. State of Orissa, **2009 Cr.L.J. 2002 (Orissa)**; Manish Kumar vrs. The State of Jharkhand, **2011 (4) Crimes-204 (Jharkhand)**; Shahnawaz Hussain vrs. The State of Jharkhand, **2023 (1) Crimes-406 (Jharkhand)**; Sumit Kumar vrs. State of Bihar, **2021 (2) Crimes 107 (Patna) ─ referred to.**

List of Acts

The Juvenile Justice (Care and Protection of Children) Act, 2015.

Keywords

Rejection of Bail of CICL, Social investigation report, Substantive reason/ materials.

Case Arising From

Order dated 27.06.2024 passed in Criminal Appeal No.07 of 2024 passed by the learned Additional District Judge-cum-Children's Court, Sundargarh.

Appearances for Parties

For Petitioner : Mr. U.C.Behura
For Opp.Party : Mr. P.Satapathy, Learned Addl. Standing Counsel

Judgment/Order

Judgment

A.C. BEHERA, J.

This revision has been filed under Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 [in short the 'J.J.(C&P) Act, 2015')] by the Child in Conflict with Law (in short 'CICL') being the petitioner challenging the dismissal order of the criminal appeal vide Criminal Appeal No. 07 of 2024 passed

on dated 27.06.2024 by the learned Additional District Judge-cum-Children's Court, Sundargarh confirming an order i.e. refusal of bail passed by Additional Juvenile Justice Board, Rourkela on dated 03.06.2024 in Special J.G.R. Case No.03 of 2024 arising out of Uditnagar P.S. Case No.199 of 2024.

2. The factual backgrounds of this revision under Section 102 of The J.J. (C&P) Act, 2015, which prompted the CICL (petitioner) for filing of the same is that, he (CICL/Petitioner) was brought before the Additional Juvenile Justice Board, Rourkela stating his involvement in a situation with a minor girl aged about five years in her house on dated 22.04.2024 at about 5.30 P.M., but, as per order dated 03.06.2024, Additional Juvenile Justice Board, Rourkela sent the petitioner (CICL) to the observation home rejecting his prayer for bail assigning the reasons that,

> "the matter is at preliminary stage. Considering the nature of the allegation made and the stage of the case, the board found it not proper to release the CICL on bail"

3. For which, the CICL challenged the said rejection order of his bail preferring an appeal vide Criminal Appeal No.07 of 2024 under Section 101 of The J.J. (C&P) Act, 2015 before the learned Additional District Judge-cum-Children"s Court, Sundargarh being the appellant.

The learned appellate court dismissed that Criminal Appeal No.07 of 2024 of the CICL on dated 27.06.2024 and confirmed the order of rejection of his bail passed by the Additional Juvenile Justice Board, Rourkela assigning the reasons that,

> "due to peer group influence, the CICL was involved with the situation as per social investigation report, for which, the release of the CICL on bail will definitely defeat the ends of justice and there is every possibility of interference of the CICL into the matter of inquiry, if he is released on bail, for which, he (CICL) is not entitled to be released on bail."

4. So, the CICL filed this revision under Section 102 of The J.J. (C&P) Act, 2015 challenging the above dismissal order dated 27.06.2024 passed by the learned Appellate Court in Criminal Appeal No.07 of 2024.

5. I have already heard from the learned counsel for the petitioner (CICL) and the learned Additional Standing Counsel for the State.

6. During the course of hearing, the learned counsel for the petitioner (CICL) submitted that, the orders passed by the Additional Juvenile Justice Board, Rourkela in Special J.G.R. Case No.03 of 2024 as well as the appellate court in Criminal Appeal No.07 of 2024 for the refusal of bail of the CICL (petitioner) are not in conformity with law, for which, the said orders are not sustainable under law, to which, the learned Additional Standing Counsel for the State objected contending in support of the reasons assigned above by the Additional Juvenile Justice Board, Rourkela as well as the learned appellate court for the refusal of bail of the CICL (petitioner).

7. As per the provisions of law envisaged in the proviso to Subsection(1) of Section 12 of The J.J.(C&P) Act, 2015, the CICL can be denied with the privilege of bail, only, if, the court is of the opinion that,

> (i) there appears reasonable grounds for believing that, the release of CICL on bail shall bring him into association with any known criminal or
>
> (ii) shall expose him to moral, physical and psychological danger or that his such release would defeat the ends of justice.

8. The necessary essentials indicated above in (i) & (ii) of the proviso of Sub-section(1) to Section 12 of The J.J. (C&P) Act, 2015 must be there in the record to make out any of the above grounds out of two, which may persuade the court not to release the CICL on bail.

9. As per The J.J. (C&P) Act, 2015, the nature and gravity of the matter relating to the involvement of the CICL into the same has no significance for consideration of bail of the CICL. So, the CICL has to be released on bail irrespective of the nature and gravity of the matter.

The J.J. (C&P) Act, 2015 is a beneficial legislation, which has been enacted to reform the child.

As per Section 3(i) and (iv) of the said Act, 2015, all decisions regarding the child shall be passed for the "best interest" of the child (CICL) presuming the CICL "to be an innocent."

Therefore, in all orders pertaining to a CICL has to be a reformative approach for no other reason, but, only for promoting the well-being of the CICL.

10. Therefore, as per the mandate of the provisions of Section 12 of The J.J. (C&P) Act, 2015, a CICL has to be released on bail, irrespective of the nature and gravity of the matter of incident, because, bail for the CICL is the rule and refusal is an exception. The right of privilege of bail of the CICL can be denied, only assigning clear and valid reasons regarding the applicability of the proviso to Section-12 of The J.J. (C&P) Act, 2015, for its refusal, otherwise not.

11. On this aspect, the propositions of law has already been clarified by the Hon"ble Courts and the Apex Court in the ratio of the following decisions:-

> (i) ***2020(2) OJR-73(S.C.) : Exploitation of Children in Orphanages in the State of Tamil Nadu vrs. Union of India and others***— J.J.(C&P) Act, 2015— Sections 10 & 12—Bail—The only embargo created for bail of the CICL is that, (i) in case the release of the child likely bring into association with known criminals or (ii) expose the child to moral, physical or psychological danger or where the release of the child would defeat the ends of justice.
>
> (ii) ***2016(1) CLT Crl. (Supp.)-Criminal-17 : Pankaj Kumar Malik vrs. State of Odisha***— J.J.(C&P) Act, 2015—Sections 12 & 53—Bail—Release on bail of the CICL is a rule, but refusal is an exception, which can only be done in the existence of circumstances detrimental to the interest of the CICL or if the same would defeat the

ends of justice—Heinousness and seriousness of an offence has got nothing to do in consideration of the prayer for bail of the CICL.

(iii) ***2016(4) Crimes-78 (Madras) : Vigneshwaran @Vignesh Ram vrs. State***— J.J.(C&P) Act, 2015— Section 12—Bail—So far as juveniles are concerned, grant of bail is the rule and non-grant of bail is only an exception.(Para-7)

(iv) ***2016(4) Crimes-188(Allahabad): Amit Yadav Alias Monu Alias Bebo vrs. State of U.P. and Anr.—*** J.J.(C&P) Act, 2000—Section 12—Bail—If there are no imminent chances of his repeating the crime, bail to a juvenile should not be ordinarily refused.

(v) ***2009 Cr.L.J. : A Juvenile vrs. State of Orissa 2002 (Orissa)***

"A Juvenile needs parental protection and guidance to bring him back to the main-stream of the society from which he has strayed. Thus, his release on bail would aid the ends of justice rather than defeat it."

(vi) ***Suo Motu Writ Petition (Civil) No.04 of 2020(S.C.)***

The JJBS and Children"s Court shall consider in taking steps to release all children on bail, unless there are clear and valid reasons for the application of the proviso to Section 12 JJ(C&P) Act, 2015 for the refusal of their bails.

(vii) ***JJ(C&P) 2011(4) Crimes-204 (Jharkhand): Manish Kumar vrs. The State of Jharkhand— J.J.(C&P) Act, 2015— Section 12—Bail***—Bail to Juvenile is rule and refusal is an exception.

When the case of the CICL does not come within proviso to Section 12, then the CICL is deserved for bail.

(viii) ***2023(1) Crimes-406(Jharkhand) : Shahnawaz Hussain vrs. The State of Jharkhand— J.J.(C&P) Act, 2015— Section 12—Bail***—When the CICL has no criminal history and the possibility of the CICL in coming with association of any known criminal is very remote, then the CICL is to be granted on bail.

12. It is the mandate of Section 3(viii) of The J.J.(C&P) Act, 2015 in administration of that Act that,

"The Central Government, The State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act, shall be guided by the following fundamental principles, namely:-

(i) xx xx xx xx
(ii) xx xx xx xx
(iii) xx xx xx xx
(iv) xx xx xx xx
v) xx xx xx xx
(vi) xx xx xx xx
(vii) xx xx xx xx
(viii) Principle of non-stigmatizing semantics-Adversarial or accusatory words are not to be used in the processes pertaining to a child.
(ix) xx xx xx xx "
xx xx xx xx

13. In this revision at hand, the impugned orders passed by the Additional Juvenile Justice Board, Rourkela and the learned appellate court pertaining to the CICL (petitioner), those are under challenge in this revision are not free from the use

of accusatory words pertaining to the CICL (petitioner), for which, the said orders are not in proper administration of the Act, i.e., The J.J.(C&P) Act, 2015.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts in the ratio of the following decision:-

> ***2021(2) Crimes 107(Patna) : Sumit Kumar vrs. State of Bihar***—Any order relating to a juvenile passed by any court shall have no effect in eyes of law, if the same be passed in non-conformity with provisions of Juvenile Justice Act, 2015.(Para-11)

14. When, the learned Appellate Court has refused the prayer for bail of the CICL(petitioner) on the basis of the opinion given in the social investigation report that, due to peer group influence, the CICL was involved with the situation and when such opinion in the social investigation report is not supported by any substantive materials/reasons, then at this juncture, in view of the propositions of law enunciated by the Hon"ble Courts and the Apex Court in the ratio of the above decisions coupled with the mandate of Section 3(viii) of The J.J.(C&P) Act, 2015, it is held that, the impugned orders passed by the Additional Juvenile Justice Board, Rourkela on dated 03.06.2024 and the learned Additional District Judge-cum-Children"s Court, Sundargarh on 27.06.2024 in Criminal Appeal No.07 of 2024 for the refusal of the bail of the CICL(Petitioner) only on the basis of presumptions, surmises/inferences and guess works cannot be sustainable under law for the following reasons, i.e.,:-

> (i) the impugned orders have been passed using accusatory words pertaining to CICL in contravention with Section 3(viii) of The J.J. (C&P) Act, 2015.
>
> (ii) the reasons assigned by the Additional Juvenile Justice Board as well as the appellate court for refusal of the bail of the CICL are not fulfilling any of the criterias of the proviso of Sub-section(1) to Section 12 of The J.J. (C&P) Act, 2015.
>
> (iii) social investigation report does not reveal that, he (CICL) has any bad associate in his locality.
>
> (iv) absence in the social investigation report that, the CICL has been subjected to any form of abuse or was a victim of any similar situation earlier or was mixed with any bad associate earlier.
>
> (v) absence in the social investigation report about any immediate chance in repeating the similar circumstance by the CICL.
>
> (vi) absence in the social investigation report about any possibility or chance of fleeing away from the process of justice, in case of release of the CICL on bail.
>
> (vii) the father-guardian of the CICL has sworn through an affidavit that, he shall take proper care of the CICL being his natural father guardian after release of the CICL on bail.

So, for the reasons assigned above, there is justification under law, for making interference with the impugned orders through this revision filed by the CICL (petitioner).

As such, there is merit in this revision filed by the petitioner (CICL). The same must succeed.

15. In result, the revision filed by the CICL (petitioner) is allowed on merit.

The impugned orders dated 03.06.2024 and 27.06.2024, respectively passed by the Additional Juvenile Justice Board, Rourkela in Special J.G.R. Case No.03 of 2024 as well as by the learned Additional District Judge-cum-Children‟s Court, Sundargarh in Criminal Appeal No.07 of 2024 are set aside.

16. The prayer for bail of the CICL (petitioner) in Special J.G.R. Case No.03 of 2024 is allowed.

17. The Additional Juvenile Justice Board, Rourkela is directed to release the CICL (petitioner) on bail in Special J.G.R. Case No.03 of 2024 with required bail bond or bail bonds imposing lawful conditions as it deems fit and proper with a compulsory condition that:-

> The natural father-guardian of the CICL shall furnish an undertaking that, he will not allow the CICL to mix with his any bad associate and shall not allow the CICL to be involved with any unpleasant situation.

18. Accordingly, this criminal revision is disposed of finally.

Registry is directed to transmit the copies of this judgment to the appellate court in reference to Criminal Appeal No.07. of 2024 as well as Additional Juvenile Justice Board, Rourkela in reference to Special J.G.R. Case No.03 of 2024 forthwith for information and lawful actions/compliances of the directions made above.

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

Result of the case :
Criminal Revision disposed of

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2024 (III)-ILR-CUT-1306

STATE OF ORISSA & ANR.
V.
M/s. B. ENGINEERS & BUILDERS PRIVATE LTD.

(S.A. NO. 127 OF 1995)

03 DECEMBER 2024

[A.C.BEHERA, J.]

Issue for Consideration

Whether non-service of notice U/s. 80 of C.P.C against the State vitiates the proceeding/suit.

Headnotes

CODE OF CIVIL PROCEDURE, 1908 ─ Section 80 ─ The plaintiff is a private construction company ─ No notice under Section 80(1) of C.P.C. was served upon the defendants/Govt. Authorities by the plaintiff before filing of the suit ─ The defendants have not raised any objection challenging the maintainability of the suit of the plaintiff on the ground of non-service of notice under Section 80(1) of C.P.C. prior to filing of the suit ─ Whether the suit of the plaintiff is liable to be rejected on the ground of non-service of the notice.

Held : No ─ If the defendants do not raise any objection about the non-service of the notice in their written statement and no issue is framed on the said point, it will be deemed as per law that defendant/s have waived their right on such point. (Para 17)

Citations Reference

Abhimanyu Nayak & Ors. vrs. Basanta Mohanty & Ors**., W.P.(C) No.15161 of 2008**; Gangappa Gurupadapa Gugwad Gulbarga vrs. Rachawwa & Ors., **Civil Appeal No.1732 (N) of 1966 decided on 23.10.1970**; Bishandayal and sons vrs. State of Orissa & Ors**., Civil Appeal No.2522 of 1992 decided on 07.12.2000**; Raghunath Das vrs. Union of India & Anr., **AIR 1969 (S.C.)-674**; State of Punjab vrs. M/s. Geeta Iron & Brass Works Ltd., **AIR 1978 (S.C.)-1608**; State of A.P. and others vrs. M/s. Pioneer Builders, A.P., **2007 (I) CJD (S.C.)-40**; Karishma Anand vrs. Union of India & Anr., **2012 (9) Law Digital.in-450 (Karnataka)**; Managing Director Corporation Lamta Project Balaghat vrs. Bhajanlal & Ors., **2023(2) Civil Court Cases-44 (M.P.) decided on 02.02.2023**; Dhian Singh Sobha Singh and Ors. vrs. The Union of India, **AIR 1958(S.C.)-274 (decided on 29.10.1957 in Civil Appeal No.5 of 1954)**; State of Bihar & Anr. Vrs. Panchratna Devi & Anr., **AIR 1980 (Patna)-212 (decided on 20.09.1979 in A.F.O.D. No. 67 of 1967)**; Laxmichand (dead) through L.Rs. Kanta Bai and Ors vrs. Murty Shri Laxminarayan & Ors., **2007(2) CCC-323 (M.P.)**; Basudeb Biswal & Ors. vrs. Padmanav Choudhury & Ors., **25 (1959) CLT-335**; Vasant Ambadas Pandit vrs. Bombay Municipal Corporation & Ors., **AIR 1981(Bombay)-394 (Full Bench)**; State of Orissa & Anr. vrs. Bamadeb Panigrahi & Anr., **AIR 1971 (Orissa)-227─ referred to.**

Keywords

Suit against the Government, Notice, Non-service, Rejection of the plaint.

Case Arising From

Judgment and decree dated 14.02.1995 and 22.02.1995 respectively passed in T.A. No.04 of 1993 by First Appellate Court.

List of Code

Code of Civil Procedure, 1908

Appearances for Parties

For Appellants : Mr. G. Mohanty, learning Standing Counsel
For Respondent : None

Judgment/Order

Judgment

A.C. BEHERA, J.

This 2nd appeal has been preferred against the confirming judgment.

2. The appellants (State and Executive Engineer) in this 2nd appeal were the defendants before the trial court in the suit vide T.S. No.04 of 1992 and appellants before the 1st appellate court in the 1st appeal vide T.A. No.04 of 1993.

The respondent in this 2nd appeal, i.e., company was the sole plaintiff before the trial court in the suit vide T.S. No.04 of 1992 and respondent before the 1st appellate court in the 1st appeal vide T.A. No.04 of 1993.

3. The suit of the plaintiff-company vide T.S. No.04 of 1992 before the trial court against the defendants was a suit for declaration.

The case of the plaintiff-company before the trial court in nutshell against the defendants was that, the plaintiff being a registered construction company had entered into an agreement with the defendants vide Agreement No.56/G2/C.E.C. (Roads) L.S.84-85 for construction of a H.L. Bridge over river Vansadhara river near Gunupur in the district of Rayagada in order to complete such construction works within 36 calendar months starting from 25.01.1985 by furnishing Bank guarantees for Rs. 8,85,000/- as security of such work, but due to non-completion of construction works within the above stipulated period for some unforeseen natural obstacles beyond control, the time period of completion was extended by the defendants in two phases up to 30.06.1992 on the application of the plaintiff-company.

Out of all the running bills of such construction works submitted by the plaintiff, only forty two numbers of running bills were passed in favour of the plaintiff by the defendants, but, the defendants did not clear the 44th, 45th and 46 numbers of running bills of the plaintiff. During that time, the cost of construction materials and wages of the labourers were increased. For which, the plaintiff incurred extra expenditures for the construction of works with the knowledge of the defendants. Therefore, the plaintiff submitted bills for his extra expenditures due to increase of the rates of construction materials and wages of the laourers, but, the said bills were also not cleared by the defendants. Instead of clearing the pending bills, surprisingly, as per letters dated 27.01.1992 and 29.01.1992 respectively, the defendants unilaterally cancelled the agreement of the plaintiff and intimated the plaintiff that, they (defendants) shall adjust the security deposit of the plaintiff

towards part of their losses for the delay in construction works by the plaintiff, i.e., for non-completion of the same in due time.

4. For which, without getting any way, the plaintiff approached the civil court by filing the suit vide T.S. No. 04 of 1992 against the defendants praying for a declaration that, the rescission/cancellation of its contract through Letter Nos.1165 dated 27.01.1992 and letter No.1312 dated 29.01.1992 respectively issued by the plaintiff are illegal, invalid, inoperative and non-existent in the eye of law and to declare that, the plaintiff is entitled to get refund of his security deposit, i.e., Rs.8,85,000/.

5. The defendants contested the suit of the plaintiff-company by filing their joint written statement denying the averments made by the plaintiff in the plaint taking their stands inter alia therein that, the works programme for each month for each item relating to construction was planned by the defendants and the defendants had given such plan to the plaintiff, to which, the plaintiff agreed to follow, but later, the plaintiff did follow the same. For which, the defendant no.2 issued instructions to the plaintiff time and again through several letters for the progress of the works in month wise and item wise, but, without progressing the works according to their instructions, the plaintiff submitted baseless explanations. In fact, there was no flood on 08.05.1990 in river Vansadhara. After knowing about the expected rain as well as usual flood in river Vansadhara, the plaintiff had signed the agreement. The time schedule for completion of the construction works was fixed considering all the above possible future happenings. The rain in the year 1990 had not made any hindrance to the plaintiff in his works.

In the month of October, 1991, 44th running bill of the plaintiff was paid, but, the 45th running bill of the plaintiff was not paid, on the ground of non-progress of work. As the plaintiff had no interest for the progress of the works, for which, huge quantity of materials of the defendants for such works were lying unused remaining under the custody of the plaintiff those were ultimately washed away due to careless activities of the plaintiff-company. So, considering the above facts, the defendants rescinded/cancelled the works contract of the plaintiff and took steps for part adjustment of their losses from the security deposit of the plaintiff issuing notice to the plaintiff on 05.02.1992 for final measurement of the works done by it and the plaintiff also accepted the final measurement. For which, rescission/cancellation of contract of the plaintiff by the defendants is legal. As per final measurement, the plaintiff is to pay Rs.34,26,094 to the defendants after adjustment of security deposit amount. So, the plaintiff has no prima facie case and balance of convenience in its favour. Therefore, the suit of the plaintiff is liable to be dismissed against the defendants, because, the same is not maintainable for the reasons assigned above.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether three numbers of issues were framed by the trial court in the suit vide T.S. No.04 of 1992 and the said issues are:-

I S S U E S

(i) Whether the defendants can invoke the three Bank Guarantees given by the Branch Manager, S.B.I., Industrial Estate Branch, Bhubaneswar till the accounts are finally settled and paid to the plaintiff by the defendants in respect of the construction of H.L. Bridge on river Vansadhara?

(ii) Whether the court has jurisdiction to try the suit?

(iii) To what relief, if any, the plaintiff is entitled?

7. In order to substantiate the aforesaid relief sought for by the plaintiff-company against the defendants, the plaintiff-company examined one witness on its behalf as P.W.1 and relied upon the document vide Ext.1 to 19.

On the contrary, in order to nullify / defeat the suit of the plaintiff, the defendants also examined one witness from their side as D.W.1 and exhibited series of documents on their behalf vide Exts.A to N/3.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues in favour of the plaintiff-company and against the defendants and basing upon the findings and observations made by the trial court in all the issues in favour of the plaintiff-company and against the defendants, the trial court decreed the suit of the plaintiff-company vide T.S. No.04 of 1992 on contest against the defendants, as per its judgment and decree dated 09.09.1993 and 17.10.1993 respectively and declared that, letter of rescission of contract issued by the defendant no.2 vide letter No.1165 dated 27.01.1992 and letter No.1312 dated 29.01.1992 respectively are illegal and inoperative and the defendants are permanently restrained from invoking/encashing the Bank guarantees covered under this suit till the final settlement of the accounts are made, assigning the reasons that, the defendants have cancelled the works contract with the plaintiff unilaterally without the knowledge of the plaintiff before the extended period of completion of construction works, i.e., before 30.06.1992, for which, the said rescission/cancellation of contract made by the defendants are illegal and contrary to the law. Therefore, the defendants cannot encash the Bank guarantees of the plaintiff, as the plaintiff has no fault in the progress of the works, but, the contract for works has been rescinded/cancelled illegally by the defendants. For which, the plaintiff is entitled for the relief as prayed for by him against the defendants.

9. On being dissatisfied with the aforesaid judgment and decree dated 09.09.1993 and 17.10.1993 respectively passed by the trial court in T.S. No.04 of 1992 in favour of the plaintiff-company and against the defendants, the defendants challenged the same by preferring the 1st appeal vide T.A. No.04 of 1993 being the appellants against the plaintiff arraying the plaintiff-company as respondent.

After hearing from both the sides, the 1st appellate court dismissed that 1st appeal vide T.A. No.04 of 1993 of the defendants as per its judgment and decree dated 14.02.1995 and 22.02.1995 respectively confirming the judgment and decree passed by the trial court in T.S. No.04 of 1992 in favour of the plaintiff.

10. On being aggrieved with the aforesaid judgment and decree of the dismissal of the 1st Appeal vide T.A. No. 04 of 1993 of the defendants passed on dated 14.02.1995 and 22.02.1995 respectively, they (defendants) challenged the same by preferring this 2nd appeal being the appellants against the plaintiff-company arraying the plaintiff company as respondent.

11. This 2nd appeal was admitted on formulation of the following substantial questions of law:-

> (I) Whether in absence of any pleading in the plaint that, notice under Section 80 of the C.P.C. was sent or served on the defendants(appellants), the suit is/was maintainable?
>
> (II) Whether in the facts and circumstances of the present case, it can be said that, there is/was waiver regarding the notice under Section 80 of the C.P.C.?

12. I have already heard from the learned Standing Counsel for the appellants (defendants) only, as none participated in the hearing of this 2nd appeal from the side of the respondent (plaintiff-company).

13. During the course of hearing of this 2nd appeal, the learned Standing Counsel for the appellants (defendants) relied upon the ratio of the following decisions contending that, the suit of the plaintiff-company was not maintainable under law against the State and Executive Engineer (defendants) due non-service of statutory notice under Section 80 of the C.P.C. prior to the filing of the suit and the said decisions are:-

> ***(i) W.P.(C) No.15161 of 2008 : Abhimanyu Nayak and others vrs. Basanta Mohanty and others.***
>
> ***(ii) Civil Appeal No.1732 (N) of 1966 decided on 23.10.1970 : Gangappa Gurupadapa Gugwad Gulbarga vrs. Rachawwa and others.***
>
> ***(iii) Civil Appeal No.2522 of 1992 decided on 07.12.2000 : Bishandayal and sons vrs. State of Orissa and others.***

As both the aforesaid formulated substantial questions of law, are interlinked having ample nexus with each other, for which, both the above formulated substantial questions of law have been taken up together analogously for their discussions hereunder:-

Undisputedly, the plaintiff (respondent in this 2nd appeal) is a private construction company, whereas, the defendants are the State and its officer, i.e., Executive Engineer.

As per the pleadings of the parties and judgments and decrees of the trial court and 1st Appellate Court, no notice under Section 80(1) of the C.P.C., 1908 has been served upon the defendants by the plaintiff before filing of the suit vide T.S. No.04 of 1992 and there is also no averments in the plaint regarding the cause of non-service of the statutory notice under Section 80(1) of the C.P.C. on the defendants before the institution of the suit.

14. In the pleadings of the appellants/defendants, they (State and its officer) have not raised any objection challenging the maintainability of the suit of the plaintiff against the defendants on the ground of non-service of notice under Section 80(1) of the C.P.C., 1908, on the defendants prior to the filing of the suit.

As such, no pleading or evidence or argument was raised on behalf of the defendants during trial of the suit before the trial court challenging/objecting the maintainability of the suit of the plaintiff on the ground of non-service of notice under Section 80(1) of the C.P.C., 1908 prior to the institution of the suit.

The main object/purpose of issuance of notice under Section 80(1) of the C.P.C., 1908 by the plaintiff to the State/Government and its officer prior to the institution of suit is only to give the concerned Government or officer an opportunity to reconsider the legal position and to settle the claim raised by the plaintiff, if so advised, without moving for the litigation in order to enable the State and its officer to be responsive to the notice of the plaintiff for the avoidance of a fight in the suit or litigation with the plaintiff or plaintiffs.

15. It is settled propositions of law that, though, the provision of issuance of notice under Section 80(1) of the C.P.C. is mandatory, but, the same can be waived by the defendant or defendants and if once, the defendant or defendants waived the requirement of the notice under Section 80(1) of the C.P.C. without raising any objection about the same in their written statement, in that case, the plaintiff cannot be non-suited on the ground of non-service of statutory notice on the defendant or defendants prior to the institution of suit.

So, if the issuance of notice under Section 80(1) of the C.P.C. before filing of the suit is waived by the defendant or defendants without raising any objection about the same in the written statement, then in that case, there is no impediment for the court to entertain the suit of the plaintiff without notice under Section 80(1) of the C.P.C., 1908.

16. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and the Apex Court in the ratio of the following decisions:-

> (i) ***AIR 1969(S.C.)-674 : Raghunath Das vrs. Union of India and another—C.P.C., 1908—Section 80***—Object of notice contemplated by Section 80 of the C.P.C. is to give to the concerned Governments and public officers opportunity to reconsider the legal position and make amends or settle the claim, if so advised without litigation.(Para-8)
>
> (ii) ***AIR 1978(S.C.)-1608 : State of Punjab vrs. M/s. Geeta Iron & Brass Works Ltd.—CPC, 1908—Section 80—Object of notice***—State should be responsive to noticed and avoid a fight.
>
> ***C.P.C., 1908—Section 80***—Object of notice to give opportunity to reconsider, whether plaintiffs claim would be accepted or not.
>
> (iii) ***2007 (I) CJD(S.C.)-40 : State of A.P. and others vrs. M/s. Pioneer Builders, A.P.— C.P.C., 1908 — Section 80*** — The object of notice is to give opportunity to

reconsider whether the claim made could be accepted or not for the advancement of justice and the securing of public good by avoidance of unnecessary litigation.

(iv) 2012(9) Law Digital.in-450(Karnataka) : Karishma Anand vrs. Union of India and another — C.P.C., 1908 — Section 80—Object— The object of issuance of notice under Section 80, C.P.C. is to provide an opportunity to the Government to consider the legal position to settle the claim without compelling parties to go for litigation and also to afford an opportunity to the Officer of the Government to scrutinize and settle the matter, if possible with a minimum action, so that, unnecessary litigation is avoided.

(v) 2023(2) Civil Court Cases-44(M.P.)(decided on 02.02.2023) : Managing Director Corporation Lamta Project Balaghat vrs. Bhajanlal and others—C.P.C., 1908—Section 80—Provision of Section 80 of the C.P.C. is mandatory, but, it can be waived by the defendants.

(vi) AIR 1958(S.C.)-274 : Dhian Singh Sobha Singh and Ors. vrs. The Union of India (decided on 29.10.1957 in Civil Appeal No.5 of 1954)—C.P.C., 1908—Section 80(1)— No objection about notice—No issue—Notice is waived.

(vii)) AIR 1980(Patna)-212 : State of Bihar and another. Vrs. Panchratna Devi and another.(decided on 20.09.1979 in A.F.O.D. No.67 of 1967)—C.P.C., 1908—Section 80—Objection of notice—No objection about notice under Section 80(1) of the C.P.C. raised at the trial, right waived.

viii) 2007(2) CCC-323(M.P.) : Laxmichand (dead) through L.Rs. Kanta Bai and Ors vrs. Murty Shri Laxminarayan & Ors.—C.P.C., 1908—Section 80(1)—No objection raised about maintainability of suit for want of statutory notice— If no such objection raised at the trial stage, same cannot be raised at appellate stage.

(ix) 25(1959) CLT-335: Basudeb Biswal and others vrs. Padmanav Choudhury and others—C.P.C., 1908—Section 80—Waiver of the right to notice—Plea as to want of notice must be deemed to have been waived, when such plea is taken for the first time in the appeal. In that case, the appellate court is not entitled to dismiss the suit on the ground of absence of notice under Section 80, C.P.C.

(x) AIR 1981(Bombay)-394 (Full Bench) : Vasant Ambadas Pandit vrs. Bombay Municipal Corporation and others—C.P.C., 1908—Section 80—If objection as to non-service of statutory notice is waived, court can entertain a suit.

(xi) AIR 1971 (Orissa)-227 : State of Orissa and another vrs. Bamadeb Panigrahi and another—C.P.C., 1908— Section 80—Plea as to absence of notice under Section 80 though raised in written statement cannot be permitted to be argued for the first time in second appeal if no issue for the same in the courts below—Plea will be deemed to have been waived.

Once the defendants have waived the requirements of the notice under Section 80 of the C.P.C. by not raising any objection about the same in written statement, the plaintiff cannot be non-suited on that ground."

17. In view of the propositions of law settled in the ratio of the above decisions of the Hon'ble Courts and the Apex Court, the main object/purpose of issuance of notice under Section 80(1) of the C.P.C. by the plaintiff to the defendant or defendants before institution of suit is only to give the defendant or defendants an opportunity to reconsider the plaintiff's claim, i.e., whether the same can be accepted or not and to reconsider the legal position and to make amends or settle the

claim of the plaintiff, if so advised, without moving for the litigation with the plaintiff, for no other reason, but, only, in order to avoid the fight with the plaintiff and if the defendants do not raise any objection about the same in their written statement challenging the maintainability of the suit of the plaintiff on the ground of non-issuance of notice under Section 80(1) of the C.P.C., 1908 and if no issue is framed on the said point, then, it will be deemed as per law that, defendant or defendants have waived their right on such point.

Here, in the suit/appeal at hand, when the defendants, i.e., State and its officer have neither raised any objection in their written statement challenging the maintainability of the suit of the plaintiff-company on the ground of non-issuance of notice under Section 80(1) of the C.P.C., 1908 prior to the institution of the suit nor any issue has been framed on that point by the trial court during trial of the suit, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions of the Hon'ble Courts and Apex Court referred to (supra) in para no.16 to this appeal/suit at hand, it is held that, the defendants have waived the requirements of notice under Section 80(1) of the C.P.C.

For which, it cannot be held that, the suit of the plaintiff-company against the defendants was not maintainable on the ground of non-sending of notices under Section 80(1) of the C.P.C., 1908 to the defendants. So, the decisions relied upon by the learned Standing Counsel on behalf of the appellants(defendants) indicated in Para No.13 of this judgment have become inapplicable to this appeal/suit at hand on facts.

18. Therefore, there is no justification under law for making any interference with the concurrent findings and observations made by the trial court and 1st appellate court against the appellants/defendants and in favour of the respondent/ plaintiff in T.S. No.04 of 1992 and T.A, No.04 of 1993 respectively through this 2nd appeal filed by the defendants/appellants.

19. As such, there is no merit in the appeal of the appellants (defendants). The same must fail.

20. In result, the 2nd appeal filed by the appellants (defendants) is dismissed on merit, but without cost.

The judgments and decrees passed by the trial court and 1st Appellate Court in T.S. No. 04 of 1992 and T.A. No.04 of 1993 respectively are confirmed.

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

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