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ORISSA HIGH COURT, CUTTACK

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ACTING CHIEF JUSTICE

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Held: Yes – It is not about the institution or the entity and composition or structure of the same, which is only to play a role but for the activities undertaken by it, is to determine, whether, to fall within the meaning of 'authority' under Article 226 of the Constitution of India, if the same is in the nature of a public duty, even if, not a State for the purpose of Article 12 – The TPCODL is a work force to ensure distribution of power with ancillary activities but since a part of public utility service has an element of public function, hence, shall have to be held as amenable to writ jurisdiction.

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Held : No – The plea as advanced by the writ petitioner after five years of passing of the order by the DCDRC in condoning the delay as a ground to stamp approval for

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The Manager, New India Assurance Co. Ltd., Cuttack & Anr. V. Amulya Kumar Nayak

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Priyanka Gouda V. State of Odisha & Ors.

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Held: No – In the policy condition nowhere it discloses that the claim of the insured should be made within any specific time – So, the claimant has not violated any

policy condition, the contention as advanced for insurance company has no basis to interfere with the impugned judgment passed by NCDRC.

The Manager, New India Assurance Co. Ltd., Cuttack & Anr. V. Amulya Kumar Nayak

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Held: Yes – In view of Section 139 of the N.I. Act and Section 243(2) of the Cr.P.C., adducing the evidence in support of the defence is undoubtedly a valuable right and denial of such right amounts to denial of fair trial to the accused – It is well known in law that the nature of the evidence likely to come up may not be a ground for the court to reject the prayer of an accused to summon a

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Deepak Kumar Pradhan V. Sweta Parekh
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CRIMINAL PROCEDURE CODE, 1973 – Sections 397,401 – Compounding of offence U/s. 498-A of IPC – Initially an FIR was lodged against the Petitioner alleging commission of offences punishable U/s. 498-A/ 323/307/34 of IPC read with Section 4 of DP Act – The learned trial Court after hearing evidences from both sides, convicted the Petitioner U/s. 498-A, 323 of IPC – Petitioner preferred appeal challenging the order of Trial Court – The learned Appellate Court set aside the conviction of the Petitioner U/s. 323 of IPC but upheld the conviction U/s. 498-A of IPC – The Petitioner also filed a civil proceeding for dissolution of marriage U/s. 13 B of Hindu Marriage Act, 1955 – The civil proceeding was allowed and decree of mutual divorce ordered – Interim Application has been filed by both the parties with a prayer for compounding of offence under Section 498-A of IPC on the ground that the marriage has been dissolved on mutual consent – Whether the conviction and sentence of Petitioner U/s. 498-A of IPC should be quashed, once the marriage has been dissolved with mutual consent.

Held: Yes – In view of the larger interest of the parties who are now living peacefully after dissolution of their marriage on mutual consent, the conviction and sentence of petitioner U/s.498-A (of IPC) is here by set aside.

Kartik Jena @ Kartik Ch. Jena V. State of Orissa & Anr.
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CRIMINAL PROCEDURE CODE, 1973 – Sections 451 & 457 r/w Section 51 of Narcotic Drugs and Psychotropic Substances Act, 1985 – Whether the provision U/s. 457 of Cr.P.C. will have any application to the release of the vehicle seized under the NDPS Act, during the investigation or trial of the case.

Held: Yes – There is no specific bar/restriction under the provisions of the NDPS Act for return of any seized vehicle used for transporting narcotic drugs or psychotropic substances in the interim, pending disposal of the criminal case.

Rabindra Kumar Behera & Ors. V. State of Odisha & Ors.

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CRIMINAL TRIAL – The appellant (Surya Kanta Behera) found guilty under Sections 302/34 of I.P.C. so also U/ss. 201/511 of I.P.C. – The learned Trial Court found that the case is based on circumstantial evidence – The deceased was last seen with the present appellant – The appellant has not offered any explanation as to what happened to the deceased and when he parted with the company of the deceased – The appellant had not examined any witness to show that he had gone to see a girl for him with the deceased – Effect of.

Held: The proximity of time when the two were last seen together and the dead body was found coupled with the other circumstantial evidence including the medical evidence and failure to discharge his burden under Section 106 of the Evidence Act, in our view, is sufficient to attract the ingredients of both the offences under which he has been found guilty by the learned trial Court.

Syama Choudhury & Anr. V. State of Odisha

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DECLARATION OF RIGHT, TITLE AND INTEREST – Plaintiff filed Civil Suit No. 85 of 2006 in the Court of Civil Judge (Sr. Division), Jharsuguda for declaration of right, title and interest, confirmation of possession and alternatively recovery of possession, if dispossessed during the pendency of the Suit – Suit was decreed – Defendants No. 1 to 6 preferred First Appeal – First Appeal was allowed by declaring that both parties have got right, title and interest over the suit properties and their possession was confirmed – Whether findings of the First Appellate Court is sustainable.

Held: No – The impugned judgment passed by the First Appellate Court is set aside and the judgment and decree of the Trial Court are confirmed.

Ananda Devi Singh & Ors. V. Gajraj Singh @ Gajraj Singhdeo @ Birendra Kumar Singh & Ors.

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EXPORT DUTY – There were provisional and ultimately final assessment order dated 27th November, 2018 – The final assessment order resulted in demand for export duty – Respondent unsuccessfully preferred appeal before the first appellate authority and then to the Tribunal – As per the impugned order, the goods entered for export attracted export duty payable as nil – Can there be reliance on the contractual specifications for determining whether export duty is payable?

Held : No.

Commissioner of Customs (Preventive), Bhubaneswar V. M/s. Kai International Pvt. Ltd.

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FAIR TRIAL – Principles – It is no more *res integra* that a fair trial includes providing a fair and reasonable opportunity to an accused to prove his innocence by

leading adequate evidence – Therefore, when the question of right to an accused for fair trial comes to the fore, there cannot be any discrimination or denial to lead defence evidence by the accused to defend himself, except on the ground provided under Section 243(2) of Cr. P.C.

Deepak Kumar Pradhan V. Sweta Parekh
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HINDU MARRIAGE ACT, 1955 – Section 13(1)(i-a) – Dissolution of marriage – Marriage was solemnized on 25th May, 1996 – Cruelty and desertion – Is apprehension of danger or cruelty a ground for divorce?

Held: No – Clause (i-a) under sub-section (1) in Section 13 of Hindu Marriage Act, 1955 provides for cruelty that has already happened – Apprehension of danger or cruelty does not come within the ground provided.

Mini Pradhan V. Ganeswar Pradhan
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HINDU SUCCESSION ACT, 1956 – Section 22 – Relief of repurchase – Respondent No.1 as plaintiff filed C.S. No. 6 of 2016 before the Civil Judge (Senior Division), Dhenkanal for declaration that the three sale deeds executed by Defendant Nos. 6 and 7 in favour of Defendant Nos. 1 to 5 are illegal and invalid, injunction, and alternatively for a direction to Defendant Nos. 1 to 5 to execute the sale deeds in her favour on receipt of consideration – Suit was duly contested and decreed by declaring the three sale deeds as null and void and confirming the possession of the plaintiff and proforma defendants over 'B' schedule land – Plaintiff's preferential right over the purchased land of Defendant Nos. 1 to 5 was also declared and they were permanently injuncted from disturbing the peaceful possession of the

plaintiff and proforma defendants – Defendant Nos. 6 and 7 were directed to execute RSD in favour of the plaintiff within 15 days on receipt of the consideration to be deposited by the plaintiff – Being aggrieved, Defendant No. 6 preferred the First Appeal, which confirmed the judgment and decree passed by the trial Court – Whether the relief of repurchase under Section 22 of the Hindu Succession Act is maintainable when there is no relief of partition and the registered sale deeds are declared null and void and thereby reverted back the right to the vendors.

Held: No – The relief of pre-emption cannot be granted to the plaintiff in the facts and circumstances of the case – Declaration of the three sale deeds as invalid are confirmed and the grant of preferential right to the plaintiff and the consequential reliefs are set aside.

Smt. Anulekha Dash Bhatta Mishra V. Smt. Sreelekha Dash Bhatta Mishra & Ors.

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HINDU SUCCESSION ACT, 1956 – Section 22 – Right of Pre-emption – When arises? – The right of pre-emption U/s. 22 of the Hindu Succession Act would arise only if the individual shares are defined and any of the co-sharers proposes to sell the property.

Smt. Anulekha Dash Bhatta Mishra V. Smt. Sreelekha Dash Bhatta Mishra & Ors.

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INDIAN PENAL CODE, 1860 – Section 120-A, 120-B – Criminal conspiracy – The learned Trial Court found one appellant (Nibedita Panda) guilty under Section 120-B of I.P.C. – No charge was framed for such offence against co-appellant (Shyama Choudhury) – There is no discussion in the impugned judgment referring to the evidence on record as to how the learned Court found the

appellant guilty U/s. 120-B and with whom she conspired and what are the materials provided by the prosecution to establish the charge – Whether the charge U/s. 120-B of the I.P.C. is sustainable.

Held: No – In absence of any other clinching evidence, only basing on these suspicious conducts of the appellant, it cannot be held to be sufficient to convict her for offence of criminal conspiracy.

Syama Choudhury & Anr. V. State of Odisha
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INDIAN PENAL CODE, 1860 – Section 376(2)(n) – Informant was in a relationship with the petitioner and could not avoid sexual intimacy with him (petitioner) as it was forceful – In the meanwhile she became pregnant in response to which the petitioner promised to marry her but subsequently denied to do so – Whether sexual intimacy with a promise of marriage amounts to rape U/s. 376(2)(n) of IPC.

Held: No – Everything started inoffensively including the physical relationship followed by a promise of marriage, which failed to be materialized at last. Since, the promise failed and the petitioner avoided the informant and subsequently, declined to marry her, is the reason behind lodging of the FIR with an allegation of rape, which in the considered view of the Court, may not be sufficient to hold that such consent was no consent in the eye of law having been vitiated by misconception of fact or fraud arising out of promise to marry.

K. Dinesh Kumar V. State of Odisha & Anr.
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INDIAN PENAL CODE, 1860 – Section 493 – The petitioner had promised to marry the informant and had sexual relationship with her – Whether an offence U/s. 493 of I.P.C. is made out.

Held: No – As both of them were well aware of the fact that they are not yet married and still had been in physical relationship, there is no rational ground for one to believe to the contrary – As a consequence, the irresistible conclusion of the Court is that an offence under Section 493 IPC is not established even remotely.

K. Dinesh Kumar V. State of Odisha & Anr.
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JURISDICTION OF CIVIL COURT – It is the settled position of law that exclusion of the jurisdiction of the Civil Court is not be readily inferred but must either be explicitly expressed or clearly implied – Even in cases where the statutory tribunal has not acted in conformity with the fundamental principle of judicial procedure, the Civil Court can interfere.

Ananda Devi Singh & Ors. V. Gajraj Singh @ Gajraj Singhdeo @ Birendra Kumar Singh & Ors.
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LAND ACQUISITION ACT, 1894 – Section 54 – The referral court ordered for higher compensation of ₹4,00,000/- while taking into consideration the location of the acquired land together with its potential value & stiff rise in the market value of the lands in the recent years – Whether the order of the referral court should be interfered.

Held: No – On perusal of the impugned judgment so also L.C.R., it is ascertained that there is no infirmity or illegality in the said judgment passed in L.A.R. No.150 of 2014 and the Appeal preferred by the State deserves to be dismissed.

Land Acquisition Officer, Kalahandi V. Jaya Kumar Singh Deo
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MICRO, SMALL & MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Section 18(3) r/w Section 34 of the Arbitration and Conciliation Act & Article 226 of the Constitution of India, 1950 – The learned Single Judge has declined to entertain a challenge to an award passed by the Micro and Small Enterprises Facilitation Council under Article 226 of the Constitution of India holding that the said award can be challenged only in accordance with the provision prescribed U/s. 34 of the 1996 Act – Whether the Order needs any interference in the intra Court Appeal.

Held: No – Learned single Judge has rightly declined to interfere with the arbitral award which could have been assailed by the appellant U/s. 34 of the Arbitration and Conciliation Act.

AES India (Pvt.) Ltd. V. State of Odisha & Ors.
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NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42, 43 – The appellants were found in possession of contraband Ganja in a Wagnor car – It is also stated by raiding Officer-cum-PW.4 that he had seized the said car and released it in zima of its owner under a zimanama – No evidence was tendered by the prosecution to establish that said Wagnor car was a public vehicle – Whether in the above circumstances the compliance of provision of Section 42 of the Act is necessary.

Held: Yes – The vehicle being used as a private conveyance in this case, any information regarding keeping concealed any contraband Ganja in the said car or the reason of belief of the raiding officer about concealing Contraband Ganja in the said car would require compliance of Section 42 of the NDPS Act – Once there is infraction of compliance of Section 42, it would ensure to the benefit of the accused and in this

case the conviction of the appellants would be vitiated on that score only.

Simanchal Swain & Ors. V. State of Odisha
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NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 52-A – Samples which were collected in presence of Magistrate has not been certified by the Magistrate about its genuineness – Whether the mandatory requirement of section 52-A has been complied.

Held: No – It would disclose a case of infraction in section 52-A of the Act.

Simanchal Swain & Ors. V. State of Odisha
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ODISHA CIVIL SERVICE (CLASSIFICACTION, CONTROL AND APPEAL) RULES, 1962 – Rule 15 – The petitioner while working as 'Sevak' in Gugurumaha Residential Sevashram in Kotagarh Block of Kandhamal was charged for commission of offences under Sections 143/353/294/506/149, of I.P.C. read with Section 3 of the Odisha Medicare Service Person and Medicare Service Institution (Prevention of Violence and Damage to Property) Act, 2008 – Petitioner was acquitted from all the charges in the criminal proceeding – The disciplinary authority while deciding the disciplinary proceeding imposed the punishment of censure, withdrawal of one increment without cumulative effect and the period of suspension was treated as leave – The order of punishment was confirmed in appeal – Whether the order of punishment is sustainable when the charges in the disciplinary proceeding are found to be identical.

Held: No – When the charges in the criminal proceeding and departmental proceeding are identical and the

evidences brought on record in both proceedings are of similar nature, the impugned order of punishment inflicted against the Petitioner is liable to be set aside.

Sudam Charan Baliarsingh V. State of Odisha & Anr.
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ODISHA CIVIL SERVICES (PENSION) RULES, 1992 – Rules 7 r/w Section 9(2), 10 of Odisha Local Fund Audit Act, 1948 – Petitioner's pension, gratuity and other retrial benefits are not released and kept withheld on the ground of pendency of surcharge proceedings initiated under Section 9(2) of the 1948 Act – Whether such surcharge proceedings initiated under the 1948 Act against the Petitioner can be termed as a judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules.

Held: No – Since proceeding U/s. 9(2) of 1948 Act does not require collection of evidence upon oath and the procedure of recovery is as the arrear of land revenue, the same cannot be treated as a judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules giving right to the authority to withhold the pensionary benefits – It is true that depending on the final order passed in the surcharge proceeding, if any, amount is found liable for recovery from the Petitioner the same can be recovered in terms of Section-10 of the Odisha Local Fund Audit Act, 1948, and for said purpose withholding the pension, gratuity and other retirement benefits of the Petitioner would not be justified.

Debadutta Sarangi V. State Of Odisha & Ors.
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ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 42(2) proviso – Voluntary retirement – Effective date – The petitioner submitted an application on 03.07.2023 by specifying that he desires to retire voluntarily with effect from 31.10.2023 without any

curtailment in such date by the authorities – The Opp. Parties accepted the application of the Petitioner but unilaterally passed the order of retirement, considering the date 03.07.2023 as the date of retirement which is premature in nature – Whether the impugned orders of the Opp. Parties are sustainable.

Held: No – There is no vested power available with the opposite parties to *suo motu* spring into action by curtailing the notice period.

Bhupendra Kumar Mohanty V. State of Odisha & Anr.
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ORISSA EDUCATION ACT, 1969 – Section 24-C r/w Chapter VIII, Rule-21 of the High Court of Orissa Rules, 1948 and Section 100-A of CPC – Whether an intra-court appeal shall lie against a Judgment/Order passed by a learned Single Bench in an appeal under Section 24-C of the 1969 Act, which is a Special Act.

Held: No – An intra-court appeal shall not lie against a judgment/order passed by a learned Single Judge of this Court on an appeal under Section 24-C of the Orissa Education Act, 1969 which is a Special Act.

Laba Kumar Rath v. State of Odisha & Ors.
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ODISHA MUNICIPALITY ACT, 1950 – Section 54(2)(C) – No-confidence motion against Chairman – Issuance of notice – Competent Authority – Whether issuance of notice by a duly authorized person other than the competent authority is illegal.

Held: No – This Court is also unable to accept the contention raised by the learned Sr. Counsel with regard

to the service of notice through Opp. Party No.4 as illegal as there is no such bar contained under Section 54(2)(c) of the Act for service of such notice by Opp. Party No.2 though any other authority duly authorized by him.

Priyanka Gouda V. State of Odisha & Ors.
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PENSIONARY BENEFITS – Whether the Petitioner can be denied the benefit of pension on the ground that he was not in any pensionable service the day he was appointed as State Information Commissioner.

Held: Yes – In the absence of any Rules that explicitly recognize the entitlement of State Information Commissioners to receive pension, there can be no legal right for them to claim such benefits – The Petitioner is not entitled to pension or post-retirement benefits.

Jagadananda V. State of Odisha & Ors.
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PREVENTION OF CORRUPTION ACT, 1988 – Section 5(2) Proviso –Power of Court – The learned Trial Court convicted the accused/appellant for the offences U/s. 161 of IPC and Section 5(1)(d) r/w Section 5(2) of the Act – When the learned Trial Court passed the impugned order, the appellant was 80 years old – Whether a lenient view should be taken to reduce the sentence of the appellant considering his age.

Held: Yes – The proviso to Section 5(2) of the un-amended Act empowers the Court to reduce the sentence below the minimum sentence of one year by recording sufficient reasons – The sentence order passed by the trial Court is accordingly modified and appellant is sentenced to undergo R.I. of one week with a fine of ₹ 5,000/-, in default the appellant shall undergo further R.I. for two days.

Abdul Hamid V. State of Orissa (Vigilance)
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PREVENTION OF MONEY LAUNDERING ACT, 2002 – Sections 44, 45 – Cognizance has already been taken U/s. 44 of the Act and the petitioner was taken into custody by the Enforcement Directorate – The petitioner was examined and interrogated by the Enforcement Directorate with the permission of the Special Court – Application for bail – Whether the petitioner can be released on bail inspite of the twin stipulations as embargo under Section 45 of the PML Act.

Held: Yes – After cognizance of the offence based on a complaint U/s. 44(1)(b) of the Act, ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint – In the case at hand, the Petitioner was not taken into custody by the Enforcement Directorate before the learned Special Court took cognizance – Hence, this Court is of the considered view that the twin stipulations of Section 45 of PML Act as embargo for consideration of the bail application of the Petitioner do not come into play.

Soumyakant Mohanty V. Directorate of Enforcement
2025 (I) ILR-Cut…… 191

PROPERTY LAW – Share of pre-Act daughter in ancestral property – Original owner of the property expired in the year 1953 prior to the Hindu Succession Act, 1956 coming into force – Whether a pre-Act daughter has/had any right to make gift deed of ancestral property.

Held: No – When the pre-Act daughter has/had no interest in the suit properties, she had no power under law to transfer any interest in the suit properties in favour of defendant No.1 either through the so-called gift deed dated 07.10.1988 or otherwise – It is the settled position of law that a donee cannot get a better title through a gift, than his/her donor.

Jhatu Swain (since dead through his L.Rs) V. Jogi Swain & Anr.

2025 (I) ILR-Cut…… 321

PUBLIC INTEREST LITIGATION – Absence of transparency – An army officer along with his fiancée had gone to the Bharatpur Police Station on 15.09.2024 late in the night to lodge a First Information Report (FIR) against the miscreants, who had allegedly misbehaved them – What happened inside the Police Station is under investigation/inquiry – The Bharatpur Police lodged an FIR against the said Army Officer and his fiancée alleging commission of various cognizable offences including the offence of attempt to murder to the police personnel in the Police Station – The officer's fiancée was arrested – Admittedly there was no CCTV camera installed in the police station – Whether installation of CCTV camera in police station is mandatory for transparency of the proceeding.

Held: Yes – For the public interest and to ensure better transparency, the Court issued the directions.

Registrar Judicial, Orissa High Court, Cuttack v. State of Odisha & Ors.

2025 (I) ILR-Cut…… 17

REHABILITATION MATTER – The petitioners' land, measuring 6.080 acres and jointly recorded in the names of four brothers (Ashwini Pradhan & three others), was acquired in 1987 by Mahanadi Coal Fields Ltd. – Out of the total land, 5.67 acres, approximately 60%, were taken by MCL – Employment has already been granted to family members of the petitioner's brothers – The petitioners claim to be age-barred and request employment for their nominees instead – MCL denied for employment as there were no vacancies for "D" category land oustees – Are the petitioners entitled for employment?

Held: No – The petitioners' claim for employment under

Held: No – Since the Government of India has notified the Right to Information (Amendment) Act, 2019 wherein Section 16(5) of the Act, 2005 stands amended, the power to make rules governing service conditions of all Central and State Information Commissioners, has post the amendment, rests with the Central Government and the State Government therefore cannot be compelled to frame any rules now.

Jagadananda V. State of Odisha & Ors.
2025 (I) ILR-Cut…… 115

REGULARIZATION – Petitioner was initially engaged as a NMR employee in the year 1991 – He was regularized as Mate (wages) in regular establishment vide order dated 30th Dec 1999 – The order of regularization was cancelled on the plea that he has not completed ten years as NMR – Similarly placed person got the benefit of regularization – Whether the petitioner is entitled for regularization.

Held: Yes – It is not disputed that sanctioned post of Mate (Wages) is existing, which was manned by the Petitioner – Thus, the Petitioner being similarly situated cannot be discriminated and deserves equal treatment.

Upendra Prasad Bissoyi V. State of Odisha & Ors.
2025 (I) ILR-Cut…… 90

SERVICE JURISPRUDENCE – Compassionate Appointment – Delay – Application for compassionate appointment submitted after four years of death of an employee – Whether the application should be entertained by the authority.

Held: No – If the family of the deceased employee has survived for several years (since 2004 i.e. year of death of an employee) without compassionate appointment, it is presumed that the immediate financial crisis has been

addressed – Hence, there is no justification for granting such an appointment after a prolonged delay.

Prabir Kumar Dash V. Managing Director, Odisha Forest Development Corporation Ltd. & Ors.
2025 (I) ILR-Cut…… 261

SERVICE JURISPRUDENCE – Retrospective recognition of service – The appellant appointed as Research Assistant, a Class-III post with a distinct pay scale – She was allowed to perform as a Lecturer in an administrative arrangement to address the University's needs – Whether this adjustment is equivalent to an official appointment as a lecturer and thereby gives the appellant a retrospective recognition and benefit of a lecturer.

Held: No – The Appellant's claim for retrospective salary and financial benefits as a Lecturer prior to her formal appointment i.e. 17.06.2005 lacks validity, primarily because she did not undergo the prescribed appointment procedure necessary to hold the post.

The Appellant's claim for retrospective recognition as a Lecturer and associated financial benefits is legally and factually untenable.

Dr. Rajashree Mishra V. Orissa University of Agriculture & Technology, Bhubaneswar & Ors.
2025 (I) ILR-Cut…… 79

SERVICE JURISPRUDENCE – Transfer – Interference of the Court – Scope of Judicial review in dealing with a dispute over transfer of employees – Discussed.

Held: A transfer is permissible and decision towards the same lies with the employer and unless, there is violation of any statutory rules or is alleged of being malafide, a writ court is not to exercise the jurisdiction, as in any case, transfer is an incidence of service.

except a dwelling house in view of the restriction imposed by the second part of Section 44 of the TP Act – A co-owner or his transferee can sue for partition for getting possession of specific part of the joint land as per the share, his transferor is entitled to – Until then the claim of exclusive parcel cannot be accepted.

Smt. Anulekha Dash Bhatta Mishra V. Smt. Sreelekha Dash Bhatta Mishra & Ors.

2025 (I) ILR-Cut…… 178

TRANSFER OF PROPERTY ACT, 1882 – Section 107 r/w provisions of Registration Act, 1908 as well as Orissa Public Demand Recovery Act, 1962 – Auction of fishery Sairat – Settlement of auction was made in favour of the petitioner but neither the lease deed was executed in stamp paper nor registered between the petitioner and Govt. authorities/Opp. Party authorities – Whether the certificate proceedings initiated against the petitioner for recovery of the unpaid differential bid amount as an arrear of land revenue under the OPDR Act in absence of a valid lease deed is maintainable.

Held: No – Even if the demands made against the Petitioner are Government dues and the recourse available for recovery of the same is by way of initiating a certificate proceeding against the lessee under the OPDR Act, since the so called lease deeds are unstamped and unregistered, thus this court is of the view that even though the said lease deeds have a clause to the effect that all arrears of the premium and other dues payable under the said lease shall be recoverable as arrear of land revenue, in absence of a valid lease deed/agreement, the very initiation of the certificate proceeding against the Petitioner is bad and liable to be interfered with – Accordingly, the Certificate proceeding initiated against the petitioner is hereby set aside and quashed.

Durdyodhan Mallik & Ors. V. State of Odisha & Ors.

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2025 (I)-ILR-CUT-1

LABA KUMAR RATH
V.
STATE OF ODISHA & ORS.

[W.A. NO. 2047 OF 2024]

17 DECEMBER 2024

LARGER BENCH

[CHAKRADHARI SHARAN SINGH, C.J., MISS SAVITRI RATHO, J., SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether an intra-court appeal shall lie against a Judgment/Order passed by the Single Bench in an appeal under Section 24-C of the Orissa Education Act.

Headnotes

ORISSA EDUCATION ACT, 1969 – Section 24-C r/w Chapter VIII, Rule-21 of the High Court of Orissa Rules, 1948 and Section 100-A of CPC – Whether an intra-court appeal shall lie against a Judgment/Order passed by a learned Single Bench in an appeal under Section 24-C of the 1969 Act, which is a Special Act.

Held: No – An intra-court appeal shall not lie against a judgment/order passed by a learned Single Judge of this Court on an appeal under Section 24-C of the Orissa Education Act, 1969 which is a Special Act. [Para-33(i)]

Citations Reference

Mahammed Saud v. Dr. (Maj) Shaikh Mahfooz, **2008 SCC OnLine Ori 46, AIR 2009 Ori 46;** Prasanna Kumar Sahu v. State of Odisha and others, **W.A. No.666 of 2023 dated 17.01.2024;** Arabinda Panda and another v. The Director, Higher Education, Odisha and others, **W.A. No.143 of 2016 dated 29.09.2021;** Sanjaya Kumar Nayak v. State of Odisha and others, **SLP (C) Diary 39994 of 2024;** Kamal Kumar Dutta v. Ruby General Hospital Ltd.**, 2006 AIR SCW 4594**; Pradip Chandra Parija v. Pramod Chandra Patnaik, **(2002) 1 SCC 1;** State of Bihar v. Kalika Kuer Alias Kalika Singh and others, **(2003) 5 SCC 448;** U.P Gram Panchayat Adhikari Sangh and others v. Daya Ram Saroj and others, **(2007) 2 SCC 138- referred to.**

List of Act/Code/Rule

Code of Civil Procedure, 1908, Orissa Education Act, 1969; High Court of Orissa Rules, 1948.

Keywords

Intra-court appeal, Maintainability, Special Act.

Case Arising From

Judgment/order dated 09.05.2024 passed by a learned Single Judge of this Court in FAO No.119 of 2024.

Appearances for Parties

For Appellants : Mr. Dillip Kumar Mohapatra
For Respondent : Mr. Pitambar Acharya, Advocate General,
Mr. D. Tripathy, AGA.

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, C.J.

This matter is taken up through Hybrid mode.

2. The present intra-court appeal has been preferred against a judgment/order dated 09.05.2024 passed by a learned Single Judge of this Court in FAO No.119 of 2024 filed under Section 24-C of the Orissa Education Act, 1969 (in short 'the Act').

3. When this appeal was taken up on 07.10.2024, its maintainability was questioned on behalf of the respondents on the ground that an intra-court appeal would not lie against an appellate order passed by a learned Single Judge of this Court under Section 24-C of the Act, relying on a Full Bench decision of this Court in case of ***Mahammed Saud v. Dr. (Maj) Shaikh Mahfooz***, reported in ***2008 SCC OnLine Ori 46 (AIR 2009 Ori 46)***, affirmed by the Supreme Court in ***Mohd. Saud v. Dr. (Maj.) Shaikh Mahfooz: (2010) 13 SCC 517***.

4. Mr. Dillip Kumar Mohapatra, learned counsel appearing on behalf of the appellant, in response to the said submission on the point of maintainability, had relied on a Division Bench decision of this Court in case of ***Prasanna Kumar Sahu v. State of Odisha and others*** dated 17.01.2024 passed in W.A. No.666 of 2023.

5. In case of ***Mahammed Saud (FB)*** (*supra*), the Full Bench of this Court has held in paragraph 46 as under:

> *"46. In view of the authoritative pronouncements of the Supreme Court we are of the view that after introduction of Section 100-A with effect from 1.7.2002, no Letters Patent Appeal shall lie against a judgment/order passed by a learned Single Judge in an appeal arising out of a proceeding under a Special Act."*

6. In ***Prasanna Kumar Sahu*** *(supra)*, the Division Bench of this Court, after noticing an order passed by another Division Bench of this Court in case of ***Arabinda Panda and another v. The Director, Higher Education, Odisha and***

others (dated 29.09.2021 in W.A. No.143 of 2016), has held in paragraph 18 as under:

> *"18. Having heard learned counsel for the parties and keeping in view the fact that the Coordinate Bench of this Court in W.A. No.143 of 2016, relying on the judgment of the Full Bench of this Court in* ***Mahammed Saud v. Dr. (Maj) Shaikh Mahfooz, 2008(II) OLR (FB) 725****, has already entertained the writ appeal holding the same as maintainable, this Court is not inclined to take a different view than the one already taken. On a scrutiny of the decisions rendered in* ***Rabindranath @ Rabindranath v. Bijay Kumar Bhuyan, 2016 (II) ILR CUT 283, Jyotshna Mohapatra v. State of Odisha, 2018 (I) ILR CUT 869 : 2018 (II) OLR 1 and Shradhakar Mohanty v. Management of Cuttack Municipal Corporation [W.A. No.122 of 2013, disposed of on 01.11.2023]*** *on which reliance has been placed by learned counsel for respondent no.4-Sanjaya Kumar Nayak, it appears that the same have been rendered under the special statute, for which such decisions are distinguishable. Thus, in the considered opinion of this Court, the present writ appeals are maintainable and the preliminary objection raised by learned counsel for respondent no.4-Sanjaya Kumar Nayak with regard to maintainability, is accordingly rejected. Hence, the writ appeals shall be decided on merits."*

7. For the benefit of quick reference, we consider it apt to reproduce at this stage the orders dated 29.09.2021 and 27.09.2022 passed by the Division Bench of this Court in case of ***Arabinda Panda*** (*supra*), which read thus:

> ***29.09.2021***
>
> *"1. A preliminary objection has been raised by Mr. Das, learned counsel appearing for Respondent No.3 concerning the maintainability of the present appeal. He sought to argue on the strength of the judgment of the Full Bench of this Court in Mahammed Saud v. Dr. (Maj) Shaikh Mahfooz 2008 (II) OLR (FB) 725 that since the impugned judgment of the learned Single Judge setting aside an order dated 5th July 2003 of the State Education Tribunal was passed in a petition under Article 227 of the Constitution of India, no writ appeal would lie.*
>
> *2. It is seen from the opening page of the impugned judgment that below the number of the writ petition, it is clearly stated that "In the matter of an application under Article 226 and 227 of the Constitution of India." Since this forms part of the judgment itself, it is not possible to countenance the submission that the petition in which the impugned judgment was passed was one exclusively under Article 227 of the Constitution and not Articles 226 and 227 of the Constitution. That being the position, even in terms of the judgment of the Full Bench of this Court in Mahammed Saud (supra), the present appeal would be maintainable.*
>
> *3. The preliminary objection is accordingly rejected. As regards the merits of the main appeal, learned counsel for the Appellants seeks some time.*
>
> *4. List for hearing on 31st January, 2022."*
>
> ***27.09.2022***
>
> *"1. Learned counsel for the Appellants says that despite his writing letters to the Appellants they are not even responding to him, the Court finds that despite there being no stay order of the impugned judgment dated 24th February, 2016 of the learned Single Judge, it has not even been implemented by the Appellants.*

2. In the circumstances, the Court sees no reason why this writ appeal should be entertained. It is dismissed."

8. It may be noted that the decision in case of ***Mahammed Saud (FB)*** (*supra*) was challenged before the Supreme Court. Approving the said decision, the Supreme Court, in case of ***Mohd. Saud (SC)*** (*supra*), has held in paragraph 9 as under:

"9. The validity of Section 100-A CPC has been upheld by the decision of this Court in Salem Advocate Bar Assn. v. Union of India [(2003) 1 SCC 49 : AIR 2003 SC 189] . The Full Benches of the Andhra Pradesh High Court vide Gandla Pannala Bhulaxmi v. A.P. SRTC [AIR 2003 AP 458] , the Madhya Pradesh High Court in Laxminarayan v. Shivlal Gujar [AIR 2003 MP 49] , and of the Kerala High Court in Kesava Pillai Sreedharan Pillai v. State of Kerala [AIR 2004 Ker 111] have held that after the amendment of Section 100-A in 2002 no litigant can have a substantive right for a further appeal against the judgment or order of a learned Single Judge of the High Court passed in an appeal. We respectfully agree with the aforesaid decisions."

9. Being of the prima facie view that the Division Bench, in case of ***Prasanna Kumar Sahu*** *(supra)* does not lay down a correct law on the question of maintainability of an intra-court appeal against an order passed under Section 24-C of the Act, in view of the said Full Bench decision in ***Mahammed Saud (FB)*** (*supra*), a Division Bench of this Court, by an order dated 07.10.2024 has referred the matter to a larger bench for an authoritative pronouncement on the following questions of law:

(i) Whether an intra-court appeal shall lie against a judgment/order passed by a learned Single Bench of this Court in an appeal under Section 24-C of the Orissa Education Act, 1969?

(ii) Whether the view taken by the Division Bench of this Court in the case of Prasanna Kumar Sahu (supra) is a legally correct view on the point of maintainability of an intra court appeal, placing reliance on another Division Bench order dated 29.09.2021 passed in W.A. No.143 of 2016?

(iii) Whether an intra-court appeal shall lie against an order passed by a learned Single Judge of this Court exercising the appellate jurisdiction under a Special Act?

10. This is in brief the background in which the matter has been placed today before the full bench.

11. We have heard Mr. Dillip Kumar Mohapatra, learned counsel appearing on behalf of the appellant. We have also heard Mr. Pitambar Acharya, learned Advocate General assisted by Mr. D. Tripathy, learned Additional Government Advocate (AGA) appearing on behalf of the State-respondents.

12. Mr. Acharya, learned Advocate General reiterating the objection of maintainability of the present intra-court appeal has, at the outset, taken us to the provisions under Sections 24-A, 24-B and 24-C of the Act, which read thus:

"24-A. Constitution of Tribunal- (1) The State Government may, by notifications constituted one or more Tribunals having such local jurisdiction as may be specified in the notifications.

(2) The Tribunal shall consist of one person only to be appointed by the State Government from among the officers of the Odisha Superior Judicial Service (Senior Branch).

(3) The Tribunal shall have the power to call for the records of all proceedings relating to the dispute and shall, after giving the parties concerned a reasonable opportunity of being heard, dispose of the appeals preferred to it.

(4) In disposing of an appeal, the Tribunal may make such consequential orders and issue such directions as it may deem necessary for giving effect to its decision.

(5) The decision of the Tribunal shall be final and binding on all parties and shall not be called in question in any Court of law.

(6) The order passed by the Tribunal shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Civil Court.

***24-B. Adjudication by Tribunal** – (1) The Tribunal shall have jurisdiction, power and authority to adjudicate all disputes and differences, between the Managing Committee or, as the case may be, the Governing body of any private educational institution and any teacher or employee of such institution or the State Government or any officer or authority of the said Government, relating to or connected with the eligibility, entitlement, payment or non-payment of grant-in-aid.*

(2) Any person, aggrieved by an order pertaining to any matter within jurisdiction of the Tribunal, may make an application to the Tribunal for the redressal of his grievance.

(3) On receipt of an application under Sub-section (2), the Tribunal shall, if satisfied after such inquiry as it may deem necessary that the application is a fit case for adjudication by it, admit such application, but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons:

Provided that no application before the Tribunal seeking a claim of grant-in-aid against the State Government or any officer or authority of the said Government shall be admitted, unless the applicant has served a notice on the State Government or concerned officer or authority furnishing the details of the claim and a period of two months has expired from the date of receipt of the said notice by the State Government or, as the case may be, the concerned officer or authority.

(4) The Tribunal shall not admit an application under Sub-section (2), unless it is made within one year from the date of expiry of the period of two months referred to in Sub-section (3).

(5) The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to any rules made by the Government, shall have power to regulate its own procedure.

(6) All the proceedings before the Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code, 1860.

***24-C. Appeal to High Court-** Any person aggrieved by an order or decision or judgment of the Tribunal may prefer an appeal before the High Court within a period of sixty day's from the date of such order or decision or judgment."*

(Underscored for emphasis)

13. Mr. Acharya has submitted, on conjoint reading of Sections 24-A and 24-B of the Act that Section 24-A of the Act provides for constitution of a Tribunal having jurisdiction, power and authority to adjudicate all disputes and differences

between the managing committee or as the case may be, the Governing body of any private educational institution and any teacher or employee of such institution or the State Government or any officer or authority of the said Government, relating to or connected with the eligibility, entitlement, payment or non-payment of grant-in-aid.

14. Section 24-B(2) of the Act provides that any person aggrieved by an order pertaining to any matter within the jurisdiction of the Tribunal can make an application to the Tribunal for the redressal of his grievance, he argues.

15. He has further contended, referring to sub-Section 5 of Section 24-A of the Act that the decision of the Tribunal under the Scheme of the Act is to be final and binding on all parties which cannot be called in question in any Court of law. Laying emphasis on the language used in sub-Section 6 of Section 24-A of the Act, he has submitted that an order passed by the Tribunal dealing with the disputes as mentioned in Section 24-B of the Act is enforceable under the Code of Civil Procedure (CPC), 1908 in the same manner as if it were a decree of the Civil Court. Such order of the Tribunal, thus, has the trappings of a decree under the CPC, he contends.

16. He has submitted that Section 24-C of the Act enables a person aggrieved by an order or decision or judgment of the Tribunal to prefer an appeal before the High Court within a period of sixty days from the date of such order or decision or the judgment.

17. He has, thereafter, taken us to sub-Rule 1 of Rule 2 under Chapter VIII of the Rules of the High Court of Orissa, 1948, which reads as under:

> *"**Rule-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."*

18. He has argued that the language of sub-Rule 1 of Rule 2 under Chapter VIII of the Rules of the High Court of Orissa, 1948 is unambiguous and accordingly, no intra-court appeal can be maintained against an order passed by a learned Single Judge of this Court exercising appellate jurisdiction under a special statute or supervisory jurisdiction of the High Court under Article 227 of the Constitution of India.

19. He has submitted that the decision in case of ***Prasanna Kumar Sahu*** (*supra*) does not lay down the correct law for two reasons. Firstly, in case of ***Prasanna Kumar Sahu*** *(supra)*, reliance has been placed on an order passed by a Division Bench of this Court in case of ***Arabinda Panda*** *(supra)*. The said order in case of ***Arabinda Panda*** *(supra)* had arisen out of an order passed by a learned Single Judge of this Court in a proceeding under Article 226/227 of the Constitution of India. The said order does not reflect that the concerned intra-court appeal, i.e., W.A. No.143 of 2016 was preferred against an order passed by a learned Single Judge of this Court exercising appellate jurisdiction under Section 24-C of the Act. He has secondly submitted that the opinion formed by the Division Bench in case of ***Prasanna Kumar Sahu*** *(supra)* does not duly take note of the Full Bench decision rendered by this Court in case of ***Mahammed Saud (FB)*** *(supra)* which came to be subsequently affirmed by the Supreme Court in ***Mohd. Saud (SC)*** *(supra)*.

20. *Per contra*, Mr. Mohapatra, learned counsel appearing on behalf of the appellant has reiterated his submission that the present writ appeal is maintainable and that the Division Bench in case of ***Prasanna Kumar Sahu*** *(supra)* has taken a correct view. He has further submitted that the legal question as to whether a writ appeal is maintainable or not against an order passed by a learned Single Judge in exercise of power under Section 24-C of the Act is pending consideration before the Supreme Court. He has, however, not brought to our notice any issue on this point framed by the Supreme Court in any order, though he has produced before us an order dated 20.09.2024 passed in SLP(C) Diary 39994 of 2024 (***Sanjaya Kumar Nayak v. State of Odisha and others***) whereby notices have been issued in the petition seeking special leave to appeal against the order dated 20.06.2024 passed in RVWPET Nos.40 and 39 of 2024 (arising out of order dated 17.01.2024 passed in W.A. Nos.650 and 666 of 2023).

21. After having heard Mr. Pitambar Acharya, learned Advocate General, raising the issue of the maintainability of the present intra-court appeal and Mr. Dillip Kumar Mohapatra, learned counsel appearing on behalf of the appellant, we are of the considered opinion that in the light of the law clearly laid down by a Full Bench of this Court in case of ***Mahammed Saud (FB)*** (*supra*), an intra-court appeal against an appellate order passed under Section 24-C of the Odisha Education Act, which is a Special Act, is not maintainable.

22. In case of ***Mahammed Saud (FB)*** (*supra*), the Full Bench of this Court relied on a Supreme Court's decision in case of ***Kamal Kumar Dutta v. Ruby General Hospital Ltd. (2006 AIR SCW 4594)*** wherein it has been held that the Parliament while amending Section 100-A of the Code of Civil Procedure by Amendment Act 22 of 2002 with effect from 01.07.2002 took away the Letters Patent power of the High Court in the matter of appeal against an order of a learned Single Judge to the Division Bench. In case of ***Mahammed Saud (FB)*** *(supra)*, the Full Bench of this Court, noticing the provision under Section 100-A of the CPC, has held in paragraphs 45 to 47 as under:

"45. We have already noticed that the newly incorporated S. 100-A, CPC in clear and specific terms prohibits further appeal against the decree and judgment or order of a learned single Judge to a Division Bench notwithstanding anything contained in the Letters Patent. The Letters Patent which provides for further appeal to a Division Bench remains intact, but the right to prefer a further appeal is taken away even in respect of the matters arising under the special enactments or other instruments having the force of law — be it against original/appellate decree or order heard and decided by a learned single Judge. It has to be kept in mind that the special statute only provide for an appeal to the High Court. It has not made any provision for filing appeal to a Division Bench against the judgment or decree or order of a learned single Judge.

46. In view of the authoritative pronouncements of the Supreme Court we are of the view that after introduction of S. 100-A with effect from 1-7-2002, no Letters Patent Appeal shall lie against a judgment/order passed by a learned single Judge in an appeal arising out of a proceeding under a Special Act.

47. We have learned counsel for the parties patiently, noted the citations carefully, perused the materials meticulously and considered the submissions pragmatically and for the discussions made above, we have arrived at the following conclusions:—

(1) After introduction of S. 100-A in the Code of Civil Procedure by 2002 Amendment Act, no Letters Patent Appeal is maintainable against a judgment/order/decree passed by a learned single Judge of a High Court.

(2) The decision of a Division Bench of this Court in Birat Ch. Dagara case (supra) has not laid down the correct position of law. On the other hand, the conclusions arrived at by Division Benches of this Court in V.N.N. Panicker and Ramesh Ch. Das cases (supra) are held to be good law and are confirmed.

(3) A writ appeal shall lie against the judgment/orders passed by a learned single Judge in a writ petition filed under Art. 226 of the Constitution of India. In a writ application filed under Arts. 226 and 227 of the Constitution, if any order/judgment/decree is passed in exercise of jurisdiction under Art. 226, a writ appeal will lie, whereas no writ appeal will lie against judgment/order/decree passed by a single Judge exercising powers of superintendence under Art. 227 of the Constitution.

(4) No Letters Patent Appeal shall lie against judgment/order passed by a learned single Judge in proceedings arising out of Special Acts." (Emphasis supplied)

23. As has been noticed, the Supreme Court in case of ***Mohd. Saud (SC)*** (*supra*), while affirming the Full Bench decision of this Court in case of ***Mahammed Saud (FB)*** (*supra*), has ruled in paragraph 9 as under:

"9. The validity of Section 100-A CPC has been upheld by the decision of this Court in Salem Advocate Bar Assn. v. Union of India [(2003) 1 SCC 49 : AIR 2003 SC 189] . The Full Benches of the Andhra Pradesh High Court vide Gandla Pannala Bhulaxmi v. A.P. SRTC [AIR 2003 AP 458], the Madhya Pradesh High Court in Laxminarayan v. Shivlal Gujar [AIR 2003 MP 49] , and of the Kerala High Court in Kesava Pillai Sreedharan Pillai v. State of Kerala [AIR 2004 Ker 111] have held that after the amendment of Section 100-A in 2002 no litigant can have a substantive right for a further appeal against the judgment or order of a learned Single Judge of the High Court passed in an appeal. We respectfully agree with the aforesaid decisions."

24. We are of the considered view that the Division Bench in case of ***Prasanna Kumar Sahu*** *(supra)* could not have taken a view contrary to the law laid down by a

Full Bench of this Court in case of ***Mahammed Saud*** *(FB) (supra)*, subsequently, affirmed by the Supreme Court. In our considered opinion, after having noticed the Full Bench decision in case of ***Mahammed Saud*** *(FB) (supra)* the division bench in case of ***Prasanna Kumar Sahu*** *(supra)* had no other option but to follow the law laid down in no uncertain terms in case of ***Mahammed Saud (FB)*** *(supra)*.

25. We find force in the submission advanced by Mr. Acharya, learned Advocate General that the order in case of ***Arabinda Panda*** *(supra)* had not arisen out of an appellate order passed by a learned Single Judge of this Court exercising appellate power. From the order itself it appears that the intra-court appeal had arisen out of a writ proceeding, which was filed under Article 226/227 of the Constitution of India. In the said background, the Division Bench, in case of ***Arabinda Panda*** *(supra)*, had rejected the challenge on the point of maintainability since in the petition "Article 226" was also mentioned.

26. In any view of the matter, the order in case of ***Arabinda Panda*** *(supra)* does not dilute in any manner the effect of law clearly laid down by the Full Bench of this Court in case of ***Mahammed Saud (FB)*** *(supra)*. If the Division Bench, in case of ***Prasanna Kumar Sahu*** *(supra)*, was inclined to entertain the writ appeal rejecting the objection of maintainability, the proper course ought to have been to refer the matter to a larger bench as has been laid down in catena of decisions of the Supreme Court.

27. In this context, we consider it useful to refer to the observations made by the Supreme Court in the case of ***Dr. Vijay Laxmi Sadho v. Jagdish***, reported in ***(2001) 2 SCC 247***, paragraph 33 of which reads thus:

> *"33. As the learned Single Judge was not in agreement with the view expressed in Devilal case [Election Petition No. 9 of 1980] it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."*

28. Further, in the case of ***Pradip Chandra Parija v. Pramod Chandra Patnaik***, reported in ***(2002) 1 SCC 1***, the Supreme Court has held that where a Bench consisting of Two Judges does not agree with the judgment rendered by a Bench of Three Judges, the only appropriate course available is to place the matter before another Bench of Three Judges and in case of Three-Judge Bench also concludes that the judgment concerned is incorrect then the matter can be referred to a Larger Bench of Five Judges.

29. The said decisions in the cases of ***Dr. Vijay Laxmi Sadho (supra) and Pradip Chandra Parija*** *(supra)* have been noticed with approval and relied on by

the Supreme Court in the case of ***State of Bihar v. Kalika Kuer Alias Kalika Singh and others***, reported in ***(2003) 5 SCC 448***. It is trite that the law laid down in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or equal strength.

30. Taking a different course would be detrimental not only to rule of discipline and the doctrine of binding precedents but it will also lead to inconsistency in the decisions on the point of law; consistency and certainty in the development of the law and its contemporary status- both would be immediate casualty; [see ***Pradip Chandra Parija*** *(supra)*].

31. In the case of ***U.P Gram Panchayat Adhikari Sangh and others v. Daya Ram Saroj and others***, reported in ***(2007) 2 SCC 138***, the Supreme Court made the following significant observation in paragraph 26 :-

> *"26. Judicial discipline is self-discipline. It is an inbuilt mechanism in the system itself. Judicial discipline demands that when the decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then open is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity."*

32. Considering the law laid down by the Supreme Court, we are of the definite opinion that the Full Bench judgment in the case of ***Mahammed Saud (FB)*** *(supra)* is required to be followed by the Bench of lesser strength.

33. In view of the above noted discussions, we answer the questions referred to the Full Bench as under:

> (i) An intra-court appeal shall not lie against a judgment/order passed by a learned Single Judge of this Court on an appeal under Section 24-C of the Odisha Education Act, 1969 which is a Special Act.
>
> (ii) We respectfully disagree with the view taken by the Division Bench of this Court in case of ***Prasanna Kumar Sahu*** *(supra)* which is not a legally correct view on the point of maintainability of an intra-court appeal. The Division Bench order in case of ***Arabinda Panda*** *(supra)* (dated 29.09.2021 passed in W.A. No.143 of 2016) does not indicate that a writ appeal is maintainable against an order passed by a learned Single Judge of this Court exercising appellate power under a Special Act.
>
> (iii) We accordingly hold that an intra-court appeal shall not lie against an order passed by a learned Single Judge of this Court exercising appellate jurisdiction under a Special Act.

34. After having answered the questions as above, we hold that this intra-court appeal is not maintainable and dismiss it.

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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2025 (I) ILR-CUT-11

AES INDIA (PVT.) LTD.
V.
STATE OF ODISHA & ORS.

(W.A. NO. 968 OF 2024)

05 NOVEMBER 2024

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

Issue for Consideration

Whether the award passed by the Micro & Small Enterprises Facilitation Council can be challenged in the Writ petition.

Headnotes

MICRO, SMALL & MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Section 18(3) r/w Section 34 of the Arbitration and Conciliation Act & Article 226 of the Constitution of India, 1950 – The learned Single Judge has declined to entertain a challenge to an award passed by the Micro and Small Enterprises Facilitation Council under Article 226 of the Constitution of India holding that the said award can be challenged only in accordance with the provision prescribed U/s. 34 of the 1996 Act – Whether the Order needs any interference in the intra Court Appeal.

Held: No – Learned single Judge has rightly declined to interfere with the arbitral award which could have been assailed by the appellant U/s. 34 of the Arbitration and Conciliation Act. (Para 10)

Citations Reference

Jharkhand Urja Vikas Nigam Limited v. State of Rajasthan & Ors., **(2021) 19 SCC 206;** Vijeta Construction v. Indus Smelters Ltd. & Anr., **2021 SCC OnLine SC 3436**; Shri Mahavir Ferro Alloys Pvt. Ltd. v. Passary Minerals Ltd. & Ors., **2023 SCC OnLine Ori 880 ─ referred to.**

List of Acts

Micro, Small & Medium Enterprises Development Act, 2006; Arbitration & Conciliation Act, 1996.

Keywords

Award, Arbitral proceeding, Interference by the Writ Court, Intra-Court Appeal.

Case Arising From

Order dated 28.03.2024 passed by a learned Single Judge of this Court in W.P.(C) No. 36825 of 2023.

Appearances for Parties

For Appellant : Mr. Sudipto Sarkar, Sr. Adv., Mr. S. Satyakam, Ms. Adyasha Kar

For Respondents : Mr. Debakanta Mohanty A.G.A. (For Respondent No.1)
Mr. Manoj Ku. Mishra Sr. Adv.,
Mr. Digambar Mishra (For Respondent No .3)

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, C.J.

1. In the present intra-court appeal, the appellant has challenged a judgment and order of this Court dated 28.03.2024 passed by a learned Single Judge of this Court in W.P.(C) No.36825 of 2023 whereby the learned Single Judge has declined to entertain a challenge to an award passed by the Micro and Small Enterprises Facilitation Council, Cuttack ("the Council", in short) under Article 226 of the Constitution of India, holding that the said award can be challenged only in accordance with the provisions prescribed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration and Conciliation Act").

2. Before we address the pleadings and factual aspects and the grounds taken by the appellant to assail the impugned order passed by the learned Single Judge, it would be beneficial to notice the relevant provisions of the Micro, Small and Medium Enterprises Development Act, 2006 ("the MSMED Act", in short) and the Arbitration and Conciliation Act.

2.1 Chapter-V of the MSMED Act contains the provision relating to "Delayed Payments to Micro and Small Enterprises" within the meaning of Section 2(h) and 2(m) of the said Act. Section 18 of the MSMED Act as it then existed, prior to its amendment, read as under:

> ***18. Reference to micro and small enterprises facilitation council.-***
>
> *1. Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*
>
> *2. On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.*

> *3. Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.*
>
> *4. Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.*
>
> *5. Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.* (Underscored for emphasis)

2.2. Respondent No.3 is covered by the provisions of MSMED Act. Part-III of the Arbitration and Conciliation Act contains provision for conciliation. Section 62 to 75 of the Act lay down the procedure for conciliation proceeding. Section 76 of the Arbitration and Conciliation Act deals with the termination of conciliation proceedings, which reads as under:

> *76. Termination of conciliation proceedings.—The conciliation proceedings shall be terminated—*
>
> *(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or*
>
> *(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or*
>
> *(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or*
>
> *(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.*

3. It is primarily the case of the appellant/writ petitioner that the award made by the Council ought to have been interfered with under Article 226/227 of the Constitution of India as there was no conciliation held in accordance with the procedure prescribed, which is a condition precedent for initiation of arbitration proceeding under Section 18(3) of the MSMED Act and, therefore, the arbitral award is a nullity.

4. Learned Single Judge after having noticed the rival submissions made on behalf of the parties and taking into account various judicial pronouncements, has held as under:

13.1 On a plain reading of the case law, it is clear that the jurisdiction of a Court may be classified into several categories, which are broadly described as (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction and (iii) jurisdiction over the subject matter.

13.2 So far as the territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be raised at the earliest possible opportunity and in any case at or before the settlement of issues. If objection with regard to territorial or pecuniary jurisdiction is not raised at the earliest possible opportunity, it cannot be allowed to be taken at a subsequent stage. The aforesaid case law also makes it clear that jurisdiction as to the subject matter is however totally distinct and stand on a different footing. Where the Court has no jurisdiction over the subject matter of the dispute by reason of any limitation imposed by the statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity. Endeavour was made by Mr. Rath, learned Senior Advocate for the Petitioner to bring the instant case under the third category stating that the Council had no jurisdiction to proceed with the arbitration without conducting an effective conciliation under Section 18(2) of the MSMED Act. As discussed earlier, this Court has already held that there is no infirmity in the process of conciliation. Further, no objection with regard to the jurisdiction of the Council to proceed with the arbitration was raised, as required under Section 16 of the Arbitration Act. In any event, the proceeding of arbitration before the Council having all characteristics of an arbitration proceeding under the Arbitration Act, the objection with regard to competence or jurisdiction of the Arbitrator can only be challenged in a proceeding under Section 34 of the Arbitration Act and not before that. Thus, the issue with regard to competence of the Arbitrator (the Council) can only be raised in a properly constituted petition under Section 34 of Arbitration Act as provided under Section 19 of MSMED Act and not in a proceeding under Article 227 of the Constitution of India, as in the instant case.

14. Accordingly, this Court is constrained to hold that the writ petition in the present form is not maintainable and hence stands dismissed. However, in the facts and circumstances, there shall be no order as to costs.

5. Mr. Sudipto Sarkar, learned Senior Counsel appearing on behalf of the appellant has vehemently argued that in the present case, there was no conciliation proceeding held in accordance with the procedure prescribed and termination of conciliation proceeding before the Council and, therefore, the arbitration proceeding undertaken by the council was completely beyond jurisdiction. He has placed reliance on the Supreme Court's decision in case of ***Jharkhand Urja Vikas Nigam Limited v. State of Rajasthan and others, (2021) 19 SCC 206*** to strengthen his contention. Reliance has also been placed by him on the Supreme Court's decision in case of ***Vijeta Construction v. Indus Smelters Ltd. and another, 2021 SCC OnLine SC 3436 and Shri Mahavir Ferro Alloys Pvt. Ltd. v. Passary Minerals Ltd. and others, 2023 SCC OnLine Ori 880.*** He has submitted that the conciliation was purportedly initiated on 17.11.2022 and on the very next date on 27.12.2022, the conciliation was terminated ostensibly on the ground that no proposal was received

from the parties. He has argued that the Council clubbed the arbitral and conciliation proceeding together, as the parties were directed to file their pleadings for arbitration in response to pleadings filed at the stage of conciliation. He has submitted that such clubbing of arbitration and conciliation proceeding is impermissible under the MSMED Act. He has also argued that the impugned award dated 07.09.2023 was passed in violation of principles of natural justice inasmuch as no opportunity was afforded to the appellant to cross-examine the sole witness of respondent No.3 based on whose evidence the award was passed. He submits that the learned Single Judge failed to appreciate that no conciliation proceeding as mandated by Section 18 of the MSMED Act was conducted which envisages a two tier system for dispute resolution. An arbitration proceeding can be initiated under Section 18(3) of the MSMED Act only if conciliation between the erring parties fails. Assailing the view taken by learned Single Judge that the appellant could have made an application under Section 16 of the Arbitration and Conciliation Act questioning the competence of arbitration tribunal, it has been submitted by learned Senior Counsel for the appellant that since the appellant was asked to file a counter affidavit before initiation of the arbitral proceeding, it had no opportunity to file application under Section 16 of the Act.

6. Mr. Mishra, learned Senior Counsel appearing on behalf of the contesting respondent No.3, on the other hand, has submitted that the impugned order passed by learned Single Judge does not suffer from any legal infirmity requiring interference in the present intra-court appeal. He has submitted that the Council after undertaking the conciliation proceeding has specifically recorded that the conciliation proceeding failed, where-after the arbitration proceeding was undertaken as prescribed under Section 18 (3) of the Act. He submits that the learned Single Judge has rightly declined to interfere with the award with a liberty to the appellant to question the same in accordance with the provisions under Section 34 of the Arbitration and Conciliation Act.

7. From the materials on record, it is evident that by an order dated 17.11.2022, the conciliation process under Section 18 (2) of the MSMED Act was initiated for amicable settlement of the disputes between the parties. By a subsequent order dated 27.12.2022, the Council declared failure of the conciliation process under Section 18 (2). Thereafter, it invoked arbitration clause under Section 18 (3) of the Act. It is the appellant's case that there is no semblance of any attempt to conciliate the dispute in accordance with the provisions under the Arbitration and Conciliation Act.

8. Upon careful scrutiny of the arguments advanced on behalf of the appellant, it appears that the appellant in the writ proceeding attempted to assail the opinion of the Council that conciliation between the parties had failed, on various grounds including the ground that effective steps were not taken for conciliation. The appellant had appeared before the Council in the conciliation proceeding, completely denying the claim of the respondent and had asserted to the extent of saying that it

sought to abuse the beneficial legislation i.e. MSMED Act and sought to unjustly enrich itself at the cost of the appellant. Taking into account the rival stands by the parties, the Council had terminated the conciliation process under Section 18 (2) of the MSMED Act on 17.11.2022. The appellant participated in the arbitration proceeding, as is evident from the impugned award made by the Council. From the award, it does not appear that the appellant ever raised any issue of non-compliance of the requirement under Section 18 (2) of the MSMED Act read with the provisions under Part-III of the Arbitration and Conciliation Act. 9. The decision rendered in case of ***Jharkhand Urja Vikas Nigam Limited*** (supra) is not applicable in the present facts and circumstances of the case. In case of ***Jharkhand Urja Vikas Nigam Limited*** (supra), the appellant before the Supreme Court had not appeared in the proceeding for conciliation and on the very first date of appearance, an order was passed by the Council directing the appellant and/or its predecessor Jharkhand State Electricity Board to pay a sum of Rs.78,74,041/- towards principal claim and Rs.91,59,705 towards interest. In the said case, no arbitration proceeding was found to have been initiated in accordance with the provisions of Arbitration and Conciliation Act. In such view of the matter, the Supreme Court had held in paragraph-18 as under:

> *18. The order dated 6-8-2012 is a nullity and runs contrary not only to the provisions of the MSMED Act but contrary to various mandatory provisions of the Arbitration and Conciliation Act, 1996. The order dated 6-8-2012 is patently illegal. There is no arbitral award in the eye of the law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996, an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time, when an order is passed without recourse to arbitration and in utter disregard to the provisions of the Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that the appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996.*

10. In the facts and circumstances of the present case, learned Single Judge has rightly declined to interfere with the arbitral award which could have been assailed by the appellant under Section 34 of the Arbitration and Conciliation Act.

11. There is no legal infirmity in the impugned order passed by the learned Single Judge. We do not find any merit in the present appeal, which is accordingly 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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2025 (I) ILR-CUT-17

REGISTRAR JUDICIAL, ORISSA HIGH COURT, CUTTACK
V.
THE STATE OF ODISHA & ORS.

[SUO MOTU W.P.(C) NO. 23735 OF 2024]

23 DECEMBER 2024

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

Issues for Consideration

1. Whether installation of CCTV camera in police stations is mandatory for transparency of the proceeding.
2. Whether a member of the Armed Forces could be tried as per Bharatiya Nagarik Suraksha Sanhita, 2023.

Headnotes

(A) PUBLIC INTEREST LITIGATION – Absence of transparency – An army officer along with his fiancee had gone to the Bharatpur Police Station on 15.09.2024 late in the night to lodge a First Information Report (FIR) against the miscreants, who had allegedly misbehaved them – What happened inside the Police Station is under investigation/inquiry – The Bharatpur Police lodged an FIR against the said Army Officer and his fiancée alleging commission of various cognizable offences including the offence of attempt to murder to the police personnel in the Police Station – The officer's fiancée was arrested – Admittedly there was no CCTV camera installed in the police station – Whether installation of CCTV camera in police station is mandatory for transparency of the proceeding.

Held: Yes **–** For the public interest and to ensure better transparency, the Court issued the directions. (Para 9)

(B) BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 – Sections 4 & 70 of the Army Act, 1950 r/w guidelines of MHA – Whether the member of the Armed Forces could be tried as per BNSS for committing any offence.

Held : Yes **–** It is clear that offence of murder, culpable homicide not amounting to murder and rape committed by a member of the Armed Forces attracts jurisdiction and procedure of the common law i.e. BNSS, 2023 – In the light of guidelines of Ministry of Home Affairs, Govt. of India instruction issued to the Police Officers which need to be scrupulously followed when dealing with any member of the Armed Forces committing or purports to commit any offence or subjected to the process of investigation for having

any complicity in a criminal case – Necessary SOP approved by the Chief Minister of the State, dealing with arrest and interaction with members of Armed Forces in Police Stations – Indicated. (Para 16)

Citations Reference

Delhi Judicial Service Association Vs. State of Gujarat: **(1991) 4 SCC 406;** D.K. Basu Vs. State of West Bengal: **(2015) 1 SCC 744;** Paramvir Singh Saini Vs. Baljit Singh and Others: **(2020) 7 SCC 397 and (2021) 1 SCC 184 – referred to.**

List of Acts/Sanhita/Rules

Commissions of Inquiry Act, 1952; The Army Act, 1950; The Air Force Act, 1950; The Navy Act, 1957; Bharatiya Nagarik Suraksha Sanhita, 2023; Criminal Courts & Court Marital (Adjustment of Jurisdiction) Rules, 1978.

Keywords

Public Interest litigation; Absence of transparency; Trial of Army Officer; Murder; Attempt to Murder.

Case Arising From

Suo motu cognizance in the nature of P.I.L.

Appearances for Parties

For Petitioner : Mr. Gautam Mishra, Sr. Adv., (Amicus Curiae)
Mr. A. Dash
For Opp.Parties : Mr. Pitambar Acharya, Advocate General,
Mr. Saswat Das, A.G.A.

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, CJ

The Bharatpur Police Station in the city of Bhubaneswar, the capital of the State of Odisha shot to prominence and widely hit the headlines of both the print and electronic media, for wrong reasons, in relation to a disturbing occurrence that had taken place in the premises of the police station on 15th September, 2024. We have considered it just and equitable not to refer to the allegations and counter allegations concerning the said incident in the present order as that may influence the matters which are pending police investigation and, the inquiry ordered by the State government under the Commissions of Inquiry Act, 1952 by a retired Hon'ble Judge of this Court.

2. The fact which was found to be disturbing was that an army officer along with his fiancée had gone to the Police Station on 15.09.2024 late in the night to lodge a First Information Report (FIR) against the miscreants, who had allegedly misbehaved with them. What happened inside the police Station with them or what

did the duo do with the police personnel are subject matter of investigation/inquiry. The Bharatpur Police lodged an FIR against the said army officer and his fiancée registered as Bharatpur P.S. Case No.640 of 2024, alleging commission of various cognizable offences including the offence of attempt to murder the police personnel in the police station. The officer's fiancée was arrested. The army officer and his fiancée were unarmed.

3. Based on a letter dated 18.09.2024 addressed to the Chief Justice by the Lieutenant General PS Shekhawat, AVSM, SM, General Officer Commanding & Colonel of the MECH INF REGT, Madhya Bharat Area and his meeting with the Chief Justice at the residence on 17.09.2024, prior to making of the said communication dated 18.09.2024, *suo motu* cognizance of the incident was taken and this case, in the nature of Public interest Litigation came to be registered. The contents of the said communication dated 18.09.2024 of Mr. Shekhawat is being reproduced herein below:-

> "1. I am writing to bring to your attention, a grave incident that occurred at Bharatpur Police Station, Bhubaneswar on 15 September, 2024, where the prestige of a serving Army Officer was demeaned and the modesty and dignity of his fiancée , x x x x x .
>
> 2. The unfortunate incident took place when the Army Officer along with his fiancé went to the police station to file a complaint against miscreants who had misbehaved with the couple at approximately 0100 hours on the day of the incident. Instead of extending the expected protection and support, the officers on duty acted in a manner unbecoming of their position. They not only humiliated the lady but also molested her and also disrespected the Army Officer by putting him under custody without any charge for almost 14 hours. The medical inspection of the lady also indicates grave injuries, which point to manhandling by the police personnel. The Bharatpur Police Station does not have a CCTV installed which is violative of Hon'ble Supreme Court's directions. The police actions and their purported statements are manipulative and aimed at concealing the police brutality on the lady and the officer.
>
> 3. Sir, the actions of the police personnel have deeply shaken the faith of the victims and also the military fraternity as a whole in the law enforcement system. This is evident from the wide coverage of the incident, not only on the main stream media but also the outrage of netizens across all social media platforms. While the officer was later released on intervention by the military authorities on the night of 15 September, the lady is still in judicial custody. Her medical examination was done at Institute of Medical Science and SUM Hospital, Bhubaneswar, which indicates reasonable injuries, but a subsequent medical done at Capital Hospital, Bhubaneswar was manipulated and shows no such injuries. The manipulated medical reports were produced before the Judicial Magistrate, thus, forging evidence as well as misleading the judiciary. Such blatant manipulation and tampering of evidence is violative of her basic rights. I am enclosing the medical documents and photographs of her injury for perusal of your lordship. The arbitrary manner in which the lady was put through medical examination as also the hastily

conducted hearing in front of the Magistrate on 15th September are indicative of gross travesty of justice and to an extent, manipulation of evidence.

4. Sir, we are of the opinion that the law has been violated on numerous counts. In the first instance a serving Army Officer was placed under custody without any offence and also without informing the Army Authorities. Secondly, the couple who had approached the police station for lodging a complaint, were denied their rights and instead a FIR was framed against the lady. In addition, the lady was sexually abused and manhandled. She was also subjected to physical torture. Subsequently, while in jail the lady was denied medical assistance when she complained of pain in her jaw and hip due to the manhandling she had sustained. The jail doctor too diagnosed suspected fracture of jaw but the jail authorities paid no heed to his advice. It was on the intervention of the Hon'ble Cuttack High Court that her medical examination and medical treatment is being done at AIIMS, Bhubaneswar. Denying basic medical assistance is grossly inhuman and violation of Human Rights of any individual. The lady was sexually abused by Mr. Dinakrushna Mishra, the IIC of Bharatpur Police Station and manhandled by the lady SI at the Police Station.

5. On intervention by the Army Authorities, the case has been handed over to the Crime Branch of the Orissa Police and an independent enquiry constituted. The lady, however, continues to remain in judicial custody.

6. In the light of the above, I humbly request your lordship to take Suo Motu cognizance of this incident and ensure that ends of justice are served by ensuring the following:-

(a) Grant of bail to the lady without any further delay.

(b) The enquiry conducted by the Crime Branch is absolutely fair and impartial in both letter and spirit. A FIR be lodged against the miscreants who indulged in the scuffle with the couple on the night of 14-15 September.

(c) The errant police personnel are not only removed from their positions but also adequately punished so that the corrective message is sent to all concerned.

(d) The police authorities be instructed to implement Hon'ble Supreme Court orders and install CCTV so that the action of police authorities are transparent and not violative of basic Human Rights of the citizens of the country.

(e) The concerned medical authorities at Special Jail, Jharpada be held accountable for not providing urgent medical assistance to the lady even after the medical advice by the doctor of the Jail.

7. I am sanguine that under your Lordship's guidance, the matter will be impartially investigated and prompt appropriate action will be taken against those responsible.

8. Thanking you, Sir, in anticipation for your kind intervention."

4. There is no clue whether any person, other than the police personnel of the police station, the army officer and his fiancée, was present when the said occurrence had taken place in the police station. This observation, however, should not be construed as our finding on this point, since the matter is under investigation by the Police and is being inquired into by a Commission of Inquiry. From the latter part of the present order, it can be seen that admittedly there was no CCTV camera

installed in the police station. There was, thus, no clue as to what must have happened within the premises of the police station because of which the persons who had gone to lodge a criminal case stood implicated in the Bharatpur P.S. Case No.640 of 2024, with accusation of commission of offence of attempt to murder the police personnel in the police station.

5. The occurrence reminded us of an incident of 25th September, 1989 in which a Chief Judicial Magistrate of Nadiad, who had gone to the police station was arrested and taken to hospital for medical examination on the charge of having consumed liquor in breach of prohibition law in force in the State of Gujarat. The Chief Judicial Magistrate was photographed in handcuffs with a rope tied around his body, along with the constables which were published in the newspapers all over the country. That had led to "tremors in the bench and the Bar throughout the whole country" as observed by the Supreme Court in the case of ***Delhi Judicial Service Association Vs. State of Gujarat*** reported in ***(1991) 4 SCC 406*** which led to issuance of slew of guidelines by the Supreme Court in the matter of arrest of a judicial officer. The Supreme Court, while issuing the guidelines remarked in no uncertain terms that no person whatever his rank or designation may be, is above law and he must face the penal consequences of infraction of criminal law. A Magistrate, Judge or other Judicial Officer is liable to criminal prosecution for an offence like any other citizen.

6. When the present matter was taken up by this Court on 23.09.2024, Mr. Pitambar Acharya, learned Advocate General representing the State of Odisha informed this Court about the swift action taken by the Director General of Police, Odisha by transferring the investigation of said Bharatpur P.S. Case No.640 of 2024 to the Crime Branch and registration of a fresh Crime Branch P.S. Case No.10 of 2024. Another case i.e. Crime Branch P.S. Case No.11 of 2024 had also been registered based on the complaint made by the said army officer. In addition, one Chandaka P.S. Case No.615 of 2024 was also registered in connection with the incident of road rage, to complaint about which the army officer and his fiancé had gone to the police station, Mr. Acharya informed, and he further stated that all the three cases were being investigated by the Crime Branch of the State of Odisha under the supervision of a Senior Police Officer of the rank of Additional Director General of Police, Crime Branch. He had also informed that in exercise of the powers conferred under Section 3 read with sub-section (1) of Section 5 of the Commissions of Inquiry Act, 1952 the State Government has appointed a Commission of Inquiry headed by Mr. Justice C.R. Dash, a retired Hon'ble Judge of this Court to inquire into the incident and submit report on the following aspects:-

> "(i) Examining the sequence of events and circumstances alleged to have led to the incidents of alleged misbehaviour/assault on a woman, serving army officer, police officers etc. leading to registration of Bharatpur PS Case Nos.640/ 15.09.2024 (CID-CB Case No.10/24), CID-CB Case No.11/24 and Chandaka PS Case No.315, dated 19.09.2024 of UPD Bhubaneswar.
>
> (ii) The Role, Conduct and Accountability of the Individuals/ Groups/Authorities.

(iii) Any other matter connected with or incidental thereto as the Commission may consider appropriate.

(iv) To suggest measures to be taken to avoid the recurrence of such events in future and ensuring safety and Security of women."

7. He had submitted that the State did not have any objection, if this Court decided to monitor the investigations, in the interest of justice, despite the aforesaid steps having already been taken by the State administration at the level of police headquarters. In response to his submission, we had observed in our dated 23.09.2024 as under:-

"7. We do appreciate the swift action taken at the level of the Director General of Police (DGP) to investigate the occurrence. It is needless to say that power and duty of the Investigating Agency to investigate into a cognizable offence is statutory and unless there are exceptional circumstances, it is not desirable for the Court to interfere. We expect that the Investigating Agency shall act independently and fairly. There is no reason why this Court should monitor the investigation.

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10. At this juncture, we make it clear that unless the circumstances are exceptional and compelling, this Court shall not comment upon the investigation which is being conducted by the police, who have the statutory power to conduct such investigation. The State of Odisha has already constituted a Commission under the Commission of Inquiry Act headed by a retired Judge of this Court. In the present suo motu proceeding in the nature of Public Interest Litigation, the Court will generally confine itself to the issues concerning facilities available in various police stations and police outposts in the State of Odisha."

8. In view of the admitted facts that the concerned police station did not have the facility of CCTV camera, this Court in its order dated 23.09.2024 had also made the following observations in paragraphs 8, which reads thus:-

"8. What is disturbing to this Court, after having seen the sequence of events, that admittedly two persons had entered into the police station, apparently with no intention to commit any crime, rather to lodge a complaint. What happened inside the police station is a matter which is under investigation. It is, however, surprising that they came out of the police station with an FIR registered against them alleging commission of offence of attempt to murder the police personnel. It is an admitted fact that the concerned police station does not have the facility of CCTV camera. This is despite the Supreme Court's directions issued in the cases of ***D.K. Basu Vs. State of West Bengal reported in (2015) 1 SCC 744, Paramvir Singh Saini Vs. Baljit Singh and Others, reported in (2020) 7 SCC 397 and (2021) 1 SCC 184.***"

9. Mr. Acharya, learned Advocate General had informed the Court that out of 650 police Stations in the State of Odisha, 559 police stations were equipped with CCTV cameras. We were informed to our utter surprise that some of the newly constructed Police Stations in the State did not have the facility of CCTV cameras. In the said background, in the public interest, and to ensure better transparency, we

had issued the following directions in our order dated 23.09.2024 in paragraphs 11 and 12:-

> "11. For the said purpose, for the present, we direct the Addl. D.G. of Police (Modernisation), Odisha, Cuttack Mr. Dayal Gangwar, I.P.S. to submit a report based on the information available with the headquarters as regards availability of CCTV facilities in all the police stations and outposts in the State. He will be required to submit a report by 8th October, 2024. If possible, Mr. Gangwar shall be required to explain the scheme of positioning of the CCTV cameras in the police stations. If required, we shall issue further directions to ensure that the Supreme Court's direction in the cases noted above are fully complied with, depending upon the nature of report which is submitted by Mr. Gangwar.
>
> 12. We further observe that Mr. Gangwar shall submit his report to this Court as an officer of the Court and shall assist the Court in the present matter in that capacity, even if, he is shifted to any other post in the State of Odisha. In his report, he must also mention as to whether the existing CCTV facilities in various police stations are in fact functional or not. Storage capacity of the hard disk kept in the police station should also be disclosed in the said report."

10. Appreciating the concern about the personnel of the armed forces as reflected from the communication made by Mr. Sekhawat, which led to registration of the present *suo motu* PIL, we had desired to know as to what steps did the State Government intended to take to protect the dignity of the personnel of the armed forces in such circumstances.

11. Further, Mr. Gangwar, the Addl. Director General of Police (Modernization) was requested by the said order dated 23.09.2024 to suggest a fool-proof method for ensuring installation and proper maintenance of CCTV facilities in the police station.

12. Pursuant to the said order of this Court dated 23.09.2024, Mr. Dayal Gangwar filed a report before this Court on 08.10.2024 based on the inputs which he had received about the status of functional CCTV cameras in various police stations in the State, in the light of this Court's direction, he mentioned in his report that out of 593 police stations in the State of Odisha, in 456 police stations CCTV cameras were not functional. He further informed that with his intervention and the efforts made by the top officials of the police and the State Government, CCTV cameras in all the police Stations of the State, except 13 had become functional and rest of the 13 police stations would also be equipped with CCTV cameras within 15 days. On the point of supervision, maintenance and upkeep of the CCTVs and their equipment, he suggested in his affidavit as under:-

> "12. That, it will be pertinent to mention here that, the integrated system involves three tier supervision, maintenance and upkeep of CCTVs and its equipments. The first at the level of the Police Station, wherein it's the duty of the IIC/OIC to ensure working, maintenance and recording of CCTVs and allied equipment and monitor the footage of all the cameras under the Police Station. The second level is at the level of District Level Oversight Committee which has to continuously monitor the

maintenance and upkeep of CCTV equipments, review footages of all the PSs under their jurisdiction and final at the State Level Oversight Committee to address concerns raised by DLOC. This mechanism required requisite internet bandwidth for connecting all Police Stations with the S.P. offices and all Police Stations with the State Police HQ. The system needed installation of Video Management Software (VMS) at the district level under the control of S.P. and Central Monitoring System (CMS) at the state level for seamless monitoring of the CCTV surveillance system."

13. It was further stated in paragraphs 13, 14 and 15 of the affidavit as under:

"13. That, this deponent has carefully gone through the contents of the present case and directions given by the Hon'ble High Court. In response to the directions given to this deponent and being aware of the seriousness and importance of the above directions, this deponent chalked out a visit programme on a daily basis and visited several Police Stations in different districts to personally satisfy himself about the CCTV facilities in vogue. This deponent also constituted 20 teams led by officers of the rank of DC/AC of different battalions to visit different police stations of all the districts of Odisha to physically check the status of the functioning of the CCTV facilities. After carefully studying the reports and on the basis of the personal visits to different police stations, this deponent hereby humbly submits the report as narrated in the following paragraphs.

i. CCTV facilities has been installed in 593 police stations and installation in 52 newly created police stations has been undertaken from 24th September 2024. CCTV facilities is not installed in any of the 295 outposts as of now. Proposal has been submitted to State Government to install CCTV facilities in the outposts after clear instructions of the High Court.

ii. A quick assessment was undertaken to obtain the status of all the 593 PS where CCTV were installed.

iii. It's to submit that out of 11,729 CCTV cameras installed in 593 police stations, 2266 of cameras were non-functional in 456 Police Station due to various causes as on 24th September 2024. The Police station wise breakup was collected from the districts and directions were issued to OCAC and the system integrator for taking steps to make them functional. The System Integrator has the provision to implement and maintain the monitoring/ticketing tool and capture all the incidents/complaints on CCTV equipment and resolve them. It was being done telephonically due to non-implementation of the VMS/CMS systems which has been made functional now.

iv. 57 Police stations needed shifting of some of the CCTV surveillance systems due to relocation of Police Stations from old building to new building or need for change of NVRs to different room for want of technical requirements.

v. The Video Management Software (VMS) and Central Monitoring System (CMS) systems were not functional due to want of requisite internet connectivity and bandwidth.

vi. For CCTV installation in 52 numbers of new Police Station buildings, OCAC has been requested to take necessary steps for CCTV facilities at the earliest.

vii. A meeting was conducted with the Principal Secretary, E&IT Department for preparation of the road map for installation/ restoration of the CCTV facilities in the Police Stations.

viii. A meeting was convened with Director SCRB to decide on the IP schema and the modalities of completion of the Video Management Software (VMS) and Central Monitoring System (CMS), using existing CCTNS network.

ix. CEO, OCAC has been requested to submit a detailed proposal to this Hdqrs. for budgetary provision for repair and restoration, reinstallation & maintenance of CCTV Surveillance System in Police Stations throughout Odisha along with new installation in 52 new Police Stations for onward transmission to Govt. vide SP Hdqrs. Letter No.40736/Building dtd.25.09.2024.

x. Revenue Divisional Commissioners of all Ranges have been requested for making District Level Oversight Committee (DLOC) functional for necessary oversight mechanism for supervising the installation/ relocation/ restoration of CCTVs facilities.

xi. All Range IGs/DIGs have been instructed to act as supervisory officers of their respective ranges for vetting of the status report being sent by SsP of their Ranges.

xii. State Government has been requested for necessary approval for installation of CCTV facilities in 52 new Police Stations and 295 nos. of Out Posts.

xiii. All Commandants of Battalions have been instructed to depute one Deputy Commandant/ Asst. Commandant for physical checking of CCTV facilities functioning in Police Stations.

xiv. CEO, OCAC has been requested to organise a Refresher Training for the officers/ personnel of all Police Stations / Outposts across the State in management of CCTV facilities. xv. The Principal Secretary, Skill Development & Technical Education, Govt. of Odisha, Bhubaneswar has been requested to prepare a standard training module on management of the CCTV surveillance system to be imparted to all the police personnel of the state in a phased manner.

14. That, in view of the immediate steps taken as described in point no.13 as above, regular follow-up was done at this deponent's end, each day, and as such, the status report as on the date of submission of this affidavit is as under:

i. The restoration work of non-functional CCTV cameras has been completed in 1166 out of 2266 bringing down the percentage of non-functional cameras from 25% to less than 10% and the rest restoration work is underway which will be completed by 15th November 2024.

ii. The 57 Police Stations where the relocation was to be done has been completed and are functional.

iii. The installation work of 52 new PS has already started and completed in 49 Police Stations and rest installation would be completed soon.

iv. VMS and CMS has been integrated in 06 districts, namely Urban Police District Cuttack, Urban Police District Bhubaneswar, Berhampur, Rourkela, Puri and Nuapada. The system will be integrated with all districts by the end of 15.11.2024.

v. OCAC has initiated steps for installation of the CCTV facilities in all Outposts of the state and the System Integrator of OCAC would complete by the end of 31.03.2025.

15. That, as regards to the scheme of positioning of CCTV cameras is concerned, clear instructions as per guidelines of Hon'ble Supreme court of India have been circulated and well explained that no part of the Police station should be left uncovered. The following points have been covered as per the guidelines in the 593 police stations and would be done in the 52 newly created police stations as well. The same guidelines would be implemented for installation of CCTV systems in the outposts.

i. Entry and exit points
ii. Main gate of the Police Stations
iii. All Corridors
iv. Lobby
v. Reception area
vi. All verandas/outhouses
vii. Inspector/Sub-Inspector(in-charges) rooms
viii. Sub-Inspectors room
ix. Areas Outside the lock up room
x. Police Station hall
xi. Front side of Police Station Compound
xii. Outside wash rooms and toilets
xiii. Duty officer room
xiv. Back part of the Police Station
xv. Any other area/room available in Police station campus.

That, Mahila & Sishu Desk and the front view of the Hazats was also covered for all round surveillance of a Police Station as mentioned above."

14. Dealing with the storage capacity of the Hard Disks of Network, Video recorders kept with the police stations for historical investigation and evidentiary purposes, following statement was made in the said affidavit in paragraphs 16 and 17 which read thus:

"16. That, as regards to the storage capacity of the hard disks of the Network Video Recorders kept in the Police Stations for historical, investigation and evidentiary purposes, it may be mentioned that there are 14 Hard Drive Disks(HDD),each having a capacity of 10 TB in each NVR in each police station of the state. To further explain the final usable storage after formatting of the HDDs it's to mention that RAID 5 storage configuration has been used in the NVRs for enhancing data reliability and performance. The total raw capacity of the 14 HDDs in each NVR is 140 TB and after deducting RAID 5 usable capacity (10 TB) and approximately 10% loss for formatting, the final usable storage capacity of the 14 HDDs is around 117 TB in each NVR in each police station, which is sufficient to store video footages for a period of 1 (one) year.

17. That, further it was decided that instead of having a separate network, the network available for CCTNS project will be leveraged with this project to ensure data security and prevent the leakage of any content of the CCTV data. The installation of VMS and CMS are underway in view of allocation of requisite bandwidth at respective PS and SP office recently. The System Integrator in the

meantime attended to the complaints as per his capability though not as per the standard as required under the service level agreement."

15. In his affidavit, further statements have been made in paragraphs 18 and 19 in relation to comprehensive maintenance, regular maintenance and service for Court activities:

"18. That, a comprehensive maintenance plan has been prepared for ensuring the sustainability of the project.

a. The current system will be operative till 31-03- 2027 which is 5 years from the installation.
b. As per the standard industry practice the CCTV project carries a life span of 5 years with additional maximum 2 years depending on the condition of the system after 5 years. After which the system will attend its salvage value and have to be scrapped and new system with updated technology have to be adopted.

19. That, the regular maintenance and service support activities will be as below: -

i. Scheduled Maintenance:

• Routine Check-ups: Establishing a monthly maintenance schedule to inspect camera functionality, wiring, and recording equipment at each Police Station.
• Preventive Maintenance: Addressing minor issues before they escalate, such as cleaning lenses and checking cable connections.

ii. Monitoring and Alerts:

• Real-Time Monitoring: The activation of the Central Management System (CMS) and Video Management System (VMS) would allow real-time viewing and monitoring of CCTV feeds to quickly identify issues, in police station and address the issues promptly.
• Automated Alerts: Through CMS all the alerts for malfunctions issues would be monitored enabling rapid response and solutions.

iii. Documentation and Record Keeping: -

• Maintenance Logs: Detailed records of all maintenance activities, repairs, and inspections carried out at police station would be kept to track system performance and issues.
• Incident Reports: Documentation of incidents involving CCTV footage for accountability and follow up.

iv. Training and Awareness:

• Staff Training: Regularly training provision to staff in each Police Station on operation of the CCTV system, identifying issues, and reporting malfunctions.
• User Manuals: Providing easy access to manuals and troubleshooting guides for quick reference.

v. Data Management:

• Storage Solutions: Ensuring sufficient storage capacity of 117 TB usable space at each police station and regular backups.
• Compliance Protocols: Use strong passwords authentication for system access.
• Data Security: Conduct regular training sessions for staff on the importance of data security and privacy regarding CCTV footage.

vi. System Upgrades:

• Regular Software Updates: Ensuring that the CCTV software and firmware are up-to-date at each police station to improve security and functionality.

• Hardware Reviews: Periodically assessing the need for hardware upgrades or replacements based on performance and technology advancements in coming days.

vii. Cooling and Humidity Control Management:

• Air Conditioning (AC): Providing adequate air conditioning (AC) for Network Video Recorders (NVRs) for safeguarding Hard Drives (HDDs) and ensuring optimal performance.

• Proper Placement: Positioning of NVRs in well ventilated areas, avoiding enclosed spaces without airflow.

• Rack Cooling: Using server racks with built-in cooling solutions or fans to promote airflow around the NVRs.

• Humidity Levels: Keeping humidity under control to prevent moisture build-up that can harm electronic components.

viii. Power Supply System:

• Ensuring the availability of uninterrupted power supply like Solar Power and effective UPS Systems to the equipment with provisioning of lighting arrester to safeguard the installed CCTV equipment in all Police Station and outposts.

ix. CCTV Camera Layout Diagram:

• Clear Labels: Using clear labels for each camera location in the Police Station and outposts.

• Directional Arrows: Including directional arrows to indicate camera coverage areas.

• Critical Zones: Highlighting critical zones that require extra monitoring.

• Coverage: Ensuring overlapping fields of view to eliminate blind spots.

x. Role-based Access Control:

a. Administrator

• Full access to all CCTV footage and settings.

• Can manage user roles and permissions.

b. Officers

• Limited access to footage from their assigned areas.

• Can view footage.

xi. Manpower Support:

• At present the CCTV system is being monitored by CCTV operators at Central monitoring system control room. Footages from cameras are recorded 24x7 in real time basis and retained for the period of one year in all NVRs (Network Video Recorder) at each Police Stations and Outposts.

• Adequate number of dedicated CCTV operators to be deployed at CMS Command and Control Room for monitoring of real time camera feeds, ensuring prompt response to any incidents occurring at Police Stations and Outposts.

• Adequate district engineers have been deployed covering each district for the smooth operation & support of CCTV systems installed at each Police Stations and Outposts."

16. On 08.10.2024, during the course of hearing, we were informed that pursuant to the Court's observations made in the order dated 23.09.2024 that the State Government was in the process of preparation of standard operating procedure (SOP) so that certain issues concerning members of armed forces were duly addressed. The matter was adjourned to 12.11.2024. When the matter was taken up on 12.11.2024, Mr. Acharya, learned Advocate General produced before us the SOP on arrest and interaction with the members of the armed forces in the police stations, informed this Court that the said SOP has been approved by the Chief Minister of the State. The said SOP is being reproduced herein below:-

"SOP ON ARREST OF AND INTERACTION WITH MEMBERS OF ARMED FORCES IN POLICE STATIONS

Instances have come to notice that Police Officers deployed in Police Stations are not sound enough on situation management and interaction with members of Armed Forces visiting in the Police Station. They are also not well versed to deal with the issues while registering complaints against the members of Armed Forces and the consequential procedures. Sometimes they fail to carry out the dictums of law while detaining and arresting defence personnel for the alleged involvement in a criminal act. Hon'ble Orissa High Court in seisin over **SUO MOTU Writ Petition(C) No. 23735 of 2024 (Registrar Judicial, Orissa High Court vs. Government of Odisha and Others**) vide order dtd. 23.09.2024 have directed in paragraph-13 of the order to know about the steps intended to be taken by the State Government to protect the dignity of the personnel of the Armed Forces in the Police Stations/ out posts premises. In order to enlighten and illuminate the Police Officers in the matters of arrest of defence personnel in deserving cases and to equip them with the skill of proper interaction with the defence personnel in Police Station/ out posts premises, it is felt expedient to issue this SOP.

A. Interaction with the Defence Personnel visiting Police Station

(1) Whenever any defence personnel either on duty or not, approaches any Police Officer inside the Police Station to lodge a complaint, the Police officer shall exhibit due courtesy to him so as to respect dignity of the Officer or defence personnel.

(2) Problems and grievances of the defence personnel shall be promptly attended to by the Police Officer and all required legal and logistic supports shall be extended to him as early as possible.

(3) If any defence personnel tender a written complaint, same shall be promptly attended to in accordance with the Law. Pro-active steps shall be taken by the Police Officer to mitigate his grievance.

(4) All necessary helps shall be provided in the filing of complaint.

(5) If the defence personnel make any oral information revealing commission of cognizable offence, without insisting for written report, the Police Officer shall forthwith reduce the information to writing and obtain signature of the complainant to initiate legal action into motion.

B. Arrest of Defence Personnel

Powers of Police Officer to arrest a person under BNSS 2023 finds an exception u/s 42 of BNSS 2023 wherein it has been provided that no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties, except after obtaining the consent of the Central Government Of course, u/s 42(2) BNSS the State Government has the authority to issue notification specifying class or category of the members of the Force in whose favour the protection will be applicable.

Section 70 of The Army Act, 1950 categorically provides that a person subject to this Act who commits an offence of murder, culpable homicide not amounting to murder, or rape against a person not subject to Military, Naval or Airforce law shall not be tried by a Court-Martial, even if he is in active service or he commits the offence outside India or at a frontier post. Section 72 of The Air force Act, 1950 and Section 78 of The Navy Act, 1957 enjoin provisions exactly similar to section 70 of The Army Act. For ready reference, section 70 of the Army Act, 1950 is quoted hereunder:

"70. Civil offence not triable by court-martial.—A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences— (a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the Central Government by notification in this behalf."

On conjoint reading of Section 4 BNSS, 2023, Section 4 and 70 of The Army Act, 1950, it is made clear that offence of murder, culpable homicide not amounting to murder and rape committed by a member of the Forces attracts jurisdiction and procedure of the common law i.e. BNSS, 2023.

While dealing with investigation of cases and treatment of offenders belonging to the Armed Forces, Ministry of Home Affairs, Govt of India has issued a set of guidelines vide their letter No. VI250/13/6/83.

In the light of the above legal provisions and guidelines of MHA, Government of India the following instructions are hereby issued to the Police Officers which need to be scrupulously followed when dealing with any member of the Forces committing or purports to commit any offence or subjected to the process of investigation for having any complicity in a criminal case.

(1) A Police Officer cannot arrest any personnel of Army, Airforce and Navy while on duty without permission of the Central Government.

(2) The permission of arrest will be given by the nearest Station Commander in the rank of Major General or above. If permission is denied, the officer detained by the Police needs to be handed over to Military Police and they will further look into the matter.

(3) The Police can arrest serving officers of the forces without permission if they are involved in heinous crimes like rape, murder and kidnapping etc. which are unrelated to their duty. If the offence is other than the above crimes, the Police is not authorised to make arrest of any defence personnel without prior permission of the authority.

(4) In case, the Police officer arrests defence personnel in crimes unrelated to performance of their duty, it is mandatory for the Police to inform the nearest Military Station Headquarters with the details of offences, date of arrest and the place of detention and custody.

(5) The complaints against Military personnel may be looked into promptly and the Military commanders may be informed of the action taken or proposed to be taken on the complaints.

(6) The defence personnel under arrest should not be manhandled or assaulted or beaten up. He should not also be handcuffed.

(7) The provisions contemplated under section 521 of BNSS, 2023 (475 Cr.P.C) and the Rule 3.3 of Criminal Courts and Court Martial (adjustment of jurisdiction) Rules, 1978 should be brought to the notice of criminal courts while dealing with an accused belonging to defence forces.

Section 521 of BNSS, 2023 and Rule 3.3 of Criminal Courts and Court martial (adjustment of jurisdiction) Rules, 1978 are quoted hereunder for ready reference.

Section 521 of BNSS- Delivery to commanding officers of persons liable to be tried by Court-martial.

(1) The Central Government may make rules consistent with this BNSS and the Army Act, 1950, the Navy Act, 1957, and the Air Force Act, 1950, and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air-force law, or such other law, shall be tried by a Court to which this BNSS applies, or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this BNSS applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for the purpose of being tried by a Court martial.

Rule 3.3 of Criminal Courts and Court Martial (adjustment of jurisdiction) Rules, 1978–

Where a person subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court martial, such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless- (a) he is moved thereto by a competent military, naval or air force authority; or (b) he is of opinion, for reasons to be recorded.

Any deviation of the above instructions shall be viewed seriously."

17. In addition to the above, a status report by way of additional affidavit was also filed by Mr. Gangwar, paragraph 5 of which read thus:

"5. xxx

"1. That in compliance of the order of this Hon'ble Court dated 23.09.2024 and 08.10.2024, this deponent have been able to achieve as follows:

a. This deponent have been able to complete restoration work with respect to 96% of the CCTV cameras installed in Police Stations in the State of Odisha and all are live. The remaining 4% of CCTV Cameras would be restored by the end of November 2024 which were damaged due to "CYCLONE DANA".

b. This deponent have been able to complete the relocation work of CCTV cameras in the 57 Police Stations and installation of cameras in 52 new Police Stations by employing the current system integrator in full and they are functioning properly.

c. This deponent have also been able to integrate 85% Police Stations out of 645 Police Stations in the Central Monitoring System (CMS) of the State Police Headquarters, Cuttack. The process of integration was started after the Bharatpur incident.

d. This deponent have already accomplished the task of connecting 36 districts in the state of Odisha to the Central Monitoring System (CMS) through Video management system (VMS) and the rest 2 districts would be connected well within the stipulated time of 15.11.2024.

2. That it is to state the process with respect to installation of CCTV cameras for 295 Police Outposts has been taken up by OCAC as on 11.11.2024.

3. That it is further pertinent to bring to the knowledge of this Hon'ble Court that this deponent had issued a letter to OCAC bearing No. VIIIC-27-2024-46896/Building Dt. 22.10.2024 wherein this deponent had communicated to OCAC that the work for installation of CCTV Cameras in Police Outposts must be undertaken in an expedient manner.

4. That regular correspondences and meetings have been done with OCAC authority explaining the gravity of the situation, as well as communicating the directions of Hon'ble High Court with the clear time-frame of 31.03.2025 for completion of the installation work. Due approval of Government was also communicated to OCAC to go ahead with the work immediately. That the same has been communicated to OCAC vide Letter Dt. 02.11.2024 bearing No. VIIIC-27-2024/48382/Building. 5. That subsequently a letter was issued by OCAC Dt.08.11.2024 bearing Reference No. OCAC-SEGPINFRA-0021-2021 wherein OCAC has stated their intent to float a fresh tender for the allocation of the work of installation of CCTV Cameras at 295 Police Outposts throughout the State."

18. As can be seen from the facts noted above, the dark side of the incident is truly shocking which reveals a situation where the two individuals who had gone to the police station to register a case stood implicated in a criminal case of attempt to murder the police personnel of the police station. Further, there is manifest administrative failure on the part of the State in not installing CCTV facilities in the police station, more so, in the capital of the State, which could have easily revealed the truth. We cannot, however, ignore that realizing the lapse the State and its officials in the present case, in our opinion, have acted promptly and with this Court's intervention satisfactory target has been achieved, not only in installation of the CCTV cameras in the police stations, their relocation, maintenance and integration in the Central Monitoring System (CMS) of the State Police Headquarters, Cuttack. As it emerges from the last affidavit filed by Mr. Gangwar, 36 districts in the State of Odisha, the task of connecting 36 districts in the State of Odisha to the CMS through Video Management System (VMS) has already been accomplished and the rest of the two districts, the Court expects, must have been connected by now.

19. We have been informed that not only in the police stations, the work of installation of CCTV cameras in 95 police outposts has been taken up by Odisha Computer Application Center (OCAC) as on 11.11.2024. The OCAC has been asked

by the State Government to complete the work of installation of CCTV cameras in the police outposts by 31.03.2025.

20. In view of the facts which have emerged, as have been noted in the present order, we close the present *suo motu* PIL with the following observations and directions:-

> (i) All the police stations and the police out-posts in the State of Odisha must be fully equipped with aptly placed and duly located CCTV cameras by 31.03.2025. Their integration with the Central Monitoring System (CMS) through Video Management System (VMS) must also be completed by the said date.
>
> (ii) The State Officials/police personnel shall be under the obligation to strictly follow the SOP formulated by the State Government **ON ARREST OF AND INTERACTION WITH MEMBERS OF ARMED FORCES IN POLICE STATIONS** as has been noted hereinabove. The said SOP should be duly publicized and effective steps should be taken to ensure that the police personnel are made aware of the provisions of the SOP. The said SOP should be circulated in odia language to all the police stations and the police outposts of the State.
>
> (iii) The State Government and the Police Headquarters must ensure that the assurance given to this Court in the affidavits filed by Mr. Gangwar is not breached.
>
> (iv) We reiterate that no observation made in the present order should prejudice the police investigation being conducted by the Crime Branch or the inquiry being held under the provisions of Commission of Inquiry Act.

21. Before we part with the present order, we place on record our appreciation for the assistance extended by Mr. Gautam Mishra, learned Senior Counsel appearing as Amicus Curiae at the Court's request. Befitting his status as the first law officer of the State, learned Advocate General, Mr. Acharya has assisted this Court with all fairness. Mr. Gangwar discharged his function as an officer of this Court and has acted proactively in obtaining inputs and carrying out the work of installation of CCTV Cameras in the police stations and the police outposts as well as the integration in CMS. We do record our appreciation for his assistance extended to this Court.

22. The writ petition is disposed of accordingly.

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

Result of the case:
Writ Petition disposed of.

—— o ——

2025 (I)-ILR-CUT-34

RABINDRA KUMAR BEHERA & ORS.
V.
STATE OF ODISHA & ORS.

[CRLREV NO. 503 OF 2022 & BATCH]

15 JANUARY 2025

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

Issue for Consideration

Whether the provision U/s. 457 Cr.P.C. will have any application to the release of the vehicle seized under the NDPS Act during the investigation or trial of the criminal case.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 451 & 457 r/w Section 51 of Narcotic Drugs and Psychotropic Substances Act, 1985 – Whether the provision U/s. 457 of Cr.P.C. will have any application to the release of the vehicle seized under the NDPS Act, during the investigation or trial of the case.

Held: **Yes** – There is no specific bar/restriction under the provisions of the NDPS Act for release of any seized vehicle used for transporting narcotic drugs or psychotropic substances in the interim, pending disposal of the criminal case. (Para 13)

Citations Reference

Bishwaji Dey vs. State of Assam**, 2025 INSC 32: 2025 SCC OnLine SC 40;** Sunderbhai Ambala Desai vs. State of Gujarat, **(2002) 10 SCC 283;** Bhola Singh @ Ayush Singh vs. The State of Bihar, **Criminal Misc. No. 40912/ 2016;** Smt. Narender Kaur vs Arun Sheoran, **2000 SCC OnLine Del-502;** Ganga Hire Purchase Pvt. Ltd. Vs. State Of Punjab & Ors., **(1999) 5 SCC 670;** Union of India vs. Dinesh Kumar Verma**, (2005) 9 SCC 330;** Shajahan vs. Inspector of Excise, **(2019) SCC OnLine Ker 3685;** Moumita Saha, **2023 SCC OnLine Cal 1094;** General Insurance Council & Ors. vs. State of Andhra Pradesh, **(2010) 6 SCC 768;** Gurbinder Singh @ Shinder vs. State of Punjab, **2016 SCC OnLine P&H 16026;** Tej Singh vs. State of Haryana, **2020 SCC OnLine P&H 4679;** Shams Tavrej vs. Union of India, **2023 SCC OnLine All 1154;** Manakram vs. State of Madhya Pradesh, **Crl. Rev. 2421/ 2021;** Nirmal Singh vs. State of Punjab, **CRR- 1208-2018 (O&M);** Kawal Jeet Kaur vs. State of Karnataka, **2024:KHC- K:5691;** Bhagirath vs. State of Rajasthan, 2024: **RJ-JD:36868,** *R (on the application of Noone) v. Governor of HMP Drake Hall**, [2010] UKSC 30***]**; *Sainaba vs. State of Kerala and Another, **2022 SCC OnLine SC 1784*** ─ **referred to.**

List of Act/Code

Code of Criminal Procedure, 1973, Narcotic Drugs and Psychotropic Substances Act, 1985.

Keywords

Seize of the vehicle; Interim release of the vehicle; Restriction; Bar.

Case Arising From

Order dated 23.08.2022 passed in CRLREV No. 346 of 2022, CRLREV No. 205 of 2022, CRLREV No. 253 of 2022, CRLREV 266 of 2022, CRLREV No. 353 of 2022 and CRLREV No. 356 of 2022.

Appearances for Parties

For Petitioner : Mr. S.R. Mulia, Mr. Devasish Panda, *Amicus Curiae*, Mr. Anupam Dash

For Opp.Party : Mr. L. Samantary, A.G.A.

Judgment/Order

Judgment

SAVITRI RATHO, J.

The following question had been referred to the Division Bench by a learned Single Judge of this Court by a common order dated 23.08.2022 passed in CRLREV No. 346 of 2022, CRLREV No. 205 of 2022, CRLREV No. 253 of 2022, CRLREV 266 of 2022, CRLREV No. 353 of 2022 and CRLREV No. 356 of 2022 :-

> *"to examine the question as to whether the provision under Section 457 of Cr.P.C. will have no application in a case of release of the vehicle seized under the N.D.P.S. Act during investigation or trial of the case."*

2. This common order dated 23.08.2022 had been passed by the learned Single Judge while hearing the batch of criminal revisions which had been filed challenging the orders rejecting applications filed U/s. 457 of Cr.P.C., for release of vehicles, seized in connection with prosecutions under the NDPS Act, by the learned Courts below. Other criminal revisions involving similar question had also been tagged and listed before us alongwith CRLREV No. 346 of 2022, CRLREV No. 205 of 2022, CRLREV No. 253 of 2022, CRLREV 266 of 2022, CRLREV No. 353 of 2022 and CRLREV No. 356 of 2022.

3. We have heard Mr. D Panda learned amicus curiae, Mr. S.R. Mulia and Mr. Anupam Dash learned counsel and Mr. L. Samantray, learned Additional Government Advocate. The other counsel for the petitioners adopted the submissions of Mr. Panda, learned amicus curiae.

4. It was the submission of Mr. Panda and Mr. Dash learned counsel that there is no bar in the NDPS Act for entertaining applications under Section – 451 and 457 of the Cr.P.C for interim release during pendency of the trial for which the power under Sections 451 and 457 of the Cr. P.C could be invoked for interim release of such vehicles. They had also submitted that in many of the cases, the owner is not an

accused in the case but the vehicles seized during investigation are left lying in open in the Police Station or Excise Office premises, exposed to the vagaries of weather and miscreants. As a result the vehicles get damaged and sometimes its parts are also stolen. So by the time of conclusion of the trial and / or the confiscation proceedings, the value of the vehicle has gone down substantially which does not benefit the State or the owner. Often the owners who are not accused in the case and even where the vehicle has been utilised for carrying contraband inspite of precautions taken by them , have to suffer pecuniary loss due to damage to the vehicles. They have also submitted that if the vehicles are released in the interim, pending finalization of the proceedings, imposing suitable conditions, the interest of the prosecution as well as the owner will be protected.

5. The learned counsel for the State did not dispute the contention that there was no prohibition in the NDPS Act for interim release of the vehicle during pendency of the confiscation proceeding or criminal case. But he had submitted as the Legislature had not included any provision for interim release of the vehicle in the NDPS Act, which is a special enactment and as there was a provision in the NDPS Act for confiscation of the vehicle, the provision would be rendered redundant and the trial of the case would be hampered, if the interim release of a vehicle would be allowed during pendency of the trial. It was also his submission that the vehicle may again be used for similar purpose, which would defeat the aims and objection of the enactment of the NDPS Act.

6. The learned counsel had relied on a number of decisions of this Court as well as the Supreme Court in support of their submissions.

7. After the reference had been heard and reserved for judgment but before we could deliver the judgment answering the reference, the Supreme Court in the case of ***Bishwaji Dey vs. State of Assam: 2025 INSC 32: 2025 SCC Online SC 40*** has delivered a judgment on 07.01.2025, dealing with the identical question, in the application filed by the owner of a vehicle for interim release of the vehicle which had been seized in connection with a case registered for commission of offences under the NDPS Act .

8. In the case of ***Bishwajit Dey*** (supra), the truck had been seized by the police on 10.04.2023 and two soap boxes covered with black tarpaulin containing heroin were recovered from the hood of the vehicle. The suspected substance was confirmed to be 24.8gm of heroin which was being carried by the main accused who had boarded the vehicle at Manipur. The owner of the vehicle was not an accused in the case and had been cited as a witness in the case. As his prayer for interim release of the vehicle was rejected by the learned Special Judge as well as the High Court, the appellant had approached the Supreme Court, stating that the vehicle which had been purchased for commercial purpose on monthly equated installment was the only source of income of the appellant and it was getting damaged lying unattended in the police station campus, exposed to sun and rain. He relied on the case of

Sunderbhai Ambala Desai V. State of Gujarat, (2002) 10 SCC 283 and the decision of the Patna High court in the case of ***Bhola Singh @ Ayush Singh vs. The State of Bihar, Criminal Misc. No.40912/2016***.

9. The counsel appearing on behalf of the State of Assam had opposed the prayer for interim release interalia contending that the NDPS Act being a special enactment is a complete code by itself and did not contemplate interim release of a vehicle during pendency of the trial. She had referred to Chapter-IV of the NDPS Act which dealt with offences and penalties and Chapter-V which deals with procedure and relied on the decisions of the High Court of Delhi, Kerala and Calcutta where interim release had been refused. Relying on the decisions in the cases of (i) ***Smt. Narender Kaur vs Arun Sheoran: 2000 SCC OnLine Del-502,*** (ii) ***Ganga Hire Purchase Pvt. Ltd. vs State of Punjab & others:(1999) 5 SCC 670,*** (iii) ***Union of India vs. Dinesh Kumar Verma: (2005) 9 SCC 330,*** (iv) ***Shajahan vs. Inspector of Excise: (2019) SCC OnLine Ker 3685,*** (v) ***Moumita Saha : 2023 SCC OnLine Cal 1094,*** she had submitted that the seized vehicle would be required during trial and if it was released during pendency of the trial, it may not be available for such purpose. She had also submitted that if released, the vehicle may again be utilized for the same purpose and encourage third party misuse for transportation and smuggling of drugs and undermine the drive to combat such illegal activity.

10. The Supreme Court after discussing the provisions of Section- 36C, Section 60, the second proviso to Section 63 of the NDPS Act and the earlier decisions of different High courts and the Supreme Court, observed that in the decisions relied on by the State of Assam, interim release of vehicles had not been allowed, but in the cases of ***General Insurance Council &Ors. vs. State of Andhra Pradesh, (2010) 6 SCC 768; Gurbinder Singh@ Shinder vs. State of Punjab, 2016 SCC OnLine P&H 16026; Tej Singh vs. State of Haryana, 2020 SCC OnLine P&H 4679; Shams Tavrej vs. Union of India, 2023 SCC OnLine All 1154; Manakram vs. State of Madhya Pradesh, Crl.Rev. 2421/2021; Nirmal Singh vs. State of Punjab, CRR- 1208-2018 (O&M); Kawal Jeet Kaur vs. State of Karnataka, 2024:KHC- K:5691 and Bhagirath vs. State of Rajasthan, 2024: RJ-JD:36868,*** in NDPS cases, the Courts had directed for release of vehicles in the interim. It further held that the judgments of the Supreme Court did not lay down any general proposition of law and went on to lay down the law.

11. The relevant portions of Section – 451 and 457 of the Code of Criminal Procedure and Section- 36 C, Section 51, 52 A Section 60 and, the second proviso to Section 63 of the NDPS Act are extracted below:

> **Code of Criminal Procedure**
>
> *"451. Order for custody and disposal of property pending trial in certain cases.—When any property is produced before any criminal court during any inquiry or trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*

Explanation.—For the purposes of this section, "property" includes—

(a) property of any kind or document which is produced before the court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

* * *

457. Procedure by police upon seizure of property.—

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a criminal court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

Narcotics drugs and Psychotropic Substances Act

*"**Section 36C of the NDPS Act:** "Save as otherwise provide in this Act, the provisions of the Code of Criminal Procedure,1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court…."*

*". **Section 51.** The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."*

*"**Section 52A(1):** The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine…."*

*"**Section 60** :. Liability of illicit drugs, substances, plants, articles and conveyances to confiscation.—*

(1) Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.

(2) Any narcotic drug or psychotropic substance [or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance or controlled substances which is liable to confiscation under sub-section (1) and there receptacles, packages and coverings in which any narcotic drug or psychotropic substance [or controlled substances], materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance [or controlled substances], or any article liable to confiscation under sub-section (1) or subsection (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use.

(2) Any narcotic drug or psychotropic substance [or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance or controlled substances which is liable to confiscation under sub-section (1) and there receptacles, packages and coverings in which any narcotic drug or psychotropic substance [or controlled substances], materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance [or controlled substances], or any article liable to confiscation under sub-section (1) or subsection

(2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in- charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use.

"Section 63 Second Proviso:
63. ……..

Provided further that if any such article or thing, other than a narcotic drug, psychotropic substances [controlled substance], the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of the opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this

12. The relevant portions of the judgment of the Supreme Court are extracted below;

"COURT'S REASONING

NO SPECIFIC BAR/RESTRICTION UNDER THE NDPS ACT FOR RELEASE IN THE INTERIM OF ANY SEIZED VEHICLE.

19. Having heard learned counsel for the parties and having examined the issue at hand, this Court finds that different Courts have taken divergent views with regard to interim release of conveyances during the pendency of the trial in NDPS cases. While the courts in cases referred to by learned counsel for the respondent-State of Assam have not released the vehicles in the interim during NDPS trial, yet in ***General Insurance Council & Ors. vs. State of Andhra Pradesh, (2010) 6 SCC 768; Gurbinder Singh @ Shinder vs. State of Punjab, 2016 SCC OnLine P&H 16026; Tej Singh vs State of Haryana, 2020 SCC OnLine P&H 4679; Shams Tavrej vs. Union of India, 2023 SCC OnLine All 1154; Manakram vs. State of Madhya Pradesh, Crl. Rev. 2421/2021; Nirmal Singh vs. State of Punjab, CRR-1208-2018 (O&M); Kawal Jeet Kaur vs. State of Karnataka, 2024:KHCK: 5691*** *and* ***Bhagirath vs. State of Rajasthan, 2024: RJ-JD:36868,*** *the Courts have directed release of the vehicles in the interim in NDPS cases.*

20. The judgements of this Court are confined to their facts or in the context of the expression „owner" and do not lay down any general proposition of law. Consequently, the issue would have to be examined on first principles.

21. Upon a reading of the NDPS Act, this Court is of the view that the seized vehicles can be confiscated by the trial court only on conclusion of the trial when the accused is convicted or

acquitted or discharged. Further, even where the Court is of the view that the vehicle is liable for confiscation, it must give an opportunity of hearing to the person who may claim any right to the seized vehicle before passing an order of confiscation. However, the seized vehicle is not liable to confiscation if the owner of the seized vehicle can prove that the vehicle was used by the accused person without the owner's knowledge or connivance and that he had taken all reasonable precautions against such use of the seized vehicle by the accused person.

22. This Court is further of the opinion that there is no specific bar/restriction under the provisions of the NDPS Act for return of any seized vehicle used for transporting narcotic drug or psychotropic substance in the interim pending disposal of the criminal case.

23. In the absence of any specific bar under the NDPS Act and in view of Section 51 of NDPS Act, the Court can invoke the general power under Sections 451 and 457 of the Cr. P.C. for return of the seized vehicle pending final decision of the criminal case. Consequently, the trial Court has the discretion to release the vehicle in the interim. However, this power would have to be exercised in accordance with law in the facts and circumstances of each case.

COURTS WILL LEAN AGAINST ANY CONSTRUCTION THAT WOULD PRODUCE AN ABSURD OR UNJUST RESULT.

24. It is trite law that the more absurd a suggested conclusion of construction is, the more the court will lean against that conclusion. That is ordinarily so whether one is construing a contract or a statute. [See: ***Hatzl v. XL Insurance Co. Ltd. [2009] EWCA Civ.223****].*

*25. The presumption against absurdity is found in the brief observation of Lord Saville agreeing with his colleagues in the case of Noone [****R (on the application of Noone) v. Governor of HMP Drake Hall [2010] UKSC 30****]. Lord Saville says simply:*

"I would allow this appeal. For the reasons given by Lord Phillips and Lord Mance, I have no doubt that by one route or another the legislation must be construed so as to avoid what would otherwise produce irrational and indefensible results that Parliament could not have intended"

26. If the respondent-State's interpretation is accepted, then in a case where an accused is arrested carrying heroin in a private plane or a private bus or a private ship without the knowledge and consent of the management and staff of the private plan or bus or ship, the plane/bus/ship would have to be seized till the trial is over!

27. Though the risk of misuse by the accused or third party of the same plane or bus or ship cannot be ruled out, yet the Courts do not take coercive action on the basis of fear or suspicion or hypothetical situation.

28. Undoubtedly, the Vehicle is a critical piece of material evidence that may be required for inspection to substantiate the prosecution's case, yet the said requirement can be met by stipulating conditions while releasing the Vehicle in interim on superdari like videography and still photographs to be authenticated by the Investigating Officer, owner of the Vehicle and accused by signing the said inventory as well as restriction on sale/transfer of the Vehicle.

BROADLY SPEAKING THERE ARE FOUR SCENARIOS

29. Though seizure of drugs/substances from conveyances can take place in a number of situations, yet broadly speaking there are four scenarios in which the drug or substance is seized from a conveyance. Firstly, where the owner of the vehicle is the person from whom the possession of contraband drugs/substance is recovered. Secondly, where the contraband is recovered from the possession of the agent of the owner i.e. like driver or cleaner hired by the owner. Thirdly, where the vehicle has been stolen by the accused and contraband is

recovered from such stolen vehicle. Fourthly, where the contraband is seized/recovered from a third party occupant (with or without consideration) of the vehicle without any allegation by the police that the contraband was stored and transported in the vehicle with the owner's knowledge and connivance. In the first two scenarios, the owner of the vehicle and/or his agent would necessarily be arrayed as an accused. In the third and fourth scenario, the owner of the vehicle and/or his agent would not be arrayed as an accused.

30. This Court is of the view that criminal law has not to be applied in a vacuum but to the facts of each case. Consequently, it is only in the first two scenarios that the vehicle may not be released on superdari till reverse burden of proof is discharged by the accused owner. However, in the third and fourth scenarios, where no allegation has been made in the charge-sheet against the owner and/or his agent, the vehicle should normally be released in the interim on superdari subject to the owner furnishing a bond that he would produce the vehicle as and when directed by the Court and/or he would pay the value of the vehicle as determined by the Court on the date of the release, if the Court is finally of the opinion that the vehicle needs to be confiscated.

31. This Court clarifies that the aforesaid discussion should not be taken as laying down a rigid formula as it will be open to the trial Courts to take a different view, if the facts of the case so warrant."

SUPREME COURT IN SIMILAR FACTS IN SAINABA VS. STATE OF KERALA AND ANOTHER HAS RELEASED THE VEHICLE

*32. In the present case, this Court finds that after conclusion of investigation, a chargesheet has been filed in the Court of Special Judge, Special Leave Petition (Crl.) No. 13370/2024 Page **29** of **31** NDPS Karbi Anglong. In the said chargesheet, neither the owner of the Vehicle nor the driver has been arrayed as an accused. Only a third-party occupant has been arrayed as an accused. The police after investigation has not found that the appellant i.e. the owner of the vehicle, has allowed his vehicle to transport contraband drugs/substances with his knowledge or connivance or that he or his agent had not taken all reasonable precautions against such use. Consequently, the conveyance is entitled to be released on superdari.*

*33. In fact, the Supreme Court in similar facts in **Sainaba vs. State of Kerala and Another, 2022 SCC OnLine SC 1784** has held as under:-*

"6. The appellant has urged inter alia that as per Section 36-C read with Section 51 of the NDPS Act, Criminal Procedure Code would be applicable for proceedings by a Special Court under NDPS Act and Section 451 has an inbuilt provision to impose any specific condition on the appellant while releasing the vehicle. The appellant is undoubtedly the registered owner of the vehicle but had not participated in the offence as alleged by the prosecution nor had knowledge of the alleged transaction.

*7. Learned counsel seeks to rely on the judgment of this Court in **Sunderbhai Ambalal Desai v. State of Gujarat, (2002) 10 SCC 283** opining that it is no use to keep such seized vehicles at police station for a long period and it is open to the Magistrate to pass appropriate orders immediately by taking a bond and a guarantee as well as security for return of the said vehicle, if required at any point of time.*

8. On hearing learned counsel for parties and in the conspectus of the facts and circumstances of the case, and the legal provisions referred aforesaid, we are of the view that this is an appropriate case for release of the vehicle on terms and conditions to be determined by the Special Court.

9. The appeal is accordingly allowed leaving parties to bear their own costs."

IF THE VEHICLE IN THE PRESENT CASE IS KEPT IN THE CUSTODY OF POLICE TILL THE TRIAL IS OVER, IT WILL SERVE NO PURPOSE

34. This Court is also of the view that if the Vehicle in the present case is allowed to be kept in the custody of police till the trial is over, it will serve no purpose. This Court takes judicial notice that vehicles in police custody are stored in the open. Consequently, if the Vehicle is not released during the trial, it will be wasted and suffering the vagaries of the weather, its value will only reduce.

35. On the contrary, if the Vehicle in question is released, it would be beneficial to the owner (who would be able to earn his livelihood), to the bank/financier (who would be repaid the loan disbursed by it) and to the society at large (as an additional vehicle would be available for transportation of goods).

CONCLUSION

36. Consequently, the present Criminal Appeal is allowed with directions to the trial Court to release the Vehicle in question in the interim on superdari after preparing a video and still photographs of the vehicle and after obtaining all information/documents necessary for identification of the vehicle, which shall be authenticated by the Investigating Officer, owner of the Vehicle and accused by signing the same. Further, the appellant shall not sell or part with the ownership of the Vehicle till conclusion of the trial and shall furnish an undertaking to the trial court that he shall surrender the Vehicle within one week of being so directed and/or pay the value of the Vehicle (determined according to Income Tax law on the date of its release), if so ultimately directed by the Court."

13. On a consideration of the submission of the learned counsel, the provisions of Section – 451 and 457 of the Cr.P.C and Section 51 of the NDPS Act, and the decision of the Supreme Court in the case of ***Bishwajit Dey*** (supra), we answer the reference in the following manner:-

(i) There is no specific bar/restriction under the provisions of the NDPS Act for return of any seized vehicle used for transporting narcotic drug or psychotropic substance in the interim, pending disposal of the criminal case.

(ii) In the absence of any specific bar under the NDPS Act and in view of Section 51 of NDPS Act, the Court can invoke the general power under Sections 451 and 457 of the Cr.P.C. for release of the seized vehicle pending final decision in the criminal case.

(iii) The Court has the discretion to release the seized vehicle in the interim but the power has to be exercised in accordance with law, in the facts and circumstances in each case.

(iv) If the Court decides to exercise its discretion to release a vehicle in the during pendency of the criminal case, suitable conditions have to be imposed to ensure its identification and production during trial with an embargo on its sale and / or transfer till conclusion of the trial and for submission of a specific undertaking for production of such vehicle.

14. The cases may now be listed before the assigned Single Bench for disposal in accordance with law.

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

Result of the case:
Writ Petition answered and be listed before the assigned Single Bench for disposal.

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2025 (I)-ILR-CUT-43

COMMISSIONER OF CUSTOMS (PREVENTIVE), BHUBANESWAR
V.
M/s. KAI INTERNATIONAL PVT. LTD.

[OTAPL NO. 40 OF 2024]

11 DECEMBER 2024

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

Issue for Consideration

For purpose of determining export duty, where the export is being made under contract specifications, can there be reliance on the contractual specifications for determining, whether export duty is payable?

Headnotes

EXPORT DUTY – There were provisional and ultimately final assessment order dated 27th November, 2018 – The final assessment order resulted in demand for export duty – Respondent unsuccessfully preferred appeal before the first appellate authority and then to the Tribunal – As per the impugned order, the goods entered for export attracted export duty payable as nil – Can there be reliance on the contractual specifications for determining whether export duty is payable?

Held : No. (Para 13)

Citation Reference

Commissioner of Customs, Vijayawada v. Kimmi Steels Pvt. Ltd., **2019 (368) E.L.T.92 (Tri.–Hyd.);** Commissioner of Customs, Mumbai v. M/s. Dilip Kumar and Co.**, 2018 (361) E.L.T.577 (S.C.);** Dwijendra Narain Roy v. Joges Chandra De**, AIR 1924 Calcutta 600;** State of Punjab v. Dhanjit Singh Sandhu, **(2014) 15 SCC 144;** V.M. Salgaocar and Brother Pvt. Ltd. v. Assistant Commissioner of Customs (Export) and others, **2022 (9) Tax Management India 1306 ─ referred to.**

Keywords

Export Duty; Contract Specifications; Final assessment; Provisional assessment; Assessing Authority; Final Assessment Order; Private test report.

Case Arising From

Final Order dated 2nd August, 2024 passed by Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata in Customs Appeal No. 75936 of 2024.

Appearances for Parties

For Appellant : Mr. Tusharkanti Satapathy, S.S.C.(Revenue)

For Respondent : Mr. Abhratosh Majumdar, Sr. Adv.,
Mr. Sidharth Sankar Padhy, Mr. Indranil Banerjee

Judgment/Order

Judgment

ARINDAM SINHA, J.

1. The appeal has been preferred by revenue against final order dated 2nd August, 2024 passed by Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata in Customs Appeal no.75936 of 2024. The appeal was admitted by us on order dated 22nd November, 2024, upon a question of law formulated, reproduced below.

> *"For purpose of determining export duty, where the export is being made under contract specifications, can there be reliance on the contractual specifications for determining whether export duty is payable?"*

2. There were provisional and ultimately final assessment order dated 27th November, 2018. The assessment order says, goods under shipping bill dated 11th March, 2017 were provisionally assessed, pending submission/receipt of, inter alia, certificate of weight, quality of Inspectorate Griffith India Pvt. Ltd. and test memo report from Chemical Laboratory, Kolkata. The final assessment resulted in demand for export duty. Respondent unsuccessfully preferred appeal before the first appellate authority. It then carried its grievance to the Tribunal. In impugned order finding was, the goods entered for export attracted export duty payable as nil.

3. Mr. Satapathy, learned advocate, Senior Standing Counsel appears on behalf of appellant-revenue. He submits, there is no dispute that samples were drawn, when the goods were entered for export. Though the samples resulted in a test report that was in favour of revenue, it was not considered by the Tribunal in returning finding of export duty payable as nil. There was available a test report duly made on samples drawn per circular dated 17th November, 2014. The Tribunal in not considering it, fell into error of law.

4. He cites a decision rendered by the Customs, Excise and Service Tax Appellate Tribunal, Regional Bench, Hyderabad on **order dated 12th November, 2018 in Appeal no. C/536/2009 (Commissioner of Customs, Vijayawada v. Kimmi Steels Pvt. Ltd.)** reported in **2019 (368) E.L.T. 92 (Tri. – Hyd.).** He relies on paragraph-5 to submit, existence of report following samples duly drawn, which goes against report relied upon by the Tribunal is creation of doubt, for decision in favour of revenue. This legal position was settled by the Supreme Court in **Commissioner of Customs, Mumbai v. M/s. Dilip Kumar and Co.** reported in

2018 (361) E.L.T. 577 (S.C.). Also, the contract specifications required supply on Dry Metric Ton (DMT) basis. As such, the percentage of iron (Fe) content in the goods exported was above 58% DMT, per even the private test report. The question be answered in favour of revenue.

5. Mr. Majumdar, learned senior advocate appears on behalf of respondent. He points out from the final assessment order that it was made upon submission of the desired final documents, pending submission of which the provisional assessment order had been made. The private test report along with test memo report from Chemical Laboratory, Kolkata were before the assessing authority, for making the final assessment order. He submits, it appears from the order, information given in the private test report was relied upon.

6. Referring to appellate order dated 31st December, 2020 he points out from paragraph-6 therein, the first appellate authority perused the final assessment order. The authority found, goods in respect of the shipping bill were duly assessed finally based on load port certificate of quality dated 25th March, 2017 issued by Inspectorate Griffith India Pvt. Ltd. and not on basis of CRL test report as contended by appellant before it (herein respondent). He submits, thus it can be seen that appellant/revenue had taken a position, to rely upon the final assessment order as well as order passed by the first appellate authority. He reiterates, the final assessment order was found to have been made on basis of the private test report. Revenue, on accepting the final assessment order and subsequently having been successful before the first appellate authority, could not take a different position before the Tribunal and cannot do so before us. He relies on an old case decided by the Calcutta High Court in **Dwijendra Narain Roy v. Joges Chandra De** reported in **AIR 1924 Calcutta 600**, of the report. Relied upon passage is extracted and reproduced below, being view taken by the Division Bench.

> *"……It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent : Bhaja Choudhury v. Chuni Lal (45); Giris v. Bepin (46); Bama Charan v. Nimai Mandal (47).* ***This wholesome doctrine applies not only to the successive stages of the same suit,*** *but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first. … …"* (Emphasis supplied)

This view was also declared by the Supreme Court in **State of Punjab v. Dhanjit Singh Sandhu** reported in **(2014) 15 SCC 144**, inter alia, paragraphs 22 and 23.

7. Mr. Majumdar submits, for purpose of determination of export duty, the goods being iron ore fines are to be assessed on Fe content taken at Wet Metric Ton (WMT) basis. There is no dispute percentage Fe content on that basis is below 58% and therefore the goods not attracting levy of export duty. He adds, it will appear from the test report relied upon by revenue, the samples were drawn on 31st March,

2017 and there is indication in the test memo disclosed at page-60, testing was on 4th July, 2017. The report itself is doubtful.

8. Moving on for answer to the question, according to him it should be given in the negative and in favour of his client. He relies on view taken by the Bombay High Court in **V.M. Salgaocar and Brother Pvt. Ltd. v. Assistant Commissioner of Customs (Export) and others** available at **2022 (9) Tax Management India 1306,** paragraph-47. He submits, his research reveals the judgment was neither carried to nor otherwise commented on by the Supreme Court. Reproduced below is relied upon passage from the paragraph.

> *"… … Thus, it appears that there was never a confusion in determining the iron content by two different standards, firstly, a standard whereunder by applying the wet (WMT) method the iron content in the iron ore for the purpose of classification of the iron ore for levy of export duty being adopted; and secondly, and analysis of the iron content in the iron ore for the purpose of trade and commerce by applying the dry method, which is recognized for the purposes of trade on the basis of which invoicing would take place between the parties. It is for such reason, it is not correct for the Revenue to contend that the dry method which is being used for the purpose of trade and commerce be made applicable for the purpose of determination of its classification for the purposes of levy of export duty on export of raw iron ore in its natural form. Such hypothesis insofar as tariff entries are concerned, appears to be totally unacceptable as recognized by Supreme Court in its decision in Gangadhar Agarwal's case. … …"* (Emphasis supplied)

He submits, when exporters enter goods being iron ore fines for export, the buyer would want to contract to pay for the iron content, in exclusion of impurities and moisture. Thus contracts, under which export of iron ore fines are made and in his client's case, the basis was DMT weight of the goods. However, the levy of export duty is on WMT basis, again on which there is no dispute. In the circumstances also, the answer should be in the negative and in favour of his client.

9. We do find that revenue though had the test report as a document submitted for final assessment, accepted the final assessment made on basis of information obtained from the private test report. This crystalizes into a position on facts that there was no dispute regarding the private test report inasmuch as, no doubt can be cast on it. The exporter preferred appeal. Revenue supported the final assessment order. We have been shown that the first appellate authority found from the final assessment order, material relied upon to levy the demand of export duty was, inter alia, the private test report. It appears, both the assessing authority as well as the first appellate authority proceeded on DMT basis to levy and sustain demand of export duty.

10. Before the Tribunal, respondent was successful. It is there that revenue contended on the test report from the Kolkata Lab. There have been submissions made, based on information appearing from the report dated 7th July, 2017 that on

drawing of samples as on 31st March, 2017, there is indication the test was conducted in July. If that is not so, there is no indication from the report as to when the test was conducted. All this makes us inclined to accept petitioner's contention that the report is itself doubtful. We need not delve into said report any further as we have already found there was no doubt raised regarding the private test report. **Kimmi Steels Pvt. Ltd.** (supra) is of no assistance to revenue. Nor is **M/s. Dilip Kumar and Co.** (supra).

11. Revenue relies on circular dated 17th November, 2014. In paragraph-3 it was said that the matter had been examined. In order to bring in uniformity, transparency and consistency in assessment of export of iron ore fines and pellets, it had been decided on procedure, given in the circular. We have looked at the orders made by the assessment authority, first appellate authority and the Tribunal. There is no indication of any controversy regarding application of the circular, as appearing from said orders.

12. We accept respondent's contentions upon reliance on **Dwijendra Narain Roy** (supra). So far as **V.M. Salgaocar and Brother Pvt. Ltd.** (supra) is concerned, one of the views taken by the Division Bench of the Bombay High Court says, it is not correct for revenue to contend that the dry method which is being used for the purpose of trade and commerce be made applicable for purpose of determination of its classifications for the purposes of levy of export duty of raw iron ore in its natural form. Disclosed in the appeal is circular dated 17th February, 2012, paragraph-3 in which is reproduced below.

> *"3.* ***In light of the observation by the Apex Court*** *that export duty is chargeable according to Fe contents, and to maintain uniformity all over the custom houses,* ***it is clarified that for the purpose of charging of export duty the assessment of iron ore for determination of Fe contents shall be made on Wet Metric Ton (WMT)*** *basis which in other words mean deducting the weight of impurities (inclusive of moisture) out of the total weight/Gross Weight to arrive at Net Fe contents."*
>
> (Emphasis supplied)

13. We answer the question in the negative and in favour of respondent.

14. The appeal is dismissed.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief Appeal dismissed.

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2025 (I) ILR-CUT-48

AKULI CHARAN BEHERA & ORS.
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 1863 OF 2015]

16 DECEMBER 2024

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

Issue for Consideration

Whether the Writ Court can interfere with the decision of the Advisory Board.

Headnotes

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970 – Section 10 – Explanation under sub-section (2) of Section 10 r/w Article 226 of Constitution of India – Maintainability of Writ Petition against the decision of State Advisory Board – Whether Writ Court can interfere with the decision of the Board.

Held : No – The discretion has been provided to the appropriate government under Section 10 of the Act. (Para 6)

Citations Reference

Barat Fritz Werner Ltd. v. State of Karnataka, **(2001) 4 SCC 498;** Bijaya Kumar Jena and others v. Union of India & others, **OJC No.3158 of 1994 dated 18th May, 2006;** Steel Authority of India Ltd. v. Union of India**, (2006) 12 SCC 233 – referred to.**

List of Act

Contract Labour (Regulation & Abolition) Act, 1970.

Keywords

Discretion; Interference in the decision of the Advisory Board.

Case Arising From

Decision of the State Advisory Board reflected in minutes of 26th meeting held on 22nd September, 2010.

Appearances for Parties

For Petitioners : Mr. B.N. Mohanty
For Opp.Parties : Mr. T.K. Dash, A.G.A. (O.P. Nos. 1 & 2)
Mr. D.P. Nanda, Sr. Adv. (O.P. No. 3)

Judgment/Order

Judgment

ARINDAM SINHA, J.

1. Mr. Mohanty, learned advocate appears on behalf of petitioner. He submits, impugned is decision of the State Advisory Board reflected in minutes of 26th meeting held on 22nd September, 2010. Reasons given for not abolishing specified contract labour relating to watch and ward in opposite party no.3 (Odisha Power Generation Corporation Limited) do not bear scrutiny. The reasons paragraph from the minutes is reproduced below.

> *"... ... The Board after detailed deliberation on the report of the Deputy Labour Commissioner, Sambalpur came to a conclusion that watch & ward/security services of the industry is not a regular/perennial nature of work. The security personnel should be able bodied persons having special training to guard the factory. Without proper training through security agencies, their deployment in the factory may endanger the safety and security of the factory. Hence, the Board after consensus opinion resolved to move the Government for non-abolition of the contract labour system in respect of 131 security guards as well as watch and ward/security services of the industry ... ..."*

2. On query made Mr. Mohanty submits, it is perennial nature of work that the workmen do. Contractual engagement for the work should be abolished to pave the way for his clients to be regularized. On further query he relies on judgment of the Supreme Court in **Barat Fritz Werner Ltd. v. State of Karnataka**, reported in **(2001) 4 SCC 498**, paragraph- 10. There be interference.

3. Mr. Dash, learned advocate, Additional Government Advocate appears on behalf of State and supports reasons given by the Board. He relies on explanation under sub-section (2) in section 109 Contract Labour (Regulation and Abolition) Act, 1970. He submits, the explanation is, if a question arises whether any process for operation or other work is of perennial nature, the decision of the appropriate government thereon should be final. The reasons gives decision that nature of the work involved is not perennial. He submits, the writ petition be dismissed.

4. Mr. Nanda, learned senior advocate appears on behalf of opposite party no.3 and submits, no interference is warranted. He relies on view taken by coordinate Bench on **judgment dated 18th May, 2006** in **OJC no.3158 of 1994 (Bijaya Kumar Jena and others v. Union of India & others,** paragraph-9. He supports contention of State to submit, decision has been taken by the Board, on the matter referred to it by order of this Court in petitioners ' earlier writ petition. He also relies on a judgment of the Supreme Court in **Steel Authority of India Ltd. v. Union of India,** reported in **(2006) 12 SCC 233**, inter alia, paragraph-20. The paragraph is reproduced below.

> *"20. The 1970 Act is a complete code by itself. It not only provides for regulation of contract labour but also abolition thereof. Relationship of employer and employee is essentially a question of fact. Determination of the said question would depend upon a large number of factors. Ordinarily, a writ court would not go into such a question."*

5. Mr. Mohanty in reply also relies on **Steel Authority of India Ltd.** (supra), paragraph-23 reproduced below.

> *"23. A decision in that behalf undoubtedly is required to be taken upon following the procedure laid down in sub-section (1) of Section 10 of the 1947 (sic) Act. A notification can be issued by an appropriate Government prohibiting employment of contract labour if the factors enumerated in sub-section (2) of Section 10 of the 1970 Act are satisfied."*

He submits, it is for the writ Court to see from the specious reasons given, whether the conditions are satisfied or not.

6. We see that discretion has been provided to the appropriate government under section 10. Relied upon explanation fortifies the discretion, for interpretation that it is absolute discretion. In the circumstances, though sub section (2) provides for relevant factors, a strict scrutiny of reasons given, when the appropriate government enjoys absolute discretion, may not be possible.

7. In **Barat Fritz Werner Ltd.** (supra), paragraph-10, the Supreme Court referred to section 10. The case was dealt with on upholding the abolition made by the appropriate government in that case. The contract labour was abolished. Appellant before Supreme Court was a company Court was a company that had had its affairs made subject matter of a reference to the Board for Industrial and Financial Reconstruction (BIFR) constituted under Sick Industrial Companies (Special Provisions) Act, 1985, since repealed. The Supreme Court in that case rejected contention of appellant-company seeking exception against the abolition because it had been referred. The Supreme Court also noted there was report that the company could be revived. The decision does not come to aid of petitioners.

8. So far as **Bijaya Kumar Jena** (supra) is concerned, that was a clear case of claim made by appellants before this Court for regularization. Here petitioners are seeking the abolition to thereby have regularization. There may be similarity but for purposes of reliance as a view of precedent, it is not applicable.

9. In **Steel Authority of India Ltd.** (supra), the Supreme Court was dealing with a situation of interference by the High Court, with reasons for or against abolition. In that context the declaration that the High Court would not go into such a question. We have not and do not intend to attempt at adjudicating what were or can be the reasons, for or against abolition. We have already stated our view regarding discretion provided to the appropriate government by section 10.

10. Mr. Mohanty contended on paragraph-23 in **Steel Authority of India Ltd.** (supra). We are unable to accept his interpretation of the paragraph simply because, in paragraph-20 the Bench of the Supreme Court said that the writ Court would not interfere. In that context when paragraph-23 is read, the power to abolish on circumstances found to exist on factors enumerated, as satisfied, is with the appropriate government.

11. In view of aforesaid we are unable to interfere in favour of petitioners. However, we do observe in context of the facts and circumstances that the State allowing opposite party no.3 to continue to contractually engage, must ensure industrial peace to be maintained on labour relations in respect of the employment by opposite party no.3, of petitioners as contractual workers.

12. 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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2025 (I) ILR-CUT-51

MINI PRADHAN
V.
GANESWAR PRADHAN

[MATA NO. 166 OF 2024]

17 DECEMBER 2024

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

Issue for Consideration

Is apprehension of danger or cruelty a ground for divorce?

Headnotes

HINDU MARRIAGE ACT, 1955 – Section 13(1)(i-a) – Dissolution of marriage – Marriage was solemnized on 25th May, 1996 – Cruelty and desertion – Is apprehension of danger or cruelty a ground for divorce?

Held: No – Clause (i-a) under sub-section (1) in Section 13 of Hindu Marriage Act, 1955 provides for cruelty that has already happened – Apprehension of danger or cruelty does not come within the ground provided. (Para 6)

Citations Reference

Shri Rakesh Raman v. Smt. Kavita, **Civil Appeal no.2012 of 2013 dated 26th April, 2023;** Samar Ghosh v. Jaya Ghosh, **(2007) 4 SCC 511 – referred to.**

List of Act

Hindu Marriage Act, 1955

Keywords

Physical and mental cruelty, Dissolution of marriage, Desertion.

Case Arising From

Judgment dated 23.03.2024 passed by the Family Court.

Appearances for Parties

For Petitioner : Mr. Lalitendu Mishra
For Respondent : None

Judgment/Order

Judgment

ARINDAM SINHA, J.

1. The appeal has been called on for hearing. Mr. Mishra, learned advocate appears on behalf of appellant-wife. Respondent-husband goes unrepresented.

2. Order sheet reveals there was valid service reported, of notice of the appeal. In order dated 15th July, 2024 there was direction for communication of website copy of that order to learned advocate, who had appeared on behalf of respondent in the Family Court and to file the acknowledgement. Mr. Mishra hands up memo dated 5th November, 2024. Attached to it is postal receipt showing dispatch of notice dated 22nd July, 2024 to the learned advocate and track consignment confirming item delivered to addressee as on 25th July, 2024. We are convinced respondent is not interested.

3. Mr. Mishra submits, there was erroneous appreciation of the facts and law by the Family Court in making impugned judgment dated 23rd March, 2024, to dismiss his client's petition for dissolution of the marriage. The marriage was soleminized on 25th May, 1996. There was cruelty meted out to his client, physical and mental. Subsequent thereto, he deserted her and has since withdrawn himself from society. In the facts and circumstances, his client is entitled to dissolution of the marriage on grounds of cruelty and desertion. His client is not seeking maintenance by permanent alimony or otherwise.

4. We have perused impugned judgment. There is precious little in the lower Court record inasmuch as, there was no documentary evidence produced. Appellant and her father gave evidence to prosecute the petition while respondent also adduced oral evidence.

5. Perusal of the judgment reveals, the Family Court was of view that appellant could not prove her contentions. So far as physical and mental cruelty are concerned, the Family Court found appellant to not have made any specific averment. Her allegation was that she had approached the police but they did not receive her complaint. On desertion, analysis of the oral evidence by the Family Court resulted in conclusion that it was appellant who had left respondent in year 2014. On top of it all the Family Court found inconsistencies in the oral evidence adduced by appellant and her father. As aforesaid, there was no documentary evidence to back up claim of physical assault, reported to the police or of articles given as dowry.

6. Mr. Mishra relies on paragraph-14 in evidence on affidavit dated 5th July, 2023 filed by his client in the Family Court. The paragraph is reproduced below.

> *"14. That, the temperament of the O.P. is quite different and aggressive and arrogant, self centered and cruel one* ***as such I apprehend danger to my life and limb*** *and as the O.P. lives in wine and women it is not possible to save the institution of marriage. Hence, this petition for dissolution of marriage."* (emphasis supplied)

We are unable to sustain contention of Mr. Mishra that his client's assertion by paragraph-14 in her evidence on affidavit was not demolished in cross-examination, amounting to admission of cruelty. This is because the allegation is of apprehension. Clause (i-a) under sub-section (1) in section 13 of Hindu Marriage Act, 1955 provides for cruelty that has already happened inasmuch as, after the solemenization of the marriage, a spouse has treated the other with cruelty.

Apprehension of danger or cruelty therefore does not come within the ground provided.

7. Mr. Mishra relies on **judgment dated 26th April, 2023** of the Supreme Court in **Civil Appeal no.2012 of 2013 (Shri Rakesh Raman v. Smt. Kavita),** paragraph-17 (live law print). He submits, the Bench delivering the judgment relied on earlier decision of said Court in **Samar Ghosh v. Jaya Ghosh**, reported in **(2007) 4 SCC 511**. The earlier judgment gave instances of mental cruelty and instance (xiv) talks about long separation amounting to mental cruelty.

8. In dealing with reliance by appellant on **Shri Rakesh Raman** (supra) and **Samar Ghosh (**supra) we must keep in mind the facts found by the Family Court. The findings appear to be based on the oral evidence adduced. In that context clause (a) under subsection (1) of section 23 is reproduced below.

> *"(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-*
>
> *(a) any of the grounds for granting relief exists* ***and the petitioner*** *[except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause*
>
> *(b) or sub-clause (c) of clause (ii) of section 5]* ***is not in any way taking advantage of his or her own wrong*** *or disability for the purpose of such relief, and … … …"*
>
> (emphasis supplied)

Long separation between spouses has been declared to be an instance that may amount to mental cruelty. However, long separation caused by a spouse, who thereafter seeks dissolution of the marriage on fact of it is the spouse taking advantage on a wrong done. In the circumstances, instance (xiv) given in **Samar Ghosh** (supra) is not applicable to appellant for furthering her claim for dissolution of the marriage.

9. We find no error made by the Family Court, either on facts or in law. Impugned judgment is confirmed.

10. The appeal is found to be without merit and dismissed.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief. Appeal dismissed.

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2025 (I) ILR-CUT-54

SYAMA CHOUDHURY & ANR.
V.
STATE OF ODISHA

(JCRLA NO. 46 OF 2010 & CRLA NO. 442 OF 2010)

14 NOVEMBER 2024

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

Issues for Consideration

1. Whether a co-accused can be convicted under Section 120-B of the IPC, when other co-accused has been acquitted from the said charge.

2. Whether an accused person can be convicted on the theory of last seen, when he has not offered sufficient explanation to his defence.

Headnotes

(A) INDIAN PENAL CODE, 1860 – Section 120-A, 120-B – Criminal conspiracy – The learned Trial Court found one appellant (Nibedita Panda) guilty under Section 120-B of I.P.C. – No charge was framed for such offence against co-appellant (Shyama Choudhury) – There is no discussion in the impugned judgment referring to the evidence on record as to how the learned Court found the appellant guilty U/s. 120-B and with whom she conspired and what are the materials provided by the prosecution to establish the charge – Whether the charge U/s. 120-B of the I.P.C. is sustainable.

Held: No **–** In absence of any other clinching evidence, only basing on these suspicious conducts of the appellant, it cannot be held to be sufficient to convict her for offence of criminal conspiracy. (Para 19)

(B) CRIMINAL TRIAL – The appellant (Surya Kanta Behera) found guilty under Sections 302/34 of I.P.C. so also U/ss. 201/511 of I.P.C. – The learned Trial Court found that the case is based on circumstantial evidence – The deceased was last seen with the present appellant – The appellant has not offered any explanation as to what happened to the deceased and when he parted with the company of the deceased – The appellant had not examined any witness to show that he had gone to see a girl for him with the deceased – Effect of.

Held: The proximity of time when the two were last seen together and the dead body was found coupled with the other circumstantial evidence including the medical evidence and failure to discharge his burden under Section 106 of the Evidence Act, in our view, is sufficient to attract the

ingredients of both the offences under which he has been found guilty by the learned trial Court. (Para 21)

Citations Reference

Ram Sharan Chaturvedi -Vrs.- State of M.P., **(2022) 16 Supreme Court Cases 166**; State of Kerala -Vrs.- P. Sugathan, **(2000) 8 Supreme Court Cases 203**; Ram Narayan Popli -Vrs.- C.B.I., **(2003) 3 Supreme Court Cases 641**; Bimbadhar Pradhan -Vrs.- State of Odisha, **A.I.R. 1956 SC 469**; Maghavendra Pratap Singh -Vrs.- State of Chhattisgarh, **(2023) 4 SCR 829**; Girija Sankar Misra -Vrs.- State of U.P., **A.I.R. 1993 SC 2618–referred to.**

List of Code

Indian Penal Code, 1860

Keywords

Acquittal of co-accused, Sustainability of the charge of conspiracy, Last seen theory, Sufficient explanation.

Case Arising From

Order dated 29.04.2010 passed by the learned Sessions Judge, Ganjam-Gajapati, Berhampur in Sessions Trial No. 102 of 2008.

Appearances for Parties

For Appellants : Ms. Samita Nanda
For Respondent : Mr. Jateswar Nayak, AGA.

Judgment/Order

Judgment

S.K. SAHOO, J.

The appellants Syama Choudhury and Nibedita Panda in JCRLA No.46 of 2010 and the appellant Surya Kanta Behera @ Katiki in CRLA No.442 of 2010 along with Chandra Maharana, Tukuna Maharana @ Hati faced trial in the Court of learned Sessions Judge, Ganjam-Gajapati, Berhampur in Sessions Trial No.102 of 2008 for the offences punishable under section 302 read with section 34 of the Indian Penal Code on the accusation that on the night of 12.12.2007 near Ghatima Thakurani temple at Chikiti-Tamana Ghat road in furtherance of their common intention, they committed murder of one Raghaba Chandra Panda (hereinafter 'the deceased'). The appellants Syama Choudhury, Surya Kanta Behera @ Katiki and co-accused persons Chandra Maharana and Tukuna Maharana @ Hati were additionally charged under section 201 read with section 34 of the Indian Penal Code on the accusation that on 12.12.2007 night near Ghatima Thakurani temple at Chikiti-Tamana Ghat road, knowing that the murder of the deceased has been committed, set fire to the body of the deceased to cause evidence of the said offence to disappear with the intention of screening themselves from the legal punishment in

furtherance of their common intention. The appellant Nibedita Panda was additionally charged under section 120-B of the Indian Penal Code on the accusation that on 12.12.2007 night, he entered into criminal conspiracy with appellant Syama Choudhury to commit murder of the deceased.

The learned trial Court vide judgment and order dated 29.04.2010 though acquitted the co-accused persons Chandra Maharana and Tukuna Maharana @ Hati of all the charges, but found the appellants Syama Choudhury and Surya Kanta Behera @ Katiki guilty under sections 302 read with section 34 and 201/511 read with section 34 of I.P.C. and appellant Nibedita Panda under section 120-B of I.P.C. The appellant Shyama Choudhury and Surya Kanta Behera @ Katiki were sentenced to undergo imprisonment for life for commission of offence under section 302 read with section 34 of the I.P.C., however no separate sentence was passed against them for the offence under section 201/511 of the I.P.C. The appellant Nibedita Panda was sentenced to life imprisonment for the offence under section 120-B of I.P.C.

Prosecution Case:

2. The prosecution case, as per the first information report (Ext.22) lodged by Prafulla Kumar Padhi (P.W.21), Inspector-in-Charge (I.I.C.) of Nuagaon police station, in short, is that on getting reliable information that one unknown male burnt dead body was lying on Chikiti-Tamana Ghat road near Ghatima Thakurani temple, he along with his staff left for the spot. Upon reaching at the spot on 13.12.2007 early morning, he found the burnt dead body of a man aged about 25 to 30 years lying by the side of the ghat road near the bush in a naked condition and his wearing apparels were burnt except a little piece of shirt and pant sticking to the body and blood was oozing out from the nose, eye, ear and mouth and there was injury mark also on the left eye brow, the skins were found to be peeled and water bubbles could be seen over the body. It is further stated that the deceased had put on a belt on his waist and had worn a pair of shoes out of which left shoe was found in a half burnt condition and the dead body had become blackish and a few drops of blood could be found near the dead body sticking to the earth.

On suspicion that some unknown culprits after committing the murder elsewhere threw the dead body near the bush and set fire by pouring petrol or diesel to cause disappearance of evidence, P.W.21 drew up a plain paper first information report (F.I.R.) at the spot and registered a formal F.I.R. upon returning to the police station and accordingly, Nuagaon P.S. Case No.87 dated 13.12.2007 was registered under sections 302/201 of I.P.C. against unknown persons.

P.W.21 himself took up investigation. During the course of investigation, he visited the spot, prepared crime details form vide Ext.23, sent requisition for police tracker dog, scientific team and held inquest over the dead body of the deceased in presence of the witnesses and prepared the inquest report vide Ext.6. To procure the identity of the dead body, he enquired the local gentries and certain leading persons from the locality but they could not identify the same and therefore, he took the

photographs of the dead body and the scene of the crime from different angles and collected blood stained earth, sample earth and some soil with burnt grasses and leaves on production by the Scientific Officer, D.F.S.L., Chatrapur and prepared the seizure list vide Ext.16. P.W.21 sent the dead body of the deceased for post mortem examination to the Department of F.M. & T., M.K.C.G. Medical College and Hospital, Berhampur. On 16.01.2008, he got the information from I.I.C., Bada Bazar police station, Berhampur that the photograph of the dead body has been identified to be that of the deceased and he proceeded to conduct search in the house of the deceased in presence of police officers of Bada Bazar police station and other witnesses and on seeing the police, the appellant Syama Choudhury tried to escape through the back door of the house and he was apprehended. Upon search of the house of the deceased, P.W.21 found incriminating clues in presence of witnesses and recovered one identity card, savings bank passbook and prepared the seizure list vide Ext.5. He took the appellants Syama Choudhury and Nibedita Panda into his custody for interrogation and during such interrogation, the involvement of the appellant Surya Kanta Behera @ Kataki and the co-accused persons Tukuna Moharana @ Hati and Chandra Maharana came to light and he accordingly examined the accused persons and seized the motor cycle, which was used in the commission of the crime. The I.O. recorded the disclosure statement of the appellant Syama Choudhury under section 27 of the Evidence Act vide Ext.25 and upon being led by him, the I.O. went to a culvert near the village Ramadihi and found a 'Muli Thenga' from under the culvert and seized the same as per seizure list Ext.26. Thereafter, P.W.21 forwarded the accused persons to Court on 18.01.2008 and prayed the learned J.M.F.C., Patrapur to treat accused Tukuna Moharana as an approver. On 14.02.2008, he seized a petition of the appellant Nibedita Panda and a copy of the judgment and prepared the seizure list vide Ext.11 and also seized the service book and other service particulars regarding date of birth and the age of the employee of S.M.I.T. and his period of absence from duty as per seizure list Ext.12. He produced the exhibits seized in the Court of learned J.M.F.C., Patrapur and prayed for dispatching the same to the Regional Forensic Science Laboratory, Berhampur for chemical examination and also received the chemical examination report. On conclusion of investigation, upon getting prima facie material against the accused persons, P.W.21 submitted charge sheet on 14.05.2008 for offences punishable under sections 302/201/120-B/114/34 of I.P.C.

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 accused persons pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prove their guilt.

Prosecution Witnesses, Exhibits & Material Objects :

4. In order to prove its case, the prosecution examined as many as twenty one witnesses.

P.W.1 Subhasree Panda is the minor daughter of the deceased and appellant Nibedita Panda who stated that on 12.12.2007 i.e. on the date of occurrence, the appellants came to their house and talked to her mother and at that time, she along with her two brothers was present in the house. She also stated that after talking to her mother, the appellants left the house and at about 04.30 p.m., her deceased father returned to their house from college and took rest. It is her further statement that while the deceased was taking rest, the appellant Syama Choudhury asked her brother Suraj to procure some kerosene in a bottle and around 5.00 p.m., the appellant Kataki came to their house and called the deceased to go to Chikiti for seeing a girl and her mother also convinced her deceased-father to get ready for going to see the girl. Thereafter, the deceased and the appellant Kataki left their house for Chikiti on the motor cycle of the deceased. Subsequently, in the night at around 10.30 p.m., the appellant Kataki alone returned to their house and on seeing him, when she enquired from him as to the whereabouts of her deceased-father, he informed that the deceased was at Hanuman temple and he was instructed by the deceased to keep the motor cycle at their house. She further went on to state that the appellant Kataki left their house and since the deceased did not return to their house, the appellant Syama Choudhury started living in the house at night and when she enquired as to the whereabouts of the deceased, the said appellant always assured her that the deceased would return to the house and he was also searching for the deceased. Furthermore, she stated that appellant Syama Choudhury threatened them saying not to move out of the house or else he would kill them. The minor witness also stated that before the occurrence, the appellant Syama Choudhury used to visit their house and the deceased used to take exception to that and for that reason, the relationship between the deceased and the appellant Nibedita Panda got strained.

P.W.2 Rajiba Kumar Panda is the elder brother of the deceased who stated that the deceased had first married to another lady but when she conceived and gave birth to a baby boy at his in-law's house, he did not go to see the newborn rather he brought another woman i.e. appellant Nibedita Panda and kept her as his second wife. He also stated that appellant Syama Choudhury was a candidate in the Municipal Election of the year 2002 and during that period, he developed intimacy with the appellant Nibedita Panda. As the illicit relationship between the two became deep, the deceased had altercation of words and exchange of blows on multiple occasions. He further stated that once appellant Syama Choudhury met and complained about misbehavior being meted out to him by the deceased but he advised the appellant not to disturb the family of the deceased, however, the appellant threatened to teach a lesson to the deceased if he misbehaves with him any further. He expressed strong suspicion about the involvement of appellant Syama Choudhury and appellant Nibedita Panda in the commission of the murder of the deceased.

P.W.3 Tapan Kumar Padhi stated to have known appellants Syama Choudhury and Nibedita Panda, however he expressed ignorance about the identities

of the other accused persons. He stated that the police had shown him some photos and from that, he identified the dead body of the deceased. But he stated to have not known anything more about the case for which he was declared hostile by the prosecution.

P.W.4 Bhagaban Das stated to have known the appellants Nibedita Panda and Syama Choudhury and expressed ignorance about the identities of the other accused persons. He is a witness to the seizure of one blue film book, one pass book of Andhra Bank and one red colour motor cycle from the house of the deceased as per seizure list Ext.5, but as he expressed ignorance about the further facts of the case, he was declared hostile by the prosecution.

P.W.5 Dharma Sahu is a witness to the preparation of inquest report vide Ext.6 and he is also a witness to the seizure of one spectacle and burnt pieces of a shirt as per seizure list Ext.7.

P.W.6 Sibanarayana Panda is the nephew of the deceased who stated to have received a telephonic call from the police to come to his ancestral house in Old Berhampur Street. He again stated that the police had shown him some photos, but he could not identify the same but his father could identify the dead body shown in the photos to be that of the deceased. As the witness could not state anything more about the case, the prosecution declared him hostile.

P.W.7 Binod Bihari Mishra stated that he knew the deceased from the childhood and he was also aware of the fact that the appellant Syama Choudhury used to visit the house of the deceased. He also stated about the first marriage of the deceased with another lady and subsequently with appellant Nibedita Panda. He further stated that when appellant Nibedita Panda had once left the house of the deceased, the deceased had explained his plight before him and thus, he had advised the deceased to practise ‘pranayama’ and ‘yoga’ and not to have relationship with ladies. The witness also stated that the appellant Nibedita Panda subsequently circulated leaflets throughout Berhampur town assailing the character and conduct of the deceased. He is also a witness to the seizure of one blue film book, one savings account pass book and one motor cycle as per the seizure list Ext.5. However, as he expressed ignorance about any further details of the case, he was declared hostile by the prosecution.

P.W.8 Soubhagini Tripathy is the sister of appellant Nibedita Panda who stated that once the said appellant had come to her house at Nawarangapur as she had some difference of opinion with her deceased-husband and she stayed with her for about seven to eight months thereafter. Subsequently, they all came to Berhampur for an event and at that time, the appellant lived with the deceased. She came to know about the death of the deceased from newspaper ‘Samaj’ and expressed ignorance about any further details of the case and therefore, the prosecution declared her hostile.

P.W.9 Srikanta Panda is the minor son of the deceased and appellant Nibedita Panda who stated that appellant Syama Choudhury and his mother (appellant Nibedita Panda) once had a discussion in the middle room of their house and at that time, the deceased was absent as he had been to the college. He further stated that around 4 to 5 p.m., the deceased returned to the house and appellant Syama Choudhury asked his brother Suraj to fetch some kerosene. Thereafter, appellant Kataki came to the house and the accused Nibedita asked the deceased to go with the appellant Kataki and accordingly, the deceased proceeded on a motor cycle with appellant Kataki. He further stated appellant Kataki came back to their house on the motor cycle around 10 p.m. alone and when P.W.1 enquired from appellant Kataki about the whereabouts of the deceased, he replied that he would come back but the deceased did not return. The minor witness also stated that since the deceased did not return to the house, the appellant Syama Choudhury used to live in their house and also used to beat them. After one month, the police came to the house and had shown him some photos, from which he could know that his father (deceased) had died.

P.W.10 Suraja Kumar Panda is the son of the deceased and appellant Nibedita Panda who stated that during the absence of his deceased-father, the appellant Syama Choudhury used to come to their house to talk to his mother. He further stated that on the date of occurrence, appellant Syama Choudhury had come to their house after the deceased left for the college and had some discussions with his mother. He further stated that the said appellant again came to their house around 3 p.m. and asked him to fetch kerosene in a bottle and thereafter the appellant Kataki came to their house and called the deceased to go to see a girl and accordingly, both of them left on a motorcycle, but after that the deceased never returned back to the house. He further stated that in absence of the deceased, appellant Syama Choudhury started living in their house and after a month, when police came and showed him the photos of the deceased, he came to know that he had died.

P.W.11 Prasan Kumar Patnaik is the proprietor of a photo studio namely 'Balakumari' who, on requisition of C.I. of police, took photographs of the scene of occurrence at Tamana Ghati, which are marked as Exts.8, 8/1, 8/2, 8/3 and 8/4.

P.W.12 Dr. Satchidananda Mohanty was the Associate Professor in the Department of Forensic Medicine and Toxicology, M.K.C.G. Medical College, Berhampur, who on police requisition, held post mortem over the dead body of the deceased and proved his report vide Ext.9.

P.W.13 Bhagaban Gantayat was the President of Sanjaya Memorial Institute of Technology, Berhampur (hereafter 'SMIT') where the deceased used to work as a Lecturer. He stated that though the deceased used to come to the college regularly but once he stopped coming for a long time for which the college had issued notice to him by registered post. He further stated that appellant Nibedita Panda had sent petitions to the Principal of the College alleging that the deceased was not taking

care of her and the children. He is a witness to the seizure of one allegation petition of appellant Nibedita Panda and copy of the judgment as per seizure list Ext.11 and seizure of the extract of service book of the deceased and his bio-data as per seizure list Ext.12.

P.W.14 Sudhansu Mohan Padhy was working as the Principal of the Diploma Wing of SMIT who stated that as the deceased did not attend the college from 13.12.2007, a notice was sent to him in his home address by registered post on 04.01.2008 and the said notice returned back undelivered on 16.01.2008. He expressed his ignorance about the occurrence and stated that the he came to know about the murder of the deceased from newspaper.

P.W.15 Bulu Charan Sabat was working as a peon in SMIT who stated having no knowledge about the occurrence, for which he was declared hostile by the prosecution.

P.W.16 Ladu Kishore Sahoo was working as a Constable attached to Chikiti outpost under Kandha Nuagaon police station. He is a witness to the seizure of blood stained earth, sample earth and some soil from the spot of occurrence as per seizure list Ext.16 and he is also a witness to the seizure of command certificate, burnt sacred thread, burnt pieces of shirt, pant, belt, rubber shoe and sealed packet as per seizure list Ext.17.

P.W.17 Bipin Bihari Mishra was the Councilor and neighbour of the deceased who after learning about the missing of the deceased reported the matter to the I.I.C., Bada Bazar police station on 14.01.2008 in writing vide Ext.18. He further stated that after one and half month of missing, the police had shown him some photographs from which he came to know about the murder of the deceased. He also stated that appellant Nibedita Panda was living along with her children and appellant Syama Choudhury in the house of the deceased.

P.W.18 Krushna Mohan Padhi was working as the Establishment Officer in the Diploma wing of SMIT who is a witness to the seizure of personal file of the deceased along with extract of his service book, a letter regarding holding of a condolence meeting and other documents.

P.W.19 Amanulla Khan was posted as the Scientific Officer, District Forensic Science Laboratory, Chatrapur, Ganjam who, on requisition of police, visited the spot and found the dead body of the deceased in a charred condition facing upwards. He further stated to have found the wearing apparels in burnt condition and he also detected bleeding injuries on the left eye and right ear of the charred body. He collected blood stained earth from the near the dead body so also sample earth from the spot.

P.W.20 Brajabandhu Choudhury is the brother of appellant Syama Choudhury and also a witness to the seizure of his motor cycle as per seizure list Ext.20. He stated to have learnt about the death of the deceased from newspaper.

P.W.21 Prafualla Kumar Padhi was the Inspector-in-Charge of Nuagaon police station and he is the Investigating Officer of this case.

The prosecution proved thirty-three numbers of documents to fortify its case. Exts.1 to 4 and 8 are the photos of the deceased, Exts.5, 7, 11, 12, 16, 17, 20, 26, 30 and 31 are the seizure lists, Exts.6 is the inquest report, Ext.9 is the post mortem report, Ext.10 is the letter of I.I.C., Nuagaon addressed to P.W.12, Exts.13,14, 15 and 21 are the zimanamas, Ext.18 is the report of P.W.17, Ext.19 is the spot visit report, Ext.22 is the plain paper F.I.R., Ext.22/1 is the formal F.I.R., Ext.23 is the crime details form, Ext.23/1 is the spot map, Ext.24 is the dead body challan, Ext.25 is the disclosure statement made by the appellant Syama Choudhury, Exts.27 & 28 are the chemical examination reports, Ext.29 is the carbon copy of forwarding letter of J.M.F.C., Patrapur, Ext.32 is the forwarding letter regarding sending of the negatives and Ext.33 is the negative of photograph.

The prosecution also produced one material object for proving its case. M.O.I is a wooden lathi.

5. The defence plea is of complete denial to the prosecution case.

6. The learned trial Court after assessing the oral as well as documentary evidence on record, came to hold that the deceased died a homicidal death and the death took place around 11.30 p.m. on the night of 12/13.12.2007 which was within six and half hours of the departure of the deceased with the appellant Katiki from the house and death of the deceased was homicidal in nature and the medical evidence was consistent to the prosecution case that with the help of M.O.I (wooden lathi), fatal injuries were caused to the deceased. The learned trial Court found that the case is based on circumstantial evidence and it jotted down the circumstances available on record against the appellants and the co-accused persons who were acquitted which are as follows:-

> (1) Though the deceased and accused Nibedita were living together with their children, there was dissension between the two and sometimes it used to be of serious nature;
>
> (2) Accused Nibedita had intimacy with accused Syama and used to mix with him which was not liked by the deceased;
>
> (3) On 12.12.2007 forenoon after departure of the deceased to his College, accused Syama and Katiki had come to deceased's house and had some talk with Nibedita. On the same day in the afternoon, accused Syama had sent P.W.10 to fetch kerosene for him and P.W.10 had in fact brought kerosene and handed it over to accused Syama;
>
> (4) At about 4.30 p.m. the deceased returned from his college and took rest for some time. At that time accused Katiki came and called him giving a proposal that they should go to Chikiti to see a girl. At that time accused Nibedita also induced the deceased to get ready to go with Katiki;
>
> (5) In the evening, the deceased and Katiki left deceased's home riding on the deceased's motor cycle. Some hours thereafter (according to P.W.1 the time was 10.30 p.m.) Katiki returned with deceased's motor cycle but the deceased did not come. When

asked about the whereabouts of the deceased, accused Katiki replied that the deceased went to the Hanuman temple asking him to keep the motor cycle in his house;

(6) The death of the deceased was found to have occurred around 11.30 p.m. of 12.12.2007;

(7) From the same night, accused Syama had been staying in the deceased's house and when the children used to ask him about their father, his reply was that he would come back soon. He also used to threaten the children not to go outside their house;

(8) As stated by the I.O., on 16.01.2008 night when he went to the deceased's house to search it, he found accused Syama Choudhury, accused Nibedita Panda and three children of the deceased inside that house, which was then kept bolted from inside;

(9) While in custody, accused Syama Choudhury disclosed that with the help of a 'Muli Thenga', the deceased was assaulted and after commission of the crime the 'Muli Thenga' (M.O. I) was thrown under one culvert near village Ramadihi and subsequently he led the police to that culvert where from one 'Muli Thenga' (M.O.I) was recovered;

(10) Even though Raghaba Panda was missing, accused Nibedita, the only major person in the family did not report about the deceased's missing nor did she take the help of others for days together to find out where the deceased might be, more so when she herself had asked the deceased to go with Katiki to see a girl.

The learned trial Court held that the circumstantial evidence are there against the appellants Syama Choudhury, Surya Kanta Behera @ Katiki and Nibedita Panda, but there is neither circumstantial nor direct evidence against the co-accused persons, namely, Chandra Maharana and Tukuna Maharana @ Hati. The learned trial Court considered the evidence of P.W.1, the daughter of the deceased regarding the last seen theory against appellant Surya Kanta Behera @ Katiki and found the evidence believable and the non-explanation offered by the appellant Surya Kanta Behera @ Katiki was held to be providing missing link to the chain of circumstantial evidence. The learned trial Court took into account the conduct of the appellant Nibedita Panda in not reporting about the missing of the deceased to anyone so also her absence of anxiety and the conduct of the appellant Syama Choudhury in giving threat to the children of the deceased not to go outside show their complicity in the commission of the crime. It was further held that the last seen theory along with other circumstances raised a presumption that the appellant Surya Kanta Behera @ Katiki committed the murder of the deceased so also the appellant Syama Choudhury on the basis of whose disclosure statement, the weapon of offence was recovered. Similarly, it was held that the appellant Nibedita had a criminal conspiracy with the appellant Syama Choudhury and Surya Kanta Behera @ Katiki for committing the murder of the deceased. The learned trial Court held that there are material omissions in the evidence of P.W.9 and P.W.10 so also there were chances of tutoring to them, however, they were held to be competent witnesses to know about their parents' private life and therefore, it was held that their evidence cannot be discarded in toto. It was held that the evidence of the deceased being last seen with the appellant Surya Kanta Behera @ Katiki, is the strongest piece of evidence and there is also evidence to show that some of the co-

accused had ill-feeling towards the deceased. Accordingly, the learned trial Court while acquitting the two co-accused persons of all the charges, found the appellants guilty.

7. Ms. Sasmita Nanda, learned counsel appearing for the appellants argued that in absence of any direct evidence, the learned trial Court ought not to have relied upon the circumstantial evidence as produced by the prosecution to convict the appellants as those circumstances are neither clinching nor on being taken together, form a complete chain which pointed towards the guilt of the appellants. She argued that there is no clinching evidence that the dead body which was found by P.W.21 on 13.12.2007 near Ghatima temple on ChikitiTamana Ghat road, was that of the deceased. Learned counsel further argued that all the three witnesses on whom the learned trial Court has placed utmost reliance are the children of the deceased and appellant Nibedita Panda and they are highly interested witnesses and possibility of tutoring them to depose against the appellants cannot be ruled out. It was further argued that in view of the time of death of the deceased as per the evidence of the doctor (P.W.12) who conducted post mortem examination, it does not match with the time of last seen of the appellant Surya Kanta Behera @ Katiki with the deceased. The learned counsel further argued that even if the conduct of the appellants Syama Choudhury and Nibedita Panda can be said to be suspicious, but in view of the settled position of law that suspicion, howsoever strong, cannot take the place of legal proof and particularly when there is absence of evidence of criminal conspiracy between the appellant Nibedita Panda with the other appellants, her conviction under section 120-B of the I.P.C. is not sustainable in the eye of law. The learned trial Court without any evidence whatsoever on record, has presumed that both the appellants Syama Choudhury and Surya Kanta Behera @ Katiki attempted to cause disappearance of evidence and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Jateswar Nayak, learned Addl. Government Advocate, on the other hand, supported the impugned judgment and argued that in view of the evidence of the I.O. (P.W.21), it would be clear that after taking photographs of the dead body from different angles, he visited many places and enquired from many persons to establish the identity of the dead body and finally he could be able to establish the same when he examined the family members of the deceased showing the photographs and therefore, the contention raised by the learned counsel for the appellants that the dead body which was found by P.W.21 on 13.12.2007 near Ghatima temple on Chikiti-Tamana Ghat road, was not that of the deceased, is not acceptable. It is further argued that the children of the deceased and the appellant Nibedita Panda cannot be said to be interested witnesses and they are truthful witnesses and their evidence has rightly been accepted by the learned trial Court since the defence has failed to bring out anything from their mouth that they had been tutored to depose against the appellants. It is further argued that not only the doctor (P.W.12) found that the deceased met with a homicidal death, but there was

depressed fracture of the skull and lacerated wound and the probable time of death which has been assessed by the doctor almost matches with the last seen of the appellant Surya Kanta Behera @ Katiki with the deceased and moreover, the weapon of offence was seized at the instance of the appellant Syama Choudhury and it was examined by the doctor, who opined that the ante-mortem injuries detected on the person of the deceased were possible by such weapon and therefore, there is no illegality or infirmity in the impugned judgment and as such, both the appeals should be dismissed.

8. Adverting to the contentions raised by the learned counsel for the respective parties, so far as the identity of the dead body is concerned, P.W.21, the I.O. has stated that when he proceeded to the spot on 13.12.2007 morning, he found a naked dead body of a person, aged about 25-30 years was lying by the side of Ghat road and the wearing apparels were burnt leaving the remnant of a piece of shirt and pant sticking to the body. He stated that he enquired from the local gentries and leading persons of the locality to get the identity of the dead body, but they could not identify. He further stated that he took the photographs of the dead body and the scene of the crime from different angles and sent messages to all the I.I.Cs. and O.I.Cs. of Berhampur and Ganjam district and made wide publication to establish the identity of the dead body and also requested the Station House Officer, Icchapur requesting him to make wide publication to establish the identification of the dead body. He further stated that on 14.12.2007, he moved to villages Belapali, Benthapalli, Tamana, Konisi and Golanthara and showed the photos of the corpse to the public, but nobody could be able to identify or establish the identity of the dead person. He further stated that on 28.12.2007 he visited some other villages and contacted transport godowns and drivers, but failed in his attempt to establish the identity of the dead body. On 27.12.2007 and on 08.01.2008, he made efforts to ascertain the identity of the deceased by contacting the sources, Inspectors and O.I.Cs. of different police stations, but could not get any information. On 16.01.2008, he received information from I.I.C., Badabazar police station, Berhampur that the photograph which was sent by him related to the deceased who was missing since 12.12.2007. He further stated that in the house of the deceased, he examined Subhashree Panda (P.W.1), Saroj Kumar Panda (P.W.10), Srikanta Kumar Panda (P.W.9), Nibedita Panda (appellant) and all of them who were shown the photo of the dead body identified the same to be that of the deceased. Suggestion has been given by the learned counsel that the identity of the deceased had not been established and that the charred body, which was found lying by the side of Tammana Ghat road was not that of the deceased, but the I.O. (P.W.21) has denied such suggestion. We also verified all the photographs which have been marked as exhibits, from which we found that the face portion including the hairs and some of the limbs of the deceased are quite visible even though a major part of the body had been burnt and therefore, there could not have been any difficulty on the part of the family members of the deceased to identify the dead body. P.W.1 has stated that the

police showed them the photos and wearing apparels of her father and she could identify the same to be that of her father. P.W.9 has also stated that police came to their house and showed some photographs, from which they could come to know that their father had died. P.W.10 has also stated that one month after his father was found missing, the police came and showed the photos, from which they could come to know that their father had died. In view of such evidence on record, we are of the humble view that the identity of the dead body has been established by the prosecution successfully and the burnt body of a male person which was lying on Chikiti-Tamana Ghat road near Ghatima temple on 13.12.2007 was that of the deceased.

First Circumstance :

9. The first circumstance jotted down by the learned trial Court in the impugned judgment is that the appellant Nibedita and the deceased were living together with their children and there was dissension between the two and sometimes it used to be of serious nature. The relevant witnesses on this point are P.Ws. 1, 7, 8 and 13.

P.W.1 is the daughter of the deceased, who was aged about fourteen years and when she deposed in this case on 16.12.2008, the learned trial Court put some questions to her and from the answers given by the witness, the Court was of the view that she appeared to be highly intelligent and she answered some of the questions very intelligently.

Section 118 of the Evidence Act deals with the competence of a person to testify before the Court. If a child witness is able to understand the questions and his duty to speak the truth before the Court and give rational answers thereof, he can be said to be competent to depose the facts of the case. The trial Judge sees the child witness, notices his manner, his apparent possession or lack of intelligence by resorting to any examination which would disclose his capacity and intelligence and accordingly, he has to form his opinion. The child witnesses are amenable to tutoring and they are pliable and liable to be influenced easily, shaped and moulded and therefore, careful scrutiny is necessary by the Court to come to the conclusion that there is an impress of truth in it.

P.W.1 stated that her father (deceased) was working as a Lecturer in S.M.I.T. College and she was having two brothers, namely, Suraj (P.W.9) and Srikant (P.W.10). She further stated that when appellant Syama Choudhury started coming to their house, her father (deceased) took exception to that and since then, the relationship between her father (deceased) and her mother (appellant Nibedita Panda) got strained. Suggestions have been given to P.W.1 in the cross-examination that being tutored by her Mousi (aunt) and Mamu (maternal uncle) and other maternal relations, she was deposing falsehood, to which the witness denied. Further suggestion has been given by the learned defence counsel in the cross-examination that only to grab the properties of her deceased father and to keep her mother behind

bar, her Mousi and maternal uncle had set her in making false accusation against the accused persons, to which also she had denied. Nothing further has been elicited in the cross-examination to doubt the veracity of this witness.

P.W.7 has stated that the deceased first married to a lady namely, Ranjana and later on he brought the appellant Nibedita Panda and kept her as his wife and once the appellant Nibedita Panda left the house of the deceased to which the latte expressed his plight before him. He further stated that the appellant Nibedita Panda circulated leaflets throughout Berhampur town about the character and conduct of the deceased. In the cross-examination, it has been elicited that his brother was contesting election for the post of Councillor in Municipality for the year 2002 against the appellant Syama Choudhury and his brother won the election. Nothing further has been brought out in the cross-examination of P.W.7 to disbelieve his evidence.

P.W.8, who was the sister of the appellant Nibedita Panda, stated that appellant Nibedita married to the deceased and out of their wedlock, a daughter and two sons were born. She further stated that the appellant Nibedita had a difference of opinion with the deceased for which she came and stayed with them for seven to eight months.

P.W.13 has stated that he was the President of the S.M.I.T., Berhampur where the deceased was a Lecturer in Diploma wing. He further stated that the appellant Nibedita had sent petitions to the Principal of the College against the deceased as he was not taking care of her as well as her children.

The evidence of these four witnesses i.e. P.Ws.1, 7, 8 and 13 substantiate the first circumstance that though the deceased and the appellant Nibedita were staying together with their children, but there was dissention between the two and sometimes it used to be serious nature.

Second circumstance :

10. The second circumstance jotted down by the learned trial Court is that the appellant Nibedita had an intimacy with the appellant Syama Choudhury and she used to mix with him, which was not liked by the deceased. P.Ws. 1 and 10 are the relevant witnesses on this point.

P.W.1 has stated that the deceased took exception when the appellant Syama Choudhury started coming to their house and the relationship between the deceased and the appellant Nibedita got strained over such issue.

P.W.10, the son of the appellant Nibedita and the deceased has stated that his father (the deceased) used to go to the college everyday at 8.00 a.m. and during his absence, the appellant Syama Choudhury was coming to his house and was talking with his mother (appellant Nibedita). Suggestion has been given to P.W.10 that he had been tutored by his Mousi and Mamu as well his sister to which he has denied.

In view of the evidence of P.W.1 and P.W.10, the second circumstance has been clearly established by the prosecution.

Third circumstance :

11. The third circumstance jotted down by the learned trial Court is that on 12.12.2007 forenoon, after departure of the deceased to the college, appellants Syama and Katiki had come to the house of the deceased and had talked with the appellant Nibedita and on the same day, in the afternoon, the appellant Syama had sent P.W.10 to fetch kerosene for him and P.W.10 had in fact brought kerosene and handed it over to appellant Syama. The relevant witnesses are P.Ws.1, 9 and 10.

P.W.1 has stated that on 12.12.2007 after her father left for the college, appellants Syama Choudhury and Katiki came to their house and talked with their mother. She further stated that at that time, she along with her two brothers (P.W.9 and P.W.10) were there in the house and both the appellants talked with her mother for some time in a room and left the house and on the same day, while her deceased father was taking rest after returning from the college, appellant Syama Choudhury called her brother (P.W.9) and gave him a bottle to procure kerosene. In the cross-examination, she had stated that on 12.12.2007, she had not gone to the school as she had left her studies for one year by then and her two brothers (P.W.9 and P.W.10) had also stopped going to the school and because of the dissention between their mother (appellant Nibedita) and father (deceased), all of them had stopped going to the school.

P.W.9 has also stated like P.W.1 and in the cross-examination, he has stated that he had left studies since last two years and he was not going to attend any tuition.

P.W.10 has stated that the appellant Syama Choudhury came to their house and at that time he was outside the house and the appellant gave him a bottle to fetch kerosene and accordingly, he procured kerosene and handed over the same to the appellant Syama Choudhury whereafter the latter left their house. In the cross-examination, he was suggested that he had been tutored by his Mousi and Mamu as well as his sister and that he had no knowledge about the missing of the deceased, to which he denied.

Nothing has been brought out in the cross-examination of any of these three witnesses relating to their evidence on this circumstance and therefore, the prosecution has established the third circumstance as well.

Fourth circumstance :

12. The fourth circumstance jotted down by the learned trial Court is that the deceased returned from his college at 4.30 p.m. and took rest for some time and appellant Katiki came and called him giving a proposal that they should go to

Chikiti to see a girl and appellant Nibedita also induced the deceased to get ready to go with appellant Katiki. The relevant witnesses on this point are P.Ws. 1, 9 and 10.

P.W.1 has stated that after returning from the college, when her father (deceased) was taking rest, appellant Katiki came to their house, called the deceased to go to Chikiti for seeing a girl and her mother (appellant Nibedita) also asked the deceased to get ready as he would be going to see a girl.

P.W.9 has stated that around 4 to 5 p.m., his father (deceased) returned from the college and appellant Katiki arrived in their house and on seeing him, his mother (appellant Nibedita) called the deceased who was then taking a nap as he was to go with appellant Katiki somewhere.

P.W.10 has stated that the appellant Katiki came to their house in the afternoon and called the deceased to go to see a girl.

Nothing has been brought out in the cross-examination of these three witnesses to disbelieve the evidence given on this circumstance. Thus, the fourth circumstance has also been established by the prosecution successfully.

Fifth circumstance :

13. The fifth circumstance jotted down by the learned trial Court is that in the evening hours on 12.12.2007, the deceased and appellant Katiki left the house of the deceased riding on the motor cycle of the deceased and few hours after, appellant Katiki returned with the motor cycle of the deceased alone, but the deceased did not return. When P.W.1 asked about the whereabouts of her father (deceased), appellant Katiki replied that the deceased had been to the Hanuman temple and asked him to keep the motor cycle in the house.

This circumstance is a vital one which is the last seen theory of the appellant Katiki with the deceased. The relevant witnesses on this point are P.Ws.1, 9 and 10, the three children of the deceased.

P.W.1 has stated that the deceased and the appellant Katiki left their house in a Hero Honda motor cycle of the deceased for Chikiti to see a girl and at about 10.30 p.m. in the night, the appellant Katiki alone returned to their house and when she enquired as to what happened to her deceased father, appellant Katiki informed her that the deceased was at Hanuman temple and that he had been instructed by the deceased to keep the motor cycle in the house. She further stated that keeping the motor cycle, the appellant Katiki left the house and since then, the deceased did not return to the house. In the cross-examination, P.W.1 has stated that she had seen her father (deceased) leaving from the house in his motor cycle with appellant Katiki and then she had wished her father and at that time, her mother (appellant Nibedita) was inside the house.

P.W.9 has stated almost in the similar line that the deceased and the appellant Katiki proceeded in the motor cycle of the deceased and in the same night

at about 10 p.m., the appellant Katiki came with the motor cycle of the deceased and when his sister (P.W.1) enquired as to the whereabouts of her deceased father, appellant Katiki replied that the deceased had gone to the Hanuman temple and he would return back and since that date, the deceased did not return to the house.

P.W.10 has also stated that in the afternoon, the appellant Katiki came to their house and called his deceased father to see a girl and accordingly, the deceased got dressed and he along with appellant Katiki proceeded to Chikiti site in the motor cycle of the deceased, but since then his father did not return to the house.

The evidence of these three witnesses on this circumstance has remained unassailed. Specific questions on this circumstance has been put to appellant Katiki in his accused statement recorded under section 313 of Cr.P.C., but he has not explained this circumstance and simply stated that it is falsehood.

The last seen theory is a legal principle that is based on the idea that if someone is the last person seen with the deceased before a crime being committed, he is likely to be responsible for the crime unless he provides a satisfactory explanation in view of section 106 of the Evidence Act (section 109 of Bharatiya Sakshya Adhinayam, 2023). Doctrine of last seen, if proved, shifts the burden of proof onto the accused, placing on him the onus to explain how the incident occurred and what happened to the deceased who was last seen with him. If there is a failure on the part of the accused to furnish any explanation in this regard, or furnishing false explanation, it would give rise to a strong presumption against him and in favour of his guilt and would provide an additional link in the chain of circumstances. Last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen alive together and the discovery of the dead body is quite small and the possibility of any person other than the accused being the author of the crime becomes impossible. The Court may assume that there is a possibility of some other circumstance intervening to cause the offence to be committed, if the accused can demonstrate that there was a fair amount of time between the commission of the wrong and when they were last seen together. Of course, if the accused establishes that the evidence of the person who claimed to have last seen him in the company of the deceased is not credible for any reason, the Court will be unable to rely on the testimony of such witness. Even though there was significant amount of time between an event and the accused and the deceased were last seen together, in some circumstances, if the prosecution can prove that no one else would have intervened because the accused was sole person in the company of the deceased, the last seen theory can still be established. In the cases of ‘last seen together’, the prosecution is relieved of the obligation to establish the precise sequence of events as the accused possesses specialized knowledge of the incident and thus, carries the burden of proof under section 106 of the Evidence Act. The last seen together in itself may not be sufficient to hold the person guilty in certain circumstances.

In view of the evidence of P.Ws. 1, 9 and 10 and non-explanation of this circumstance and mere plea of denial by the appellant Katiki, we are of the humble view that the learned trial Court is quite justified in holding that this circumstance has been proved and also utilized it against the appellant Katiki.

Sixth circumstance :

14. The sixth circumstance jotted down by the learned trial Court is that the death of the deceased was found to have occurred around 11.30 p.m of 12.12.2007. In this connection, the evidence of the doctor (P.W.12) who conducted the post mortem examination is very relevant.

P.W.12 has stated that on 14.12.2007 at about 11.30 a.m., he conducted the post mortem examination over the dead body of a male person and found the burnt remnants of maroon colour underwear, blue colour banian, green and white striped shirt, coffee colour pant, remnants of six strands of sacred thread, khadims rubber half shoe on the left side which was partially burnt and melted and remnants of a leather belt on the body surface of the deceased. He also found smell of kerosene was faintly coming from the body surface. There was superficial burn with blackening and charring at places covering almost the entire body surface except lower 1/3rd of right leg. At places blisters were found. The burn area did not show typical ante mortem reaction. On dissection he found:

> (i) Both temporalis found contused so also contusion could also be detected over right fronto temporal and left parieto occipital scalp. A depressed fracture of skull involving an area of 7 cm x 4 cm is found over left temporo occipital area just above the left ear. A fissure fracture was found extending downwards backwards and outwards from the parietal bone 5 cm in front of right parietal eminence going up to right mastoid;
>
> (ii) Lacerated wound of size 2.5 cm x 0.5 cm x bone deep over right mandible 2 cm away from symphysis menti with underlying mandible found to be fractured at the level of canine. The maxilla of same side found to be fractured with surrounding extravasation;
>
> (iii) The base of skull in continuation with injury no.1 is found to be fractured starting from left side extending up to the right side with multiple fractures;
>
> (iv) Intracerebral haemorrhage on either side of cerebral hemisphere;
>
> (v) The xiphisternum united with body whereas the membrane sterni not united with the body of the sternum.

He has opined the burn injuries to be post mortem in nature caused due to dry heat with the aid of kerosene like substance. According to him, all the internal injuries were ante mortem and homicidal in nature, caused by the impact of hard and blunt force. The doctor has examined the alleged weapon of offence and given his opinion that the internal injuries detected by him during post mortem could be possible by a weapon like the one sent to him for his opinion. He has opined that the deceased died due to complications as a result of ante mortem injuries. He has further opined that the probable time of death of the person was around 36 hours preceding the time of post mortem.

On the basis of this opinion, the learned trial Court held that the death was caused around 10.30 p.m. on the night of 12/13.12.2007 and therefore, it is reasonable to presume that within six and half hours of the alleged departure of the deceased with the appellant Katiki, his death had occurred and that the death was homicidal in nature.

P.W.1 has stated that the appellant Katiki returned alone to their house on 12.12.2007 at 10.30 p.m. P.W.10 has stated that the appellant Katiki returned to their house at 11.00 p.m. Therefore, the return time of appellant Katiki matches almost with the probable time of death of the deceased as assessed by the doctor.

Therefore, the prosecution has successfully established the sixth circumstance.

Seventh circumstance :

15. The seventh circumstance jotted down by the learned trial Court is that from the night of 12/13.12.2007, appellant Syama was staying in the house of the deceased and when the children used to ask him about their father, his reply was that he would come back soon and he used to threaten the children not to go outside of the house. On this circumstance, the relevant witnesses are P.Ws.1, 9 and 10.

P.W.1 has stated that since her father did not return to the house, appellant Syama started leaving in their house in the night and when she asked appellant Syama as to the whereabouts of her father, he was always telling that the deceased would be returning to the house. She further stated that the appellant Syama threatened them not to move out of the house or else they would be killed by him.

P.W.9 has stated that since the day his father did not return to the house, appellant Syama Choudhury lived in their house and when they asked him as to what had happened to their father, he used to tell that their father had gone somewhere.

P.W.10 has stated that since the day his father did not return to the house, the appellant Syama Choudhury started living in their house.

The evidence of these three minor children of the deceased are very clinching and nothing has been brought out in the cross-examination to disbelieve the same. The contention of the learned counsel for the appellants is that the children should have disclosed before the neighbours and their other relations about the missing of their father and since they had not done the same, their evidence becomes suspicious. We are not inclined to accept such contention as they were children and they were not allowed to go outside after the occurrence and were threatened by the appellant Syama and they were also not going to the school and their mother (appellant Nibedita Panda) was remaining passive, therefore, they had no opportunity to disclose it before anyone.

Thus, this circumstance is also proved by the prosecution successfully.

Eighth circumstance :

16. The eighth circumstance jotted down by the learned trial Court is that on 16.01.2008 night when the I.O. (P.W.21) came to the house of the deceased to search it, he found that the appellants Syama Choudhury and Nibedita and the three children of the deceased were inside the house which was then kept bolted from inside.

Apart from the evidence of the three children that appellant Syama Choudhury was staying in their house from the date their father was found missing and that they were treated very badly and threatened by the said appellant, the evidence of the I.O. (P.W.21) is very relevant. He stated that after coming to know about the identity of the dead body to be that of the deceased, he searched the house of the deceased in presence of the police officers of Badabazar police station and witnesses in between 7.30 to 9.00 p.m. on 16.01.2008 and found that the appellants Syama Choudhury and Nibedita and the three children of the deceased were there in the house and the door was bolted from inside. He further stated that on seeing the police, the appellant Syama Choudhury tried to escape through the backdoor of the house, but he was nabbed.

Nothing has been elicited in the cross-examination of P.W.21. Thus, the eighth circumstance has been clearly established by the prosecution.

Ninth circumstance :

17. The ninth circumstance jotted down by the learned trial Court is that while in custody, appellant Syama Choudhury disclosed that with the help of a 'Muli Thenga' (M.O. I), the deceased was assaulted and after commission of the crime, M.O.I was thrown under one culvert near village Ramdihi and subsequently, he led the police to that culvert wherefrom M.O. I was recovered.

The I.O. (P.W.21) has stated that the appellant Syama Choudhury disclosed before him and the witnesses that he would lead them to the culvert near village Ramadihi to show as to where he had thrown M.O. I and accordingly, he recorded the disclosure statement under section 27 of the Evidence Act vide Ext.25 in which the appellant put his signatures and then the appellant led to the culvert near village Ramadihi and brought out M.O.I from under the culvert which was seized and the seizure list (Ext.26) was prepared.

P.W.7 is a witness to the said seizure, but he has not supported the prosecution case. The other witness to the seizure list has not been examined by the prosecution. However, law is well settled that even though no independent witnesses support the prosecution case of seizure but the statement of official witnesses relating to the seizure are found to be cogent, reliable, trustworthy and inspires confidence, such evidence can be acted upon as there is absolute no command of law that the testimony of such witnesses should always be treated with suspicion.

We are of the view that the evidence of the I.O. (P.W.21) that at the instance of appellant Syama Choudhury, M.O.I was recovered is acceptable and thus, the prosecution has established the ninth circumstance successfully.

Tenth circumstance :

18. The tenth circumstance jotted down by the learned trial Court is that though the deceased was missing and appellant Nibedita was the only major person in the family, she did not report about the missing of the deceased, nor did she take the help of others for days together to find out where the deceased might be, more so when she herself had asked the deceased to go with appellant Katiki to see a girl.

We are of the view that the evidence of three children of the deceased and the appellant Nibedita clearly established that the deceased was missing from his house since 12.12.2007 as he did not return home after leaving the house in the evening hours in his motor cycle with appellant Katiki. Thus, the tenth circumstance has also been established by the prosecution but even if the conduct of appellant Nibedita is very suspicious, it is to be seen whether the prosecution case against her has been established to find her guilty under section 120-B of the Indian Penal Code.

Appellant Nibedita Panda :

19. The learned trial Court found Nibedita Panda guilty under section 120-B of the Indian Penal Code.

Section 120-B of I.P.C. deals with punishment of criminal conspiracy which has been defined under section 120-A of I.P.C. When two or more persons agree to do, or cause to be done, an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. The meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is the sine qua non of criminal conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design inasmuch as the conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. The entire agreement is to be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. Encouragement and support which co-conspirators give to one another rendering enterprises possible, which if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. Conspiracy is never hatched in open and therefore, evaluation of proved circumstances plays a very vital role in establishing the criminal conspiracy.

The charge was framed under section 120-B of I.P.C. only against appellant Nibedita Panda that she entered into criminal conspiracy with appellant Syama Choudhury. There is no discussion in the impugned judgment referring to the

evidence on record as to how the learned trial Court found the appellant Nibedita Panda guilty under section 120-B of I.P.C. and with whom she conspired and what are the materials provided by the prosecution to establish the charge. No charge was framed for such offence against appellant Syama Choudhury.

In the case of **Ram Sharan Chaturvedi -Vrs.- State of M.P. reported in (2022) 16 Supreme Court Cases 166**, the Hon'ble Supreme Court reiterated the views expressed in the cases of **State of Kerala -Vrs.- P. Sugathan reported in (2000) 8 Supreme Court Cases 203 and Ram Narayan Popli -Vrs.- C.B.I. reported in (2003) 3 Supreme Court Cases 641** that for the offence of criminal conspiracy some kind of 'physical manifestation' of agreement is sine qua non and the evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. In the present case, the prosecution has utterly failed to conclusively prove transmission of thoughts between the appellant Nibedita Panda and other accused persons, leave alone putting forward any acceptable and rigid evidence regarding physical manifestation of agreement. Therefore, when the basic ingredient of the offence of criminal conspiracy i.e. agreement between at least two persons, is not proved, no strength remains in the prosecution argument that the appellant Nibedita Panda is liable for criminal conspiracy.

In the case of **Bimbadhar Pradhan -Vrs.- State of Odisha reported in A.I.R. 1956 SC 469**, the appellant and his four companions were charged with criminal conspiracy under section 120-B of I.P.C. All the four co-accused persons were acquitted, but the appellant alone was convicted as the Court found that the conviction can be supported as the approver was one of the co-conspirators. The Hon'ble Supreme Court held that it is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the Court is in a position to find that two or more persons were actually concerned in the criminal conspiracy.

In the case of **Maghavendra Pratap Singh -Vrs.- State of Chhattisgarh reported in (2023) 4 SCR 829**, it is held that for the charge of criminal conspiracy under section 120-B of I.P.C., an agreement between the parties to do an unlawful act must exist. To prove the offence of criminal conspiracy, it is imperative to show a meeting of minds between the conspirators for the intended common object and the charge fails when the prosecution shows its inability to prove involvement and meeting of minds of more than one person and thus, a single person cannot be convicted for hatching a criminal conspiracy.

In the case of **Girija Sankar Misra -Vrs.- State of U.P. reported in A.I.R. 1993 SC 2618**, it has been held that an accused alone cannot be convicted for the offence of conspiracy since the conspiracy cannot be by a single individual inasmuch as if the other alleged conspirators have been acquitted, a single remaining accused cannot be convicted under that section.

The evidence of three children of the deceased and appellant Nibedita Panda is totally silent to fulfil the ingredients of offence of criminal conspiracy. Even if their evidence that the appellant Syama Choudhury had come to their house on the date of occurrence and was talking with their mother is accepted and it is further accepted that the said appellant Syama Choudhury was staying with their mother after the missing of the deceased in the house of the deceased and it is further accepted that the appellant Nibedita Panda did not try to ascertain the whereabouts of the deceased whom she had sent with the appellant Katiki on 12.12.2007 even though the deceased did not return home for more than a month and did not try to report the matter before police, but in absence of any other clinching evidence, only basing on these suspicious conducts of the appellant, it cannot be held to be sufficient to convict her for offence of criminal conspiracy. Accordingly, the appellant Nibedita Panda is acquitted of the charge under section 120-B of I.P.C.

Appellant Syama Choudhury :

20. The appellant Syama Choudhury was found guilty with appellant Surya Kanta Behera @ Katiki under sections 302/34 and 201/511 of I.P.C.

The evidence of the three children of the deceased did not indicate that he had accompanied the deceased in the evening hours on 12.12.2007. Even there is no evidence on record that when appellant Katiki left with the deceased on that day, appellant Syama Choudhury was present in the house of the deceased or he played any role in asking the appellant Katiki to take the deceased with him on the pretext of seeing a girl in village Chikiti. There is no evidence that he had gone to the spot where the dead body was found. There is no evidence that when appellant Katiki returned alone in the night on 12.12.2007 with the motorcycle of the deceased, the appellant Syama Choudhury was there. The conduct of appellant Syama Choudhury in coming to the house of appellant Nibedita in the absence of the deceased and also staying with her after the deceased was found missing might raise suspicion against his conduct, but law is well settled that suspicion howsoever strong, cannot be a substitute for proof of guilt of an accused beyond reasonable doubt. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind might take the place of proof and therefore, the Court has to be watchful and ensure that such thing should not take place.

In our humble view, whatever materials are there against the appellant Syama Choudhury on record though raised some suspicion against his conduct, but the prosecution has failed to elevate the case against him from the realm of “may be true” to the plane of “must be true” as is indispensably require in law for conviction on a criminal charge. The evidence is also lacking that the appellant Syama Choudhury played any role in causing disappearance of evidence. Even though it is the evidence of P.W.10 that appellant Syama Choudhury gave him a bottle to fetch kerosene in the afternoon and accordingly, he procured the kerosene and handed over the same to him and thereafter, the appellant left the house and even though the

doctor's evidence is that the burn injuries sustained by the deceased were post-mortem in nature which were caused due to dry heat with aid of kerosene like substance, but there is no evidence on record that the kerosene which was procured by appellant Syama Choudhury was used in causing burn injuries to the deceased. The I.O. (P.W.21) has stated that he had not examined any kerosene dealer of Puruna Berhampur street to know if any child of the deceased had gone to purchase kerosene in the afternoon of 12.12.2007. Even if the prosecution has proved that one 'Muli Thenga' (M.O.I) was seized at the instance of the appellant Syama Choudhury from under one culvert near village Ramadihi and the doctor opined that with such wooden stick, the ante-mortem injuries could be possible on the deceased, but all these circumstances taken together, in our humble view do not unerringly point towards the guilt of the appellant and therefore, the prosecution has failed to establish the charges under sections 302/34 and 201/511 of the Indian Penal Code against appellant Syama Choudhury and accordingly, he is acquitted of such charges.

Appellant Surya Kanta Behera @ Katiki :

21. The appellant Surya Kanta Behera @ Katiki was found guilty under section 302/34 of I.P.C. so also under section 201/511 of I.P.C.

The evidence on record clearly established that this appellant had come to the house of the deceased on 12.12.2007 after his departure to the college with appellant Syama Choudhury and had talk with appellant Nibedita Panda. Appellant Katiki also came again to the house of the deceased in the afternoon while the deceased was taking rest after returning from college and called the deceased giving a proposal to go to Chitiki to see a girl and in the evening, he alone accompanied with the deceased in the motorcycle of the deceased and few hours thereafter, he alone returned to the house of the deceased with the motorcycle of the deceased and when he was asked by P.W.1 about the whereabouts of the deceased, he replied that the deceased had gone to Hanuman temple. The probable time of death as assessed by the doctor (P.W.12) who conducted post-mortem examination matches with the time when the deceased was in the company of the appellant Katiki. The appellant has not offered any explanation as to what happened to the deceased and when he parted with the company of the deceased. The dead body of the deceased was found on the very next date in the early morning in a burnt condition and according to the doctor, there were number of fracture injuries on the body of the deceased. The appellant Katiki had not examined any witness to show that he had gone to see a girl for him with the deceased. The proximity of time when the two were last seen together and the dead body was found coupled with the other circumstantial evidence including the medical evidence and failure to discharge his burden under section 106 of the Evidence Act, in our view, is sufficient to attract the ingredients of both the offences under which he has been found guilty by the learned trial Court.

Accordingly, the conviction of the appellant Surya Kanta Behera @ Katiki under section 302 of I.P.C. so also under section 201/511 of I.P.C. is upheld. The sentence imposed by the learned trial Court for the offence under section 302 of I.P.C. is the minimum punishment prescribed for such offence, which is accordingly upheld.

Conclusion :

22. In the result, JCRLA No.46 of 2010 is allowed. The appellant Nibedita Panda is acquitted of the charge under section 120-B of the Indian Penal Code. She be set at liberty forthwith, if her detention is not otherwise required in any other case. The appellant Syama Choudhury is acquitted of the charges under section 302/34 of I.P.C. and under section 201/511 of I.P.C. He be set at liberty forthwith, if his detention is not otherwise required in any other case.

CRLA No.442 of 2010 is dismissed. The conviction of the appellant Surya Kanta Behera @ Katiki under section 302 of I.P.C. and under section 201/511 of I.P.C. and the sentence passed thereunder stands confirmed. The appellant was directed to be released on bail vide order dated 23.02.2015. His bail bonds and surety bonds stand cancelled. He shall surrender before the learned trial Court within two weeks from today to serve out the sentence awarded by the learned trial Court which is confirmed by us, failing which, the learned trial Court shall take appropriate steps for his arrest and send him to judicial custody.

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 Ms. Sasmita Nanda, Advocate for all the appellants rendering her 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 :
Smt. Madhumita Panda, Law Reporter
(Verified by Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
JCRLA No.46 of 2010 is allowed & CRLA No.442 of 2010 is dismissed.

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2025 (I)-ILR-CUT-79

Dr. RAJASHREE MISHRA
V.
ORISSA UNIVERSITY OF AGRICULTURE & TECHNOLOGY, BHUBANESWAR & ORS.

(W.A. NO. 134 OF 2017)

17 DECEMBER 2024

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

Issue for Consideration

Whether the administrative arrangement can recognize the service/post of a person retrospectively.

Headnotes

SERVICE JURISPRUDENCE – Retrospective recognition of service – The appellant appointed as Research Assistant, a Class-III post with a distinct pay scale – She was allowed to perform as a Lecturer in an administrative arrangement to address the University's needs – Whether this adjustment is equivalent to an official appointment as a lecturer and thereby gives the appellant a retrospective recognition and benefit of a lecturer.

Held: No – The Appellant's claim for retrospective salary and financial benefits as a Lecturer prior to her formal appointment i.e. 17.06.2005 lacks validity, primarily because she did not undergo the prescribed appointment procedure necessary to hold the post. (Para 10)

The Appellant's claim for retrospective recognition as a Lecturer and associated financial benefits is legally and factually untenable. (Para 14)

Citation Reference

Purilal Mohanta v. NESCO, **W.P.(C) No. 8192 of 2008 – referred to.**

List of Statutes

Orissa University of Agriculture and Technology Statutes, 1966

Keywords

Equity in service; Retrospective recognition; Official/administrative arrangement; Procedural formalities; Ad-hoc administrative arrangement; Regularization.

Case Arising From

Judgment dated 05.05.2017 passed by the Hon'ble Single Judge in W.P.(C) No. 15499 of 2008.

Appearances for Parties

For Appellant : Mr. Manoj Mishra, Sr. Adv., Mr. Dinesh Kumar Panda
For Opp.Parties : Mr. Ashok Kumar Mishra (O.P. No. 1)

Judgment/Order

Judgment

CHITTARANJAN DASH, J.

1. Heard Mr. Manoj Mishra, learned Senior Advocate appearing on behalf of the Appellant and Mr. Ashok Kumar Mishra, learned counsel representing the Opposite Party No.1-OUAT.

2. By means of this writ appeal, the Appellant has challenged the Judgment dated 05.05.2017 passed by the Hon'ble Single Judge in W.P.(C) No. 15499 of 2008 as placed under Annexure-1 and to further quash the order of rejection passed vide Annexure-21 of the writ petition and further direct the Opposite Parties to consider the case of the Appellant as Teacher/Asst. Professor in the Department of Bacteriology & Virology of Orissa Vety. College and pay the scale of pay and financial benefits retrospectively w.e.f. from 31.07.1993 along with other service benefits.

3. The background facts of the case are that the Appellant, Dr. Rajashree Mishra, being a highly qualified individual who stood first in her B.V.Sc. & A.H. course and completed her M.V.Sc. in Veterinary Bacteriology and Virology in 1992, was appointed as a Research Assistant (a Class-III post) by the Orissa University of Agriculture and Technology (OUAT) in the scale of pay of Rs. 1640-2900/-, in the year 1993. She was initially posted against the post of Junior Scientist but was soon adjusted against a vacant post of Lecturer in the Department of Bacteriology, where she discharged the duties of a Lecturer from 31.07.1993 onwards. However, she continued to receive the scale of pay of that of a Research Assistant (in Class-III post) without any objection whatsoever. Despite her qualifications, including clearing the National Eligibility Test (NET) in 1994, and her performance in teaching and research, the Appellant was never regularised as a Lecturer. Over the years, she submitted multiple representations to the University seeking regularisation and service benefits, but her requests were consistently ignored or deferred.

In the year 1999, she filed her first writ petition vide OJC No. 13411 of 1999, before this Court, seeking regularisation and consequential benefits in the post of Lecturer from 31.07.1993 i.e. the very date she was adjusted in the same position. This Court disposed of the OJC with a direction to the University to consider her case whenever the question of appointing Lecturers in Bacteriology arose. However, the Court declined to grant her other benefits as claimed. Following this, an advertisement was issued in 2005, and the Appellant was selected and appointed as an Assistant Professor, a designation for the post of Lecturer under the three-tier teaching pattern. She formally joined in the said position on 17.06.2005. However, her case was not considered for continuity and seniority benefits for her prior service

rendered. Aggrieved by the same, she filed a second writ petition vide W.P.(C) No. 12199 of 2008, seeking recognition of her teaching experience from 1993 to 2005 and its inclusion in her service records. This Court directed the university to reconsider her representation, but her request was ultimately rejected on 20.09.2008, with the university citing procedural and statutory barriers.

Subsequently, she filed another writ petition vide W.P.(C) No. 15499 of 2008, reiterating her demand for recognition of her service continuity from 31.07.1993. She argued that she had been effectively performing the duties of a Lecturer, that her peers in similar situations were regularised, and that the University's inaction on regular recruitment disadvantaged her unfairly. However, this Court dismissed the petition, concluding that her appointment as a Research Assistant could not entitle her to benefits attached to a Lecturer post before her formal appointment in 2005. This present appeal challenges the above decision of this Court, emphasising the unfair denial of recognition for her long years of teaching service and the differential treatment meted out to her compared to similarly placed colleagues.

4. Mr. Manoj Mishra, learned Senior Advocate appearing on behalf of the Appellant submits that the Hon'ble Single Judge failed to appreciate the existence of vacancies for the posts of Lecturer/Assistant Professor in the Department of Bacteriology and Virology, one of which the Appellant had been discharging her duties against. He further submits that there was a clear budgetary provision for the post of Assistant Professor under the IIS Plan, ensuring no financial constraint in appointing the Appellant to the position she was already performing. Moreover, the Hon'ble Single Judge overlooked the fact that there was no sanctioned post of Research Assistant in the Department of Bacteriology and Virology. Mr. Mishra asserts that the Appellant was officially directed to discharge the duties of Assistant Professor with proper intimation to the university authorities, and this direction underscores the university's acknowledgment of the Appellant's role and the absence of procedural impediments to her regularisation. Mr. Mishra further contends that the University authorities had, on multiple occasions, permitted her to officiate as a Lecturer/Assistant Professor, and despite this, the University neglected to issue formal orders recognising her as such, thereby depriving her of the due benefits of her service. The Hon'ble Single Judge failed to consider the office order dated 24.07.1993, which clearly states that the Appellant had been posted as Lecturer (IIS Plan) and overlooked subsequent communications, such as Annexure-11, that reinforced her functioning in the capacity of an Assistant Professor.

It is further argued by Mr. Mishra that the Hon'ble Single Judge did not properly consider the Appellant's contention that her selection as a Research Assistant was followed by her assignment to Assistant Professor duties due to the acute need for teaching staff in the department. The Appellant had been discharging her duties as a Lecturer/Assistant Professor in a regular manner from 31.07.1993 until her formal appointment in 2005 by this Court's order in OJC No. 13411 of

1999, which explicitly directed the University to consider the Appellant's qualifications, NET certification, and experience when filling the Lecturer post. Mr. Mishra prays that the period between 1993 to 2005, should be treated as continuous service and recognised as teaching experience, entitling her to differential financial benefits and seniority. It was further argued that the Hon'ble Single Judge failed to appreciate that the delay in advertising and filling the vacant post, despite repeated requests, significantly disadvantaged her. This delay not only denied her rightful appointment but also violated the university's statutory obligations and this Hon'ble Court's directions in OJC No. 13411 of 1999.

Mr. Mishra contends that the Hon'ble Single Judge erroneously held that her original appointment as a Research Assistant, a Class-III post, precluded her from continuity of service in a Class-II teaching post, and that this interpretation ignores the statutory provisions of Statute-49 of the OUAT Rules, which mandates that employees continuously serving in temporary posts with requisite qualifications be considered for substantive appointments. The Appellant's teaching experience, recognised by the university in practice, was wrongfully dismissed as lacking official status, despite her performing duties equivalent to those of other regularised Assistant Professors. Finally, it was submitted by Mr. Mishra that similarly situated individuals, who were junior to her in the merit list, have been granted benefits of past service and continuity in other disciplines. This selective treatment violates her fundamental rights under Articles 14 and 16 of the Constitution of India, and the Hon'ble Single Judge's failure to address this differential treatment and consider precedents from the Hon'ble Supreme Court and this Hon'ble Court constitutes a significant error in law, justifying the present appeal, and the Appellant hence prays for relief recognising her service continuity, granting retrospective financial and seniority benefits, and remedying the manifest injustice caused by the University's inaction and the impugned judgment.

5. Mr. Ashok Mishra, learned counsel representing the Opposite Party-OUAT, submits that the appellant was substantively appointed as a Research Assistant in 1993, which is a Class-III post with a distinct pay scale and responsibilities and her subsequent ad hoc assignment to perform Lecturer duties was an administrative arrangement made to address the university's needs and did not constitute a formal appointment to the post of Lecturer. Mr. Mishra asserts that Statute-49 of the OUAT statutes is inapplicable to the appellant's case as the provision mandates that substantive appointments to permanent posts must prioritise employees holding temporary posts in the same grade and pay scale as the permanent post, provided they meet the requisite qualifications. The appellant's substantive position as a Research Assistant was in a lower grade and pay scale than the Lecturer post, precluding her from claiming benefits under this statute. He furthers his argument that the appellant did not undergo the mandatory recruitment process, including selection by the Standing Selection Committee as required under Clause 3(1)(ii) of the OUAT statutes, to hold the post of Lecturer before 2005. Her duties as a Lecturer were assigned administratively and did not confer any statutory entitlement to

regularisation or retrospective benefits. It is further argued by Mr. Mishra emphasising the appellant's continued acceptance of the pay and benefits of a Research Assistant throughout the relevant period undermining her claim for higher pay and seniority as a Lecturer as she also availed study leave from 2000 to 2004 under provisions applicable to non-teaching staff, reaffirming her official designation as a Research Assistant during this period. The principle of "no work, no pay" further bars her from claiming retrospective salary for a post she was not formally appointed to.

Mr. Mishra again highlighted the orders in previous writ petitions, including OJC No. 13411 of 1999 and W.P.(C) No. 12199 of 2008, where her case was graciously considered by this Court with a direction that during the next recruitment process for Lecturers, her case be considered, which resulted in her appointment as an Assistant Professor in 2005 after undergoing the prescribed selection process. Mr. Mishra concludes his argument by affirming with the impugned judgment passed by the learned Single Judge. He argues that allowing the appellant's claims would set a dangerous precedent, enabling individuals to bypass statutory procedures and claim benefits for ad hoc arrangements. Such an outcome would compromise the integrity of public employment systems, especially when her appointment as Assistant Professor was made through open competition ensured transparency and fairness in 2005. He, therefore, prays for the dismissal of the appeal and upholding of the impugned judgment.

6. Keeping in view the submissions of the respective parties, it is expedient for us to look into the findings rendered by the learned Single Judge, if the same stands the scrutiny of correctness, legality and propriety.

7. The impugned judgment rendered by the learned Single Judge of this Court delves into Dr. Rajashree Mishra's plea for recognition of her teaching duties from 31.07.1993 to 17.06.2005 as continuity in service for pay, seniority, and related benefits. The Court rejected the petition based on several statutory, procedural, and factual observations, with significant reliance on the OUAT Statutes and the nature of her original appointment. Reliance on Statute-49 of the OUAT Rules was addressed by the learned Single Judge and held that this statute did not apply to the Appellant's case because her original appointment as a Research Assistant was in a different grade and pay scale than the Lecturer post. The impugned judgment further noted that the Appellant's duties during the period were not officially recognised as those of a Lecturer under a proper appointment order. It is also observed by the learned Single Judge that the Appellant availed study leave from 2000 to 2004 as a nonteaching employee under university resolutions applicable to her substantive post as a Research Assistant. It stated that her case had already been considered in earlier writ petitions OJC No. 13411 of 1999 and W.P.(C) No. 12199 of 2008. In these cases, the Court had directed the university to consider her case during the next recruitment process for Lecturers. Following these directions, she was appointed as an Assistant Professor in 2005 after undergoing the requisite selection process.

Finally, the impugned judgment places its reliance on an order of judgment in the matter of ***Purilal Mohanta v. NESCO*** passed in **W.P.(C) No. 8192 of 2008**, where an individual performing duties beyond their official designation was not granted retrospective benefits. Applying this analogy, it was held that merely discharging Lecturer duties while being substantively appointed as a Research Assistant could not entitle the Appellant to retrospective recognition of service, seniority, or pay. The learned Single Judge, thus, dismissed the writ petition, concluding that the Appellant's claim for retrospective regularisation and service continuity lacked merit under both the procedural framework and the statutory provisions governing OUAT appointments.

8. The learned counsel for the Appellant has primarily placed the reliance on Clause-49 of the OUAT Statutes, which reads as follows –

> *49. Whenever a permanent post in any grade and pay scale is available for substantive appointment, the claim of any University employee holding a tenure post or temporary post continuously for a period exceeding two years in that grade and pay scale and possessing the qualification required for the permanent post, shall be considered first for substantive appointment in that permanent post.*

9. A comprehensive reading of the provision would expound that it applies only to university employees holding tenure or temporary posts in the **same grade and pay scale as the permanent post** available for substantive appointment. The Appellant, however, was substantively appointed as a Research Assistant, a Class-III post with a pay scale of Rs. 1640-2900/-, whereas the post of Lecturer/Assistant Professor is a Class-II post with distinct responsibilities and a different pay scale. The clear disparity in grade and pay scale disqualifies the Appellant from invoking Clause-49, which is predicated on equivalency between the temporary and permanent posts in both grade and remuneration. The Appellant's duties as a Lecturer were assigned as an ad hoc administrative arrangement to address the university's needs in the absence of a sanctioned Research Assistant post in the Department of Bacteriology and Virology. This temporary adjustment, made for administrative convenience, did not constitute a formal appointment to the Lecturer post, which requires selection through the Standing Selection Committee as per Clause 3(1)(ii) of the OUAT Statutes. Consequently, the Appellant's role as a Lecturer cannot be equated to a temporary post within the meaning of Clause-49.

However, this Court in OJC No. 13411 of 1999 and W.P.(C) No. 12199 of 2008, still directed consideration of the Appellant's case during the next recruitment process for Lecturers. In adherence to these directives, the university issued a fresh advertisement, and the Appellant underwent the prescribed selection process, ultimately being appointed as an Assistant Professor on 17.06.2005. This appointment followed due process, ensuring merit-based recruitment in line with statutory requirements and judicial directives. The partial relief granted to the Appellant in these earlier proceedings underscores that her claims were considered, and she was provided appropriate redress through formal appointment.

10. The Appellant's claim for retrospective salary and financial benefits as a Lecturer prior to her formal appointment i.e. 17.06.2005 lacks validity, primarily because she did not undergo the prescribed appointment procedure necessary to hold the post. The OUAT Statutes, particularly Clause 3(1)(ii), mandate that appointments must be made through a competitive selection process involving the Standing Selection Committee. The Appellant, by her own admission, was appointed as a Research Assistant on 31.07.1993, a Class-III post with a distinct pay scale and responsibilities. Her posting against a vacant Lecturer position was an ad hoc administrative arrangement necessitated by departmental needs. This adjustment was not equivalent to an official appointment as a Lecturer, as it lacked the requisite procedural formalities, including advertisement of the post, scrutiny of applications, and selection through the prescribed committee. The Appellant's failure to undergo this mandatory process precludes her from claiming the status, salary, or benefits of a Lecturer prior to 17.06.2005.

11. Financial benefits and salary are intrinsically linked to the substantive post held by an employee under valid appointment orders. Since the Appellant's designation as a Research Assistant was never formally changed through due process, her claims for higher financial entitlements based on her duties are unsustainable. The entitlement to salary and other benefits must stem from lawful appointment to the claimed position, not from mere discharge of duties in an officiating or ad hoc capacity.

12. Furthermore, while the Appellant performed duties associated with the Lecturer position, she did so as an appointee to the post of Research Assistant, receiving compensation corresponding to her substantive post. Allowing retrospective financial claims would create an inequitable situation, granting her dual benefits without the necessary procedural safeguards. The Appellant's appointment as Assistant Professor on 17.06.2005 was the result of compliance with judicial directions in prior writ petitions (OJC No. 13411 of 1999 and W.P.(C) No. 12199 of 2008), where this Hon'ble Court directed the university to consider her case in future recruitment processes following due advertisement and selection, she was appointed on merit, ensuring procedural integrity.

13. A significant point to note in the Appellant's claim is the inherent contradiction in her actions and assertions regarding her roles as Research Assistant and Lecturer. If the Appellant genuinely believed that her duties and position were equivalent to those of a Lecturer, it is reasonable to argue that she should have refrained from accepting the benefits, pay, and privileges attached to the position of Research Assistant. By continuing to accept the salary and benefits of a Research Assistant, she effectively affirmed her substantive appointment in that capacity, which was a Class-III post, while simultaneously performing duties associated with the post of Lecturer, a Class-II post. The Appellant's case is further weakened by her reliance on benefits specific to Research Assistants, such as study leave granted between 2000 and 2004, which she availed under provisions applicable to non-teaching employees. This availing of benefits under the Research Assistant designation, while now claiming entitlement to Lecturer pay and continuity, reveals

a contradictory stance. It indicates an attempt to derive selective benefits from both positions, which is inequitable and inconsistent with the principles of administrative and statutory accountability. Her acquiescence to this arrangement, combined with her consistent drawal of Research Assistant pay and the benefits thereof, indicates an implicit acknowledgment of her official status as a Research Assistant during the disputed period.

14. In light of the discussions above, the Appellant's claim for retrospective recognition as a Lecturer and associated financial benefits is legally and factually untenable. The Appellant was appointed as a Research Assistant, a Class-III post, and her ad hoc assignment to Lecturer duties did not entitle her to the position of Lecturer, as Statute-49 of the OUAT requires the temporary post to be in the same grade and pay scale as the permanent post. Since the Appellant's Research Assistant role differed in both grade and pay, the statute is inapplicable. Additionally, the Appellant did not undergo the formal recruitment process for the Lecturer post, as required by OUAT statutes, until her appointment on 17.06.2005. Her continued acceptance of Research Assistant pay and benefits further undermines her claim.

15. The Hon'ble Single Judge in the impugned judgment has rightly observed that the Appellant's case had been adequately addressed in prior proceedings, including OJC No. 13411 of 1999 and W.P.(C) No. 12199 of 2008, where partial relief was granted. The directions in those cases led to her formal appointment on 17.06.2005, conclusively resolving her claims to the post of Assistant Professor through lawful and transparent procedures. Reopening these issues in the current petition undermines the finality of judicial determinations and the integrity of appointment procedure.

16. The Appellant's claims also lack equity. Allowing her retrospective benefits would create an untenable precedent where individuals performing higher duties without formal appointment can claim benefits, thereby circumventing established recruitment procedures and statutory safeguards. This would be detrimental to the principles of fairness and equality in public employment.

17. For the reasons as above, the impugned judgment in W.P.(C) No. 15499 of 2008 by the learned Single Judge is upheld. The Appellant's claims for retrospective regularisation, salary, and seniority benefits are rejected as legally unsustainable and procedurally flawed.

18. This Writ Appeal is accordingly dismissed.

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

Result of the case :
Writ Petition dismissed.

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2025 (I) ILR-CUT-87

DIPTIMAYEE SAMAL
V.
STATE OF ODISHA & ORS.

[RVWPET NO. 107 OF 2022]

13 DECEMBER 2024

[K.R. MOHAPATRA, J. & R.K. PATTANAIK, J.]

Issue for Consideration

Whether in the review petition re-appreciation of material records is permissible.

Headnotes

CODE OF CIVIL PROCEDURE, 1908 – Order 47 – Review – Petitioner filed present petition seeking review of the Order dated 30th March 2022 in garb of re-appreciation of the materials on record afresh – Whether the review is maintainable.

Held : No – Entertaining the review petition would amount to appreciation of the materials on record afresh, which has already been considered during adjudication of OJC No.16071 of 2001, which is not permissible in review petition. (Para 10)

List of Code

Code of Civil Procedure, 1908

Keywords

Review; Appreciation of material records; Maintainability.

Case Arising From

Order dated 30th March, 2022 passed in O.J.C. No. 16071 of 2001.

Appearances for Parties

For Petitioner : Mr. Satya Narayan Mohapatra
For Opp.Parties : Mr. Debendra Kumar Sahoo, A.G.A.

Judgment/Order

Judgment

BY THE BENCH:-

1. This matter is taken up through hybrid mode.

2. Perused the kind minutes of Hon'ble the Chief Justice at Flag-'X' assigning this matter to be heard by a Bench, where Hon'ble Mr. Justice R.K. Pattanaik is a member. Accordingly, the RVWPET is listed before this Bench for adjudication.

3. SR has pointed out a delay of 811 days in filing the Review Petition. Order sought to be reviewed in this petition was passed on 30th March, 2022. Hence, the Review Petition ought to have been filed by 29th April, 2022. As it appears, the Review Petition was filed on 29th April, 2022, which is in time. Hence, delay of 811 days in

filing the Review Petition pointed out by SR is ignored as there is no delay in filing the review petition. Other defects pointed out by SR are also ignored.

4. The Petitioners seek review of the order dated 30th March, 2022 passed in OJC No.16071 of 2001.

5. Mr. Mohapatra, learned counsel submits that the Petitioner's husband, namely, Pravat Kumar Samal while continuing as Statistical Assistant in his parent department, i.e., Directorate of Economics and Statistics (DES), was deputed to Odisha Construction Corporation Limited (OCC). While continuing as such, Petitioner's husband was again deputed to District Rural Development Agency (DRDA), Sonepur. Assailing the said order, husband of the Petitioner moved Odisha Administrative Tribunal, Principal Bench, Bhubaneswar in OA No.2093 of 1996, which was disposed of on 18th January, 1999 with the following direction:

> *"7. ……O.P.No.2 passed the order under Annexure-10 dated 7.8.1996 confirming the earlier order of deputation of the applicant to DRDA, Sonepur. Therefore, it was expected of the applicant to submit his joining report before the DADA, Sonepur in absence of stay order granted in the present original application. When the applicant has not joined at Sonepur despite his relief from CCC Ltd., the intervening period from the date of relief till the date of his joining at Sonepur cannot be treated as spent on duty or extension of joining time and for this period the applicant is to apply for leave to regularize his service.*
>
> *8. For the reasons indicated above the original application is allowed with a direction to the State Respondents to bring back the applicant to the parent department within 15 days from the date of receipt of a copy of this order. I would direct the applicant to apply for leave for regularization of his service for the intervening period between the date of relief from the OCC Ltd. and the date of joining at Sonepur. No costs."*

6. Be it clarified that pursuant to the order of deputation of the Petitioner's husband to DRDA, Sonepur he was relieved from OCC. Keeping in mind that the husband of the Petitioner was already relieved from OCC, the above quoted order in OA No.2093 of 1996 was passed. Further, in compliance of such order, the Director, DES on 24th November, 1999 passed an order reverting the Petitioner to the parent department.

7. The grievance of the Petitioner is that by the time the order of reversal of her husband to the parent department was passed, he was continuing under OCC and was drawing salary. In absence of any fresh relieve order from OCC, Petitioner's husband was not in a position to join the parent department. As such, husband of the Petitioner again moved learned Tribunal in OA No.2183 of 2000. The said OA was disposed of on 28th September, 2001 holding that no relieve order was necessary from the OCC to enable the Petitioner's husband to join in his parent department, as he had already been relieved by OCC to join DRDA, Sonepur. Further, the Director, DES had already passed an order reverting the Petitioner's husband back to the parent department. Assailing the said order, husband of the Petitioner filed OJC No.16071 of 2001, which was dismissed vide order dated 30th March, 2022. In this petition, the Petitioner sought to review the said order. It is submitted that while disposing of OA No.2093 of 1996, learned Tribunal had made an observation that the Government will post the Petitioner's husband suitably in the parent department within fifteen days. Since that order was not complied with, husband of the Petitioner had moved MP No.310 of 1999 before learned

Tribunal in the aforesaid disposed of OA and in disposing of MP No.310 of 1999, learned Tribunal had observed that husband of the Petitioner was continuing in OCC, when order of reversion to the parent department was passed. Thus, Mr. Mohapatra, learned counsel for the Petitioner submitted that the Writ Court failed to appreciate that a relieve order was necessary for husband of the Petitioner to join in his parent department. In the interregnum, husband of the Petitioner died and his widow has filed the Review Petition as the services her husband could not be regularized in absence of any relieve order by the OCC and he could not get the retiral benefits during his lifetime. Hence, the order passed by the Writ Court should be reviewed.

8. Upon hearing Mr. Mohapatra, learned counsel for the Petitioner and on perusal of the order sought to be reviewed as well as materials available in OJC No.16071 of 2021, this Court finds that learned Tribunal in its order dated 28th September, 2001, passed in OA No.2183 of 2020 has specifically observed that no relieve order was necessary to enable the husband of the Petitioner to join in his parent department. Further, learned Tribunal while disposing of OA No.2093 of 1996, directed the State Government to revert husband of the Petitioner to the parent department and post him suitably within fifteen days. It was also opined by learned Tribunal that husband of the Petitioner having not complied with the relieve order issued by the OCC, he was not entitled to the duty pay during intervening period and he should apply for leave as due and admissible.

9. From the materials available on record, it is manifest that while continuing at OCC, husband of the Petitioner was again deputed to work at DRDA, Sonepur. Upon receipt of such order OCC relieved the Petitioner's husband to join at DRDA, Sonepur. Without complying with the said order, Petitioner's husband moved learned Tribunal in O.A. No. 2183 of 2000. Neither any order protecting the Petitioner's husband for not joining at DRDA, Sonepur was passed by the parent department nor any order, interim or otherwise, was passed in O.A. No. 2183 of 2000 regularising such period. The husband of the Petitioner remained indifferent in not joining at DRDA, Sonepur at his own risk. The only relief that was given to husband of the Petitioner was that he should apply for leave as would be admissible to him to regularize his services. The plea of Mr. Mohapatra, learned counsel that while disposing of M.P. No. 335 of 2000, learned Tribunal observed that on the date of disposal of the said petition, i.e., on 12th December, 2014, husband of the Petitioner was continuing in OCC, is not correct, as that was the submission of learned counsel for husband of the Petitioner. Thus, the plea that the husband of the Petitioner should have been issued with a fresh relieve order to join in his parent department, is a misnomer.

10. Further, this Court is of the considered opinion that entertaining the review petition would amount to appreciation of the materials on record afresh, which has already been considered during adjudication of OJC No.16071 of 2001, which is not permissible in review petition.

11. Accordingly, this review petition, being devoid of any merit, stands dismissed.

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

Result of the case :
Review Petition dismissed.

2025 (I)-ILR-CUT-90

UPENDRA PRASAD BISSOYI
V.
STATE OF ODISHA & ORS.

[OJC NO. 1997 OF 2002]

24 DECEMBER 2024

[K.R. MOHAPATRA, J. & V. NARASINGH, J.]

Issue for Consideration

Whether the petitioner is entitled for regularization when sanctioned vacant post is available in the office.

Headnotes

REGULARIZATION – Petitioner was initially engaged as a NMR employee in the year 1991 – He was regularized as Mate (wages) in regular establishment vide order dated 30th Dec 1999 – The order of regularization was cancelled on the plea that he has not completed ten years as NMR – Similarly placed person got the benefit of regularization – Whether the petitioner is entitled for regularization.

Held: Yes – It is not disputed that sanctioned post of Mate (Wages) is existing, which was manned by the Petitioner – Thus, the Petitioner being similarly situated cannot be discriminated and deserves equal treatment.

(Para 9.2)

Keywords

Regularization; NMR; Mate (Wages).

Appearances for Parties

For Petitioner : Mr. Samir Kumar Mishra, Sr. Adv,
Mr. Jagajiban Pradhan
For Opp.Parties : Mr. Ajodhya Ranjan Dash, A.G.A.

Judgment/Order

Judgment

BY THE BENCH:-

1. This matter is taken up through hybrid mode.

2. The present writ petition has been filed seeking the following reliefs:

> *"....admit this writ application call for the lower court records in connection with Original Application No.1909/2000 disposed of by the O.A.T. Bhubaneswar Bench, Bhubaneswar and after hearing both the parties to quash the order of the learned Tribunal dt.20.12.2000 Annexure-4 and further be pleased to quash Annexure-3 to this writ application and further be pleased to hold that the regularization made to the petitioner vide Annexure-2 is valid and justified in the eye of law.*
>
> *xxx xxx xxx"*

3. Briefly stated, the facts relevant for proper adjudication of the writ petition are that the Petitioner being a NMR personnel was provisionally appointed on ad hoc basis against the existing vacancy of regular Mate (wages) post along with others vide order dated 30th December, 1999 (Annexure-2) passed by Superintending Engineer, Southern Irrigation Circle, Berhampur- Opposite Party No.4. Petitioner joined as such on 1st January, 2000. Appointment order of the Petitioner along with others was canceled vide order dated 27th January, 2000 (Annexure-3) issued by Opposite Party No.4. Being aggrieved, the Petitioner moved learned Tribunal in OA No.1909 of 2000. The said Original Application was dismissed vide order under Annexure-4 with certain observations, which is impugned herein.

4. As reveals from the record, the Petitioner was initially engaged in the NMR establishment in the year 1991 under Opposite Party No.4 and continued as such till he was appointed under regular establishment vide order under Annexure-2. Similarly situated NMRs had moved this Court as well as Hon'ble Supreme Court for their regularization. On consideration of their grievance, it was directed that the Government should frame a Scheme to absorb the employees who are continuing for more than ten years. Pursuant to the direction of the Hon'ble Supreme Court as well as learned Tribunal at different times, the Government in Finance Department passed resolution No.22764/F dated 15th May, 1997 formulated a Scheme for absorbing NMR/DLR/Job Contract Workers under regular establishment. Pursuant to the said Scheme framed by the Government of Odisha, Petitioner was provisionally appointed under the regular establishment. However, his appointment was canceled vide order under Annexure-3. Hence, he filed OA No.1909 of 2000. The said OA was disposed along with a batch of Original Applications, vide order under Annexure-4. While upholding the order of cancellation of Petitioner's appointment in the regular establishment, learned Tribunal observed as under:-

> *"12. We would, however, like to observe, before parting with the case, that the applicants have put in long years of service on NMR basis and have enormously contributed to the irrigation development projects; there case should be considered in all seriousness following the principles and guidelines laid down in Finance Department Resolution dated 15th May, 1997. If in the meantime, all the work-charged employees in the Southern Irrigation Circle have been absorbed in regular establishment posts, the case of the NMR employees' shall be taken up in a phased manner, subject to availability of vacant regular establishment posts. While making orders of regularization of the NMR employees, the order of their seniority in their respective categories shall also be strictly adhered to without giving any scope for any grievances/complaints.*
>
> *13. In the premises of the above discussions, Original Applications are found to be devoid of merit and are dismissed with the above observations. There shall be no order as to costs."*

5. Petitioner was continuing in his post in spite of order under Annexure-3 canceling his appointment in view of order of status quo passed by learned Tribunal as well as interim order dated 12th August, 2002 passed in Misc. Case No.1873 of

2002 by this Court in the present writ petition. However, the writ petition was disposed of vide order dated 19th April, 2019 with the following order:-

> *"Learned counsel for the petitioner states that he has no instruction from his client. As such, he seeks permission to withdraw the writ petition.*
>
> *Permission for withdrawal is granted.*
>
> *The writ petition stands dismissed as withdrawn. Misc. Cases/IAs. Connected to this writ petition, if any, are dismissed accordingly.*
>
> *Interim order passed in this case stands vacated.*
>
> *It is made clear that the petitioner will be at liberty to file an application within thirty days from today for revival of this petition in case of any difficulty."*

As the Petitioner was continuing in his post, CMAPL No.471 of 2019 was filed for restoration of the writ petition to file in terms of the leave granted by this Court while disposing of the writ petition. But, there was delay of seventy-three days in filing the CMAPL. Hence, IA No.199 of 2019 was also filed for condonation of delay in filing the CMAPL.

5.1 By order dated 24th December, 2019, both the IA as well as CMAPL was dismissed. Assailing the same, the Petitioner moved Hon'ble Supreme Court in SLP (C) No(s).20297-20298 of 2021. The said SLP(s) were disposed of vide order dated 12th February, 2024 restoring OJC No.1997 of 2002 to its original number with a direction to hear and decide the present writ petition on its own merit. Accordingly, the matter is placed before this Bench for hearing and final disposal.

6. It is submitted by Mr. Mishra, learned Senior Advocate that pursuant to the order of *status quo* passed by learned Tribunal and in the present writ petition vide order dated 12th August, 2002 passed in Misc. Case No.1873 of 2002, the Petitioner is still continuing as Mate in the regular establishment under Opposite Party No.4. Similarly situated employees have already been regularized in their respective posts without acting upon the order of cancellation of his appointment under Annexure-3. In support of his submission, Mr. Mishra, learned Senior Advocate relied upon letter No.756 dated 15th January, 2007, office of the Engineer in Chief, Water Resources, Odisha, Bhubaneswar- Opposite Party No.2 calling upon Opposite Party No.4 to its office for discussion with regard to continuance /cancellation of the appointment of the Petitioner and another Sri Gopal Krushna Padhi. Further, pursuant to a query made by the State Government in Water Resources Department, the Superintending Engineer-Opposite Party No.4, vide its letter dated 2774 dated 24th May, 2007 clarified that the appointment of the Petitioner has not been cancelled. Further, it is also clarified vide letter No.29110 dated 28th August, 2008 that the Petitioner is continuing in the regular establishment and his appointment in the post of Mate (wages) was not cancelled in view of the order of *status quo* passed by this Court dated 12th August, 2002 and pursuant to order dated 4th April, 2006, the Opposite Party No.4 was requested to continue the services of the Petitioner as Mate (wages) on regular basis, release his salary and report compliance. Accordingly, vide order dated 20th October, 2008 (Annexure-5 series), Opposite Party No.4, vide its memo

No.6936, allowed the Petitioner to continue as Mate (wages) in regular establishment with retrospective effect from 27th January, 2000, i.e., date on which the Petitioner reverted to NMR establishment (Annexure-3). Further, vide orders dated 4th December, 2010, 4th February, 2011 and 19th April, 2011 (Annexure-6 series), it was clarified that services of the Petitioner is essential in the establishment. In the meantime, pursuant to the order dated 16th November, 2011 passed by this Court in OJC No.1184 of 2002, services of Sri Gopal Krushan Padhi, who was admittedly appointed along with the Petitioner has already been regularized with effect from his initial date of appointment. Similarly situated employees, namely, Sri Susanta Kumar Panda and others have also been granted the benefit of regularization in service and other consequential benefits pursuant to order dated 19th April, 2004 passed by this Court in W.P.C.(OAC) No.4149 of 2016. Mr. Mishra, learned Senior Advocate, therefore, submits that the impugned order under Annexure-4 is illegal and is liable to be set aside and consequentially the Petitioner is entitled to be regularized with effect from his initial date of joining, i.e., 1st January, 2000 as Mate (wages).

7. Mr. Dash, learned AGA does not dispute the factual position as submitted by Mr. Mishra, learned Senior Advocate for the Petitioner. He, however, submits that the impugned order under Annexure-4 has been passed in consonance with the Finance Department Resolution dated 15th May, 1997, wherein it is clarified that the gradation /seniority list shall be prepared by the appointing authority for each category of workers determining the length of engagement of a particular employee. It is also clarified therein that the employee should have worked under the administrative control of the Department concerned directly for a minimum period of ten years. Engagement of 240 days in a year shall be construed to be a complete year of engagement for the purpose of regularization in the regular establishment.

7.1 Para-8 of the said resolution provides that while filling up the regular vacant posts preference should be given to the work-charge employees. Where no suitable work-charge employee is available to man the post, preference should be given to the workers continuing under NMR/DLR/Job Contract establishment respectively.

7.2 Since the Petitioner had not completed ten years under the NMR establishment and as he was erroneously brought to the regular establishment as a Mate, the same was kept in abeyance vide order dated 6th January, 2000 until further orders on the ground of preparation of gradation list/seniority list including the work-charge employees. The case of the Petitioner was not considered while preparing gradation list/senior list, since he had not completed ten years of service as stipulated in the resolution dated 15th May, 1997. When the matter stood thus, appointment order No.6761 dated 30th December, 1999 as well as order dated 6th January, 2000, which was communicated vide memo No.205 were canceled vide office order No.479 dated 27th January, 2000 (Annexure-3) in respect of NMRs. The same was clarified vide order No.4119 dated 7th August, 2000 (Annexure-A to the counter affidavit).

8. Thus, learned Tribunal has committed no error in dismissing the Original Application and directing absorption of the Petitioner in regular establishment in order of seniority in respective category. He, therefore, prays for dismissal of the writ petition.

9. Considering the submissions made by learned counsel for the parties and on perusal of records, this Court finds that the Petitioner was initially engaged as a NMR employee in the year 1991. He was regularized as Mate (Wages) in the regular establishment vide order dated 30th December, 1999 (Annexure-2). The order under Annexure-2 was kept in abeyance vide order dated 6th January, 2000 and was subsequently cancelled vide order dated 27th January, 2000 (Annexure-3).

9.1 In spite of the above orders, the Petitioner was reverted to the post of NMR Typist by order dated 24th January, 2019. It is also not disputed that that issue involved herein has already been settled in the case of Sri Gopal Krushna Padhi (OJC No.1184 of 2002) was disposed of vide order dated 16th November, 2011. The State Government have also unsuccessfully challenged the said order before the Hon'ble Supreme Court in SLP (C) No.(s)6411-6416 of 2013.

9.2 In the case of Sri Susanta Kumar Panda and others [W.P.C.(OAC) No.4149 of 2016], this Court, taking into consideration the facts and circumstances of the case involved therein, which is akin to the present one, directed for regularization of the employees involved therein. It is not disputed that sanctioned post of Mate (Wages) is also existing, which was manned by the Petitioner. Thus, the Petitioner being similarly situated cannot be discriminated and deserves equal treatment.

10. Accordingly, it is directed that services of the Petitioner in the post of Mate (wages) in the regular establishment under the Opposite Party No.4 shall be regularized with effect from his initial date of joining in the said post with effect from 1st January, 2000 and consequential service benefits shall be extended to the Petitioner as expeditiously as possible, preferably within a period of six months from the date of production of certified/downloaded authenticated copy of this order from the website of this Court before the competent authority. The impugned order passed by learned Tribunal at Annexure-4 and the order of cancellation of appointment of "Wages Khalasi" at Annexure-3 so far as it relates to the Petitioner is hereby quashed.

11. The writ petition is allowed to the aforesaid extent. There shall be no order as to costs.

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

Result of the case :
Writ Petition allowed.

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2025 (I)-ILR-CUT-95

LIPIKA PATRA
V.
SUBRAT KUMAR SAMAL & ANR.

[CMP NO. 1360 OF 2024]

19 DECEMBER 2024

[K.R. MOHAPATRA, J.]

Issue for Consideration

Whether the Court should exercise its discretionary power in granting *ex parte ad interim* order of *status quo* once the petition filed under Order 39 Rule 3 of CPC is rejected.

Headnotes

CODE OF CIVIL PROCEDURE, 1908 – Order XXXIX, Rule 3 read with Section 151 – Learned Civil Judge, 1st Court, Cuttack though rejected the petition filed U/o. 39, Rule 3 of CPC, exercising inherent power under Section 151 of CPC passed the order of *status quo* over the suit property – Whether the Court should exercise its discretionary power in granting *ex parte ad interim* order of *status quo* once the petition filed U/o. 39, Rule 3 of CPC is rejected.

Held: No – When learned trial Court rejected the petition under order XXXIX Rule 3 CPC, it should not have exercised inherent power under Section 151 CPC to pass an *ex parte ad interim order* of *status quo*. (Para 4)

Citation Reference

Meena Kumari Bhagat -v- Smt. Kuntala Nayak and others, **2016 (I) CLR 625** – **referred to.**

List of Code

Code of Civil Procedure, 1908

Keywords

Discretionary of the Court, Inherent power, *Ex parte ad interim* order of *status quo*.

Case Arising From

Order dated 2nd August, 2024 (Annexure-4) passed in IA No. 01 of 2024 (arising out of CS No.760 of 2024).

Appearances for Parties

For Petitioner : Mr. Bibhu Prasad Mishra
For Opp. Parties :

Judgment/Order

Order

K.R. MOHAPATRA, J

1. This matter is taken up through hybrid mode.

2. Order dated 2nd August, 2024 (Annexure-4) passed in IA No.01 of 2024 (arising out of CS No.760 of 2024) is under challenge in this CMP, whereby learned Civil Judge, 1st Court, Cuttack, though rejected a petition under Order XXXIX Rule 3 CPC, but exercising inherent power under Section 151 CPC, directed the parties to maintain *status quo* over the suit property.

3. Mr. Mishra, learned counsel for the Petitioner relying upon the case of ***Meena Kumari Bhagat -v- Smt. Kuntala Nayak and others, reported in 2016 (I) CLR 625,*** submits that once a petition under Order XXXIX Rule 3 CPC is rejected, the Court should not have exercised its discretion in granting *ex parte ad interim order of status quo*. In the meantime, the Petitioner has already entered appearance, but in view of the settled law, the impugned order under Annexure-4 is not sustainable and is liable to be set aside.

4. Considering the submission made by learned counsel for the Petitioner and on perusal of the case law cited, this Court is of the considered opinion that when learned trial Court rejected the petition under order XXXIX Rule 3 CPC, it should not have exercised inherent power under Section 151 CPC to pass an *ex parte ad interim* order of *status quo*.

5. Be that as it may, since the Petitioner has already entered appearance, it is open for him to bring the same to the notice of learned trial Court which will be in a position to appreciate the matter effectively.

6. Accordingly, this CMP is disposed of with a direction that in the event, the Petitioner files an objection/petition for vacation of *ex parte ad interim order* of *status quo*, which is impugned herein, the same shall be considered in accordance with law giving opportunity of hearing to the parties concerned.

7. Since the sole Opposite Party to the IA (the present Petitioner) has already entered appearance in the suit pending before learned trial Court, endeavour shall be made by learned trial Court to dispose of the IA, i.e., IA No.01 of 2024 (arising out of CS No.760 of 2024) as expeditiously as possible preferably within a period of one month hence giving opportunity of hearing to the parties concerned.

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

Result of the case:
CMP disposed of.

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2025 (I) ILR-CUT-97

SUDAM CHARAN BALIARSINGH
V.
STATE OF ODISHA & ANR.

[W.P.(C) NO. 5465 OF 2020]

02 DECEMBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether the order of punishment is sustainable when the charges of the disciplinary proceedings are found to be identical with criminal proceeding.

Headnotes

ODISHA CIVIL SERVICE (CLASSIFICACTION, CONTROL AND APPEAL) RULES, 1962 – Rule 15 – The petitioner while working as 'Sevak' in Gugurumaha Residential Sevashram in Kotagarh Block of Kandhamal was charged for commission of offences under Sections 143/353/294/ 506/149, of I.P.C. read with Section 3 of the Odisha Medicare Service Person and Medicare Service Institution (Prevention of Violence and Damage to Property) Act, 2008 – Petitioner was acquitted from all the charges in the criminal proceeding – The disciplinary authority while deciding the disciplinary proceeding imposed the punishment of censure, withdrawal of one increment without cumulative effect and the period of suspension was treated as leave – The order of punishment was confirmed in appeal – Whether the order of punishment is sustainable when the charges in the disciplinary proceeding are found to be identical.

Held: No – When the charges in the criminal proceeding and departmental proceeding are identical and the evidences brought on record in both proceedings are of similar nature, the impugned order of punishment inflicted against the Petitioner is liable to be set aside. (Para 16)

Citations Reference

Ajit Kumar Nag vs. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and others, **(2005) 7 SCC 764;** Depot Manager, A.P. State Road Transport Corporation vs. Mod. Yousuf Miya and others, **(1997) 2 SCC 699;** Corporation of the City of Nagpur, Civil Lines, Nagpur and another vs. Ramachandra and others, **(1981) 2 SCC 714;** R.P. Kapur vs. Union of India and another, **AIR 1964 SC 787;** Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. and another, **(1999) 3 SCC 679;** G.M. Tank vs. State of Gujarat and others, **(2006) 5 SCC 446;** Ram Lal vs. State of Rajasthan and others, **(2024) 1 SCC 175 – referred to.**

List of Act/Code/Rules

Indian Penal Code, 1860; Odisha Medicine Service Person & Medicine Service Institution (Prevention of Violence & Damage to Property) Act, 2008; Odisha Civil Service (Classification, Control and Appeal) Rules, 1962.

Keywords

Criminal proceeding; Disciplinary proceeding; Charge.

Case Arising From

The order of punishment dtd. 11.12.2017 & confirmation order dtd. 30.09.2019 in appeal.

Appearances for Parties

For Petitioner : Mr. A. Swain
For Opp. Parties : Mr. D. Mohanty, A.G.A.

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. A. Swain, learned Advocate for the Petitioner as well as Mr. D. Mohanty, learned Additional Government Advocate for the State-Opposite Parties.

2. The Petitioner, who served as 'Sevak' in Gugurumaha Residential Sevashram in Kotagarh Block of Kandhamal and presently as Asst. Teacher in Govt. (SSD) High School at Jaleshpatta, Kandhamal was proceed with departmentally and inflicted with punishment of censure, withdrawal of one increment without cumulative effect and the period of suspension was treated as leave. The order of punishment dated 11.12.2017 at Annexure-5, imposed by the departmental authority, was challenged by the Petitioner in appeal. The appellate authority in it's order dated 30.09.2019 at Annexure-7 dismissed the appeal confirming the order of punishment. The order of punishment and dismissal of appeal under Annexure-5 & 7 respectively are challenged in present writ petition.

3. It is submitted that, the Petitioner has been acquitted for the selfsame charges in the criminal court by the learned S.D.J.M., Baliguda in G.R. No.190/2014 vide judgment dated 09.04.2015. Accordingly, the departmental proceeding, which is for self-same charges, as in the criminal court, the order of punishment passed subsequent to the judgment of the criminal court is unsustainable in the eye of law.

4. The law is well settled that even after acquittal of the Petitioner by the criminal court the same would not preclude the disciplinary authority from proceeding against him and to take action, if it is otherwise permissible. In ***Ajit Kumar Nag vs. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and others, (2005) 7 SCC 764,*** it is held as follows:-

"11. As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused 'beyond reasonable doubt', he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of 'preponderance of probability'. Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside."

5. In ***Depot Manager, A.P. State Road Transport Corporation vs. Mod. Yousuf Miya and others, (1997) 2 SCC 699,*** the Hon'ble Supreme Court has observed as follows:-

"8. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public (sic duty), as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Evidence Act. Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant

statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances. In this case, the charge is failure to anticipate the accident and prevention thereof. It has nothing to do with the culpability of the offence under Sections 304-A and 338 IPC. Under these circumstances, the High Court was not right in staying the proceedings."

6. In ***Corporation of the City of Nagpur, Civil Lines, Nagpur and another vs. Ramachandra and others, (1981) 2 SCC 714,*** it is held as follows:-

"6. The other question that remains is if the respondents are acquitted in the criminal case whether or not the departmental inquiry pending against the respondents would have to continue. This is a matter which is to be decided by the department after considering the nature of the findings given by the criminal court. *Normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charges or grounds or evidence,* but the fact remains, however, that merely because the accused is acquitted, the power of the authority concerned to continue the departmental inquiry is not taken away nor is its direction [discretion] in any way fettered." (emphasis supplied)

7. In ***R.P. Kapur vs. Union of India and another, AIR 1964 SC 787,*** a Constitution Bench of the Hon'ble Supreme Court have observed that, "If the trial of the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted. Even in case of acquittal proceedings may follow, where the acquittal is other than honourable."

8. In ***Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. and another, (1999) 3 SCC 679,*** it is held as follows:-

"34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, 'the raid conducted at the appellant's residence and recovery of incriminating articles therefrom'. The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the 'raid and recovery' at the residence of the appellant were not

proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand."

9. Taking note of afore-stated decisions and other cases also, the Supreme Court in ***G.M. Tank vs. State of Gujarat and others, (2006) 5 SCC 446*** have observed as follows:-

"30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

31. In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in *Paul Anthony* case will apply, We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

10. In ***Ram Lal vs. State of Rajasthan and others, (2024) 1 SCC 175,*** the Supreme Court have observed as follows:-

"25. Expressions like "benefit of doubt" and "honorably acquitted", used in judgments are not to be understood as magic incantations. A court of law will not be carried away by the mere use of such terminology. In the present case, the Appellate Judge has recorded that Exh. P-3, the original marksheet carries the date of birth as 21.04.1972 and the same has also been proved by the witnesses examined on behalf

of the prosecution. The conclusion that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the charge can only be arrived at after a reading of the judgment in its entirety. The court in judicial review is obliged to examine the substance of the judgment and not go by the form of expression used.

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27. We are additionally satisfied that in the teeth of the finding of the appellate Judge, the disciplinary proceedings and the orders passed thereon cannot be allowed to stand. The charges were not just similar but identical and the evidence, witnesses and circumstances were all the same. This is a case where in exercise of our discretion, we quash the orders of the disciplinary authority and the appellate authority as allowing them to stand will be unjust, unfair and oppressive. This case is very similar to the situation that arose in ***G.M. Tank*** (supra). "

11. In the case at hand, the Petitioner while serving as 'Sevak' was charged for commission of offences under Sections 143/353/294/506/ 149, I.P.C. read with Section 3 f the Odisha Medicare Service Person and Medicare Service Institution (Prevention of Violence and Damage to Property) Act, 2008 as per the FIR dated 08.06.2014 of Kotagarh Police Station. He stood his trial for such criminal charges stated above and in conclusion of trial, depending on the evidences of four witnesses, namely, Amaresh Jagdev (P.W.1), Gopal Krushna Behera (P.W.2), Kunal Chandra Ranasandha (P.W.3) and Kailash Chandra Nayak (P.W.4) have directed for acquittal of the Petitioner from the criminal charges. The specific finding of the learned S.D.J.M., Baliguda is as follows:-

"7. So, in absence of independent corroboration and cogent evidence this court is constrained to opine that the prosecution has failed to prove its case against the accused persons beyond the shadow of all reasonable doubt. So, the accused persons are found not guilty U/s.143/353/294/506 of the I.P.C. r/w Sec.149 of I.P.C. and 3 of M.M.S(P)V.D.P. Act and they are acquitted from the said offences U/s.248(1) of the Cr.P.C. Accused persons are on bail. They are discharged from their bail bonds and they be set at liberty forthwith."

12. It needs to be mentioned here that, the judgment of acquittal of the learned S.D.J.M., Baliguda was passed on 09.04.2015. Prior to that, upon intimation sent by the Police regarding registration of Kotagarh P.S. Case No.26/14 to the authority concerned, the Collector, Kandhamal as per Order No.3670, dated 8.11.2014 issued memorandum of charges in terms of the OCS (CC&A) Rules, 1962 against the Petitioner. The charges as delineated in the memorandum under Annexure-1, are as follows:-

"ARTICLE OF CHARGES

Sri Sudam Charan Baliarsingh, Sevak, Gugurumaha Residential Sevashram has committed certain irregularities for which the following article of charges are framed against him.

1. Gross Misconduct.

2. Violation of Govt. Servants conduct Rules."

"STATEMENT OF IMPUTATOIN OF MISCONDUCT IN SUPPORT OF THE ARTICLES OF CHARGES FRAMED AGAINST SRI SUDAM CHARAN BALIARSINGH, SEVAK, GUGURUMAHA RESIDENTIAL SEVASHRAM UNDER KOTAGARH BLOCK

Name & Designation of the Officer to be proceeded against:- Sri Sudam Charan Baliarsingh (Sevak), Gugurumaha Residential Sevashram Under Kotagarh Block

Pay Band: P.B.-1- (Grade Pay Rs.2400/-)

Group : Group-C

Whereas, Sri Sudam Charan Baliarsingh, Sevak, Gugurumaha Residential Sevashram under Kotagarh Block has committed certain irregularities for which following charges are framed against you under Rule 15 of the O.C.S. (C.C. & A) Rules, 1962.

IMPUTATION CHARGES

That, it was reported by IIC, Kotagarh P.S. that Sri Sudam Charan Baliarsingh, Sevak, Gugurumaha Residential Sevashram has arrested on 8.6.2014 at 8.45 P.M. vide Kotagarh P.S. Case No.26/14 U/s.143/332/353/294/506/149 IPC/3, the Odisha Medicare Service Persons and Medicare Service Institution (Prevention of Violence and Damage to Property) Act, 2008, forwarded to the Hon'ble Court of S.D.J.M., Baliguda and remained in Jail custody for more than 48 hours.

The arrest and detention in jail custody of Sri Baliarsingh for more than 48 hours invites disciplinary action under Rule-93 of Odisha Service Code and Rule-12(2) of O.C.S. (CC&A) Rules, 1962. Being a bonafide Govt. servant involvement in violence at public places is highly offensive.

Thus, you are charged for Gross Mis-conduct and violation of Govt. servants conduct rules."

13. In the criminal proceeding, the charges for afore-stated offences were summarized to formulate the points for determination in the judgment of the learned S.D.J.M., Baliguda, which speaks as follows:-

"4. The points which need determination in this case are as follows:

(a) Whether on 08.06.2014 at 6.00 P.M. at Kotagarh the accused persons were members of an unlawful assembly, and common object of such assembly namely to commit offence?

(b) Whether on above stated date, time and place the accused persons in prosecution of their common object used criminal force to the informant with intent to prevent him discharging his duty?

(c) Whether on above stated date, time and place the accused persons in prosecution of their common object criminally intimidated the informant with injury to his person with an intention to cause alarm in his mind?

(d) Whether on above stated date, time and place the accused persons in prosecution of their common object uttered obscene words in or near a public place to the annoyance of others?

(e) Whether on above stated date, time and place the accused persons tried to cause violence at Kotagarh hospital?"

14. A cumulative reading of the charges in the criminal proceeding and the charges in the disciplinary proceeding are found identical and almost same. In the process of enquiry in the disciplinary proceeding, as seen from Annexure-3, two witnesses, namely, Dr. Amaresh Jagdev and Manoranjan Sahu were examined. The

Inquiry Officer along with the statement of these two witnesses also took into consideration the report of the Police in Kotagarh P.S. Case No.26/14 in arriving at his finding that the charge of gross misconduct as well as violation of Govt. Servant Conduct Rules by the Petitioner have been established. It is further seen from the copy of the enquiry report under Annexure-3 that, the witnesses namely Manoranjan Sahu has stated that the alleged involvement of the Petitioner and damage of property of Government Hospital, Kotagarh is not known to him.

15. From the above analysis, it is seen that Dr. Amaresh Jagdev was the common witness in the departmental proceeding as well as in the criminal proceeding, who according to learned S.D.J.M., Baliguda is the victim of the offences and he did not disclose anything regarding the alleged occurrence. As seen from the enquiry report in the departmental proceeding, said Amaresh Jagdev, the Medical Officer, also did not say anything against the Petitioner nor regarding the occurrence. In the enquiry report, it is clearly reflected that the Medical Officer (Amaresh Jagdev) in his deposition has stated that the amicable settlement of both the delinquent officer and the Medical Officer was made before the learned S.D.J.M., Baliguda prior to declaration of the judgment for which none of the witnesses disclosed regarding the alleged occurrence and all remained silent. It needs to be mentioned here that, nothing has been produced or revealed from the judgment of learned S.D.J.M., Baliguda regarding any amicable settlement between the parties.

16. Thus as seen from the above narration of facts, the witnesses have neither said anything in the criminal proceeding nor stated anything in the departmental proceeding. The evidence taken in the criminal proceeding as well as in the departmental proceeding are of similar nature. Therefore, when the charges in the criminal proceeding and departmental proceeding are identical and the evidences brought on record in both proceedings are of similar nature, the principles decided in the case of ***Capt. M. Paul Anthony*** (supra) and confirmed in ***G.M. Tank*** (supra) are found applicable in the present facts of the case. Accordingly, the impugned order of punishment inflicted in the Petitioner as per order dated 11.12.2017 (Annexure-5) is liable to be set aside. The appellate authority of course without discussing anything on the merits of the materials produced before the disciplinary authority in course of the enquiry, has dismissed the appeal to confirm the impugned order of punishment, and as such the same is also liable to be set aside.

17. In the result, the impugned orders under Annxure-5 & 7 are set aside and the Petitioner is granted all consequential service and financial benefits thereof.

18. The writ petition is disposed of as allowed.

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

Result of the case:
Writ Petition allowed and disposed of.

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2025 (I)-ILR-CUT-105

PURUSOTTAM DASH & ORS.
V.
STATE OF ODISHA & ORS.

[W.P(C). NO. 33947 OF 2021 & BATCH]

04 DECEMBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether up-gradation of a post amount to promotion thereby debars an employee from getting financial benefits under RACP Scheme, 2013.

Headnotes

(A) SERVICE JURISPRUDENCE – Up-gradation and promotion – Whether financial up-gradation by way of re-designation of post would amount to promotional benefits to debar the employee from getting the financial benefits under the RACP Scheme 2013, upon completion of 10, 20 and 30 years respectively.

Held: No – Since it is a re-designation of post of 'Field Assistant' as 'Sr. Tassar Assistant' in terms of ORSP Rules, 1985 and applicable to everyone, who has completed two years of service having Science qualification, considering the scope of the words 'promotion' and 'up-gradation' as stated above, the same cannot be said as a promotional benefit granted in favour of the Petitioners – Accordingly, the direction of the Authorities to treat the same as a promotional benefit thereby debarring them from getting the benefits under the RACP Scheme, 2013 is found unsustainable in the eyes of law. (Para 10)

(B) WORDS & PHRASES – Promotion – Upgradation – Scope and difference – Discussed - Promotion is an advancement in rank or grade or both and is a step towards advancement to a higher position, grade or honour and dignity… - Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. (Reference made to ***Bharat Sanchar Nigam Limited v. R. Santhakumari Velusamy (2011) 9 SCC 510***) (Para 9)

Citation Reference

Bharat Sanchar Nigam Limited v. R. Santhakumari Velusamy, **(2011) 9 SCC 510** – **referred to.**

List of Rules & Scheme

Orissa Revised Scale of Pay Rules, 1985; Revised Assured Career Progression Scheme, 2013.

Keywords

Up-gradation; Promotion; Re-designation; Financial Benefits; RACP.

Appearances for Parties

For Petitioners : Mr. Nihal Rath, Mr. Surya Narayan Patnaik (*In all writ petitions*)
Dr. J.K. Lenka, Mr. S.Jyotiprakash, Mr. P.K. Behera, Mr. S.K. Routray (*In W.P(C) NO.34559 of 2021*)

For Opp.Parties : Mr. D. Mohanty, AGA (*In all writ petitions*)

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. Rath, and Mr.Routray, learned counsel for the Petitioners and Mr.Mohanty, learned Additional Government Advocate for the State.

2. All the Petitioners being served as Senior Tassar Assistants have prayed for similar relief based on similar set of facts and more particularly, the impugned order is common in respect of all the Petitioners. As such, all the writ petitions are heard together and disposed of by this common judgment.

3. The Petitioners were initially appointed as Field Assistants under Director of Textiles (Opposite Party No.2). Subsequently, their posts of 'Field Assistant' were redesignated as 'Sr. Tassar Assistant' as per the Orissa Revised Scale of Pay Rules, 1985 (ORSP Rules). It is mentioned in said ORSP Rules, 1985 that those Field Assistants, who are Science Graduates and have undergone prescribed training, to be redesignated as Sr. Tassar Assistant upon completion of two years of service. Pursuant to said Rules, all the Petitioners were redesignated as Sr. Tassar Assistant from the date of respective completion of two years of service in the revised scale of pay of Rs.935-1530/-

It needs to be mentioned here that the scale of pay prescribed for Field Assistant is Rs.320-550/-. After coming into force of Revised Career Progression Scheme (RACPS) on 06.02.2013, the benefits were counted in favour of the Petitioners for completion of 10, 20 and 30 years of service in the single cadre to revise their pay. As such, they all were granted the benefits of RACP Scheme, 2013 with revision of pay pursuant to order dated 07.10.2016 (Annexure-7) and order dated 31.10.2016 (Annexure-3, in respect of W.P.(C) No.34559 of 2021). Subsequently, based on certain clarifications issued by the Finance Department, the revision of pay granting the benefits of RACP Scheme in favour of the Petitioners

were again revised to reduce their pay as per order dated 08.10.2021 under Annexure-12. The same is challenged before this Court in all the writ petitions.

4. Opposite Party No.2 has filed the counter stating that since redesignation of the post of 'Field Assistant' as 'Sr. Tassar' Assistant is carrying higher scale of pay, the benefits counted in favour of the Petitioners pursuant to their completion of 10, 20 and 30 years respectively was needed to be **revisited** and accordingly, a reduced benefit was given in favour of the Petitioners upon further revision of scale of pay.

5. It is submitted on behalf of the Petitioners that mere redesignation of the post of 'Field Assistant' as 'Sr. Tassar Assistant' does not amount to promotion and therefore, reducing the pay of the Petitioners upon further revision to the earlier revision made pursuant to the RACP Scheme, 2013, is illegal.

6. As seen from the narration of facts, the issue involved herein is that, whether financial up-gradation by way of re-designation of the post of 'Field Assistant' as 'Senior Tassar Assistant' would amount to promotional benefits to debar the employee from getting such financial benefits under the RACP Scheme, 2013 upon completion of 10, 20 and 30 years respectively.

7. A letter dated 18.06.2019 was issued under Annexure-8 stating that the Field Assistants, who have otherwise been promoted to Sr. Tassar Assistants are not eligible to avail RACP benefits since such promotion/designation is counted as one financial up-gradation as per FD Office Memorandum No.4554 dated 23.02.2016. Therefore, based on such Office Order, the benefits of RACP Scheme earlier granted in favour of the Petitioners was revised to reduce their pay as mentioned under Annexure-12.

8. It is true that RACP Scheme was introduced as a career advancement scheme for the purpose of granting financial up-gradation in absence of promotional avenue to an employee remaining in the same carder. The only reason of withdrawal of benefit of RACP Scheme, as stated by the Authority, is that the Petitioners had availed the financial up-gradation by way of re-designation of their posts as Sr. Tassar Assistant. The Government in Handlooms, Textiles and Handicrafts Department in letter dated 18.06.2019 have referred to the FD Memorandum dated 23.02.2016 to count such benefit as financial up-gradation in favour of the Petitioners.

In a similar issue, the validity of FD Memorandum dated 23rd February 2016 was considered by this Court in W.P.(C) No.18749 of 2018 and Batch, ***2021 SCC On Line Ori 1839*****.** It is observed therein as follows:-

> "xxx xxx xxx xxx
>
> Upon carefully examining the resolution dated 6th February 2013, it is seen the above upgradation effected in 2009 as a result of restructuring of the cadre cannot be construed to be an upgradation which would deny the benefit of the RACPS which in any event was not in force at the relevant point in time. For the same reason, the TBA granted earlier in 2005 cannot be considered to be as an

upgradation which would deny the Opposite Parties the benefit of the RACPs. In order words, merely because the employee had availed a TBA or ACP prior to 2013, he cannot be denied to the benefit of the RACPS. Unless a person has already got a promotion within time period of 10.20 and 30 years in the manner indicated, he cannot be denied the RACPS benefit."

9. In ***Bharat Sanchar Nigam Limited v. R. Santhakumari Velusamy (2011) 9 SCC 510***, it is stated as follows:-

"29.On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge:

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to a higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both—that is, advancement to a higher position and advancement to a higher pay scale—are described by the common term "promotion", does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simpliciter can be said to be a promotion in its wider sense, that is, advancement to a higher pay scale.

(iv) Generally, up gradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simpliciter. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simpliciter. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simpliciter, there is no need to apply the rules of reservation. But where the upgradation involves a selection process and is therefore a promotion, the rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation. It was submitted that in terms of sub-para (iii) and (iv), when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is a difference between the two. In case such change of post is available to everyone who satisfies the eligibility condition without undergoing any process of selection, it will be upgradation. While, if it is a result of some process which has element of selection, then it will be a promotion to the higher pay scale. Sub-para (iv) is stated to further clarify this aspect that if there is process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion."

10. In the given facts of the case, since it is a re-designation of post of 'Field Assistant' as 'Sr. Tassar Assistant' in terms of ORSP Rules, 1985 and applicable to everyone, who has completed two years of service having Science qualification, considering the scope of the words 'promotion' and 'up-gradation' as stated above, the same cannot be said as an promotional benefit granted in favour of the Petitioners. Accordingly, the direction of the Authorities to treat the same as a promotional benefit to debar them from getting such benefits under the RACP Scheme, 2013 is found unsustainable in the eye of law.

11. Accordingly, the impugned order under Annexure-12 is quashed in respect of present Petitioners and the Opposite Parties are directed to grant the benefit in terms of the earlier pay fixation as per the order dated 07.10.2016 (Annexure-7) and order dated 31.10.2016 (Annexure-3 in W.P.(C) No.34559 of 2021).

12. All the writ petitions are disposed of as allowed.

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

Result of the case:
Writ Petitions allowed and disposed of.

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2025 (I)-ILR-CUT-110

DEBADUTTA SARANGI
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 1877 OF 2021]

10 DECEMBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether the surcharge proceeding initiated under the Odisha Local Fund Audit Act, 1948 can be termed as judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules.

Headnotes

(A) ODISHA CIVIL SERVICE (PENSION) RULES, 1992 – **Rules 7 r/w Section 9(2), 10 of Odisha Local Fund Audit Act, 1948 – Petitioner's pension, gratuity and other retrial benefits are not released and kept withheld on the ground of pendency of surcharge proceedings initiated under Section 9(2) of the 1948 Act – Whether such surcharge proceedings initiated under the 1948 Act against the Petitioner can be termed as a judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules.**

Held: No – Since proceeding U/s. 9(2) of 1948 Act does not require collection of evidence upon oath and the procedure of recovery is as the arrear of land revenue, the same cannot be treated as a judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules giving right to the authority to withhold the pensionary benefits – It is true that depending on the final order passed in the surcharge proceeding, if any, amount is found liable for recovery from the Petitioner the same can be recovered in terms of Section-10 of the Odisha Local Fund Audit Act, 1948, and for said purpose withholding the pension, gratuity and other retirement benefits of the Petitioner would not be justified. (Para -13)

(B) WORDS & PHRASES – **Meaning of "JUDICIAL PROCEEDING" as mentioned in Rule 7 of OCS (Pension) Rule**.

Held: The meaning of judicial proceeding is not defined in OCS (Pension) Rules, 1992 nor in the Odisha Service Rules – As per the definition provided in the Criminal Procedure Code and Bharatiya Nagarik Suraksha Sanhita, judicial proceeding includes any proceeding in course of which evidence is or may be legally taken on oath – The procedure prescribed in the Odisha

Local Fund Audit Act for conducting the surcharge proceeding does not speak for taking evidence on oath. (Para 9)

List of Act/Rules

Odisha Local Fund Audit Act, 1948, Odisha Civil Service (Pension) Rules, 1992.

Keywords

Surcharge proceedings; Judicial proceedings; Pension; Gratuity; Retirement benefits; Recovery; Local fund audit.

Appearances for Parties

For Petitioner : Mr. M.K. Mohanty
For Opp.Parties : Mr. B.L.Tripathy, ASC

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. M.K.Mohanty, learned counsel for the Petitioner and Ms. B.L.Tripathy, learned ASC for State-Opposite Parties.

2. The Petitioner has prayed for releasing his pending gratuity and other retirement benefits.

3. The Petitioner retired from service as Additional Block Development Officer of Puri Sadar Block upon superannuation on 28th February 2018. During his incumbency in the block for the financial year 2011-12 and 2012-13, certain financial irregularities were noticed in course of the audit as per the audit report under Annexure-C/4 and D/4. Financial irregularities being noticed relating to excess payment of government money, a criminal case was instituted against one Rabindra Mallick, the then cashier of Puri Sadar Block. A departmental proceeding was initiated against him also.

The Petitioner was then working as the Accounts Officer as well as Additional Block Development Officer in the block. He was also remained in-charge of the BDO for the period from 1st April 2011 to 4th August 2011. But, it is true that neither any criminal proceeding nor departmental action was taken against the Petitioner. However, a surcharge proceeding under Section 9(2) of the Odisha Local Fund Audit Act, 1948 was initiated against the Petitioner on 22nd March 2014 (Annexure-A/2) for recovery. Further, another surcharge proceeding was initiated against the Petitioner in the year 2016. It is also true that no order has yet been passed in both of the aforesaid surcharge proceedings initiated against the Petitioner.

4. In the meantime, upon retirement of the Petitioner on superannuation on 28th February 2018 his pension, gratuity and other retiral benefits are not released and kept withhold on the ground of pendency of both these proceedings.

5. The State has filed its counter affidavit stating that since two surcharge proceedings are pending against the Petitioner for recovery of government money, the pension and other retiral benefits of the Petitioner has been withheld pending finalization of proceedings. Nonetheless, the Petitioner is receiving provisional pension.

6. Rule-7 of the Odisha Civil Service (Pension) Rules, 1992 gives right to the Government to withhold the pension of an employee. Said Rule-7 is reproduced below:-

> **7. Right of Government to Withhold or Withdraw Pension-**
>
> (1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part. whether permanently or for specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement:
>
> Provided that the Odisha Public Service Commission shall be consulted before any final orders are passed:
>
> Provided further that when a part of pension is withheld/ withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.
>
> (2) (a) Such departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be a proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:
>
> Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its findings to the Government.
>
> (b) such departmental proceedings as referred to in sub-rule (1) if not instituted while the Government servant was in service, whether before his retirement or during his re-employment-
>
> (i) shall not be instituted save with the sanction of Government;
>
> (ii) shall not be in respect of any event which took place more than four years before such institution ; and
>
> (iii) shall be conducted by such authority and in such place as the Government may, direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service;
>
> (c) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his reemployment, shall be

> instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.
>
> (d) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceeding are instituted or where departmental proceedings are continued under clauses (a) and (b), a provisional pension as provided in rule 66 shall be sanctioned.
>
> (e) Where the Government decide not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.
>
> **Explanation**- For the purpose of this rule-
>
> (a) Departmental proceedings shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from the date of his suspension; and
>
> (b) judicial proceedings shall be deemed to be instituted,-
>
> (i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made; and
>
> (ii) in the case of civil proceedings, on the date of presentation of the plaint in the Court.

7. As it seen from the above prescription of language used in Rule-7, the Government can reserve his right to withhold the pension and gratuity in case the employee is found guilty during the period of his service in any departmental or judicial proceeding. Admittedly, no departmental proceeding has ever been initiated or pending against the Petitioner.

8. The question for determination here is that, whether pendency of surcharge proceedings initiated against the Petitioner could be treated within the meaning of judicial proceeding mentioned in Rule-7 stated above.

9. The meaning of judicial proceeding is not defined in OCS (Pension) Rules, 1992 nor in the Odisha Service Rules. As per the definition provided in the Criminal Procedure Code and Bhratiya Nagarik Suraksha Sanhita, judicial proceeding includes any proceeding in course of which evidence is or may be legally taken on oath. The procedure prescribed in the Odisha Local Fund Audit Act for conducting the surcharge proceeding does not speak for taking evidence on oath. Section 9(3) of Odisha Local Fund Audit Act envisages that,

> "After considering such cause as may be shown by any such person, the Examiner of Local Accounts may surcharge such payment on the person making or authorizing such payment or charge the amount of any loss or deficiency against the person responsible therefore or any amount which ought to have been but is not brought into account against the person failing to account for such amount and shall in every such case certify the amount due from such person."

10. Further, Section-10 speaks that,

> "Any amount certified under section 9 as due from any person shall, if not paid by such person within one month next after the date of the certification thereof, be recoverable from him as an arrear of land revenue under the provisions of the law for the time being in force for the recovery of arrears of land revenue."

The Odisha Local Fund Audit Rules, 1951 also does not prescribe any specific proceeding to be followed in the surcharge proceeding to collect evidence on oath.

11. As per the audit report under Annexure-C/4 and D/4, Shri Rabindra Mallick has been specifically fixed with the responsibility for the alleged misappropriation of the amount and it is observed that the responsibility of the Petitioner cannot also be ruled out.

12. The Petitioner upon his retirement on superannuation is entitled for his pension, gratuity and other retiral benefits. The only right remains with the Government is regarding withholding of such pension and gratuity on the ground of finding guilty the Petitioner in any departmental or judicial proceeding or pendency of the same. The right of the Petitioner to get his pensionary benefits upon retirement on superannuation has been settled by several decisions of the Hon'ble Supreme Court, which may not be reiterated here.

13. In the case at hand, as stated above the only question is whether such surcharge proceeding initiated under the Local Fund Audit Act against the Petitioner can be termed as a judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules. In the opinion of this Court since such proceeding does not require collection of evidence upon oath and the procedure of recovery is as the arrear of land revenue, the same cannot be treated as a judicial proceeding within the meaning of Rule-7 of the OCS (Pension) Rules giving right to the authority to withhold the pensionary benefits. It is true that depending on the final order passed in the surcharge proceeding, if any, amount is found liable for recovery from the Petitioner the same can be recovered in terms of Section-10 of the Odisha Local Fund Audit Act, 1948, and for said purpose withholding pension, gratuity and other retirement benefits of the Petitioner would not be justified.

14. Accordingly, the writ petition is disposed of as allowed and the Opposite Parties are directed to release the pensionary benefits including gratuity and other admissible dues to him, within a period of two months from the date of receipt of copy of this order.

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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2025 (I)-ILR-CUT-115

JAGADANANDA
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 37415 OF 2020]

08 NOVEMBER 2024

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

Issues for Consideration

1. Whether the Right to Information Act, 2005 statutorily provides for grant of post-retiral benefits to retired State Information Commissioners.

2. Whether the State is duty bound to formulate the rule governing the issue of pension as per the mandate of Section 16(5) of the Act, 2005.

3. Whether the Petitioner can be denied the benefit of pension on the ground that he was not in any pensionable service the day he was appointed as State Information Commissioner.

Headnotes

(A) RIGHT TO INFORMATION ACT, 2005 – Section 15(3), 16(5) – The petitioner was appointed as the State Information Commissioner in Odisha in 2008 – On completion of five years tenure, the petitioner was permitted to relinquish office on 06.08.2013 – State has not formalized the service conditions including post-retirement benefits for the State Information Commissioners – Petitioner submitted multiple representations before filing W.P.(C) No. 990 of 2019, which was disposed of on 11.03.2019 with direction to Opposite Party No. 1 to issue an appropriate decision – Representations were not resolved within three months – Contempt proceeding vide CONT(C) No. 1027 of 2020 initiated – Whether the Right to Information Act, 2005 statutorily provides for grant of post-retiral benefits to retired Commissioners.

Held: No – In the absence of any statutory provisions regarding the release of pension or pensionary benefits, and where the State Government cannot be compelled to provide the same, the Petitioner is not entitled to receive any pension or post-retirement benefits. (Para - 38)

(B) RIGHT TO INFORMATION ACT, 2005 – Section 16(5) – Whether the State is duty bound to formulate the rule governing the issue of pension as per the mandate of Section 16(5) of the Act, 2005.

Held: No – Since the Government of India has notified the Right to Information (Amendment) Act, 2019 wherein Section 16(5) of the Act, 2005 stands amended, the power to make rules governing service conditions of all Central and State Information Commissioners, has post the amendment,

rests with the Central Government and the State Government therefore cannot be compelled to frame any rules now. (Para 31)

(C) PENSIONARY BENEFITS – Whether the Petitioner can be denied the benefit of pension on the ground that he was not in any pensionable service the day he was appointed as State Information Commissioner.

Held: Yes – In the absence of any Rules that explicitly recognize the entitlement of State Information Commissioners to receive pension, there can be no legal right for them to claim such benefits – The Petitioner is not entitled to pension or post-retirement benefits. (Paras 41 & 42)

Citations Reference

State of Madhya Pradesh and Ors. v. Shardul Singh, **(1970) 1 SCC 108;** I.N. Subba Reddy v. Andhra University and Ors., **(1977) 1 SCC 554;** State of Punjab v. Kailash Nath, **(1989) 1 SCC 321;** Union of India v. Gurnam Singh, **(1982) 2 SCC 314;** Jagdish Prasad Saini and Ors. v. State of Rajasthan and Ors., **2022 SCC OnLine SC 1298;** Prabhu Narain v. State of U.P., **(2004) 13 SCC 662;** UP Roadways Retired Officials and Officers Association v. State of UP & Anr. **(2024) 9 SCC 331;** Shristidhar Mahato v. State of Jharkhand, **2023 SCC OnLine Jhar 3215;** Supreme Court Employees' Welfare Association v. Union of India, **(1989) 4 SCC 187;** Census Commr. v. R. Krishnamurthy, **(2015) 2 SCC 796;** Suresh Chand Gautam v. State of U.P., **(2016) 11 SCC 113;** State of Jharkhand v. Ashok Kumar Dangi, **(2011) 13 SCC 383 ─ referred to.**

List of Acts/Rules

Right to Information Act, 2005; Right to Information (Amendment) Act, 2019; Right to Information (Term of Office, Salaries, Allowances, and Other Terms and Conditions of Service) Rules, 2019; All India Services (Conduct) Rules, 1968.

Keywords

Appointment; Official resolution; State Information Commissioner; Representation; Post-retirement benefits.

Case Arising From

Order dated 22.07.2020 passed by Opposite Party No. 1.

Appearances for Parties

For Petitioner : Mr. Debesh Panda, Ms. S. Guman Singh
For Opp.Party(s) : Mr. Sonak Mishra, ASC, Mr. B.K.Dash, Mr. R.B.Dash

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. The Petitioner has filed the present Writ Petition challenging the order dated 22.07.2020 by which the Opposite Parties have dismissed the petitioner's claim for post-retirement benefits, deeming it devoid of merit and unworthy of consideration.

I. FACTUAL MATRIX OF THE CASE:

2. Succinctly put, the facts leading to the petition are as follows:

(i). The petitioner, a social worker involved in various public welfare initiatives, served as a private citizen until his appointment to the position of State Information Commissioner in Odisha.

(ii). In 2008, a committee was constituted in terms of Section 15(3) of the Right to Information Act, 2005 to evaluate and recommend the names of persons for appointment to the posts of State Information Commissioners in Odisha.

(iii). In furtherance of the recommendations of the Committee, the Governor of Odisha approved the appointment of the present Petitioner as a State Information Commissioner, following which Notification No. 22585/RTI-110/07 dated 9.7.2008 was issued and he was consequently appointed.

(iv). On 07.08.2008, the petitioner assumed office and commenced his duties. He duly completed the prescribed tenure of five years in accordance with the provisions of the Act, 2005, and was permitted to relinquish office on 06.08.2013. The aforementioned facts are undisputed and stand admitted by all parties.

(v). The present dispute arose following the petitioner's retirement. The petitioner contends that while Section 16(5) of the Act, 2005, refers to *"service, allowances, and other terms and conditions,"* which he interprets to include post-retirement benefits, the State has not formalized the service conditions, including such benefits, for State Information Commissioners through any official resolution, order, or memorandum. It is noteworthy that the State had issued an official resolution regarding the service conditions of State Chief Information Commissioners via Resolution No. RTI-51/11/2013/I&PR dated 13.10.2011; however, no equivalent policy decision has been made to date for State Information Commissioners.

(vi). Aggrieved by this omission, the petitioner submitted multiple representations before ultimately approaching this Court by filing W.P.(C) 990 of 2019. By an order dated 11.03.2019, this Court disposed of the writ petition with a direction to Opposite Party No. 1 to consider the representations and issue an appropriate decision in accordance with the law, without expressing any opinion on the merits of the case.

(vii). As the representations were not resolved within the stipulated period of three months as directed, the petitioner initiated contempt proceedings through CONT(C) No. 1027/2020. During the pendency of the contempt case, the impugned order dated 22.07.2020 was passed, wherein the Opposite Party No. 1 rejected the representation of the petitioner and held as hereunder:

"…Whereas in order to dispose of the representation of the petitioner under Annexure-8 series a meeting was held on 30th August, 2019 under the chairmanship of Director, I&PR in presence of Additional Director-cum-Joint Secretary to Govt., Joint Secretary to Govt, AFA-cum-Deputy Secretary to Govt I&PR Dept. and other members. It was unanimously recommended that in absence of any provision for sanction of pension under the Right to Information Act, 2005, the claim of the petitioner is having no merit for consideration."

3. Now that the broad factual matrix leading up to the instant Petition have been laid down, this Court shall endeavour to summarise the contentions of the Parties and the broad grounds that have been urged to seeking the exercise of this Court's writ jurisdiction.

II. PETITIONER'S SUBMISSIONS:

4. Learned counsel for the Petitioner Mr. Debesh Panda earnestly made the following submissions in support of his contentions:

(i). The impugned order is *ultra vires* Section 16(5) of the Act, 2005, rendering it manifestly arbitrary. It is argued that the phrase *"other terms and conditions"* employed in Section 16(5) was intended to encompass post-retirement benefits. Furthermore, it is contended that the State Government lacks the authority to issue orders regulating the petitioner's service conditions, including post-retirement benefits, as these matters fall within the scope of the general superintendence, direction, and management of the affairs of the Odisha Information Commission. Consequently, the responsibility for making such determinations rests exclusively with the Odisha Information Commission.

(ii). It is further submitted that where the Act itself states that the salaries and allowances payable to the Petitioner and other terms and conditions of service of the Petitioner *"…shall be the same as that of the Chief Secretary to the State Government…"* It is unfortunate that though a Chief Secretary is entitled to post-retiral benefits, the present Petitioner is not. It is argued that the Impugned Order has failed to give effect to the expression *"shall be the same as".* It is submitted that such equivalence was given intentionally by the Parliament to attract the best possible talent to be appointed to these positions, which now gets defeated as a private sector person of eminence would see no reason to give up their vocation for five years and then face discrimination in service conditions while their counterparts from the government service remain better placed in so far as post retiral benefits are concerned.

(iii). It is argued that pension is not a bounty, nor a gratuitous payment made depending on the will of the employer, it is an allowance made in consideration of past service and therefore, the Impugned Order is in gross disregard of the settled principles of law.

(iv). It is submitted that the States of Karnataka, Kerala, Tamil Nadu and Haryana have all extended pensionary benefits to the post of State Information Commissioners *albeit* not the same pension to the level of the Chief Secretary of the State Government. The present Petitioner also claims parity with past State Chief Information Commissioners who have enjoyed pension and retiral benefits.

III. OPPOSITE PARTIES' SUBMISSIONS:

5. *Per contra*, learned counsel for the Opposite Parties Mr. Sonak Mishra earnestly made the following submissions in support of his contentions:

(i) The Odisha Information Commission, established as a statutory body under Section15 (1) of the Act, 2005 by Notification No. 29067/IPR dated 29.10.2005. The Commission has rightfully rejected the petitioner's representation for pension and other post-retirement benefits. The rejection is grounded in the absence of any provision in the Act, 2005, sanctioning such benefits for State Information Commissioners. The Information and Public Relations Department, as the nodal department, examined the provisions of the Act and concluded accordingly. It was further contended that the petitioner, having not belonged to a pensionable establishment prior to his appointment, cannot claim parity with individuals who were eligible for such benefits. The State Government, upon due deliberation, adopted a policy decision to extend post-retirement benefits solely to State Chief Information Commissioners. In the absence of a similar policy for State Information Commissioners, the petitioner's claims in the present writ petition are unsustainable.

(ii). It was argued that pensions can only be granted in accordance with rules specifically framed for such benefits. In this case, as no such rules have been enacted, the question of granting post-retirement benefits to the petitioner does not arise. Attention was drawn to the Right to Information (Amendment) Act, 2019, which amended Section 16(5) of the Act, 2005. Post-amendment, the power to formulate rules governing the service conditions of both Central and State Information Commissioners lies with the Central Government. The Department of Personnel and Training, Ministry of Personnel, Public Grievances, and Pensions, has already framed the relevant rules under the Right to Information (Term of Office, Salaries, Allowance, and Other Terms and Conditions of Service) Rules, 2019. Consequently, the authority to create any rules, memoranda, or orders concerning post-retirement benefits for the petitioner has been removed from the jurisdiction of the Opposite Parties.

(iii). It was submitted that the Act, 2005 imposes no statutory obligation to grant post-retirement benefits to retired State Information Commissioners. Although the Act stipulates that the salaries, allowances, and other terms and conditions of service of a State Information Commissioner shall be the same as that of the Chief Secretary of the State Government, it was argued that the Chief Secretary's service conditions are governed by the All India Services (Conduct) Rules, 1968. These rules do not apply to the petitioner or any State Information Commissioners. Therefore, any grant of postretirement benefits to the petitioner would necessitate the framing of specific rules, which had not been done before the 2019 Amendment and cannot now be done post-amendment. As such, the petitioner cannot seek a writ of mandamus compelling the State to enact a policy decision in this regard.

(iv). It was also contended that the petitioner was fully aware of the service conditions at the time of his appointment, including the absence of provisions for post-retirement benefits. Throughout his tenure, he was repeatedly informed that such benefits could not be granted without a policy decision, which the State, in its discretion, has not found appropriate to make.

(v). Furthermore, Respondent No. 5, the Odisha Information Commission, has submitted that the responsibility for providing salaries, allowances, and retirement benefits to State Information Commissioners lies exclusively with the State Government. The Odisha Information Commission itself plays no role in these matters, as they fall squarely within the domain of the State Government.

IV. COURT'S REASONING AND ANALYSIS:

6. Having heard the parties and perused the materials available on record, this Court has identified the following issues that have to be determined which have emerged contentiously during the course of the hearing and is germane to finally decide the *lis* at hand;

A. WHETHER THE RIGHT TO INFORMATION ACT, 2005 STATUTORILY PROVIDES FOR GRANT OF POST-RETIRAL BENEFITS TO COMMISSIONERS?

7. Before adverting to the submissions, and analysis of this court, it is apposite to refer to Section 16(5) of the Act, 2005 prior to its amendment in 2019. The same is reproduced herein below for ready reference:

"Section 16. Terms and Conditions of Service –

... 5. The salaries and allowances payable to and other terms and conditions of service of—

(a) the State Chief Information Commissioner shall be the same as that of an Election Commissioner;

(b) the State Information Commissioner shall be the same as that of the Chief Secretary to the State Government."

Provided that if the State Chief Information Commissioner or a State Information Commissioner, at the time of his appointment is, in receipt of a pension, other than a disability or wound pension, in respect of any previous service under the Government of India or under the Government of a State, his salary in respect of the service as the State Chief Information Commissioner or a State Information Commissioner shall be reduced by the amount of that pension including any portion of pension which was commuted and pension equivalent of other forms of retirement benefits excluding pension equivalent of retirement gratuity:

Provided further that where the State Chief Information Commissioner or a State Information Commissioner if, at the time of his appointment is, in receipt of retirement benefits in respect of any previous service rendered in a Corporation established by or under any Central Act or State Act or a Government company owned or controlled by the Central Government or the State Government, his salary in respect of the service as the State Chief Information Commissioner or the State Information Commissioner shall be reduced by the amount of pension equivalent to the retirement benefits:

Provided also that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment."

8. The aforementioned provision was amended and incorporated into the statute effective from 24.10.2019. The amendment introduced a new framework

stipulating that the salaries, allowances, and other terms and conditions of service for the State Chief Information Commissioner and State Information Commissioners shall be determined by the Central Government. However, the amendment includes a safeguard that such salaries, allowances, and terms and conditions of service shall not be altered to the disadvantage of the incumbents after their appointment. Furthermore, it is expressly provided that the State Chief Information Commissioner and State Information Commissioners who were appointed prior to the commencement of the Right to Information (Amendment) Act, 2019, shall remain governed by the provisions of the original Act and the rules framed thereunder as if the 2019 amendment had not come into effect.

9. The counsel for the Petitioner has vehemently argued that the use of the expression "*and other terms and conditions of service*" includes post-retiral benefits, invoking the principle of ejusdem generis. In this regard, he has relied on the Supreme Court's judgment in ***State of Madhya Pradeshand Ors. v. Shardul Singh***[1]***, I.N. Subba Reddy v. Andhra University and Ors.***[2]***, State of Punjab v. KailashNath***[3]***, Union of India v. Gurnam Singh***[4]**, and ***Jagdish Prasad Saini and Ors. v. State of Rajasthan and Ors***[5]**.**

10. This Court recognizes that the phrase "*other terms and conditions of service*" has been usually interpreted to include various service conditions, which may extend to post-retirement benefits. However, the petitioner's contention cannot succeed on this ground alone. The Court must interpret the statutory framework in its entirety, taking into account the relevant provisions, legislative intent, and the established rules governing the service conditions of State Information Commissioners.

11. A holistic examination of the Act, 2005, and the applicable legal framework demonstrates an absence of any explicit provision or legislative intent to grant pensionary benefits to individuals in the petitioner's position. The statutory equivalence of the petitioner's service conditions with those of the Chief Secretary is limited to allowances and pay and does not encompass the pension framework applicable to cadre-based posts under the All India Services. Furthermore, the omission of any provision for post-retirement benefits in the Right to Information (Term of Office, Salaries, Allowance, and Other Terms and Conditions of Service) Rules, 2019, underscores the lack of a statutory basis for the petitioner's claim. Consequently, the petitioner, as a retired State Information Commissioner, cannot claim pension under these rules.

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[1] (1970) 1 SCC 108
[2] (1977) 1 SCC 554
[3] (1989) 1 SCC 321
[4] (1982) 2 SCC 314
[5] 2022 SCC OnLine SC 1298

12. A detailed examination of the Act, 2005 reveals that it does not explicitly mandate the grant of post-retirement benefits to State Information Commissioners.

(i) *First*, an ocular perusal of the provisos to Section 16(5) clarify that where an individual is appointed as a State Chief Information Commissioner or State Information Commissioner belongs to a pensionable establishment, the Act explicates adjustments to their salary to account for any pension already received. This demonstrates a clear legislative intent to prevent duplication of benefits and ensure fiscal prudence. When the legislature has consciously refrained from even granting full salary without adjustments to such appointees, it would be unreasonable to infer an intention to confer a right to pension upon them.

(ii) *Second*, the Act does not designate the Commission itself as a pensionable establishment, nor does it provide any statutory entitlement to post-retirement benefits. This absence of statutory support underscores the legislative intent to exclude State Information Commissioners from the ambit of pensionary benefits unless expressly covered by prior service in a pensionable establishment.

(iii) *Third*, while the 2019 Amendment to the Act does not apply to the present petitioner, it is pertinent to note that the Right to Information (Term of Office, Salaries, Allowance, and Other Terms and Conditions of Service) Rules, 2019 comprehensively outline the service conditions of State Information Commissioners. These include provisions for the term of office, retirement from parent service upon appointment, pay, dearness allowance, leave, cash payment in lieu of unutilized earned leave, medical facilities, accommodation, leave and travel concession, as well as travel and daily allowances. However, the deliberate omission of any provision for pension or gratuity for retired State Information Commissioners is quite significant. This omission reflects the legislative intent not to extend pensionary benefits to retired State Information Commissioners, particularly those who were not part of a pensionable establishment prior to their appointment to the Commission.

13. It is no longer *res integra* in service law that pension is not a bounty but a vested right of a retired employee, subject to the fulfillment of the conditions prescribed under the applicable rules, regulations, or schemes. However, it must also be emphasized that not all forms of employment automatically confer an entitlement to pension. Eligibility for pension is contingent upon specific conditions, such as the employee occupying a pensionable post, completing the requisite tenure of service, or meeting other criteria laid down under the governing framework. In the absence of such qualifications, an employee cannot assert a claim to pension benefits as a matter of right. Furthermore, the courts, including writ courts, are precluded from issuing a mandamus to compel an employer to grant pension benefits to an employee who does not fall within the ambit of the prescribed rules, as such an order would grossly lack a solid legal foundation. This principle underscores that pension entitlements are derived solely from statutory provisions and not from equitable or moral considerations, thereby ensuring the uniform and consistent application of pension schemes without deviation or judicial intervention.

14. The Supreme Court in ***Prabhu Narain v. State of U.P.***[6], held that to receive pension, the employees must establish that they are entitled to pension under a particular rule or scheme. The following has been held in para 5:

> *"5. No doubt pension is not a bounty, it is a valuable right given to an employee, but, in the first place it must be shown that the employee is entitled to pension under a particular rule or the scheme, as the case may be."*

15. Further, in ***UP Roadways Retired Officials and Officers Association v. State of UP & Anr***[7]**,** the Supreme Court reaffirmed its position and held that in the absence of any applicable rules or provisions establishing a right to pension, the judiciary lacks the authority to grant such benefits. This decision underscores the principle that pension entitlements are governed strictly by law and cannot be conferred on equitable grounds or through judicial directives. The relevant excerpt is produced hereinbelow:

> *"It is a constitutional right for which an employee is entitled on his superannuation. However, pension can be claimed only when it is permissible under the relevant rules or a scheme. If an employee is covered under the Provident Fund Scheme and is not holding a pensionable post, he cannot claim pension, nor the writ court can issue mandamus directing the employer to provide pension to an employee who is not covered under the rules."*

16. In a similar vein, in ***Shristidhar Mahato v. State of Jharkhand***[8], the Jharkhand High Court addressed the question directly and ruled that the entitlement of the State Information Commissioner to certain benefits, based on the terms and conditions granted by the Chief Secretary, does not automatically confer pensionable service status. The court emphasized that the mere pensionable nature of the Chief Secretary's post does not imply similar entitlement for the incumbent of the State Information Commissioner role. The relevant portion is produced herein below:

> *"25. Further argument has been advanced that since the post of State Information Commissioner is held to be at par with the post of Chief Secretary of the State as such similar benefit including pension is to be extended to the holder of the post of State Information Commissioner but according to our considered view based upon the provision of Section 27 read with un-amended provision of Section 16(5) it is only confined to the salary and allowances.*
>
> *26. The authority by taking into consideration the fact that the holder of the post of State Information Commissioner has been given the benefit as per the terms and conditions of the Chief Secretary but that does not mean that merely because the post of Chief Secretary is pensionable hence the incumbent will be entitled for the pensionable service it is for the reason that the Chief Secretary the day when entered into service was in the pensionable service but the writ petitioner when entered into service it was not pensionable particularly since there was already a rule under un-amended Section 16(5)*

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[6] (2004) 13 SCC 662
[7] (2024) 9 SCC 331
[8] 2023 SCC OnLine Jhar 3215

governing the issue of pension and as such it is not available for the writ petitioner to claim parity with the Chief Secretary so far as claim of pensionary benefit is concerned.

……

32. Further question will be that the writ petitioner at the time when appointed was well knowing about the fact that he is not in the service said to be pensionable so as to govern the pensionary benefit rather he, after demitting the office after completing tenure of five years for the first time, has made such claim, which according to our considered view cannot be said to be sustainable on the ground that once the writ petitioner has accepted the offer of appointment based upon the statutory provision as was existed even there was the same rule when he demitted the office he cannot insist upon for direction to frame out a new rule holding him entitled for pensionary benefit for the reason that if any appointment is being made the same is to be governed by the existing rule as was in vogue at the time when appointment was made or even the day when the concerned incumbent had demitted the office."

17. It is, thus, evident that the right to pension arises exclusively when an employee holds a pensionable post and fulfills the conditions stipulated under the applicable legal framework. In the present case, the petitioner does not hold a position that directly entitles him to post-service pension benefits. Furthermore, courts exercising writ jurisdiction lack the authority to issue a mandamus directing the grant of pension in the absence of statutory provisions establishing such entitlement.

B. WHETHER THE STATE IS DUTY BOUND TO FORMULATE THE RULE GOVERNING THE ISSUE OF PENSION AS PER THE MANDATE OF SECTION 16(5) OF THE ACT, 2005?

18. As discussed hereinabove, the pension is not statutorily provided for in the Act, 2005, this Court shall now delve into the question of whether the State is duty bound to formulate Rules for grant of pension to the State Information Commissioners.

19. The Rule making power of the State Government is outlined in Section 27 of the Act, 2005. Section 27 of the Act is reproduced herein below for ready reference:

"Power to make rules by appropriate Government.

(1) The appropriate Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the cost of the medium or print cost price of the materials to be disseminated under sub-section (4) of section 4;

(b) the fee payable under sub-section (1) of section 6;

(c) the fee payable under sub-sections (1) and (5) of section 7;

(d) the salaries and allowances payable to and the terms and conditions of service of the officers and other employees under sub-section (6) of section 13 and sub-section (6) of section 16;

> *(e) the procedure to be adopted by the Central Information Commission or State Information Commission, as the case may be, in deciding the appeals under sub-section (10) of section 19; and*
>
> *(f) any other matter which is required to be, or may be, prescribed."*

20. A plain reading of Section 27 reveals that there is no mandatory obligation on the State Government to formulate rules prescribing the salaries, allowances, or service conditions of State Information Commissioners. The power to frame such rules may only be exercised by the State Government if it deems it necessary for the purpose of effectuating the provisions of the Act.

21. In this context, the State Government issued Resolution No. RTI51/11/2013/I & PR dated 13.10.2011, detailing the service conditions of State Chief Information Commissioners; however, no corresponding policy decision has been made to date concerning the service conditions of State Information Commissioners.

22. This does not imply that the matter was ignored by the State Government. The petitioner has appended various file notings and internal communications to the writ petition to demonstrate that the State Government considered issuing a resolution to extend postretirement benefits to State Information Commissioners. Nonetheless, it remains a fact that no such resolution has been finalized or implemented.

23. The petitioner has argued that several States, including Karnataka (Government Order No. DPAR 56 RTI 2011 dated 5.1.2013), Tamil Nadu (Government Order No. 167 dated 5.12.2018), Kerala (Government Order P. No. 199/2014/Fin dated 29.5.2014), and Haryana (Government Order No. 5/2/2012-1 AR dated 11.6.2014), have introduced policies granting pension benefits to State Information Commissioners. While this demonstrates that other States have exercised their discretion to provide such benefits, it is a settled principle of law that the formulation of rules or policies is a matter of exclusive executive prerogative. Each State Government has the autonomy to determine its priorities and financial considerations, and the judiciary cannot impose a uniform approach based on actions taken by other States.

24. This position has consistently been upheld in law from the outset, as reflected in the judgment of the Supreme Court in ***Supreme Court Employees' Welfare Association v. Union of India***[9] wherein it has been laid down:

> *"51. There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority."*

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[9] (1989) 4 SCC 187

25. The Apex Court in the case of ***Census Commr. v. R. Krishnamurthy***,[10] was pleased to hold that interfering with a policy decision and issuing a mandamus to frame a policy in a specific manner are distinct matters. The power to issue notifications related to the conduct of the census lies with the Central Government, which has exercised this authority. It is not within the judicial domain to legislate or dictate policy. The extracts of the judgment is as follows:

> *"25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by way of issuing a writ of mandamus. …"*

26. The abovementioned judgment has been followed by the judgement of the Apex Court in ***Suresh Chand Gautam v. State of U.P.***[11] wherein it has been held that:

> *"48. Be it clearly stated, the courts do not formulate any policy, remain away from making anything that would amount to legislation, rules and regulation or policy relating to reservation. The courts can test the validity of the same when they are challenged. The court cannot direct for making legislation or for that matter any kind of subordinate legislation…."*

27. The law is, therefore, well settled in so far as interference by the Court sitting under Article 226 of the Constitution of India in the matters of policy decisions of the State. It has been consistently held that the High Court in exercise of its powers under Article 226 must be slow to interfere with the policy decision of the State Government unless a specific plea is taken and demonstrated that the policy in question suffers from mala fides or is arbitrary and whimsical.

28. In the case of State of ***Jharkhand v. Ashok Kumar Dangi***[12]**,** the Apex Court has held that Policy formulation requires careful consideration, and courts should not dictate or direct the government on specific policies. The court has been pleased to hold as under:

> *"17.The High Court has found that the Government of Jharkhand, till date, had not framed any policy regarding the number of posts to be filled by physical trained candidates. How many posts of primary school teachers be filled up by physical trained candidates, in our opinion, is essentially a question of policy for the State to decide.* ***In framing of the policy, various inputs are required and it is neither desirable nor***

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[10] (2015) 2 SCC 796
[11] (2016) 11 SCC 113
[12] (2011) 13 SCC 383

> ***advisable for a court of law to direct or summarise the Government to adopt a particular policy which it deems fit or proper. It is well settled that the State Government must have liberty and freedom in framing policy.*** *Further, it also cannot be denied that the courts are ill-equipped to deal with competing claims and conflicting interests. Often, the courts do not have the satisfactory and effective means to decide which alternative, out of the many competing ones, is the best in the circumstances of the case."* (Emphasis supplied)

29. In this regard, this Court may also note that the Central Information Commission vide its letter dated 27.1.2014 has clarified as follows:

> *"... So far as guidelines in respect of framing a rule/ specifying service conditions and pensionary benefits to State information Commissioners appointed by the State Government from nongovernment background, I am directed to say that the matter does not come under the jurisdiction of the Central Information Commission. The Central Information Commission cannot give any opinion/guidelines in their respect, since it is clearly a state government matter and the concerned state government have to decide the entitlements and pensionary benefit of the State information Commissioner is appointed from outside the government.*
>
> *However, the draft suggestions in the matter were placed as an agenda for discussion in the 8th Annual Convention of the Central Information Commission held on 4th September 2013 on request of some of the State Information Commissioners coming from different states. But no final view was arrived at in the matter in the convention. The state government like to examine the matter at their end and take appropriate decision on the issue."*

30. The State must have liberty and freedom in framing the policy decisions. It is a well-accepted principle that in complex administrative, social, economic and commercial matters, decisions have to be taken by governmental authorities keeping in view several factors and it is not possible for the courts to consider competing claims and to conclude which way the balance tilts. Courts are ill-equipped to substitute their decisions. It is not within the realm of the courts to go into the issue as to whether there could have been a better policy and on that parameters direct the executive to formulate, change, vary and/or modify the policy which appears better to the court.

31. In any case, since the Government of India has notified the Right to Information (Amendment) Act, 2019 wherein Section 16(5) of the Act, 2005 stands amended, the power to make rules governing service conditions of all Central and State Information Commissioners, has post the amendment, rests with the Central Government and the State Government therefore cannot be compelled to frame any rules now.

32. Therefore, it becomes abundantly clear that the State Government could not be compelled either under the Statute or by this Court to take a policy decision and frame a rule to grant post-retiral benefits to retired State Information Commissioners. In the absence of the same, the State Government cannot be directed by this Court to grant or release post-retiral benefits to the present Petitioner. Imposing a policy by judicial fiat could create administrative and

financial burdens on the State, potentially disrupting existing governance priorities. It is also pertinent to note that the decision to frame a policy depends on various factors, including fiscal capacity, administrative feasibility, and public policy considerations, which the judiciary is ill-equipped to evaluate comprehensively. Therefore, unless there is a clear statutory mandate requiring the State to act, the judiciary must exercise restraint and allow the executive to operate within its constitutional domain.

C. WHETHER THE PETITIONER CAN BE DENIED THE BENEFIT OF PENSION ON THE GROUND THAT HE WAS NOT IN ANY PENSIONABLE SERVICE THE DAY HE WAS APPOINTED AS STATE INFORMATION COMMISSIONER?

33. Before adverting to the aforesaid issue it is worthwhile to bear in mind that the present Petitioner is a private person who was straightaway appointed as State Information Commissioner. The said fact is not only borne out from the records of the case but is also an admitted position. It is with this backdrop in mind that the Petitioner prior to his appointment as State Information Commissioner was a private person, i.e. was not a part of any government service or subject to any pensionable establishment thereunder.

34. The relevant portion of the impugned order is produced here:

> *"…Whereas/ Government in I&PR Department have sanctioned additional pension in favour of former State Chief Information Commissioners in line with the State Chief Information Commissioner of Himanchal Pradesh with due concurrence of Finance Department vide Resolution No. 12013/IPR- dated. 13.10.2011.*
>
> *Whereas, the former State Chief Information Commissioners are retired Government Officers having pensionable service and additional pension and other retirement benefits have been sanctioned as the salaries and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner is same as that of an Election Commissioner as per Section 16(5) (a) of the RTI Act, 2005 whereas the present petitioner does not belong to the said category no pension and retirement benefits have been sanctioned in favour of the retired State Information Commissioners.*
>
> *Whereas in order to dispose of the representation of the petitioner under Annexure- 8 series a meeting was held on 30th August, 2019 under the chairmanship of Director, I&PR in presence of Additional Director-cum-Joint Secretary to Govt., Joint Secretary to Govt, AFA-cum-Deputy Secretary to Govt I&PR Dept. and other members. It was unanimously recommended that in absence of any provision for sanction of pension under the Right to Information Act, 2005, the claim of the petitioner is having no merit for consideration…."*

35. It is germane to the *lis* at hand to refer to the correspondences annexed with the Writ Petition by the Petitioner:

> (i) ***State Information Commission's Order dated 10.2.2009:*** Following the implementation of the revised pay structure for IAS officers under the Sixth Pay Commission, as per Section 16(5)(b) of the RTI Act, 2005, the petitioner was granted pay, house rent allowance, and dearness allowance.

(ii) ***Letter dated 19.8.2010 from the Odisha Information Commission:*** The letter highlighted that while the New Pension Scheme was adopted by Odisha from 1.1.2005, eligibility requires service under the government, a pensionable post, and government funding. Statutory bodies like the Orissa Public Service Commission have their own pension rules, but no rules was framed for State Information Commissioners. The Department of Personnel and Training was advised to clarify the matter.

(iii) ***Letter dated 12.1.2012 from the Chief Information Commissioner, Central Information Commission:*** It was noted that despite the RTI Act being enacted six years prior, no comprehensive rules had been formulated by any State Government regarding the service conditions and entitlements of State Information Commissioners. The State Government was urged to take necessary steps.

(iv) ***Minutes of Meeting dated 22.2.2012:*** During this meeting, where the petitioner was a member of the State Information Commission, it was resolved to recommend the State Government frame appropriate rules for pensionary benefits for State Information Commissioners.

(v) ***Letter dated 13.2.2013 from the Chief Information Commissioner, Central Information Commission:*** The letter stressed the need for the State Government to urgently define the terms and conditions, including post-retirement benefits, for State Information Commissioners.

(vi) ***Internal File Noting dated 15.4.2013:*** The petitioner's claim for pension and pensionary benefits was recommended for further review and concurrence.

(vii) ***Letter dated 1.11.2013 from the Central Information Commission:*** The letter clarified that the final decision regarding the service terms of State Information Commissioners, including pension benefits, rests with the State Government.

(viii) ***Government Orders from other States:*** The State Governments of Karnataka (Govt. Order No. DPAR 56 RTI 2011 dated 5.1.2013), Kerala (Govt. Order P. No. 199/2014/Fin dated 29.5.2014), Haryana (Govt. Order No. 5/2/2012-1 AR dated 11.6.2014), and Tamil Nadu (Govt. Order No. 167 dated 5.12.2018) issued policies granting pension and post-retirement benefits to State Information Commissioners.

(ix) ***Government of Odisha's Letter dated 23.10.2019:*** In compliance with the Court's order in W.P.(C) No. 990/2019 dated 11.3.2019, the Government of Odisha clarified that no specific provision for pension and pensionary benefits exists for retired State Information Commissioners. As such, the petitioner's claim for pension was found to have no merit.

36. A careful review of the materials on record, particularly those referred to above, reveals that while the Petitioner's claim was thoroughly considered at various stages, it was ultimately not approved due to the absence of any governing Rules in this regard. Furthermore, the individuals with whom the Petitioner seeks parity were undeniably part of the IAS cadre, belonging to a pensionable establishment prior to their appointment in the Commission. Consequently, the Petitioner's claim for parity with them cannot, under any reasonable interpretation, be sustained.

37. It is significant to note that the Petitioner himself participated in meetings where the recommendation was made to urge the State Government to establish rules for the provision of post-retirement benefits to State Information Commissioners. Given that the Petitioner was fully aware of the terms of his service both at the time of his appointment and when he retired, he cannot now claim entitlement to pension benefits, particularly when such benefits were never extended to his post during his tenure.

38. In light of the aforementioned considerations, this Court has unequivocally concluded that, in the absence of any statutory provisions regarding the release of pension or pensionary benefits, and where the State Government cannot be compelled to provide the same, the Petitioner is not entitled to receive any pension or post-retirement benefits.

39. Pensionary benefits are governed by established statutory frameworks, which provide clarity on eligibility and entitlement. Absent such statutory provisions, judicial intervention cannot create a right where none exists. The courts must respect the legislative and executive domains and refraining from making policy decisions that are within the purview of the State. The role of the judiciary is to interpret and apply the law, not to legislate or mandate benefits that have not been statutorily prescribed.

40. The Court's intervention in granting pension benefits where none exists under the applicable rules would set a dangerous precedent, potentially encouraging similar claims and placing an undue burden on the state exchequer. Such an approach could lead to arbitrary and unsustainable financial obligations, undermining the principle that pension entitlements must be rooted in law and based on clear statutory provisions. Additionally, granting pension benefits to an individual who has served for a mere five years would create inequitable disparities, as pension schemes are typically designed to reward long-term service, ensuring fairness and fiscal responsibility in public finance management.

V. CONCLUSION:

41. In the absence of any Rules that explicitly recognize the entitlement of State Information Commissioners to receive pension, there can be no legal right for them to claim such benefits.

42. Based on the foregoing discussion and in adherence to established legal principles, this Court is of the considered opinion that the Petitioner is not entitled to pension or post-retirement benefits. Accordingly, the present Writ Petition is dismissed.

43. Interim order, if any, passed earlier stands vacated.

44. No order as to costs.

Headnotes prepared by:
Shri Pravakar Ganthia, Editor-in-Chief.

Result of the case:
Petition is dismissed.

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2025 (I)-ILR-CUT-131

ALEKHA CHANDRA PRADHAN & ANR.
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 2961 OF 2017]

22 NOVEMBER 2024

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

Issue for Consideration

Are the petitioners entitled for employment?

Headnotes

REHABILITATION MATTER – The petitioners' land, measuring 6.080 acres and jointly recorded in the names of four brothers (Ashwini Pradhan & three others), was acquired in 1987 by Mahanadi Coal Fields Ltd. – Out of the total land, 5.67 acres, approximately 60%, were taken by MCL – Employment has already been granted to family members of the petitioner's brothers – The petitioners claim to be age-barred and request employment for their nominees instead – MCL denied for employment as there were no vacancies for "D" category land oustees – Are the petitioners entitled for employment?

Held: No – The petitioners' claim for employment under the Rehabilitation and Resettlement Scheme lacks merit **–** While the loss of land and displacement undoubtedly caused hardship at the time, the petitioners' prolonged inaction and the absence of justifiable reasons for the delay preclude the grant of relief at this belated stage. (Para - 17)

Citations Reference

State of Madhya Pradesh and Ors. v. Nandlal Jaiswal and Ors., **1987 AIR 251;** State of Uttaranchal v. Shiv Charan Singh Bhandari, **(2013) 12 SCC 179**; State of Haryana v. Raghubir Dayal, **1995 SCC (1) 133 ─ referred to.**

List of Scheme

Rehabilitation and Resettlement Scheme.

Keywords

Employment; Land oustees; Agricultural holdings; Rehabilitation Advisory Committee; Displacement.

Case Arising From

Denial of employment by Mahanadi Coal Fields Ltd.

Appearances for Parties

For Petitioner(s) : Mr. Samir Kumar Mishra, Sr. Adv. & Associates.
For Opp.Party(s) : Mr. Sonak Mishra, ASC, Mr. S.D. Das, Sr. Adv.
Mr. Biswa Mohan Patnaik, Mr. P.R.Patnaik, (for O.P.2)

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. In this Writ Petition, the petitioners seek redressal for the denial of employment under the Rehabilitation and Resettlement Scheme, contending that such denial constitutes arbitrary and discriminatory treatment, particularly as other individuals in identical circumstances have been granted similar relief.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) The petitioners' land, measuring 6.080 acres and jointly recorded in the names of four brothers (Ashwini Pradhan, Jeevan Pradhan, Deba Pradhan, and Laxmidhar Pradhan), was acquired in 1987 by Mahanadi Coal Fields Ltd. (hereinafter "MCL") for the Ananta Open Cast Mining Project. Out of the total landholding, 5.67 acres were taken over by MCL, which represented a substantial portion—approximately 60%—of the family's agricultural land.

(ii) The rehabilitation scheme under MCL guidelines provides benefits, including employment, to land oustees based on specific criteria, such as the loss of one-third or more of agricultural or homestead land. Employment is to be provided to one member of each family in eligible cases, subject to the availability of posts.

(iii) Employment under the scheme has already been granted to family members of the petitioners' brothers through earlier Writ Petitions:

a. In **W.P.(C) No. 15543 of 2010**, this court granted employment to Bimal Chandra Pradhan and Govinda Chandra Pradhan.

b. Similarly, in **W.P.(C) No. 20759 of 2017**, employment was granted to Ashwini Pradhan, the son of Govinda Pradhan, pursuant to court directions.

(iv) Appeals against these orders (**W.A. Nos. 578 and 552 of 2019**) were dismissed by the division bench on the grounds of limitation. However, the division bench clarified that these orders should not be treated as precedents.

(v) Alekha and Kartika, the sons of late Laxmidhar Pradhan, have now approached this Court seeking employment. They claim to be age-barred and request employment for their nominees instead.

(vi) Successive Rehabilitation Advisory Committee ("RAC") meetings held in 1993 and 1998 concluded that there were no vacancies for 'D' category land oustees. MCL has also filed affidavits confirming the non-availability of posts for 'D' category oustees.

(vii) Aggrieved by the denial of employment, the Petitioners have approached this Court, alleging that the denial of employment to they, while others in identical

circumstances were granted employment, constitutes arbitrary and discriminatory treatment.

II. SUBMISSIONS ON BEHALF OF THE PETITIONERS:

3. Learned counsel for the Petitioners earnestly made the following submissions in support of his contentions:

(i) The petitioners submitted that since the claims of other branches (Deba's heirs) were allowed in W.P. (C) Nos. 15543 of 2010 and 20759 of 2017, the same principles applies to their claim, as it arises from the same land acquisition.

(ii) He submitted that the letter dated 18.11.2015 by the Senior Manager (L&R), Jagannath Area, corroborates their eligibility for employment under the R&R Scheme, indicating that the petitioners cannot be denied the benefit.

(iii) The petitioners contended that there was no delay, and their case has been actively considered by the authorities and that they approached the court promptly in 2017 when decision was made.

(iv) He further contended that the use of the term "shall" in the R&R Scheme indicates that the authorities are obligated to provide employment to members of families who have lost more than one-third of their agricultural holdings.

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 employment under the policy was aimed at preventing penury at the time of acquisition (1989). After 28 years, the claim for compassionate employment lacks merit.

(ii) He further submitted that there are no vacancies under the 'D' category in the MCL, as confirmed in multiple RAC meetings and affidavits.

(iii) It is contended that the petitioners delayed asserting their claims, making them ineligible for consideration. The principle of "fence sitters" applies in this case.

(iv) He further contended that employment was subject to availability. The absence of vacancies eliminates the possibility of accommodating further claims.

(v) It is argued that previous judgments providing employment to other family members were rendered in specific factual contexts and do not establish precedents.

IV. COURT'S REASONING AND ANALYSIS:

5. Heard the Learned Counsel for the parties and meticulously examined the materials on record.

6. It is apparent, at the very outset, that the petitioners have invoked the jurisdiction of this Court seeking employment under the Rehabilitation Assistance Scheme only in the year 2017, nearly 28 years subsequent to the accrual of the cause of action. In light of this significant delay, it becomes imperative for this Court to first ascertain whether the petition warrants consideration at all.

7. It is well established in law that a High Court, while exercising its Writ jurisdiction under Article 226 of the Constitution, must refrain from entertaining claims that are brought after an inordinate and unexplained delay. The principle of laches is rooted in equity and is intended to prevent stale claims from unsettling long-standing positions or adversely impacting the rights of third parties. Courts have consistently held that undue delay in approaching the judicial forum erodes the credibility of the petitioner's case and undermines the orderly administration of justice. Therefore, unless the petitioners demonstrate compelling reasons for the delay, the writ court should decline to grant relief in such cases.

8. To this effect, the Supreme Court has reiterated this well established position in the case of ***State of Madhya Pradesh and Ors. v. Nandlal Jaiswal and Ors.***[1] The Court held that entertaining such petitions after inordinate delay may negatively affect the rights of third parties and inflict not only hardship and inconvenience but also injustice on such third parties. The relevant excerpt is produced herein below:

> *"Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent of the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled With the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction. We do not think it necessary to burden this judgment with reference to various decisions or this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal."*

9. A similar stance was taken by the Supreme Court in the case of ***State of Uttaranchal v. Shiv Charan Singh Bhandari***[2] wherein it observed as following:

> "..even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time. In Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and

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[1] 1987 AIR 251
[2] (2013) 12 SCC 179

> another, the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silent mere making of representations could not justify a belated approach."

10. Applying the aforementioned judicial precedents to the present case, it can be conclusively determined that the unexplained and inordinate delay on the part of the petitioners precludes this Court from exercising its discretionary jurisdiction in their favour. The petitioners have failed to demonstrate any cogent reason or justification for the denial of employment to their family members under the Rehabilitation and Resettlement Policy. A belated invocation of such policy, after 28 years of the cause of action, might have merited consideration in exceptional circumstances, provided the petitioners had convincingly established that they diligently pursued their claim and were deprived of relief due to any lapse or dereliction on the part of the opposite parties.

11. The very essence of the Rehabilitation and Resettlement Policy lies in extending employment within a reasonable temporal proximity to the occurrence of the displacement. The objective of the policy would stand frustrated if employment were granted after an inordinate and unreasonable lapse of time. Employment under such a scheme parallels the jurisprudential concept of compassionate appointment, which is inherently time-sensitive, aiming to alleviate immediate hardship. Therefore, it cannot be sought or granted at such a significantly belated stage.

12. The next issue requiring adjudication pertains to the interpretation of the term "shall" as employed in the Rehabilitation and Resettlement Scheme. The petitioners contend that the use of the term "shall" imposes a binding obligation upon the authorities to provide employment to members of families who have lost more than one-third of their agricultural holdings. However, this Court, after a careful and measured analysis, finds such an inference to be untenable and devoid of substantive merit.

13. The term 'shall' is generally presumed to carry a mandatory connotation. However, it is the duty of the court to discern the true legislative intent by meticulously examining the statute's overall framework, its underlying purpose, and the implications of the interpretation to be adopted. The word 'shall' must not be construed solely on the basis of its linguistic form but rather in the context of its usage and the objective it seeks to achieve within the statutory scheme.

14. In similar vein, the Supreme Court in ***State of Haryana v. Raghubir Dayal***[3] has observed that the term "shall" must be interpreted in light of its contextual usage and the underlying purpose it serves, determining whether it imposes a mandatory or directory obligation. The relevant portion is produced herein under:

> *"The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word 'shall' as mandatory or as directory,*

[3] 1995 SCC (1) 133

accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."

15. Accordingly, in the context of the Rehabilitation and Resettlement Scheme, the use of the term "shall" must be interpreted in light of its purpose—to provide a framework for mitigating the hardship caused by displacement due to land acquisition. While the scheme undoubtedly envisions providing benefits to displaced families, including employment, such entitlements are not absolute and remain subject to conditions like the availability of posts and the timelines for seeking relief. Construing "shall" as imposing an unqualified obligation would disregard the inherent limitations within the scheme and lead to administrative impracticalities, particularly when significant time has lapsed, and vacancies have ceased to exist. In light of the abovementioned principles, it is observed that the petitioners approached the court nearly three decades after the land acquisition, during which time the very purpose of the scheme—to alleviate the immediate hardships of displacement—has long since faded. The significant delay in seeking relief, coupled with the lack of justification for the same, underscores the absence of a genuine and pressing necessity. The delay has also rendered the practical enforcement of the scheme untenable, given the non-availability of posts in the 'D' category as repeatedly confirmed by the Rehabilitation Advisory Committee.

16. The petitioners' argument that employment has already been granted to the family members of his brothers through prior writ petitions is equally untenable. The Division Bench, in its judgment rendered in W.A. No. 578 of 2019, explicitly clarified that the orders passed in those cases do not constitute binding precedents. Instead, they are to be regarded as decisions confined to the unique facts and circumstances of each individual case.

V. CONCLUSION:

17. Taking the above considerations into account, this Court is constrained to conclude that the petitioners' claim for employment under the Rehabilitation and Resettlement Scheme lacks merit. While the loss of land and displacement undoubtedly caused hardship at the time, the petitioners' prolonged inaction and the absence of justifiable reasons for the delay preclude the grant of relief at this belated stage.

18. Consequently, this Writ Petition is dismissed and, accordingly, disposed of.

19. Interim order, if any, passed earlier stands vacated.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief. Writ petition dismissed.

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2025 (I)-ILR-CUT-137

K. DINESH KUMAR
V.
STATE OF ODISHA & ANR.

[CRLREV NO. 168 OF 2024]

24 DECEMBER 2024

[R.K. PATTANAIK, J.]

Issue for Consideration

Whether sexual intimacy with a promise of marriage amounts to rape.

Headnotes

(A) INDIAN PENAL CODE, 1860 – Section 376(2)(n) – Informant was in a relationship with the petitioner and could not avoid sexual intimacy with him (petitioner) as it was forceful – In the meanwhile she became pregnant in response to which the petitioner promised to marry her but subsequently denied to do so – Whether sexual intimacy with a promise of marriage amounts to rape U/s. 376(2)(n) of IPC.

Held: No **–** Everything started inoffensively including the physical relationship followed by a promise of marriage, which failed to be materialized at last. Since, the promise failed and the petitioner avoided the informant and subsequently, declined to marry her, is the reason behind lodging of the FIR with an allegation of rape, which in the considered view of the Court, may not be sufficient to hold that such consent was no consent in the eye of law having been vitiated by misconception of fact or fraud arising out of promise to marry. (Para 17)

(B) INDIAN PENAL CODE, 1860 – Section 493 – The petitioner had promised to marry the informant and had sexual relationship with her – Whether an offence U/s. 493 of I.P.C. is made out.

Held: No **–** As both of them were well aware of the fact that they are not yet married and still had been in physical relationship, there is no rational ground for one to believe to the contrary – As a consequence, the irresistible conclusion of the Court is that an offence under Section 493 IPC is not established even remotely. (Para 19)

Citations Reference

Ghulam Hassan Beigh Vrs. Mohammad Maqbool Magrey and Others, **(2022) 12 SCC 657;** Sonu alias Subhash Kumar Vrs. State of Uttar Pradesh and another, **(2021) 18 SCC 517;** Dayanidhi Nayak Vrs. State of Orissa and others, **92 (2021), CLT 673;** Nimmy Mathew Vrs. State of Kerla and others,

CRL.REV.PET.No.931 of 2023; M/s Karnataka EMTA Coal Mines Limited and Another Vrs. CBI, **2024 SCC Online SC 2250;** Ghanashyama Mandothia Vrs. State of Odisha and Another, **(2023) 90 OCR 42;** Sajjan Kumar Vrs. CBI, **2010 (9) SCC 368;** Brij Mohan Kushwaha Vrs. State of UP, **Misc. Bench No.13935 of 2021;** N.S. Madhanagopal and another Vrs. K. Lalitha, **(2022) 17 SCC 818;** Pramod Suryabhan Pawar Vrs. State of Maharashtra and Another, **(2019) 9 SCC 608;** Moideenkutty Haji and others Vrs. Kunhihoya and others, **AIR 1987 Kerala 184 – referred to.**

List of Codes

Code of Criminal Procedure, 1973; Indian Penal Code, 1860.

Keywords

Rape; Sexual intimacy; Will; Promise; Marriage; Consent.

Case Arising From

Order dated 14th March, 2024 passed in connection with S.T. No.123 of 2022 by learned 1st Additional Sessions Judge, Berhampur.

Appearances for Parties

For Petitioner : Mr. Tanmay Mishra
For Opp.Parties : Mr. N.K. Praharaj, AGA,
Mr. Jugal Kishore Panda (O.P. No.2)

Judgment/Order

Judgment

R.K. PATTANAIK, J.

1. Instant revision under Section 401 read with Section 397 of the Code of Criminal Procedure, 1978 (hereinafter referred to as 'the Cr.P.C') is filed by the petitioner challenging the legality and judicial propriety of the impugned order dated 14th March, 2024 as at Annexure-4 passed in connection with S.T. No.123 of 2022 by learned 1st Additional Sessions Judge, Berhampur, whereby, an application under Section 227 Cr.P.C. seeking discharge from the alleged offences under Sections 493, 294, 427 and 376(2)(n) read with 34 IPC was declined followed by the order framing the charge against him on the grounds inter alia that no case much less for an offence under Section 376(2)(n) IPC is made out.

2. As per the prosecution case, the informant lodged the FIR dated 20th May, 2020 mentioning therein that the petitioner denied marrying her after having a relationship and forced sexual intimacy, as a result of which, Berhampur Town P.S. Case No.97 was registered for the offences alleged, later to which, the chargesheet was filed, whereafter, the petitioner moved the learned court below seeking

discharge with an application under Section 227 Cr.P.C., which, as earlier stated, was rejected followed by the order of framing of charge under Annexure-4.

3. The contention of the petitioner is that learned 1st Additional Sessions Judge, Berhampur, without proper application of judicial mind, framed the charge against him vide Annexure-4, which is not sustainable and liable to be quashed. It is claimed that the informant was in a consensual relationship with the petitioner, hence, no offence under Section 376(2)(n) IPC is established. It is further claimed that the victim has filed an application under Section 9 read with Section 5(13) of the Hindu Marriage Act, 1955 before the court of learned Family Judge, Berhampur in Civil Proceeding No.241 of 2021 with a pleading that she and the petitioner were leading a life as spouses and in that view of matter, the relationship cannot be said to be forceful, however, with such an allegation of rape, the report was lodged, which has ultimately led to the framing of charge on 14th March, 2024. It is also stated that no offence under Section 493 IPC is prima facie proved but the learned court below miserably failed to consider the same and framed the charge for the said offence as well. It is, hence, pleaded that the impugned order under Annexure-4 is deserves be set aside followed by discharge of the petitioner fully.

4. Heard Mr. Mishra, learned counsel for the petitioner, Mr. Praharaj, learned AGA for the State and Mr. Panda, learned counsel for opposite party No.2.

5. Mr. Mishra, learned counsel for the petitioner would submit that the relationship between the petitioner and informant was with consent and it was for a period of one year and thereafter, when the marriage between them did not materialize and the former declined to marry the latter, the report was lodged and in absence of any material to show that there was no intention to go for a marriage from the very inception and when a breach of promise to marry is made out rather, learned court below could not have framed a charge for an offence under Section 376(2)(n) IPC. It is contended that the other offence under Section 493 IPC is also not established, since the petitioner is not alleged of having deceived the informant and with any such intention ever, induced to make her believe that she was lawfully married to him and as a result, co-habitation to have taken place but unfortunately, the learned court below committed serious illegality in framing the charge for the said offence. It is contended that learned 1st Additional Sessions Judge, Berhampur lost sight of the settled principles of law, while dealing with the application under Section 227 Cr.P.C. and stating so, Mr. Mishra, learned counsel for the petitioner relies on a decision of the Apex Court in **Ghulam Hassan Beigh Vrs. Mohammad Maqbool Magrey and others (2022) 12 SCC 657**. In support of the contention that a case for an offence under Section 376(2)(n) IPC is not established, Mr. Mishra, learned counsel cited the decision of the Supreme Court in **Sonu alias Subhash Kumar Vrs. State of Uttar Pradesh and another (2021) 18 SCC 517**. A decision of this Court in **Dayanidhi Nayak Vrs. State of Orissa and others 92 (2021), CLT 673** is relied on further to claim that the necessary ingredients of the offence under Section 493 IPC to be conspicuously absent. An order of the Kerala High Court in

CRL. REV. PET. No.931 of 2023 dated 9th October, 2023 in the case of **Nimmy Mathew Vrs. State of Kerala and others** is placed reliance on, which is based on the decision in **Ghulam Hassan Beigh** (supra) on the point of discharge. One more case law in **M/s Karnataka EMTA Coal Mines Limited and Another Vrs. CBI 2024 SCC Online SC 2250** is referred to by Mr. Mishra, learned counsel to contend that no justifiable ground exists for proceeding against the petitioner.

6. On the other hand, Mr. Praharaj, learned AGA for the State submits that a prima facie case is clearly made out against the petitioner and therefore, the learned court below did not consider it proper to discharge him and rightly, rejected the application filed under Section 227 Cr.P.C. It is further submitted that the material evidence is subject to scrutiny of learned court below and in so far as the defence of the petitioner is concerned, it shall have to be tested during the trial and hence, therefore, he cannot demand discharge and correctly, the same stood rejected vide Annexure-4.

7. Mr. Panda, learned counsel for the informant, namely, opposite party No.2 submits that the petitioner forced a relationship on the victim and on the pretext of marriage in future, developed the sexual relationship, as a consequence, she became pregnant and in the meantime, she has given birth to a male child. It is further submitted that the petitioner is found to have fathered the child born to the victim with the DNA report received and in any view of the matter, considering the nature of allegations made and substantiated with the filling of chargesheet, upon a satisfaction reached at regarding an offence under Section 376(2)(n) IPC and other offences being committed, the impugned order under Annexure-4 is fully justified and while advancing such an argument, he relies on a decision of a Co-ordinate Bench of this Court in **Ghanashyama Mandothia Vrs. State of Odisha and Another (2023) 90 OCR 42.**

8. Whether, the impugned order under Annexure-4 with the framing of charge vis-a-vis the petitioner for the alleged offences rejecting the application under Section 227 Cr.P.C. filed by him is justified? In fact, the parents of the petitioner have been discharged for an offence under Section 294 IPC. On perusal of the chargesheet, the Court finds that the parents of the petitioner were booked only for an offence under Section 294 read with 34 IPC, however, they have been discharged by the learned court below but, a similar relief to the petitioner was declined vide Annexure-4. Considering the materials received along with the chargesheet, learned 1st Additional Sessions Judge, Berhampur held that a prima facie case is made out against the petitioner for the alleged offences, hence, refused to discharge him and thereafter, framed the charge and proceeded to summon the witnesses to be examined by the prosecution.

9. The role of a court while entertaining an application under Section 227 Cr.P.C. has been the subject of discussion and debate and in catena of decisions, the Apex Court held and observed that such an exercise is not a mere formality. The decision in **Ghulam Hassan Beigh** referred to by Mr. Mishra, learned counsel for

the petitioner is on the point of framing of charge and the duty of the court enjoined, when discharge is claimed. Referring to the decision in **Sajjan Kumar Vrs. CBI 2010 (9) SCC 368**, the Apex Court in the aforesaid decision held and concluded in the following words:

> "27. Thus, from the aforesaid, it is evident that the trial court is enjoined with the duty to apply its mind at the time of framing of charge and should not act as a mere post office. The endorsement on the charge-sheet presented by the police as it is without applying its mind and without recording brief reasons in support of its opinion is not countenanced by law. However, the material which is required to be evaluated by the court at the time of framing charge should be the material which is produced and relied upon by the prosecution. The sifting of such material is not to be so meticulous as would render the exercise a mini trial to find out the guilt or otherwise of the accused. All that is required at this stage is that the court must be satisfied that the evidence collected by the prosecution is sufficient to presume that the accused has committed an offence. Even a strong suspicion would suffice. Undoubtedly, apart from the material that is placed before the court by the prosecution in the shape of final report in terms of Section 173 of CrPC, the court may also rely upon any other evidence or material which is of sterling quality and has direct bearing on the charge laid before it by the prosecution."

10. It has been held therein that the trial court at the time of framing of charge shall have to consider the materials on record and to briefly state the reasons in support of its opinion though examination of the same with meticulous scrutiny is prohibited. It has been held that the evidence collected is sufficient to presume that the accused has committed an offence, a strong suspicion would be enough to frame charge and even observed to the extent that apart from the material, which is placed in the shape of a final report in terms of Section 173 Cr.P.C. the Court may also rely upon such other evidence of sterling quality having a direct bearing on the charge led before it by the prosecution.

11. As per the submission of Mr. Mishra, learned counsel for the petitioner, learned court below grossly erred to hold that a case under Sections 493 and 376(2)(n) IPC to have been made out against the accused, when the materials produced along with the chargesheet proved it otherwise, since the relationship between the parties has been admittedly consensual. The fact that, a case under Section 493 IPC is not prima facie established, has also been entirely lost sight of, while framing of charge vide Annexure-4.

12. In support of the contention that a case under Section 493 IPC is not proved, Mr. Mishra, learned counsel cited one more decision in **Brij Mohan Kushwaha Vrs. State of UP** decided in Misc. Bench No.13935 of 2021 and disposed of on 7th July, 2021 by a Bench of Allahabad High Court, wherein, it is held that in case of a promise to marry having relationship with the victim is not to attract an offence under Section 493 IPC. Against the framing of charge for an offence under Section 294 IPC, a decision of the Apex Court in **N.S. Madhanagopal and another Vrs. K. Lalitha, (2022) 17 SCC 818** is cited at the Bar.

13. Being alive to the settled law decided and reiterated in **Ghulam Hassan Beigh** case with regard to the role of a court dealing with a request for discharge, the Court is to consider, whether, any such exercise has been duly undertaken by the learned court below in the case at hand. As per the FIR, the informant has alleged that she was in a relationship and could not avoid sexual intimacy with the petitioner as it was forced on her and, in the meanwhile, she became pregnant, in response to which, the petitioner promised their marriage but later on, avoided and ultimately, declined followed by the events described in the FIR. It is borne out of record that the informant gave birth to a male child and the DNA report proved his parentage vis-a-vis the petitioner. When the petitioner backed out and declined to marry the informant, under the circumstances described in the FIR, whether, a case under Section 376(2)(n) IPC is made out for trial? The Court is also to find out and ascertain, if an offence under Section 493 IPC is also proved against the accused. The details of the facts leading to the relationship have been narrated by the informant in her statement under Section 164 Cr.P.C. As per the FIR and the above statement of the victim, the Court finds that initially the friendship was developed at a showroom, where both of them were engaged and thereafter, they fell for each other and also maintained sexual relationship. Of course, according to the informant, such physical relationship was forced on her by the petitioner. The fact is that, even with any such reluctance, the relationship between the parties thrived and not only that, during the relevant period, both had been to Bhubaneswar and Calcutta. Ultimately, when the informant demanded marriage, the petitioner alleged to have avoided her and in one of such incidents, abused the latter and committed certain overt acts and it was followed by misbehavior by the former's parents, the report was lodged. With the nature of evidence on record, the Court is to examine, if the alleged offences under Sections 376(2)(n) and 493 IPC, in particular, are prima facie made out against the petitioner.

14. In **Sonu alias Subhash Kumar** (supra), the Apex Court, in case where the parties had a friendship initially and thereafter, the accused assured to marry the victim and both having had a relationship for one and half years, considering an allegation of sexual exploitation, concluded as hereunder:

> "10. Bearing in mind the tests which have been enunciated in the above decision, we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482 of CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482 of CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established."

15. The sum and substance of the above decision is that if there is merely a breach of promise to marry the victim, no case of rape is made out, but where, under a misconception of fact, the consent is obtained and it was on account of a false promise having a direct nexus with the victim's decision to engage in sexual act, it would be an offence under Section 376(2)(n) IPC.

16. In the instant case, the informant is a young woman aged about 28 years, whereas, the petitioner is younger to her by four years but after the acquaintance, friendship was developed between them. On the proposal of the petitioner, as claimed, the relationship started with the acceptance of such proposal and it slowly turned towards sexual intimacy. Of course, the allegation of the informant is that the petitioner forced on her and as a result, physical relationship ensued. However, on a reading of the material evidence on record, it is made to reveal that the petitioner and informant had taken a decision to marry. The family of the informant was aware of the relationship between her and the petitioner as further made to understand. It is suggested from the record that the petitioner was in visiting terms with the family of the informant. If there is no fraud played upon the victim or consent was not obtained under a misconception of fact, on account of a false promise of marriage, as earlier discussed with reference to case law (supra), the petitioner cannot be alleged of having committed an offence under Section 376(2)(n) IPC. Furthermore, the informant happens to be mature and intelligent enough to understand the consequences of the relationship, to which, she apparently consented to. From the FIR and other materials, the Court finds that it is difficult to reach at a conclusion regarding absence of any such intention on the part of the petitioner from the very beginning to marry the informant. As it appears, everything happened in natural course of events with the friendship and physical relationship being developed, though, such intimacy was with a little bit of hesitation on the part of the victim but by no stretch of imagination, it can be held that the intention of the petitioner was otherwise from day one. In view of the decision in **Pramod Suryabhan Pawar Vrs. State of Maharashtra and Another (2019) 9 SCC 608**, a false promise must be of immediate relevance or having a direct nexus with the decision of the victim vis-à-vis the sexual act. The said decision has been referred to in the case of **Sonu alias Subhash Kumar**. In other words, to establish, whether, the consent was vitiated by any mischief arising out of promise to marry, it must be held that such promise was given in bad faith without any intention to uphold the same in future and it was only to obtain such consent.

17. In the present case, the Court finds that the informant though claims to be slightly hesitant initially but accepted the proposal of the petitioner and even developed physical relationship with him and continued to remain so, till the time, it ended with the untoward events, which took place shortly before the report was lodged. Merely, denying to keep up the promise is not sufficient and the same would result in breach of such promise, which is not a criminal act but to presume that an offence under Section 376(2)(n) IPC is committed, the promise has to be held as false and given in bad faith having no intention at all to adhere to the same. Such

conduct of the accused is to be examined considering the material evidence with a prima facie view that the intention was otherwise and not in good faith at the time when the promise was offered. As far as the petitioner is concerned and also the victim, the Court finds that everything started inoffensively including the physical relationship followed by a promise of marriage, which failed to be materialized at last. Since, the promise failed and the petitioner avoided the informant and subsequently, declined to marry her, is the reason behind lodging of the FIR with an allegation of rape, which in the considered view of the Court, may not be sufficient to hold that such consent was no consent in the eye of law having been vitiated by misconception of fact or fraud arising out of promise to marry. Such sexual relationship between the parties, consequent upon, a promise of marriage during the continuance of the same by itself not to be sufficient to hold that the promise was given in bad faith. It is again not found to be a case where a false promise of the petitioner and subsequent consent of the victim was obtained with such promise. It is further not revealed that the informant consented to the sexual act only upon the promise of the petitioner to marry her. If such was the intention and false promise shown to be having a direct nexus with the consent obtained for the sexual act and then, it is broken, an offence of rape could be made out, since, it may be said to have been vitiated by fraud. However, having regard to the nature of allegations made in the FIR and materials collected and produced along with the chargesheet, the informant, after having a relationship with the petitioner and the marriage between them having not taken place, alleged sexual exploitation and rape, which, in view of the discussion as aforesaid and keeping in view the ratio laid down by the Apex Court in **Sonu alias Subhash Kumar,** cannot be the basis to hold that an offence under Section 376(2)(n) IPC is made out.

18. As far as the offence under Section 493 IPC is concerned, it is not a case that cohabitation between the informant and petitioner did take place by any deceitful means inducing a belief of existence of a lawful marriage. On a reading of the ingredients of the offence under Section 493 IPC, it would mean that in order to establish a person to have committed such an offence, it must be shown that he deceitfully induced and made the woman to believe that she is lawfully married to him and thereupon cohabits. In other words, inducement of a woman resulting her to carry such a belief is sine qua non. A Full Bench decision of the Kerala High Court in **Moideenkutty Haji and others Vrs. Kunhihoya and others AIR 1987 Kerala 184** is referred to in the decision of Allahabad High Court in **Brij Mohan Kushwaha** (supra), which may be profitable to quote and hence, reproduced herein below:

> "XXX The essence of the section is therefore the deception caused by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him while, in fact, they are not lawfully married. In order to establish deception, there must first be allegations that the accused falsely induced her to believe that she is legally wedded to him. In the complaint in this case there is no allegation of any such deception or inducement. In a case where both the man and woman fully knew that they are not husband and wife and no ceremony of marriage look place between

> them, there is no question of one of them believing otherwise. Even if the entire allegations in the complaint are taken as true the section is not being attracted. The allegation is that though they are not husband and wife they had sexual union during late hours in the night for a pretty long time. What is alleged in the complaint, in only a promise to marry in future. The strange part of it is, there is the further allegation that one day they went for registering the marriage, but the petitioner ran away from there and even thereafter she was submitting herself to him regularly for liaison. The facts cannot at any rate attract Section 493, I.P.C."

19. If the decision (supra) is read and understood, existence of a sexual relationship by itself not to be sufficient enough. To hold that an offence under Section 493 IPC is made out, what is to be shown is that a deceitful cohabitation under a false belief of existence of a lawful marriage, The victim, if managed in a way, to make her believe that the accused to be her lawfully wedded husband and upon such belief, the latter cohabits, in such a situation, the said offence is said to be committed. In the instant case, the allegation is based on the premise that the petitioner had promised to marry, either before or after, he had sexual relationship with the informant, who, hence, had never been under delusion that she was lawfully married. It is not that some kind ceremony was performed involving the parties so as to make the victim to believe so. As both of them were well aware of the fact that they are not yet married and still had been in physical relationship, there is no rational ground for one to believe to the contrary. As a consequence, the irresistible conclusion of the Court is that an offence under Section 493 IPC is not established even remotely. Such a conclusion is arrived at considering the materials on record and regard being had to the settled principles of law discussed with reference to the citations relied on by both the sides. As regards, other offences, the Court is of the considered view that a prima facie case is made out for trial.

20. Hence, it is ordered.

21. In the result, the revision stands partly allowed. As a necessary corollary, the impugned order dated 14th March, 2024 under Annexure-4 passed in connection with S.T. No.123 of 2022 by learned 1st Additional Sessions Judge, Berhampur is hereby set aside to extent indicated herein above.

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

Result of the case:
Revision partly allowed.

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2025 (I)-ILR-CUT-146

BIRAJA PRASAD PADHI & ORS.
V.
TATA POWER CENTRAL ODISHA DISTRIBUTION LTD. (TPCODL), BHUBANESWAR & ORS.

[W.P.(C) NO. 18997 OF 2024]

24 DECEMBER 2024

[R.K. PATTANAIK, J.]

Issues for Consideration

1. Scope of Judicial Review in transfer of an employee.
2. Maintainability of Writ Jurisdiction against TPCODL.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 – Article 12 – "State" or "authority" – The TPCODL as per the vesting order is a Special Purpose Vehicle in which Tata Power Company Ltd. has 51% of shares and rest is held by the State Government through GRIDCO – Admittedly, an autonomous body – Whether the TPCODL falls within the expression 'State' or 'authority' and amenable to Writ Jurisdiction.

Held: Yes – It is not about the institution or the entity and composition or structure of the same, which is only to play a role but for the activities undertaken by it, is to determine, whether, to fall within the meaning of 'authority' under Article 226 of the Constitution of India, if the same is in the nature of a public duty, even if, not a State for the purpose of Article 12 – The TPCODL is a work force to ensure distribution of power with ancillary activities but since a part of public utility service has an element of public function, hence, shall have to be held as amenable to writ jurisdiction.

(Paras – 24 & 26)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ Jurisdiction against the Special Purpose Body like TPCODL – When maintainable – Explained with reference to case laws. (Para - 25)

(C) SERVICE JURISPRUDENCE – Transfer – Interference of the Court – Scope of Judicial review in dealing with a dispute over transfer of employees – Discussed.

Held : A transfer is permissible and decision towards the same lies with the employer and unless, there is violation of any statutory rules or is alleged of being malafide, a writ court is not to exercise the jurisdiction, as in any case, transfer is an incidence of service. (Para - 35)

Citations Reference

Saiyam Mishra and others Vrs. AIR India Ltd. and others, **2023 SCC Online Delhi 4904**; R.S. Madireddy & Another Vrs. Union of India and others, **2022 SCC Online Bombay 2657;** Saint Mary's Education Society and another Vrs. Rajendra Prasad Bhargava and others, **(2023) 4 SCC 498**; Dinesh Kumar Behera Vrs. Orissa Sponge Iron Ltd. & others, **1992 SCC Online Odisha 184;** Naresh Kumar & others Vrs. Union of India, **2023 SCC OnLine Delhi 4919**; Netra Pal Vrs. Tata Power Delhi Distribution Ltd., **W.P.(C) No.13560 of 2023;** Yashpal Sharma Vrs. Tata Power Delhi Distribution Ltd., **2023 SCC Online Del 6657;** Surendra Kumar Sahu Vrs. State of Odisha & others, **W.P.(C) No. 30107 of 2021 decided on 24th January, 2022;** Ajay Hasia Vrs. Khalid Mujib Sehravardi, **(1981) 1 SCC 722;** Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsva Smarak Trust Vrs. V.R. Rudani; St. Mary's Education Society Vrs. Rajendra Prasad Bhargava and others, **(2023) 4 SCC 498;** Pradip Kumar Biswas Vrs. Indian Institute of Chemical Biology, **(2002) 5 SCC 111;** Panchraj Tiwari Vrs. Madhya Pradesh State Electricity Board & Others, **(2014) 5 SCC 101;** B. Varadha Rao Vrs. State of Karnataka and others, **(1986) 4 SCC 131;** Rajendra Singh and others Vrs. State of U.P. and others, **(2009) 15 SCC 178;** Pubi Lombi Vrs. State of Arunachal Pradesh & others, **2024 SCC OnLine SC 279;** Shilpi Bose and others Vrs. State of Bihar and others, **1992 SCC (L&S) 127 – referred to.**

List of Acts

Constitution of India, 1950

Keywords

Maintainability of Writ; Judicial Review; State; Authority.

Case Arising From

Office Order No. TPCODL/HR/2024/A-604 dated 03.08.2024.

Appearances for Parties

For Petitioners : Mr. S.K. Dash
For Opp. Parties : Mr. A.K. Parija, Sr. Adv.

Judgment/Order

Judgment

R.K. PATTANAIK, J.

1. Instant writ petition is filed with the following relief, such as, to quash the office order No. TPCODL/HR/2024/A-604 dated 03.08.2024 of opposite parties No.2 under Annexure-8 in respect of opposite party No.3 as the order of transfer violates the service conditions of the petitioners as per CESCO Officers Service Regulations (in short 'the Regulations') as at Annexure-1 and also conditions

stipulated in the vesting order dated 26.05.2020 i.e. Annexure-2 and the GRIDCO Promotion Policy at Annexure-4.

2. The challenge is at the behest of the petitioners vis-à-vis Annexure-8 for transferring and posting of opposite party No.3 in violation of the Regulations and contrary to Annexure-2 and Clause 49(c) thereof. The contention is that opposite party No.3 is a stranger to the cadre of petitioner No.1 and not an employee of the CESCO. It is pleaded that the petitioners are the employees of the erstwhile CESU which stood vested with the TPCODL w.e.f. 1st June, 2020. The further contention is that such posting of opposite party No.3 has placed the petitioners in great disadvantage, which is not in consonance with the Regulations and Annexure-2. It is pleaded that petitioner Nos. 1 and 2 belong to E-7 & E-5 Grade respectively, whereas, petitioner No.3 is continuing in the cadre of E-4 Grade and all of them, could not be posted befitting their cadres and it has happened only because of the illegality committed by opposite party Nos. 1 & 2. As further pleaded, petitioner Nos. 4 to 11 have been posted at different places as the Assistant Manager (Electrical) under the administrative control of the TPCODL and belong to E-3 Grade and their promotion to E-4 Grade is due, however, on account of indiscretion in the administration, timely promotion has not happened and they are still languishing in a lower post and while stating so, the gradation list dated 27th February, 2023 i.e. Annexure-3 is referred to.

3. The grounds advanced challenging the transfer and posting of opposite party No.3 are as follows:

> (i) The petitioners are guided by the GRIDCO Promotion Policy and as per Clause 6.3 of the said policy, minimum eligibility period for consideration of promotion has been prescribed. But, on account of official apathy of the authorities of the TPCODL, they have not received promotion in time, whereas, officials outside the cadre of CESCO like opposite party No.3 and their services are being utilized to manage the work which is impermissible as such lateral entry of outsiders has affected the service conditions of the petitioners. Since all such posts in the erstwhile CESU were to be filled up by promotion, which is to take place as per the policy (Annexure-4), but opposite party Nos. 1 & 2 in violation of the same and also the Regulations, inducted outsiders into the higher Grade directly with an attempt to introduce them into the cadre of the petitioners.
>
> (ii) As per Rule 11 of the Odisha Service Code, cadre is defined and transfer and posting of employees is confined to cadre only and considering the same, the employees of the TPCODL are subjected to transfer from among the members of the same cadre, however, TPCODL in deviation to the same has introduced direct recruits into different ranks and nomenclature, though their names did not find place in the cadre list as the petitioners.
>
> (iii) Opposite party No.3 is holding a post of MD-I cadre under the TPCODL and posted as Technical Assistant to Chief Operation Service (OS) and posted as Divisional Manager, BED, Bhubaneswar, to which cadre, he does not belong to and on the contrary, such posts belongs to the cadre strength of petitioner No.1 and since on an earlier occasion, he was posted as such, it was objected to by the petitioners and also the Association, as a result of which, the same was kept in abeyance by the authorities of the TPCODL vide Annexure-7.

(iv) Another transfer and posting of officers and decision in that regard by opposite party No.2 dated 3rd August, 2024(Annexure-8) was taken and the same included some of the petitioners, whereby, opposite party No.3, an officer under direct recruitment of the TPCODL was posted as the Divisional Manager BED, Bhubaneswar, when he is holding a different post as HOD Operations and Technical Assistant to COS, which is illegal and runs contrary to the service conditions of the petitioners.

(v) Opposite party No.3 does not belong to the cadre of Divisional Manager or E-5 Grade or any of the Grades starting from E-1 to E-10, hence, the posting in such cadre is not permissible under law;

(vi) Opposite party No.3 belongs to a different Grade all together and has nothing to do with the job assigned to the Officers in E-1 to E-10 Grade, rather, he never joined in the cadre strength of E-1 to E-10 and hence, such posting as a Divisional Manager is illegal and directly violates the Cadre Rule;

(vii) Upon posting of opposite party No.3 into E-5 Grade, the promotional avenue of E-4 Grade employees have been blocked by one post which causes serious prejudice to some of the petitioners, who are in E-4 Grade and also affect their service prospective and promotion of other officers in E-4 Grade and also other Grade officers.

(viii) Opposite party No.3 was never posted in the cadre in any Grade whatsoever or a member of CESCO and in view of such posting, it is likely to cause administrative obstructions with regard to reporting of the officers in the lower posts like SDOs and Section Officers;

(ix) The officers continuing in E-4 Grade, such as, SDOs due to such illegal order of transfer and posting dated 3rd August, 2024 are now answerable to opposite party No.3, who has not been brought into the cadre of Engineers of different Grades under CESCO Officers Service Regulations;

(x) Petitioner No.1 belongs to E-7 grade and on account of the impugned transfer order, he has been replaced by a stranger, who is not in the cadre and when law does not permit the same, which stipulates that the transfer is always permissible within a cadre, hence, the same is in gross violation of the Rules.

With the above grounds and the facts pleaded on record, the petitioners have questioned the decision of the TPCODL in view of Annexure-8 in respect of opposite party No.3, he having been posted as the Divisional Manager, BED, Bhubaneswar with a plea that the same is in utter disregard to the Regulations, GRIDCO Promotion Policy and the vesting order.

4. Heard Mr. Das, learned counsel for the petitioners and Mr. Parija, learned Senior Advocate for the opposite parties.

5. The petitioners and opposite parties in reply and response filed rejoinder and additional affidavits with the former, on the one hand, questioned the transfer and posting of opposite party No.3 vide Annexure-8 and on the other hand, justified by the latter with a stand that the same is not in violation of any rules and is unlikely to cause prejudice to the petitioners, rather, a decision in order to ensure the operational efficiency to be maintained by the TPCODL.

6. With reference to the counter affidavit of opposite party No.1, it is pleaded by the opposite parties that under the vesting order, pursuant to the privatization of power sector and enactment of Orissa Electricity Reform (Transfer of Assets,

Liabilities, Proceedings and Personnel of GRIDCO to Distribution Companies) Rules, 1998, the distribution business of GRIDCO was vested with CESCO and as per such scheme, GRIDCO transferred all its assets and liabilities to CESCO on 31st March, 1999 and in the process, 8,417 employees of GRIDCO were transferred to CESCO, whereafter, CESCO's Officers Service Regulations was introduced. It is further pleaded that the Odisha Electricity Regulatory Commission (in short, 'the OERC') revoked the license of CESCO w.e.f. 1st April, 2012 and appointed an Administrator to discharge its activities and also formulated a scheme, namely, the Central Electricity Supply Utility of Odisha (Operation and Management) Scheme, 2006 as per which the utility of CESCO was renamed as CESU by decision dated 28th November, 2006 and adopted all the Service Rules, Regulations etc. framed by OACB, GRIDCO, CESCO and followed by CESCO as on the date of vesting with CESU till CESU framed its own Regulations and thus, CESCO Officers Regulations were adopted by the CESU, whereby, making the same applicable with respect to the employees transferred from CESCO and also the direct recruits. The further pleading is that CESU suffered deficit and hence, the Government considered the vesting and accordingly, it was achieved w.e.f. 1st June, 2020, according to which, the staff deployment plan of TPCODL shall be in respect of the employees of the CESU including the regular and contractual employees and the balance employees to be filled up through direct recruitment by TPCODL and for the said purpose, every financial year, the TPCODL receives approval from the OERC and that the employees of CESU transferred to TPCODL forms part of TPCODL and are to be governed by the terms of their appointment, which are not to be inferior to their existing service conditions in CESU leaving the TPCODL, the operational flexibility to design the organization structure to ensure efficiency in operations and staff deployment. According to the TPCODL, it has submitted the organizational structure to the OERC and after the vesting of the CESU utility, the employees of the erstwhile CESU and their service conditions are not to be less favourable. It is pleaded that the TPCODL in discharge of its fiduciary duty to ensure that no discrimination takes place between such employees and CTC employees (of TPCODL), especially, with regard to career advancement and posting, which is an obligation with an objective to uphold efficiency and merit of the organization, looks after and given weightage to the organization structure and while claiming so, Annexure-D/1 is referred to. In reply to the plea of the petitioners vis-à-vis opposite party No.3's posting, it is again pleaded that in order to provide diverse opportunities to the employees of the TPCODL through horizontal and vertical movement; to take up critical and challenging responsibilities; and to ensure operational efficiency of utility, the decision was taken, by which, the said official, who was the Technical Assistant to Chief (OAS), has now been posted as Divisional Manger, BED, Bhubaneswar and petitioner No.1 to the post of DGM (Electrical) at MMG, Centre, Bhubaneswar and similarly, petitioner Nos. 2 & 5 have been transferred to different places. It is stated that the said order was kept in abeyance on account of protest and objection raised by the CESCO Engineers Service Association (CESA) and Orissa Electrical Engineers Association (OEEA) but

thereafter, with the discussions held, the order dated 19th June, 2024 was issued with the transfers and postings and the same was also was not given effect to, however, at last, on 3rd August, 2024, the impugned decision had to be taken and notified to ensure operational efficiency and by such an exercise, the service conditions of the Non-CTC employees or the employees of the TPCODL have not been altered.

7. With the above defence, the opposite parties raised a preliminary objection regarding maintainability of the writ petition by claiming that the TPCODL is a private entity, hence, not amenable to the jurisdiction of the Court as the law is well settled that writ does not lie against such entities as Article 226 of the Constitution of India can only be invoked against a private body, only if, it performs public duties or functions similar to the State as a defined in Article 12. While stating so, it is pleaded that in terms of the vesting order, it is clear that the TPCODL is a Special Purpose Vehicle, in which, TATA Power Company Ltd. holds 51% share with 49% being held by the State Government through GRIDCO and thus, majority of the shareholding is with the company and as such, there is no State control over the TPCODL and for the fact that, the same is an autonomous body having no nexus with the Government, it does not fit into the expression 'State' as occurring in Article 12 of the Constitution of India. The contention is that the distribution of electricity is in terms of the Electricity Act, 2003 and the same is merely a function providing commercial services with considerations and therefore, writ jurisdiction cannot be exercised.

8. One more ground is advanced which is, in the alternative, to the following, such as, scope of judicial review in transfer of employees is limited as law is also well settled that the Court's are not to interfere with such decisions made in the public interest and on account of administrative reasons. It is pleaded that the impugned order of transfer does not adversely affect the career prospects of any of the employees of the TPCODL and the same is necessary to ensure operational flexibility and efficiency of the utility service, which is to help and assist in reducing the financial burden on the consumers, hence, the Court is not to interfere with the same.

9. It is the contention of the opposite parties that the grievances of the petitioners are illusory and bereft of any merit since the TPCODL in compliance of its moral, ethical and legal duties being a corporate body treats all the employees equal, whether, non-CTC or CTC employees and it ensures that the service conditions of the non-CTC employees do not become less favourable in compliance of the vesting order despite the impugned transfer and posting. In other words, it is claimed that any such plea of the petitioners with a grievance against opposite party No.3 on account of the impugned decision is ex-facie unreal and merely an apprehension, which is thoroughly misconceived. The further contention is that there cannot be any classification of employees based on the method of recruitments. Lastly, it is contended that assuming for the sake of argument that the grievances of the petitioners to be valid, it would imply that despite having merit, the CTC employees can never be transferred to any posts on the ground that the

same is likely to result in some of the non-CTC employees to report them as sub-ordinates. It is stated that if such plea is accepted, it would hamper the growth of the CTC employees in the organizational structure and it could amount to discrimination as well. Any such discrimination on the basis of the source of recruitment is again not permissible, nonetheless, the decision is in confirmity with the vesting order as it has allowed and provided the TPCODL the operational flexibility to design the organization structure in operations and staff deployment. It is alleged by the opposite parties that the petitioners are actually demanding a special status like an elite group in juxtaposition to the direct recruits, namely, CTC employees, who, as if, are not entitled to any such transfers and postings.

10. The impugned office order, as according to the opposite parties, does not affect the service conditions of the petitioners, since, it is not in relation to promotions or conditions of service of any of the employees, whatsoever. It is claimed that the decision neither affects any of the rights of the petitioners nor the same is averse to their service conditions and hence, the plea that it is in breach of the existing service conditions is completely baseless, factually wrong and without any merit and there is no valid reason for the Court to quash it. It is stated that there is no prejudice caused to the petitioners nor the decision is in violation of the Regulations, as per which, Regulations 25(1) provides that every officer being liable for transfer to any place of work of the company or any other place of work related to the work of the company and in so far as the plea that the same is to directly interfere with the GRIDCO Promotion Policy is incorrect, as such policy, applies to promotion only and not to the transfers and that apart, promotion for a particular posting cannot be claimed as a matter of right, which is also a settled law. Precisely stated, with the above plea and grounds advanced, the opposite parties pleaded that there is no illegality in the impugned order of transfer, particularly, with respect to posting of opposite party No.3 and as it is unlikely to cause any prejudice to the petitioners, the same is not liable to be interfered with.

11. Mr. Parija, learned Senior Advocate would submit that the TPCODL is a private entity and therefore, jurisdiction under Article 226 of the Constitution of India is not to be invoked and hence, the writ petition should be dismissed in limine and while advancing such an argument, he refers to the following decisions, namely, **Saiyam Mishra and others Vrs. AIR India Ltd. and others 2023 SCC Online Delhi 4904; R.S. Madireddy & Another Vrs. Union of India and others 2022 SCC Online Bombay 2657; Saint Mary's Education Society and another Vrs. Rajendra Prasad Bhargava and others (2023) 4 SCC 498; Dinesh Kumar Behera Vrs. Orissa Sponge Iron Ltd. & others 1992 SCC Online Odisha 184; Naresh Kumar & others Vrs. Union of India 2023 SCC OnLine Delhi 4919** and finally, **Netra Pal Vrs. Tata Power Delhi Distribution Ltd.** in W.P.(C) No.13560 of 2023 besides **Yashpal Sharma Vrs. Tata Power Delhi Distribution Ltd. 2023 SCC Online Del 6657** to further contend that the TPCODL is involved in commercial activities and therefore, with such business and being a private entity, it is not amenable to the writ jurisdiction.

12. On the contrary Mr. Das contends that the writ petition is maintainable as the TPCODL is dealing with public functions and a dispute challenging lateral entry through direct recruitment to the promotional posts with a plea as to violation of the service Regulations was once the subject matter in **Surendra Kumar Sahu Vrs. State of Odisha & others** decided on 24th January, 2022 in W.P.(C) No. 30107 of 2021, wherein, the writ petition against the TPCODL has been held to be maintainable and therefore, the preliminary objection by the opposite parties is inappropriate.

13. No doubt, the TPCODL as per the vesting order is a Special Purpose Vehicle in which Tata Power Company Ltd. has 51% of shares and rest is held by the State Government through GRIDCO and admittedly, an autonomous body so to say and the question is, whether, such an entity having any nexus with the Government or falls within the expression 'State' or 'authority'. 14. At this juncture, it is apposite to reproduce Articles 12 and 226 (1) of the Constitution of India, which read as under:

> "Article 12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."
>
> "Article 226(1). Power of High Courts to issue certain writs:
>
> (1) Notwithstanding anything in article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

15. The State is not defined in Article 12 and according to the decision in **Surendra Kumar Sahoo** (supra), such determination is inclusive in nature and observed in the following words that it brings within its sweep all other authorities within the territory of India or under the control of Government of India and does not mean that such other authorities must be under the control of the Government and the word 'or' appearing therein is disjunctive and similarly, Article 226(1) envisages the power to issue writs to any person or 'authority' and in appropriate cases, to a Government, for enforcement of rights conferred under Part III of the Constitution and for any other purposes and the expression 'authority' though carries a definite connotation but has different dimensions and thus, must receive a liberal interpretation to arrive at a conclusion, as to which, other authorities, could be brought within the ambit of Article 12 or purview of the meaning of the word 'authority' as mentioned in Article 226(1) of the Constitution of India. It is further held therein that the term 'other authorities' contained in Article 12 is not to be treated as ejusdem generis and similarly, the word 'authorities' as appearing in Article 226 has to be taken into consideration for adjudication of the matter itself. In the aforesaid decision, the further conclusion of the Court is that the concept that all the Public Sector Undertakings incorporated under the Indian Companies Act or

Societies Registration Act or any other Act, answering the description of 'State', must be financed by the Central or State Government and be under its deep and pervasive control, in the past couple of decades, has undergone a sea change and thrust now is not upon the composition of the body but the duties and functions performed by it and therefore, the primary question, which is required to be examined is, whether, the entity in question exercises public functions.

16. In Ajay **Hasia Vrs. Khalid Mujib Sehravardi (1981) 1 SCC 722**, the Constitution Bench of the Apex Court summarized the principles to be considered for determination, whether, an entity is a State or instrumentality of the State and the same are stated hereunder:

> "(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency or Government.
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
>
> It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.
>
> (3) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
>
> (4) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classified the corporation as an instrumentality or agency of government.
>
> (5) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

17. In Andi Mukta Sadguru **Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust Vrs. V.R. Rudani,** the Apex Court held as follows:

> "15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. There are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party. XXX

> 17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statue and whose powers and duties are defined by statue. So, Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Court to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose'. XXX
>
> 19. The term 'authority' used in Article 226, in the contest, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art.32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' 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 owed 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."

18. In the above decision, the Supreme Court carved out the following exceptions, such as, if the rights are purely of a private character and if the management of a college is purely a private body with no public duty, writ of mandamus shall not lie, however, it was clarified that since the trust in the said case was an aided institution, it discharges public function like a Government institution by way of imparting education to students, more particularly when, rules and regulations of the affiliating University are applicable to such an institution and in that case, the service conditions of academic staff were not purely of a private character as the staff have the protection against any decision of the University with the creation of a legal right and duty in relationship between them and the Management.

19. In **Andi Mukta Sadguru** (supra), the term 'authority' used in Article 226 of the Constitution of India was explained in the context to receive a liberal meaning unlike the term in Article 12, which is relevant only for the purpose of enforcement of fundamental rights, whereas, Article 226 confers powers to issue writs not only to enforce any of the fundamental rights but also such other rights and therefore, the term 'authority' occurring therein would cover any other person or body performing public duty and the guiding factor is, therefore, the nature of duty imposed on such an entity, namely, public duty to make it eligible to the writ jurisdiction.

20. The decision in **St. Mary's Education Society Vrs. Rajendra Prasad Bhargava and others (2023) 4 SCC 498** referred to by Mr. Parija, learned Senior Advocate relates to a case where the question was, whether, writ jurisdiction under Article 226 of the Constitution of India may be exercised against a private unaided minority educational institution, wherein, the challenge was to the termination of an

employee and therein, the Apex Court held that the same is not maintainable, since public law element was not involved in such action with a conclusion that power of judicial review can be exercised even if the body against which action is sought is not State or instrumentality of State provided there is public element in action is complained of. While explaining further in the decision (supra), it is held that if action impugned has no nexus with public element, even though the private body in question may be discharging public function, writ jurisdiction cannot be invoked in such a case. In the context that the right of the employee originated from a private law, it cannot be enforced taking aid of the writ jurisdiction as it was held and observed therein irrespective of the fact that such institution is discharging public duty or function and scope of mandamus is limited to enforcement of a public duty and the terms of contract should not be construed to be inseparable part to impart education particularly in respect of disciplinary proceedings that may be initiated against the employee. So, the ratio decided by the Apex Court in the above cited case is that even against a private entity not receiving any aid from the Government may be amenable to writ jurisdiction provided the action under challenge has a public element. The following is the law on the issue as enunciated by the Apex Court in **St. Mary's Education Society** case as summarized below:

> We may sum up our final conclusions as under:
>
> (a) An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.
>
> (b) Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.
>
> (c) It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the

absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.

(d) Even if it be perceived that imparting education by private unaided the school is a public duty within the expanded expression of the term, an employee of a nonteaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and nonteaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of nonteaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered by the court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.

(e) From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character.

21. In the case at hand, the TPCODL is since involved in commercial activities, it is claimed that the same is not subject to writ jurisdiction and while advancing such an argument, the decision in **Saiyam Mishra and others Vrs. AIR India Ltd. and others, 2023 SCC OnLine Del 4904** is cited. The TPCODL is a Special Purpose Vehicle in which the TATA Power Company Ltd. holds 51 % of shares and 49% is held by the State Government through GRIDCO. It is claimed that the majority of shareholding is owned by the TATA Power Company Ltd. and hence, there is no State control over the TPCODL and to support such a contention, the decision in **Dinesh Kumar Behera Vrs. Orissa Sponge Iron Limited and others 1992 SCC OnLine Ori 184** is referred and to further contend that an autonomous body having no nexus with the Government does not fall within the definition of the 'State' as appearing in Article 12 of the Constitution of India. The relevant extract of the above decision is reproduced hereinbelow.

"7. It is not necessary to proliferate this judgment with large number of decisions on the point. Suffice it would to notice two Full Bench decisions of this Court in Satrughana Rout v. Managing Director, Tribal Development Co-operative Corporation of Orissa Ltd., 73 (1992) C.L.T. 588 (F.B.), and Banabehari Tripathy v. Registrar of Co-operative Societies I 67 (1989) C.L.T. 5 (F.B.), and a decision of the apex Court in Chandar Mohan Khanna v. The National Council of Educational Research and Training I (1991) 4 SCC 578: A.I.R. 1992 S.C. 76. Question whether an entity can be regarded as an instrumentality of the State would be dependent on various factors which may be peculiar to the facts of a peculiar case. No specific fact can be held to be conclusive and an over-all and cumulative view has to be taken. No straitjacket formula can be laid down. Every autonomous body which seems to have nexus with the Government is not to be encompassed within the sweep of expression "State" as appearing in Article 12. In the modern concept of welfare State, independent institutions corporations and agents are generally subject to the State control. That would, however, not make them State under Article 12. From the Memorandum of Association and the Articles of Association of the Company, the annual report for the year 1988-89 and the prospectus annexed as

> Annexure-6 to the rejoinder affidavit filed, we do not find that the Company is discharging any such functions which may make it an instrumentality of the State. It is not disputed by the learned counsel for petitioner that neither the State of Orissa nor the Central Government holds any share in the Company. It is, however, asserted that the share held by the Industrial Promotion and Investment Corporation of Orissa Limited (in short, 'IPICOL') and some such body corporates which undisputedly come within the ambit of Article 12 of the Constitution, should be considered to be investment by the State. It is, however, not disputed that fairly large amounts have been realised by issue of equity share to the public. From the prospectus and the annual report of 1988-89 to which reference was made by the learned counsel for the parties, we find that 60,00,000 equity shares of Rs. 10/- each have been issued and paid up. After taking into account calls unpaid the amount stands at Rs.5,91,57,250/- as on 31-3-1989. Even if the shareholding of IPICOL and such other corporate bodies is taken up to be a sizeable amount, that per se would not be of great importance. In Chander Mohan Khannas case (supra) and Tekraj Vasandhi alias K.L. Basandhi v. Union of India, (1988) 1 SCC 236: A.I.R. 1988 S.C. 469, it was observed by the apex Court that contribution by the State to a body corporate may be substantial so much so the same constituted the main source of functioning; but that would not be of great importance, since money was also coming from other source. The shareholding by any instrumentality of the State would not make it shareholding by the State itself. We do not find any substance in the argument of the learned counsel for petitioner that because IPICOL and some other body corporates have shares in the Company, that would make it an instrumentality of the State."

22. The contention is that holding of 49 % share in TPCODL by the Government through GRIDCO would not mean that the State has control over the Company and hence, it cannot be brought within the ambit of State under Article 12 of the Constitution.

23. The TPCODL is regulated by the OERC. The expenditure incurred by it is recovered from the consumers through tariff determined by the OERC. It is claimed that the distribution of electricity is merely concerned providing commercial services and, in that connection, one more decision of Delhi High Court in **Netrapal VRs. Tata Power Delhi Distribution Ltd.** in W.P.(C) No.13560 of 2023 is relied on.

24. Admittedly, there is disinvestment and the TPCODL is a Special Purpose Vehicle, which is to manage distribution of power in the State with other related activities. As earlier stated, the State Government has a shareholding of 49%, whereas, the rest is by the Tata Power Company Limited. Whether, in case of a private entity, it would really be amenable to the writ jurisdiction? In case, a company or corporation, where, the State Government has a role or it is financially, functionally or administratively under the control of the Government as has been held by the Apex Court in **Pradip Kumar Biswas Vrs. Indian Institute of Chemical Biology (2002) 5 SCC 111,** whatever, little control of the Government has or may be said to have, is not pervasive in nature and such limited control is purely regulatory and nothing more, however, with the majority view, it was held that when a private body exercises its public functions, even if, it is not a part of the State, the aggrieved person has a remedy, not only under the ordinary law but also under the Constitution of India by invoking writ jurisdiction under Article 226.

Taking into account the case laws referred to hereinbefore, the conclusion of the Court is that in case of public entity, no doubt, action under Article 226 is available. But in case of company or corporation or a non-governmental body, writ jurisdiction may be exercised where some element of public duty and function is involved. It is not about any less shareholding of the Government in a company, a material consideration to determine, whether, the same would be amenable to the jurisdiction under Article 226 of the Constitution of India. It is not about the institution or the entity and composition or structure of the same, which is only to play a role but for the activities undertaken by it, is to determine, whether, to fall within the meaning of 'authority' under Article 226 of the Constitution of India, if the same is in the nature of a public duty, even if, not a State for the purpose of Article 12.

25. In fact, on the point of maintainability, the Court is inclined to sum up its conclusion and the same is as follows:

> (i) To be subject to the writ jurisdiction, the entity must have to fall within the definition of the 'State' under Article 12 or 'authority' as occurring in Article 226 of the Constitution of India;
>
> (ii) Mere shareholding of the Government does not make an entity or body amenable to the jurisdiction exercisable by a writ court, where, it may have only a regulatory role;
>
> (iii) Irrespective of the organizational structure, whether, private or otherwise, if the entity has a public function to discharge, it is to be held as subservient to the writ jurisdiction;
>
> (iv) Despite being involved in a way which may be said to be commercial activities or it generates, some profit from out of which any tariff is charged, the writ jurisdiction is not excepted, if an element of public function is shown to exist;
>
> (v) Notwithstanding the nature of dispute, employees of an entity are entitled to invoke the writ jurisdiction, which is largely involved in public function;

26. As far as the case at hand is concerned, no doubt the TPCODL being a Special Purpose Vehicle is an independent body or entity, nonetheless, is a work force to ensure distribution of power with ancillary activities but since a part of public utility service has an element of public function, hence, shall have to be held as amenable to the writ jurisdiction notwithstanding any such shareholding of a private company and therefore, the argument against maintainability of the writ petition as put forth from the side of the TPCODL is liable to be rejected.

27. The next consideration would be, whether, the order of transfer and posting of opposite party No.3 by a decision of the opposite parties is justified and permissible. According to Mr. Das, learned counsel for the petitioner, opposite party No.3 is an outsider and therefore, he could not have been posted in the capacity, as has been allowed, hence, the impugned decision is liable to be interfered with. It is contended that opposite party No.3 is not a cadre official and as a result of such posting, there would be administrative inconvenience as also the hierarchy being dismantled with some of the officers losing the promotional avenue as well.

28. On the contrary, it is challenged by Mr. Parija, learned Senior Advocate with an argument that the petitioners do not belong to any cadre as against the claim

that opposite party No.3 has been brought into the cadre of E-5 Grade post and it is contended that there is no bar for any posting. The contention is that after vesting of the CESU utility in the TPCODL, all the existing staff/employees of CESU were transferred accordingly. In other words, the employees of the CESU have become the employees of the TPCODL and as such, there is no cadre and reference is made to a decision in the case of **Panchraj Tiwari Vrs. Madhya Pradesh State Electricity Board & Others (2014) 5 SCC 101.** It is argued that once the service is merged with another, the merged service gets its birth in the integrated service and looses the original identity and furthermore, there cannot be a situation where even after merger, absorption or integration, the services, which are merged or absorbed still retain their original status.

29. The impugned decision is justified by the opposite parties referring to the vesting order. At this juncture, it is necessary to extract the relevant clause of the vesting order and the same is as follows;

> "49. Treatment of existing employees.
>
> (a) As part of the terms of RFP, all the existing staff/employees of CESU as on the effective date shall be transferred to TPCODL excluding personnel on deputation from the State Government of Odisha.
>
> (b) CESU has on its rolls, 4,917 (Four thousand nine hundred and seventeen) number of regular employees and 435 (Four hundred thirty-five) number of contractual employees as of 31.05.2020.
>
> (c) All such staff shall form a part of TPCODL and shall be governed by the terms of their appointment. The terms and conditions of employment of these employees in TPCODL shall not be made inferior to their existing service conditions in any manner. TPCODL shall have the operational flexibility to design the organization structure to ensure efficiency in operations and staff deployment."

As per the above, the employees of the CESU brought in to the TPCODL and their terms and conditions of employment shall not be poorer to the existing service conditions, however, the company shall have the functioning flexibility to design the organization structure and the same is for the purpose of ensuring operational efficiency and staff deployment.

30. On a combined reading of the relevant clauses of the vesting order, it would be clear and conspicuous that the TPCODL has been allowed the leverage to devise its own staff deployment, plan and management structure exercising operational flexibility. As per the vesting order, all the employees of the CESU stood transferred to the TPCODL, however, the service conditions of such employees have been protected, which are to be governed as per the terms of appointments, which means, upon the vesting and transfer, the conditions of the service shall not be altered to their detriment.

31. Mr. Parija, learned Senior Advocate refers to a decision of the Apex Court in the case of **B. Varadha Rao Vrs. State of Karnataka and others (1986) 4 SCC 131** to contend that there is no illegality in the transfer and posting of opposite party No.3, which has taken place like any other employees of the TPCODL including the petitioners since, according to the settled principle of law, transfer is an incidence of

service and not a condition of service, so therefore, the challenge to the same on the premise that there is encroachment into the cadre by such posting of opposite party No.3 is completely misplaced.

32. Mr. Das, learned counsel for the petitioners refers to the orders of the OERC in Case No.27 of 2020 to claim that the request for review as against the restrictions placed in the vesting order was denied and dismissed. In reply, the contention of Mr. Parija, learned Senior Advocate is that the review was not filed only on the ground of any such conditional restrictions imposed towards operational flexibility and that apart, the order of the OERC dated 20th December, 2020 makes it clear that no limitation has been placed on the TPCODL to design its organizational structure. Referring to the order of the OERC dated 1st September, 2021 in Case No.87 of 2020 filed by the Union representing the employees of the power sector in the State of Odisha against the recruitment being made by the TPCODL on the ground that the same is in violation of the vesting order and affects the service conditions of the Non-CTC employees was rejected with a finding that the TPCODL is entitled to not only lateral engagement in term of the vesting order but shall have the operational flexibility as well, which includes new recruitments and the same encompasses within itself, the transfer and posting of the employees to the posts, in which such employees to be appointed. In fact, as per the aforesaid order in Case No.87 of 2020, the OERC has allowed new induction in consonance with the vesting order as the TPCODL has been provided the operational flexibility to design the organizational structure, however, observed that recruitment of large number of employees in the executive cadre should not be taken up in a single year as it would have a huge impact on the employees costs and consequently, on tariff and further recognizing the deficit of man power and aware of the fact that in the DISCOMs, no new significant recruitment has been made during a period of ten years and the ratio of the employees vis-à-vis consumers has also widened over the years and bringing new employees is to bridge the gap for efficient functioning of the DISCOMs and as such, the Commission is not averse in allowing employee costs, which is just and as per the norms of the relevant industry and the decision is to avoid any such large scale recruitment in a short period was considered to choke the career growth besides causing tariff shock, instead, it should be spread over a longer period. In such view of the matter, new recruitments are not really prohibited, which the TPCODL can undertake as a means of ensuring operational efficiency to design the organizational structure but at the same time, it is not to affect the service conditions of the erstwhile employees of the CESU, who have been absorbed and have become the employees of the TPCODL post-vesting.

33. In **Rajendra Singh and others Vrs. State of U.P. and others (2009) 15 SCC 178,** the Apex Court had the occasion to consider the scope of judicial review in dealing with a dispute over transfers of employees and held in the following words:

> "8. Insofar as the transfer of Writ Petitioner from Ghaziabad-IV to Hapur-II is concerned, the High Court found that the transfer order has not affected his service

conditions AIR 1991 SC 532 (1994) 6 SCC 1998 and pay and other benefits attached to the post which was held by him. As a matter of fact, the High Court did not find any flaw in the transfer of the Writ Petitioner from Ghaziabad-IV to Hapur-II. As regards Respondent No. 5, the High Court considered the matter thus:

"...In our view, it is evident that the respondent No. 5 also cannot be said to be an Officer having a better conduct and integrity in comparison to the petitioner justifying his posting at Ghaziabad and in this regard, it appears that I.G. (Stamps) did not give correct information to the Principal Secretary. However, it cannot be held that the respondent No. 1 in passing order dated 31st July, 2007 has acted maliciously or for extraneous reasons amounting to malafide. Once the basic ground of challenge to the impugned order of transfer that the same is malicious in law falls, we do not find any reason to interfere with the impugned order of transfer, transferring the petitioner from Ghaziabad to Hapur. It is not the case of petitioner that his transfer is contrary to rules or has been issued by an authority who is not competent. It is well settled that an order of transfer is amenable for judicial review on limited grounds namely it is contrary to rules or has been passed an incompetent authority or is a result of malafide. In view of admission on the part of the respondent No. 1 in his Counter Affidavit that the respondent No. 5 has been found guilty of serious misconduct for causing loss to the Government revenue by acting without jurisdiction and colluding evasion of stamp duty, in our view transfer of the respondent No. 5 to Ghaziabad cannot be sustained in view of further admission on the part of the respondent No. 1 that the interest of department requires posting of an honest and efficient person at Ghaziabad."

"9. It is difficult to fathom why the High Court went into the comparative conduct and integrity of the petitioner and Respondent No. 5 while dealing with a transfer matter. The High Court should have appreciated the true extent of scrutiny into a matter of transfer and the limited scope of judicial review. Respondent No. 5 being a Sub-Registrar, it is for the State Government or for that matter Inspector General of Registration to decide about his place of posting. As to at what place Respondent No. 5 should be posted is an exclusive prerogative of the State Government and in exercise of that prerogative, Respondent No. 5 was transferred from Hapur-II to Ghaziabad- IV keeping in view administrative exigencies."

34. Similarly in **Pubi Lombi Vrs. State of Arunachal Pradesh & others 2024 SCC OnLine SC 279**, the Supreme Court concluded and held as under:

"15. In view of the foregoing enunciation of law by judicial decisions of this Court, it is clear that in absence of (i) pleadings regarding malafide, (ii) nonjoining the person against whom allegation are made, (iii) violation of any statutory provision (iv) the allegation of the transfer being detrimental to the employee who is holding a transferrable post, judicial interference is not warranted. In the sequel of the said settled norms, the scope of judicial review is not permissible by the Courts in exercising of the jurisdiction under Article 226 of the Constitution of India."

35. The settled legal position of law is that scope of a writ court is narrow and limited unless such transfer is vitiated by any statutory law or actuated with malafide. The Courts are held to be reluctant in interfering in the transfer of employees as concluded in **Rajendra Singh** (supra) referring to the decision in **Shilpi Bose and others Vrs. State of Bihar and others1992 SCC (L&S) 127,** wherein, it was held that a Court should not interfere with a transfer, which is made in public interest and for administrative reasons, unless the same is in violation of any mandatory statutory rule or on account of any glaring malafide. Considering the

above case laws, the Court is to hold that a transfer is permissible and decision towards the same lies with the employer and unless, there is violation of any statutory rules or is alleged of being malafide, a writ court is not to exercise the jurisdiction, as in any case, transfer is an incidence of service.

36. Whether, opposite party No.3 is included in the cadre, hence, opposed by the petitioners? It is not a case of merger of cadre. The petitioners and opposite party No.3 are the employees of the TPCODL. However, the grievance of the petitioners is that opposite party No.3 posted as Divisional Manager (BED), Bhubaneswar, which is not a cadre post for him and on the contrary, it belongs to the cadre strength of petitioner No.1. The contention is that since opposite party No.3 does not belong to the cadre of the Divisional Manager or E-5 Grade or any of the Grade from E-1 to E-10, therefore, such posting is not permissible. The job of opposite party No.3 as further alleged is different all together and it has nothing to do with the duty and responsibility assigned for the officials of E-1 to E-10 Grade and he having never joined in any of the cadres or even worked for a day, the posting as the Divisional Manager is illegal and in violation of the cadre rules. The reply of Mr. Parija, learned Senior Advocate is that such grievance of the petitioner is ex-facie illusory and bereft of any merit and hence, does not call for any attention. It is contended that the opposite parties treat all the employees at par and does not discriminate and to ensure career advancement and operational efficiency side by side, opportunities are provided to all the employees to take up critical and challenging roles through horizontal and vertical movements in the organizational structure. Is the impugned order of transfer and posting vis-à-vis opposite party No.3 and others affects the service conditions of the petitioners? According to the opposite parties, there is no breach in the existing service conditions of the petitioners and the same is merely an apprehension devoid of any merit and even factually erroneous and therefore, no valid reason exists to interfere with the order of transfer. Referring to the Regulations, it is further submitted that every officer is liable for transfer to any office, place of work of the company. It is contended that the Board of Directors of the TPCODL, which includes the Chief Secretary, Government of Odisha and nominees of Tata Power Company Limited duly considered the requirements for efficiently operating the organization and approved a Schedule of Authority (SOA), wherein, CTC employee with the designation of HOD has been placed at a level with DGM/AGM of the non-CTC employee and accordingly, their authorities and responsibilities at such levels are fixed. It is lastly contended that the petitioners are rather trying to create a hostile environment within the organization and interfering with the decision of the Board of Directors, which is in accordance with the vesting order and as per the SOA.

37. In case of promotion of E-5 cadre of an employee, it is claimed that such cadre has multiple posts to accommodate and the same is not in any way affected due to the posting order and it is not that such promotion from E-4 cadre needs a posting as the Divisional Manager, (BED), Bhubaneswar. It has been brought to the notice of the Court that E-5 cadre allows number of postings in different

departments and an officer on promotion can be posted in any of the positions in such departments and while claiming so, Annexure-M/1 of the counter affidavit is referred to. A distinction is also sought to be made that promotion of the petitioners and for that matter, other officials is not affected that the chance of being promoted is not a substantive right, though, is the zone of consideration. Some citations are referred to buttress the above argument but there is no quarrel over the settled legal position that everyone has a right to be considered for promotion but not the chance of promotion, which cannot be predicated. As regards, the plea or concern of the petitioners, it is not a case of merger of cadres but at the same time, no encroachment into the cadre is established. If someone, who may not be of the cadres to which the petitioners belong but by his posting to manage the affairs of a particular department, in one of such capacities, which one among the cadres do manage and normally deal with, in the humble view of the Court, cannot be held to be a case of entering into a cadre destroying the hierarchy. If one sneaks in to the cadre, certainly the same cannot be condoned. But, without any such exercise, mere posting of someone in an establishment, like the present, to discharge a particular function, where operational flexibility is permissible to uphold and ensure efficiency, in the ultimate view of the Court, it would not be just and proper to attribute any kind of impropriety to the impugned decision.

38. At the same time, the Court, before winding up, is not hesitant to observe that notwithstanding the operational flexibility, large scale postings by lateral means is not expected. Any such posting must necessarily be need based and considering the exigency and should not normally be a routine exercise, the reason being quite obvious, a situation, which the Board of Directors of the TPCODL can only fathom and deal with sensibly.

39. Hence, it ordered.

40. In the result, the writ petition stands disposed of with the conclusion reached at and observations made herein above. In the circumstances, however, there is no order as to costs.

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

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2025 (I)-ILR-CUT-165

ANANDA DEVI SINGH & ORS.
V.
GAJRAJ SINGH @ GAJRAJ SINGHDEO @ BIRENDRA KUMAR SINGH & ORS.

[RSA NO. 342 OF 2017]

22 NOVEMBER 2024

[SASHIKANTA MISHRA, J.]

Issues for Consideration

1. Whether the suit is barred by Section 58 of the Limitation Act, 1963.
2. Whether findings of the First Appellate Court in declaring right, title and interest of both the parties over the suit properties is sustainable in law.
3. Whether Jurisdiction of Civil Court is ousted on the face of the orders passed by the Revenue Authority.

Headnotes

(A) DECLARATION OF RIGHT, TITLE AND INTEREST – Plaintiff filed Civil Suit No. 85 of 2006 in the Court of Civil Judge (Sr. Division), Jharsuguda for declaration of right, title and interest, confirmation of possession and alternatively recovery of possession, if dispossessed during the pendency of the Suit – Suit was decreed – Defendants No. 1 to 6 preferred First Appeal – First Appeal was allowed by declaring that both parties have got right, title and interest over the suit properties and their possession was confirmed – Whether findings of the First Appellate Court is sustainable.

Held: No – The impugned judgment passed by the First Appellate Court is set aside and the judgment and decree of the Trial Court are confirmed. (Para 20)

(B) JURISDICTION OF CIVIL COURT – It is the settled position of law that exclusion of the jurisdiction of the Civil Court is not be readily inferred but must either be explicitly expressed or clearly implied – Even in cases where the statutory tribunal has not acted in conformity with the fundamental principle of judicial procedure, the Civil Court can interfere. (Para 15.4)

Citations Reference

Magulu Jal and others vs. Bhagaban Rai and others, **AIR 1975 Orissa 219 : ILR (1975) Cut 789;** Dhulabhai vs. State of M.P. and another, **AIR 1969 SC 78 ─ referred to.**

List of Acts/Rule

Limitation Act, 1963; Odisha Government Land Settlement Act, 1962; Odisha Government Land Settlement Rules, 1983.

Keywords

Declaration of right, title and interest; Confirmation of possession; Recovery of possession; Limitation; Major settlement; Possession; Partition; Co-sharers; D.C. Patta; Ancestral property; Partition by metes and bounds; Acquisition.

Case Arising From

Judgment dated 22.07.2017 passed by the Addl. District Judge, Jharsuguda in RFA No. 13 of 2015.

Appearances for Parties

For Appellants : M/s. Ajit Ku. Hota & D.P. Dash
For Respondents : M/s. Sanjeev Udgata, S. Udgata & A. Mishra (Respondent No.1)
M/s. Bibekananda Bhuyan, S. Udgata, S.S. Mohapatra & S. Sahoo (Respondent Nos.3 to 5 & 7 to 9)

Judgment/Order

Judgment

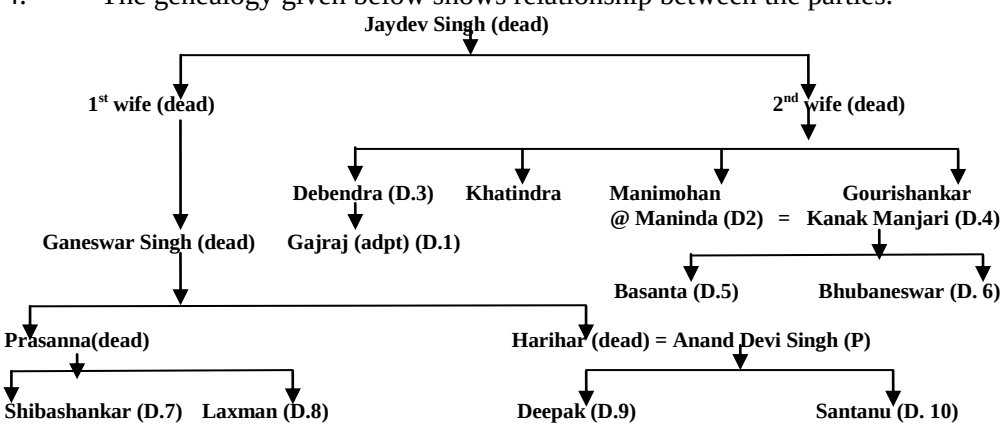
SASHIKANTA MISHRA, J.

This is a plaintiff's appeal against a reversing judgment. Judgment passed by learned Addl. District Judge, Jharsuguda on 22.07.2017 followed by decree in RFA No. 13 of 2015 is impugned, whereby the judgment dated 24.02.2015 passed by learned Civil Judge (Sr. Division), Jharsuguda followed by decree in Civil Suit No. 85 of 2006 was reversed.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. The plaintiff filed the suit for declaration of her right, title and interest and that of the proforma defendant Nos. 7 to 10 of the suit land, confirmation of possession and alternatively recovery of possession, if found to be dispossessed during the pendency of the suit.

4. The genealogy given below shows relationship between the parties.



5. Laxman (D.8) Basanta (D.5) Harihar (dead) = Anand Devi Singh (P) Deepak (D.9) Bhubaneswar (D.6) Santanu (D.10) The suit plot appertains to Hamid Settlement (HS) Plot No. 67/9 measuring Ac.8.00 dec. under Khunti No.1, corresponding to Major Settlement(MS) Plot No. 74 and Khata No. 113, further corresponding to Mutation Plot No. 74/1374 under Khata No. 108/47 of Mouza-Kirarama.

6. The case of the plaintiff, briefly stated, is that the predecessor-in-interest of the plaintiff and proforma defendant Nos. 7 to 10 namely, Ganeswar Singh was a land oustee under the Hirakud Dam Project. Several properties belonging to said Ganeswar Singh and others in the Mouza was acquired for the said project. As per the settlement policy, the State Government allotted properties to the oustees. As per Revenue Misc. Case No. 176/1956-57, the then Addl. Commissioner of Hirakud Land Organization settled the suit land in favour of Ganeswar Singh with the stipulation that the land should be reclaimed within two years from the date of order i.e., 17.08.1957. It is stated that late Ganeswar reclaimed the land and continued to possess the same having exclusive right, title and interest. Pursuant to Revenue Department letters dated 17.07.1990, 22.05.1990 and 22.09.1997, the concerned Tahasildars were directed to take up mutation of the allotted properties after making due enquiry. As such, the Tahasildar, Lakhanpur vide order dated 29.08.2000 and 01.11.2000 directed recording of the properties jointly in the name of the plaintiff and all the defendants instead of recording the same exclusively in the name of Ganeswar Singh. Though the plaintiff objected before the Tahasildar but the same was not considered. Moreover, the order of mutation was passed without issuing notice to the legal heirs of Ganeswar Singh nor any field enquiry was made. It is alleged that the said order was obtained by defendant No.1 and his other brothers. When the above fact came to the knowledge of the plaintiff, a Mutation Appeal was filed, being 12/2013 before the Sub-Collector, Jharsuguda but the appeal was dismissed vide order dated 16.09.2005. Taking advantage of joint recording of the suit properties, the defendants obtained an order of partition in Mutation Case No. 425 of 2001 but the same was set aside in appeal by the Sub-Collector, Jharsuguda. Under such facts, the plaintiff filed the suit seeking the relief as stated hereinbefore.

7. The case of the contesting defendants, who filed joint written statement is that both parties are descendants of the common ancestor, Jayadev Singh. While the plaintiff and defendant Nos. 7 to 10 are the legal heirs through his first wife, Bhagabati, the contesting defendants are the legal heirs through his second wife, Chaaya Devi, whom Jayadev had married after death of Bhagabati. The common ancestor, Jayadev was the recorded tenant of the properties under Khunti No.1 measuring an area of Ac.103.86 dec. and Khunti No.2 measuring Ac.79.81 dec. in the Hamid Settlement. After death of Jayadev, Ganeswar being his eldest son was looking after the affairs of the family, during which the properties came to be acquired for the Hirakud Dam Project. By then Jayadev was already dead, for which the notification was issued in favour of Ganeswar, he being the Lambardar Zamidar/Gountia. It is further stated that the properties of common ancestor being

acquired for the Hirakud Dam Project, all his legal heirs have right, title and interest over the same. During Major Settlement, other properties of Jayadev Singh under MS Khata No. 64, 65 and 110 of the same Mouza were jointly recorded and all legal heirs are in peaceful possession without any partition by metes and bounds. During the year 1997, the above properties were partitioned with the consent of co-sharers. Thus the properties acquired for the Hirakud Dam Project being the property of Jayadev and not exclusively of Ganeswar, the other properties allotted by the State, i.e. the suit property is the property of both parties. For the above reason, the properties were jointly recorded in the Mutation Case No. 7 of 1998 and the appeal was rightly dismissed by the Sub-Collector. Basing on the rival pleadings, the trial Court framed the following issues for determination.

1. Whether the suit is maintainable?

2. Whether there is cause of action to bring the suit?

3. Whether the suit is barred by any other law and this Court has no jurisdiction to entertain the suit?

4. Whether the mutation of the suit in favour of the defendants No.l to 6 in respect of 'A' schedule land is void?

5. Whether the plaintiff and Pro-forma defendants No.7 to 10 have right, title and interest over 'A' schedule land?

6. Whether their possession over the suit land can be confirmed?

7. Whether the possession of the suit land can be delivered in favour of the plaintiff and

Pro-forma defendant Nos.7 to 10 in case they are found dispossessed of during the pendency of the suit?

8. Whether the plaintiff is entitled to any other relief or reliefs as prayed for?

9. To what other relief or reliefs, the plaintiff is entitled to?

8. Issue Nos. 4 and 5 being the important issues, were taken up together for determination at the outset. The trial Court held that the only point which needed consideration was whether all the sons of Jayadev Singh, in whose name the land acquired for Hirakud Dam Project was exclusively recorded, are entitled to equal share over the suit land in respect of which D.C. Patta had been issued exclusively in the name of Ganeswar Singh as land oustee of the Project. The trial Court further found from the pleadings that Jayadev Singh died in the year 1950. Each of his sons being a coparcener in the joint Hindu family had equal right under the old Hindu Law. The said property was the ancestral property of Jayadev Singh as he was the Kharposhdar Zamidar of the village, which was acquired by him from his ancestor by inheritance and succession. The trial court further noted that it was not the case of the parties that any land of MS Khata No. 64, 65 and 110 of the Mouza had been acquired for the project but it showed that the sons of Jayadev were separate and separately possessing the lands inherited by them. As regards the Hamid Settlement Khunti Nos. 1 and 2, major portion of the land was acquired for the project. The settlement in OEA Case No. 29/70 in respect of the portion of HS Khunti No.1 in the name of all co-sharers does not by itself indicate as to why D.C. Patta in respect

of suit land was granted in the name of Ganeswar Singh alone. Ordinarily, even if the settlement was in the name of one co-sharer it would enure to the benefit of all but having held so, the trial court on further scrutiny of the D.C. Patta marked Ext.2, found that the same was issued in the name of Ganeswar Singh alone as land oustee. Further, from Ext.1, which is the notification dated 03.09.1955 of Hirakud Dam Project, Ganeswar Singh was the rayat in respect of HS Khunti No.1 and he and his brothers were rayats in respect of HS Khunti No.2. The brothers of Ganeswar never challenged the grant of D.C. Patta in the name of Ganeswar Singh alone before any competent authority or by filing a suit. The trial Court also noted that no reason was cited for grant of DC Patta in the name of Ganeswar Singh alone. The trial Court further took note of the fact that as per decision taken in a high level meeting held on 17.12.1996, it was specifically decided that Mutation in favour of D.C. Patta holders or their their legal heirs should be done through a special drive. Accordingly, D.C. Patta Mutation Case No. 7/98 was initiated, whereby the land was mutated in favour of all the successors of Jayadev Singh. The trial Court held that the Tahasildar had not considered the fact that D.C. Patta in respect of the suit land was issued only in favour of Ganeswar Singh and therefore, could not have gone beyond the same. The Tahasildar was never instructed by the Government to mutate the allotted lands in favour of successors of originally recorded tenants of HS Khunti from which the land was acquired. So the mutation of the suit land in the names of all the successors of Jayadev Singh and the order of the Sub-Collector upholding the same in appeal are beyond the instructions of the Government. The trial Court further took note of the Article (sic) 230 (3) of Mulla's Hindu Law that Government grant in favour of one member of the family is his separate property unless it appears from the grant that it was intended for the benefit of the family. Ext.2 being the D.C. Patta did not mention anything to show that it was intended for the benefit of the family. Thus, the trial Court held that the order passed by the Tahasildar in the Mutation Case and the order passed by the Sub-Collector confirming the same in appeal did not confer any right, title and interest on defendant Nos.1 to 6 nor can it operate to take away the exclusive right, title and interest of the plaintiff and proforma defendant Nos. 7 to 10.

9. On such findings on the main issue, the remaining issues were answered accordingly and the suit was decreed by declaring the right, tittle and interest of the plaintiff and defendant Nos. 7 to 10 over the suit land and by confirming their possession.

10. Being aggrieved, the contesting defendant Nos. 1 to 6 carried the matter in appeal. Considering the grounds cited in the appeal and the contentions raised by the parties, the first appellate Court framed the following point for determination:

> *"Whether the suit in the present form is maintainable and whether the respondents have got exclusive right, title and interest over the said properties and their possession over the same is required be confirmed or the suit property is the joint property of both parties ?*

11. The First Appellate Court analyzed the entire evidence and documents on record and held that Ganeswar being the eldest son of Jayadev and Lambardar Gountia, must have been allotted the suit property not in his individual capacity but in the capacity of eldest member of the family. The D.C. Patta (Ext.2) is to be treated as letter of allotment and not conferring exclusive title in favour of Ganeswar. Before confirmation of title, sufficient procedure was to be followed and the property was to be settled by the concerned Tahasildar. The plaintiff had not proved that Ganeswar had complied with the direction of the authorities to reclaim the property in his individual capacity. According to the First Appellate Court, the trial Court erred by placing undue emphasis on Ext.2. The First Appellate Court further found that there was no proof in support of the claim of the partition, particularly in respect of the properties acquired for the Hirakud Dam Project. Since the common ancestor, Jaydev is the recorded tenant of the property recorded under Khunti No.1 and 2 and in the absence of anything to show as to why Khunti No.1 was recorded exclusively in the name of Ganeswar, the plaintiff cannot take advantage of the notification (Ext.1) so as to claim exclusive title. In the absence of any clear proof of partition between the parties or their predecessor in interest, it cannot be said that the suit property was exclusively meant for the plaintiff and proforma defendants but it was for the benefit of the entire family. The First Appellate Court further held that the suit was barred by limitation under Article 58 of the Limitation Act. The appeal was thus allowed by declaring that both parties have got right, title and interest over the suit properties and their possession was confirmed.

12. Being further aggrieved, the plaintiff and proforma defendants have filed this appeal, which was admitted on the following substantial questions of law.

> *(i) Whether the learned Trial Court/Civil Court had no jurisdiction and powers, and thereby wronged itself by trying the Suit, on the face of right, title, interest and possession of the present appellants, being illegally encroached upon by the present Respondents behind the back of the present appellants, by the orders of fiscal tribunals contrary to the Resettlement Scheme/Policy (Ext.4) under the deliberate nexus and collusiveness particularly with Resp. no.1?*
>
> *(ii) Whether on the basis of order of allotment of suit property in favour of Ganeswar Singh in Exts. 2 and 3, Civil Court has power to sit over the finding of the order in Exts. 2 and 3, and say that it was inured to the benefit of the family members?*
>
> *(iii) Whether the learned First Appellate Court / Addl. District Judge erred in law in holding that the suit is barred by the Sec. 58 of the Limitation Act?*
>
> *(iv) Whether the learned First Appellate Court / Addl. District Judge erred in law in ignoring the statutory provisions of Rule 6(2) of OGLS Rules, and the Resettlement Scheme dt. 22.5.1990 at Ext. 4 for the purposes of mutation of land allotted with D.C. Patta during the years 1957-61 as at Exts. 2 and 3 ?*
>
> *(v) Any other substantial question of law to be formed at the time of hearing."*

13. Heard Mr. A.K Hota, learned counsel for the appellants; Mr. S. Udgata, learned counsel appearing for respondent No.1 and Mr. B. Bhuyan, learned counsel for other respondents.

14. The rival contention of the parties would be referred to while answering the substantial questions of law framed individually.

15. **Substantial question No.(i)**

(i) Whether the learned Trial Court/Civil Court had no jurisdiction and powers, and thereby wronged itself by trying the Suit, on the face of right, title, interest and possession of the present appellants, being illegally encroached upon by the present Respondents behind the back of the present appellants, by the orders of fiscal tribunals contrary to the Resettlement Scheme/Policy (Ext.4) under the deliberate nexus and collusiveness particularly with Resp. no.1?

Mr. Hota would submit that admittedly Khunti No.1 was recorded exclusively in the name of Ganeswar, while Khunti No.2 in the names of all co-sharers. As per the D.C. Patta marked Ext.2, the property of Ganeswar being acquired, he was allowed to reclaim the allotted land in lieu thereof. In the notification dated 22.05.1990, marked Ext.4, the procedure was laid down to allot the land to a genuine oustees as per D.C. Patta or his legal heirs and mutation proceeding was to be initiated in their names separately to decide tenancy rights. Therefore, on the basis of D.C. Patta (Ext.2), the names of the legal heirs of Ganeswar ought to have been mutated but the Tahasildar in complete violation of the resettlement scheme and the D.C. Patta wrongly mutated the property in names of all the co-sharers. The Sub-Collector also dropped the Mutation Appeal for want of authority. As such, accordingly to Mr. Hota, the plaintiff and the proforma defendants had no other remedy available except to file the suit.

15.1 Per contra, both Mr. Udgata and Mr. Bhuyan have submitted that a Hindu family is always presumed to be joint unless proved otherwise and that mere separate recording as per the ceiling will not be akin to partition by metes and bounds. The defendants pleaded that they were separate but never stated that there was partition by metes and bounds. Since all the co-sharers were land oustees, any grant or allotment of land in lieu of the land acquired, even if made in favour of one co-sharer, shall always enure to the benefit of all co-sharers.

15.2 Admittedly, Jayadev Singh was the common ancestor. Ganeswar was his son through his first wife, while the contesting defendants belong to the branch created by his four sons through his second wife. The Tahasildar, noting the above fact as also the possession of the defendants during field enquiry rightly allowed the mutation in their favour. The appeal preferred against the said order was dismissed. The question is, can the Civil Court sit in further appeal over the orders passed by the Revenue Authority.

15.3 From the pleadings and the rival contentions of the parties, it is seen that as per Notification No. 130 of the Hirakud Dam Project dated 03.09.1955, Ganeswar

Singh was the rayat in respect of HS Khunti No.1 while Ganeswar Singh and his brothers (through the second wife) were rayats jointly in respect of HS Khunti No.2. Land from both HS Khunti Nos. 1 and 2 were acquired for the Hirakud Dam Project. D.C. Patta was however, granted only in the name of Ganeswar Singh. This was never challenged by the contesting defendants at any point of time nor any suit was filed by them seeking declaration of their right, title and interest over the said land granted vide D.C. Patta, marked Ext.2. It has been argued and rightly so, that D.C. Patta does not by itself create a title but is only a letter of allotment. Such grant was subject to the condition that the allottee would reclaim the land within two years from the date of order i.e., 17.08.1957. It is not disputed that Ganeswar had reclaimed the land within the period for which notice of allotment was issued in his favour on 19.01.1961. As per the decision taken by the Government in Revenue Department, the concerned Tahasildars were directed to take up the matter for mutating and settling the names of the allottees or in the names of their legal heirs after due enquiry. The letter dated 22.05.1990, marked Ext.4, issued by the Additional Secretary to Government in Revenue Department and addressed to the RDC, Northern Division, Sambalpur lays down the detailed procedure to be followed for settlement of the land in favour of the oustees as was granted to them. The Tahasildar, Lakhanpur accordingly initiated a suo motu mutation case, the order sheet of which was admitted into evidence as Ext.5. The concerned R.I./Amin was directed to conduct field enquiry to ascertain the possession but most importantly, no notice appears to have been issued to the parties. The final order of mutation appears to have passed entirely basing on the field enquiry conducted by the R.I./Amin. The Tahasildar appears to have been lost sight of the fact that the D.C. Patta was granted only in favour of Ganeswar Singh with the condition of reclaiming the land within two years, which he complied. Therefore, as per Ext.4, only the original allottee or his legal heirs are entitled to be settled with the land. The Tahasildar instead, basing on the genealogy of the parties settled the land in favour of all the co-sharers, which is contrary to the instructions of the Government referred above. There was no instruction by the Government to the Tahasildar to mutate the allotted lands in favour of the successors of the originally recorded tenants for HS Khunti from which land was acquired for Hirakud Dam Project. Therefore, the order of mutation as confirmed in appeal cannot be held to have been passed in conformity with the instructions of the Government. The plaintiff also claims title on the basis of the position of law enumerated in Article 230 (3) of Mulla's Hindu Law to the effect that a Government grant in favour of a member of a joint family is his separate property unless expressly intended for the benefit of the joint family. There is nothing in the D.C. Patta vide Ext.2 to suggest that it was so intended. Under such circumstances, there was no other remedy available to the plaintiff than to approach the Civil Court for appropriate relief.

15.4 The contentions of the contesting defendants that the Civil Court has no jurisdiction or power to adjudicate upon the dispute on the face of the orders passed by the Revenue Authority cannot be accepted. It is the settled position of law that

exclusion of the jurisdiction of the Civil Court is not be readily inferred but must either be explicitly expressed or clearly implied. Even in cases where the statutory tribunal has not acted in conformity with the fundamental principle of judicial procedure, the Civil Court can interfere. The oft quoted judgment passed by a Full Bench of this Court in the case of **Magulu Jal and others vs. Bhagaban Rai and others**[1] can be referred to, wherein the following observations were made.

> *13. In Secy. of State v. Mask and Co., AIR 1940 PC 105, their Lordships made the following observation :*
>
> *"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."*
>
> *It is to be noted that even where the jurisdiction of the Civil Courts is excluded it has jurisdiction to examine cases if the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.*

In such view of the matter, substantial question of law No.(i) is answered accordingly.

16. <u>Substantial Question of Law No.(ii)</u>

> *(ii) Whether on the basis of order of allotment of suit property in favour of Ganeswar Singh in Exts. 2 and 3, Civil Court has power to sit over the finding of the order in Exts. 2 and 3, and say that it was inured to the benefit of the family members?*

Mr. Hota would argue that the DC patta vide Ext.2 followed by the letter of allotment vide Ext.3 clearly shows the suit land to have been granted/allotted exclusively in the name of Ganeswar Singh. Such being the case, as per the Article 230 of Mulla's Hindu Law, it would be the separate property of Ganeswar.

16.1 Per contra, both Mr. Udgata and Mr. Bhuyan would argue that admittedly the land is jointly recorded in the ROR. A Hindu Family is presumed to be joint. In the written statement, the contesting defendants have referred to separation but not partition by metes and bounds. Since all the co-sharers were land oustees, which was also proved in the field enquiry conducted in the mutation proceeding, all are entitled to be allotted with land. Thus, even though the D.C. Patta was for some reason granted exclusively in faovur of Ganeswar Singh, it would always enure to the benefit of all co-sharers, particularly in the absence of evidence regarding prior partition among them.

16.2 As has already been stated hereinbefore, the land under HS Khunti No.1 stood exclusively recorded in the name of Ganeswar Singh while the land under HS Khunti No.2 was recorded in the name of Ganeswar Singh and the other co-sharers.

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1 AIR 1975 Orissa, 219: ILR (1975) Cut 789

Land was acquired from both the Khuntis. DC Patta was however granted only in favor of Ganeswar Singh, which was never challenged by his other co-sharers. Such being the case, what would be the effect of such exclusive allotment in favour of one of the co-sharers in absence of any partition by metes and bounds. It must however, be mentioned that there is some evidence regarding separate possession of MS Khata Nos. 64, 65 and 110 of the same Mouza by the co-sharers as Class-1 heirs of Jayadev Singh. Of course, no land from the aforesaid Khatas was acquired for Hirakud Dam Project. So it can at best be held that the co-sharers were possessing their lands separately but there is no clear-cut evidence regarding partition of the lands by metes and bounds. Even then, in the absence of any challenge to the DC Patta issued way back in 1957, the position of law as reflected in Article 230(3) of Mulla's Hindu Law referred by the Trial Court (corresponding to Article 228(3) of Mulla's Hindu Law, Twentieth Edition), the property granted by the Government to a member of the joint family becomes his separate property unless it appears from the grant that it was intended for the benefit of the family. Law therefore, makes a distinction between other kinds of acquisition of lands and those by way of Government grant. The contention raised by the contesting defendants may hold good in case of other acquisitions but in so far as Government grant is concerned, the position of law is as referred to hereinabove. Perusal of Ext.2 , which is the copy of the order passed by the Additional Deputy Commissioner, Hirakud Land Organization, Sambalpur on 17.08.1957 in Revenue Case No. 176 of 1956 regarding allotment of waste land from village Kirarama in Brajarajnagar PS contains the list of 19 allottees including Ganeswar Singh who was allotted with 8 acres. The said order, inter alia, reads as follows:

> *The report of the Addl. Tahasildar is seen and the villagers were also .....(illegible). The nineteen persons named in the allotment statement ... page 3/C of this record are allotted waste lands as described in the schedule below provisionally for the purpose of reclamation only. They will complete the reclamation within two years from this date failing which they will lose their rights under this order and the lands may be given away to other persons for reclamation. They may get their names mutated as tenants after they complete the reclamation.*

16.3 As already stated, there is nothing on record to show that Ganeswar Singh had failed to comply with the condition of reclaiming of land within the stipulated period of two years. Thus, from what has been narrated hereinabove and particularly, considering the fact that the other co-sharers had never challenged the order under vide Ext.2 or the actual allotment vide Ext.3, it cannot be held that the land so allotted to Ganeswar Singh would enure to the benefit of the other co-sharers. It must be noted that the First Appellate Court has proceeded on the presumption that Ganeswar being the eldest son of Jayadev and Lambardar/Gountia must have been allotted the suit property not in his individual capacity but in the capacity of the eldest member of the family. Further, the observation of the First Appellate Court that the trial Court has taken into consideration extraneous materials like allotment of properties in the name of the sons of another allottee, named, Kokia is a product of misreading of the trial Court's order. In this regard it is pertinent to

note that the trial Court, as an illustration had referred to other co-allottees under Ext.2 and drawn parallel therefrom to reject the arguments made by the contesting defendants that such major portion of land being granted in favour of Ganeswar Singh implies that the same was granted also in favour of his brothers. It is in this context that the trial Court referred to the allottees mentioned in Col No. 14, 15 and 16 where DC Patta had been issued in the names of three sons of a co-allottee named Kokia in respect of 6 acres of land and therefore, held that had such being the intention of the Government, the names of brothers of Ganeswar Singh could also have been mentioned in other columns. This Court fully concurs with the above reasoning of the trial Court. The substantial question of law No.(ii) is answered accordingly.

17. **Substantal Question No.(iii)**

(iii) Whether the learned First Appellate Court / Addl. District Judge erred in law in holding that the suit is barred by the Sec. 58 of the Limitation Act?

In this regard Mr. Hota would argue that the finding of the first appellate Court that the suit was barred by limitation as per Article 58 of the Limitation Act is erroneous for the reason that the suit being filed for declaration of right, title and interest and possession, Article 58 has no application rather, Article 65 applies to the case which provides the prescribed period of 12 years. As regards the other prayer i.e., for a declaration that the contesting defendants have no right to be settled with the land, Article 58 applies whereby the prescribed period is three years from the date the right to sue first accrues. Since the mutation appeal was disposed of on 16.09.2005, the right to sue accrues from that day and the suit having been admittedly filed within three years from such date, is therefore, within time.

17.1 Per contra, both Mr. Udgata and Mr. Bhuyan would argue that according to plaintiff, the cause of action arose on 29.05.2000 i.e., the first date on which the order of mutation was passed and in view of the relief claimed the suit should have been filed within three years as per Article 58. Further, even if the plea of limitation was not specifically raised, it is obligatory on the part of the Court as per Section 3 of the Limitation Act to be satisfied with regard to limitation.

17.2 Reference to the plaint would reveal that the following relief was claimed:

(i) A declaration to the effect that the defendant No.l to 6 have no right to be mutated and/or settled in respect of schedule "A" land.

(ii) That the plaintiff and proforma defendant No. 7 to 10 have right, title and to be settle with schedule "A" land their possession be confirmed and in alternative if court find that the plaintiff and defendants 7 to 10 have been disposed from the schedule land in the meantime than recovery of possession of the same from defendant 1 to 6 be ordered after evicting them there from.

Any other relief/relief"s as the Court deems fit and proper and equity be also passed in favour of the plaintiff.

Relief No.(i) quoted above is covered under the residuary Article i.e., Article 58 which reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
58. To obtain any other declaration	Three years	When the right to sue first accrues.

17.3 In paragraph-11 of the plaint the cause of action has been described in the following words:

> *"That the cause of action of this suit arose at Village Kirarama within the jurisdiction of this court when mutation of defendants No.l to 6 were allowed and settlement of the same was made by Tahasildar, Lakhanpur on dtd.29.05.2000 and later when sub-Collector dismissed the mutation appeal No.12 of 2003 on 16.09.2003."*

In view of evidence on record, Mutation appeal No. 12 of 2003 was actually disposed of on 16.09.2005 and not 16.09.2003 as stated in the plaint which appears to be a typographical error.

17.4 Thus, the mutation proceeding must be deemed to have attained finally on 16.09.2005. The suit was filed on 21.09.2006. Therefore, the relief at serial No. (i) above is obviously within time. Further, then the relief claimed under serial No.(ii), being a declaration of the right, title and interest of the plaintiff and proforma defendant Nos. 7 to 10 along with possession, comes within the preview of Article 65 of the Limitation Act, which reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
For possession of immovable property or any interest therein based on title.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

Therefore, if the prescribed period of 12 years is to be reckoned from 16.09.2003, the suit must be held to have been filed within time in so far as relief claimed in serial No.(ii) is concerned. Neither the trial Court nor the First Appellate Court have considered the matter from the above perspective. The substantial question of law No.(iii) is therefore, answered accordingly.

18. **Substantial Question No.4**

> *iv) Whether the learned First Appellate Court / Addl. District Judge erred in law in ignoring the statutory provisions of Rule 6(2) of OGLS Rules, and the Resettlement Scheme dt. 22.5.1990 at Ext. 4 for the purposes of mutation of land allotted with D.C. Patta during the years 1957-61 as at Exts. 2 and 3 ?*

Both Mr. Udgata and Mr. Bhuyan have argued that the land being granted by Government is governed by the provision under Section 3 of the Odisha Government Land Settlement Act, 1962 (OGLS Act). As per Section 7-B, jurisdiction of the Civil Court is barred.

18.1 Per Contra, Mr. Hota would argue that as per Rule-6 (2) of OGLS Rules, 1983, where reclamation schemes are undertaken for re-settlement of displaced

persons, settlement of land reclaimed shall be made according to such scheme. But in the instant case, the scheme of resettlement as provided vide Exts. 2, 3 and 4 were violated by the Tahasildar in the Mutation Proceeding vide Ext.5. The appeal filed against such mutation order was dropped by the Sub-Collector. Therefore, the Civil Court has jurisdiction.

18.2 This Court by referring to the principle laid down in **Magulu Jal** (supra) has already held that the order of the Tahasildar as confirmed by the Sub-Collector in appeal was not in consonance with the procedure laid down by the Government for settlement of land in favour of the land oustees of Hirakud Dam Project. Moreover, the order of mutation was passed without granting opportunity of hearing to the parties. Under such circumstances, the civil Court has jurisdiction to entertain the suit. In this context, the judgment of the Constitution Bench of the Supreme Court regarding exclusion of the jurisdiction of the Civil Court rendered in the case of **Dhulabhai vs. State of M.P. and another**[2] would be relevant, wherein the following observation is noteworthy.

> *"Exclusion of jurisdiction of the Civil Court by an express provision may not be complete bar to entertain a suit, if a party satisfies the Civil Court that the statutory provision has not been followed in conformity with the fundamental principles of judicial procedure. More so, the statutory tribunal must be competent to provide all remedies normally associated with the action of the Civil Court, which may be prescribed by the said statute or more. It was further laid down that the exclusion of jurisdiction of the Civil Court is not readily to be inferred unless conditions are fulfilled.'"*

18.3 In such view of the matter, the contention advanced by learned counsel for the contesting defendants as referred above has no legs to stand. The substantial question of law No.4 is therefore, answered accordingly.

19. Thus, from a conspectus of the analysis of facts, evidence, position of law and the rival contentions, this Court finds that the first appellate Court committed manifest error in reversing the judgment and decree of the trial Court and in declaring that both parties have right, title and interest over the suit properties with confirmation of their possession. For the reasons indicated above, it is evident that the judgment passed by the first appellate Court cannot be sustained in law and therefore, warrants interference.

20. In the result, the appeal succeeds and is therefore, allowed. The impugned judgment passed by the First Appellate Court is hereby set aside and the judgment and decree passed by the Trial Court is hereby confirmed. Parties to bear their own costs.

Headnotes prepared by: *Result of the case:*
Shri Pravakar Ganthia, Editor-in-Chief. Appeal allowed.

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[2] AIR 1969 SC 78

2025 (I)-ILR-CUT-178

Smt. ANULEKHA DASH BHATTA MISHRA
V.
Smt. SREELEKHA DASH BHATTA MISHRA & ORS.

[RSA NO. 365 OF 2018]

23 DECEMBER 2024

[SASHIKANTA MISHRA, J.]

Issue for Consideration

Whether the relief of repurchase under Sec.22 of Hindu Succession Act is maintainable when there is no relief of partition and the registered sale deeds are declared null and void and thereby reverted back the right to the vendors.

Headnotes

(A) HINDU SUCCESSION ACT, 1956 – Section 22 – Relief of repurchase – Respondent No.1 as plaintiff filed C.S. No. 6 of 2016 before the Civil Judge (Senior Division), Dhenkanal for declaration that the three sale deeds executed by Defendant Nos. 6 and 7 in favour of Defendant Nos. 1 to 5 are illegal and invalid, injunction, and alternatively for a direction to Defendant Nos. 1 to 5 to execute the sale deeds in her favour on receipt of consideration – Suit was duly contested and decreed by declaring the three sale deeds as null and void and confirming the possession of the plaintiff and proforma defendants over 'B' schedule land – Plaintiff's preferential right over the purchased land of Defendant Nos. 1 to 5 was also declared and they were permanently injuncted from disturbing the peaceful possession of the plaintiff and proforma defendants – Defendant Nos. 6 and 7 were directed to execute RSD in favour of the plaintiff within 15 days on receipt of the consideration to be deposited by the plaintiff – Being aggrieved, Defendant No. 6 preferred the First Appeal, which confirmed the judgment and decree passed by the trial Court – Whether the relief of repurchase under Section 22 of the Hindu Succession Act is maintainable when there is no relief of partition and the registered sale deeds are declared null and void and thereby reverted back the right to the vendors.

Held: No – The relief of pre-emption cannot be granted to the plaintiff in the facts and circumstances of the case – Declaration of the three sale deeds as invalid are confirmed and the grant of preferential right to the plaintiff and the consequential reliefs are set aside. (Paras 19 and 21)

(B) HINDU SUCCESSION ACT, 1956 - Section 22 – RIGHT OF PRE-EMPTION – **When arises?** – The right of pre-emption U/s. 22 of the Hindu

Succession Act would arise only if the individual shares are defined and any of the co-sharers proposes to sell the property. (Para 18)

(C) TRANSFER OF PROPERTY ACT, 1882 – Section 44 – Rights of a Transferee of Joint Property – Section 44 of the TP Act deals with the rights of a transferee and safeguards his rights – The transferee steps into the shoes of his transferor and becomes as much a co-owner as his transferor was before the transfer and derives all the rights subject to all the liabilities of his transferor – Thus, a transferee cannot be in a better position than becoming a co-owner himself – Being a co-owner by purchase he shall be only entitled to enforce partition of the joint estate – He has the right of joint possession in property except a dwelling house in view of the restriction imposed by the second part of Section 44 of the TP Act – A co-owner or his transferee can sue for partition for getting possession of specific part of the joint land as per the share, his transferor is entitled to – Until then the claim of exclusive parcel cannot be accepted. (Para 17)

Citations Reference

Babaji Dehuri v. Biranchi Ananta, **AIR 1996 ORISSA 183;** M.L. Subbaraya Setty v. M.L. Nagappa, **AIR 2002 SC 2066;** Babu Ram v. Santokh Singh (deceased) through his LRs, **2019 (Supp.II) OLR (SC) 899 ― referred to.**

List of Acts

Hindu Succession Act, 1956; Transfer of Property Act, 1882.

Keywords

Right of pre-emption; Preferential right; Right of repurchase; Partition by metes and bounds.

Case Arising From

Judgment dated 11.05.2018 and decree dated 19.05.2018 passed by the learned District Judge, Dhenkanal in RFA No.17 of 2017.

Appearances for Parties

For Appellant : M/s A.C. Mohapatra, B. Beura, A.K. Panda, H. Mohanty, R.K. Rout, A.K. Behera, M. Jati, S.K. Behera and K.M. Vani.

For Respondents : M/s H.N. Mohapatra, A. Samantray, B.B. Padhi & J. Sahoo, [R-1,10 & 11]
Mr. P.K. Mishra [R-2 to 6]
M/s B.B.Mishra, A.Mishra, A.S.Patra, S.Acharya[R-7]

Judgment/Order

Judgment

SASHIKANTA MISHRA, J.

This is an appeal against a confirming judgment. The judgment dated 11.05.2018 followed by decree passed by the learned District Judge, Dhenkanal in RFA No. 17 of 2017 is impugned, whereby the judgment dated 18.02.2017 followed by decree passed by the learned Civil Judge (Senior Division), Dhenkanal in C.S. No. 6 of 2016 was confirmed.

2. For the sake of convenience, the parties are referred to as per their respective status in the trial Court.

3. The suit in question was filed by the respondent no.1 as plaintiff for a declaration that three sale deeds, as per details indicated in the plaint, executed by defendant nos. 6 and 7 in favour of defendant nos. 1 to 5 are illegal and invalid, besides the relief of injunction, and alternatively for a direction to defendant nos. 1 to 5 to execute the sale deeds in her favour on receiving the consideration amount as per the aforementioned sale deeds.

4. The case of the plaintiff is that she, defendant nos. 6 and 7 and proforma defendant nos. 8 to 12 are Hindus and Late Golak Bihari Dash Bhatta Mishra, being their father, was owner-in-possession of Ac. 2.98 dec. of land recorded in his name under Khata No. 199, as described under Schedule 'A' of the plaint. He had transferred Ac. 0.40 dec. of land to four persons in the year 2004 and delivered possession to the vendees. He remained in possession over the remaining land described under Schedule 'B'. According to the plaintiff, she, along with defendant nos. 6 and 7 and the proforma defendant nos. 8 to 12, succeeded to Schedule 'B' property with each having 1/8th share after death of their father. No partition of the property has been effected by metes and bounds. While the matter stood thus, she was surprised to receive three notices in Mutation Cases in the month of September, 2015, being issued by the concerned R.I. asking her to appear. The plaintiff appeared and filed her objection challenging alienation of the properties mentioned in the notices. On further enquiry, she came to know about execution of three sale deeds and applied for certified copies thereof, which she received in November, 2015. As such, she came to know that different portions of the suit land had been sold by defendant nos. 6 and 7 to defendant nos. 1 to 5. According to the plaintiff, there was no legal necessity for them to sell the land to outsiders. Accordingly, she filed the suit claiming the reliefs, as indicated above.

5. The defendants contested the suit by filing written statement. Defendant nos. 10 to 12, however, did not file any written statement. It is their case that sons and daughters of Late Golak Bihari Dash Bhatta Mishra were not in harmonious relationship, for which during his life time he and his wife Rupalekha Devi (defendant no.8) always insisted their children to enjoy their respective 1/7th share each of 'B' Schedule property. Accordingly, there was mutual partition. Further, in the year 2010 defendant no.8 relinquished her share from 'B' Schedule property in favour of her children. Therefore, defendant nos.6 and 7 alienated their respective

1/7th share of properties under their exclusive possession by executing the three sale deeds in question in favour of defendant nos.1 to 5. It is their further case that such sale transaction was very much within the knowledge of all the legal heirs of the recorded owner, which is evident from the declaration of relinquishment made by defendant no.8 on 15.04.2015. After purchase of the properties, defendant nos.1 to 5 applied for mutation wherein the plaintiff appeared and filed her objection. It is also stated that delivery of possession was given in respect of the sold land to the vendees on 21.03.2014, whereupon they are in exclusive possession. Defendant nos. 6 and 7, being the co-owners, were fully competent to alienate their shares of the properties and did so in favour of defendant nos.1 to 5 lawfully to meet their legal necessities and with knowledge of all concerned.

6. Basing on the rival pleadings, the trial Court framed the following issues for determination:-

> *"1. Is the suit maintainable?*
>
> *2. Has the plaintiff cause of action to file the suit?*
>
> *3. Is the schedule-A land is the joint property of the plaintiff and defendants 6 to12?*
>
> *4. Have the defendant no.1to5 acquired exclusive right, title, interest and possession over the suit land by virtue of the RSD no.2044, 2045 and 2129?*
>
> *5. Is the plaintiff entitled to avail a relief of pre- emption U/s-22 of the Hindu Succession Act for repurchasing the suit land from defendant no.1, if so, what are the mode and conditions of such retransfer?*
>
> *6. Is the plaintiff entitled to a relief of injunction in respect of the schedule-B land (suit land) against defendant no.1to5? 7. To what other relief or reliefs the plaintiff is entitled?"*

7. The trial Court took up issue no.3 for consideration at the outset. After analyzing the pleadings and evidence adduced by the parties, the trial Court disbelieved the plea taken by the defendants that the property had been partitioned by metes and bounds. With regard to separate possession, it was held that the same was only for convenience and not indicative of complete partition by metes and bounds. On issue no.5, after analyzing the facts, evidence and the settled position of law, the trial Court held that the plaintiff and defendant nos. 8 to 12 have every authority to exercise the right of preemption in respect of the suit properties. On issue no.6, the trial Court held that defendant nos. 1 to 5 could not prove their possession over any portion of the 'B' schedule land including the suit land. In view of the findings rendered on the main issues, as stated above, the remaining issues were answered against the defendants by holding that the sale deeds in question, having been executed without consent of the co-owners, are illegal, and defendant nos. 1 to 5 being stranger purchasers, are liable to be injuncted from jointly possessing the suit land. Further, the pre-emptory right of the plaintiff and defendant nos. 8 to 12 was also declared. The suit was thus decreed by declaring the three sale deeds as null and void and confirming the possession of the plaintiff and proforma defendants over 'B' schedule land. The plaintiff's preferential right over

the purchased land of defendant nos. 1 to 5 was also declared and they were permanently injuncted from disturbing the peaceful possession of the plaintiff and proforma defendants. The plaintiff was further directed to deposit the purchase money, as mentioned in three sale deeds, in Court and on receipt of the same defendant nos. 6 and 7 were directed to execute RSD in her favour within 15 (fifteen) days, failing which the plaintiff's suit shall be deemed to be dismissed with cost.

8. Being aggrieved, defendant no.6 carried the matter in appeal to the District Court. Upon consideration of the grounds raised and on appreciation of the evidence on record, the First Appellate Court held that the trial Court had rightly arrived at the conclusion that there was no partition of the suit 'B' schedule property, and that the said property was still joint. On the claim of pre-emption, the First Appellate Court noted the essential ingredients thereof and further held that such claim had been raised within the prescribed period of limitation. Further, considering the evidence and the settled position of law, the First Appellate Court held that the trial Court had rightly decided issue nos.4 and 5 to the effect that defendant nos. 1 to 5 have not acquired right, title and interest over any portion of 'B' schedule property by virtue of the sale deeds in question, and further held that the plaintiff is entitled to avail the relief of pre-emption contemplated under Section 22 of the Hindu Succession Act. Further, noting that the trial Court had followed the proper procedure while passing the decree, the First Appellant Court found no merit in the appeal and dismissed the same, confirming thereby the judgment and decree of the trial Court.

9. Being further aggrieved, defendant no.6 has filed the present RSA, which was originally admitted on the following substantial questions of law:-

> *"1) Whether the courts below are correct in saying that relief of repurchase under Sec.22 of Hindu Succession Act is maintainable when there is no relief of partition sought for by the plaintiff?*
>
> *2) Whether the courts below are correct in holding that at the stage of decreeing the relief of repurchase under Sec. 22 of Hindu Succession Act, the valuation of the sale deeds vide Exts.6 to 8 could be accepted as the proper valuation?"*

However, at the time of hearing, the substantial question no.1 was modified as follows:-

> *"(1) Whether the courts below are correct in saying that relief of repurchase under sec. 22 of the Hindu Succession Act is maintainable when there is no relief of partition sought for by the plaintiff & the impugned R.S.Ds. are declared as null & void & thereby reverted back the right to the vendors?"*

10. Heard Shri A.C. Mohapatra with Shri Harekrushna Mohanty, learned counsel for defendant no.6-appellant; Shri H.N. Mohapatra, learned counsel appearing for respondent nos.1, 10 & 11; Shri P.K. Mishra, learned counsel

appearing for respondent nos. 2 to 6; and Mr. B.B. Mishra, learned counsel for respondent no.7.

11. Shri A.C. Mohapatra would argue that the finding of the trial Court, as confirmed by the First Appellate Court, that the sale by defendant nos. 6 & 7 in favour of defendant nos. 1 to 5 is illegal being in excess of their 1/7th share, implies that the property in question would revert to the vendors, but granting the relief of pre-emption by directing defendant nos.6 & 7 to execute sale deed in favour of the plaintiff, is untenable, as she has not claimed partition. It is further argued that even otherwise, the direction to pay the purchase money, as indicated in the deeds in question, is unjustified, in view of the fact that the deeds were executed in the year 2014 and by efflux of time the market value of the lands have increased manifold. It is settled law that determination of valuation of the property has to be made on the date of final decree and not before that.

12. Shri B.B. Mishra, learned counsel appearing for respondent no.7 has advanced similar arguments as Shri A.C. Mohapatra noted above. He submits that the finding of the courts below, that defendant nos. 6 & 7 sold the property in excess of their share, has not been questioned by the plaintiff, which is, therefore, binding on her. Under such circumstances, it is illegal to direct defendant nos. 6 & 7 to execute sale deed in favour of the plaintiff beyond their share, as it would perpetuate the illegality. Shri Mishra further argues that in such view of the matter the property would revert to defendant nos. 6 & 7. He also submits that even though defendant no.7 did not specifically file appeal against the judgment of the trial Court, the finding of the appellate Court in appeal filed by the co-defendant would also enure to his benefit. He relies on a judgment of this Court in the case of ***Babaji Dehuri v. Biranchi Ananta,***[1] in this context. As regards valuation of the property, Shri Mishra also makes similar arguments as Shri Mohapatra noted above that the same has to be determined with reference to the date of final decree and not prior to that date. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***M.L. Subbaraya Setty v. M.L. Nagappa***[2]**.**

13. Shri H.N. Mohapatra, learned counsel appearing for respondent nos.1, 10 & 11, on the other hand, would argue that defendant no.6-appellant never challenged the decree declaring the three sale deeds as void. Such finding is therefore final. Shri Mohapatra further argues that law is well settled that sale of joint property by a co-owner is valid to the extent of his share, but the same is invalid in respect of a specific portion of the land. In the instant case, the evidence on record clearly shows that multiple sub-plots from plot no. 1026 were sold showing their boundary description. This proves that specific portions of land were sold, which makes the sale illegal and, therefore, rightly declared void. On the right of pre-emption claimed by the plaintiff, Shri Mohapatra argues that the land in question being agricultural

[1] AIR 1996 ORISSA 183
[2] AIR 2002 SC 2066

land, the right of pre-emption is applicable, for which there is no need for the purchaser to file a partition suit and the family members can seek pre-emption. Shri Mohapatra has relied upon the judgment of the Supreme Court in the case of ***Babu Ram v. Santokh Singh (deceased) through his LRs***[3]**.**

14. After carefully considering the contentions raised and on perusal of the impugned judgments, this Court finds that the issue to be determined at the outset is, whether the schedule property is joint family property? According to the plaintiff, defendant nos. 6 to 12 inherited the property, after the death of their father Golak Bihari Dash Bhatta Mishra, who was the recorded owner. In the written statement filed by the contesting defendants, it was claimed that the property had been partitioned by metes and bounds. The trial Court held and according to this Court rightly, that a Hindu family is presumed to be joint, unless the contrary is proved. Thus, the burden of proof was rightly placed on the contesting defendants to rebut the presumption of jointness. The trial Court as well the First Appellate Court, upon consideration of the evidence adduced by the parties found that the plea of partition was not established at all. Nothing has been demonstrated before this Court by the appellant to show that as to how such finding is wrong. This Court, therefore, holds that the finding of the court below, that the property continues to be joint does not warrant any interference in Second Appeal, being a concurrent finding of fact based on evidence.

15. This takes the Court to the claim of preemption raised by the plaintiff. Section 22 of the Hindu Succession Act deals with pre-emption and reads as follows:-

> *"**22. Preferential right to acquire property in certain cases.—***
>
> *(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*

[3] 2019 (Supp.II) OLR (SC) 899

> *any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."* ***(Emphasis added)***

Though a feeble argument was made at the outset by the counsel appearing for the appellant that Sec.22 would have no application in case of completed sale, but applies only in case of proposed sale, the same was given up subsequently, in view of the settled position of law that even in case of complete sale a co-sharer can ask for pre-emption by approaching the competent civil court. Coming to the facts of the present case, both the courts below have concurrently held that the sale to defendant nos.1 to 5 by defendant nos.6 and 7 was without knowledge of the other co-sharers, including the plaintiff. Though a document was sought to be projected as a declaration of relinquishment (Ext A), the same was not relied upon and according to this Court rightly, as it was not a registered document. It is needless to mention that title in respect of a property cannot be conveyed by an unregistered document, if the value of the property exceeds 100 rupees, which is the case at hand. Therefore, it is well established that the sale in question in respect of joint family property was effected without knowledge and consent of the other co-sharers.

16. It has been argued that the sale deeds, being executed by defendant nos. 6 & 7 in excess of their share, having been declared void the property ought to have reverted to them. Reading of the judgments of the trial Court as well as the First Appellate Court, however, does not reveal that there was any such finding. In answering issue no.4, the trial Court observed as follows:-

> ***"25. Issue No.4 :-*** *As per my answer to the foregoing issues, the schedule-B' land is still the joint property of the plaintiff as well as the defendants 6 to 12. The suit land is a part of this property, which is purported to have been transferred under Ext. 6 to 8. Law of co- ownership enjoins that unless and until a full-fledged partition takes place amongst them, the co-owners are deemed to have every right over every inch of land. In absence of any such partition, no one of them has any right to alienate or part with any specific portion of the joint land, as is found to have been done by the defendants 6 and 7 through Ext.6 to 8 There is no doubt over the fact that the vendors of this document were competent to transfer their interest, but they do not have any right to confer upon their vendee, the exclusive right and possession over the subject matter of such transfer. Applying this principle to the instant case, I can simply say that the defendant no.1 to 5 have not acquired any exclusive right over the suit land on the basis of Ext.6 to 8* ***though he seems to have acquired an interest over the same. There is no doubt over the fact that the vendors of this document were competent to transfer their interest, but they do not have any right to confer upon their vendee, the exclusive right and possession over the subject matter of such transfer."*** ***(Emphasis added)***

This Court does not find anywhere in the judgment of the trial Court or the First Appellate Court that the sale in question was invalidated on the ground that the same was in excess of the share of defendant nos. 6 & 7 (vendors). The First Appellate Court concurred with the above finding of the trial court. The highlighted portion in the above finding however, need to be addressed vis-à-vis the finding that the defendant nos. 1 to 5 have not acquired right, title and interest over any portion of 'B' schedule property by virtue of the sale deeds.

17. Section 44 of the TP Act deals with the rights of a transferee and safeguards his rights. The transferee steps into the shoes of his transferor and becomes as much a co-owner as his transferor was before the transfer and derives all the rights subject to all the liabilities of his transferor. Thus, a transferee cannot be in a better position than becoming a co-owner himself. Being a co-owner by purchase he shall be only entitled to enforce partition of the joint estate. He has the right of joint possession in property except a dwelling house in view of the restriction imposed by the second part of section 44 of the TP Act. A co-owner or his transferee can sue for partition for getting possession of specific part of the joint land as per the share, his transferor is entitled to. Until then the claim of exclusive parcel cannot be accepted. This is what virtually has been observed by the learned trial court at Para 25 of the judgment (supra) while deciding Issue No.4. This finding has been affirmed by the learned First Appellate court. But even while observing so both the learned Courts below have invalidated the sale deeds simply on the ground that the defendant nos. 6 & 7 had no right to confer upon their vendees, the exclusive right and possession over the subject matter of such transfer. These findings are self-contradictory inasmuch as the status of the defendant nos.1 to 5 as the co-owners by purchase cannot be denied regardless of the fact that the share of their vendors over the joint properties, in absence of a claim for partition, which is also not asked for in the suit, cannot be determined. But, as stated above the findings of the learned trial court on the character of the sale deeds in question have not been challenged. Therefore, this concurrent finding of the Courts below on the above score cannot be interfered with in the Second Appeal.

18. Coming back to the question of preferential right or the right of pre-emption of the plaintiff, the same was dealt with by the trial Court under Issue No.5. The trial Court, taking note of the judgments of other High Courts, accepted the plea of the plaintiff for pre-emption by holding that the sale of the schedule property by defendant nos.6 & 7 to defendant nos.1 to 5 being invalid, she would acquire such right. This finding has been concurred with by the First Appellate Court, more or less on the same ground. According to the considered view of this Court, both the courts below have committed manifest error in arriving at such finding for the reasons to be indicated hereinafter. Firstly, if the sale is invalidated, which this Court has concurred with, it is not a sale in the eye of law. Thus, to apply the principle of pre-emption on the ground of a completed sale would be contrary to the above finding. Secondly, once the sale is invalidated and the property there under gets back its character which it had before the sale that is to say, it would revert to the co-sharers and reassume its character as joint property, as no partition by metes and bounds has as yet taken place. Thirdly, when the case of the plaintiff that the sale deeds are illegal has been accepted, the Courts below should not have considered the alternative prayer for pre-emption. Fourthly, the right of preemption u/s 22 of the Hindu Succession Act would arise only if the individual shares are defined and any

of the co-sharers proposes to sell the property. But once the property reverts to the common stock of the family, the proposal to sell by a co-owner cannot be presumed. Thus, by granting the relief of pre-emption to the plaintiff, both the courts below have, in effect proceeded on the erroneous presumption that defendant nos. 6 & 7 propose to sell the suit property. This is where the Courts below appear to have fallen into error by granting the relief of pre-emption to the plaintiff after invalidating the sale in favour of defendant nos.1 to 5. It is stated at the cost of repetition that the findings of both the Courts below, in this regard, are contradictory and, therefore, not sustainable in the eye of law. In such view of the matter, the substantial question no.1, as modified at the time of hearing, is answered in favour of the appellant by holding that the relief of preemption cannot be granted to the plaintiff in the facts and circumstances of the case.

19. Such being the finding on substantial question no.1, it is not necessary to consider the second substantial question of law, as in absence of right of pre-emption, the question of valuation of the property does not arise.

20. For the foregoing reasons therefore, and for the reasons indicated, this Court holds that the impugned judgment, in so far as it relates to grant of relief of declaration of the three sale deeds in question as invalid, does not warrant any interference. However, the grant of relief of pre-emption in respect of the suit property in favour of the plaintiff is held to be illegal and thereby warrants interference.

21. In the result, the appeal is allowed in part. The impugned judgment and decree in so far as it relates to declaring the three sale deeds as invalid are hereby confirmed. However, the decree of the trial court, in so far as it relates to the grant of preferential right to the plaintiff in respect of the purchased land of defendant nos.1 to 5 and other consequential reliefs flowing there from are hereby set aside. The parties to bear their own costs.

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

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2025 (I)-ILR-CUT-188

KARTIK JENA @ KARTIK CH. JENA
V.
STATE OF ORISSA & ANR.

[CRLREV NO. 896 OF 2016]

27 NOVEMBER 2024

[A.K. MOHAPATRA, J.]

Issue for Consideration

Whether the conviction & sentence U/s. 498-A of IPC can be quashed once the marriage has been dissolved with mutual consent.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 397,401 – Compounding of offence U/s. 498-A of IPC – Initially an FIR was lodged against the Petitioner alleging commission of offences punishable U/s. 498-A/ 323/307/ 34 of IPC read with Section 4 of DP Act – The learned trial Court after hearing evidences from both sides, convicted the Petitioner U/s. 498-A, 323 of IPC – Petitioner preferred appeal challenging the order of Trial Court – The learned Appellate Court set aside the conviction of the Petitioner U/s. 323 of IPC but upheld the conviction U/s. 498-A of IPC – The Petitioner also filed a civil proceeding for dissolution of marriage U/s. 13 B of Hindu Marriage Act, 1955 – The civil proceeding was allowed and decree of mutual divorce ordered – Interim Application has been filed by both the parties with a prayer for compounding of offence under Section 498-A of IPC on the ground that the marriage has been dissolved on mutual consent – Whether the conviction and sentence of Petitioner U/s. 498-A of IPC should be quashed, once the marriage has been dissolved with mutual consent.

Held: Yes **–** In view of the larger interest of the parties who are now living peacefully after dissolution of their marriage on mutual consent, the conviction and sentence of petitioner U/s.498-A (of IPC) is here by set aside. (Para 10)

List of Acts/Codes

Code of Criminal Procedure; 1973; Hindu Marriage Act, 1955; Indian Penal Code, 1860; Dowry Prohibition Act, 1961.

Keywords

Dissolution of marriage; Compounding of offences; Mutual consent; Quashing of conviction & sentence.

Case Arising From

Judgment dated 23.09.2024 passed by the learned Judge, Family Court, Jajpur in Criminal Appeal No.5 of 2013.

Appearances for Parties

For Petitioner : Mr. Suryakanta Dash
For Opp. Parties : Mr. Samaresh Jena, ASC,
Mr. Amiya Kumar Beura, SC

Judgment/Order

Judgment

A.K. MOHAPATRA, J.

I.A. No.1008 of 2024

1. This application has been filed has mentioned by the petitioner to implead the informant as Opposite Party No.2 to the present criminal revision application.

2. Learned counsel for the petitioner submitted that the informant-Opposite Party is the wife of the present petitioner. He further contended that during pendency of the present Criminal Revision Application, a divorce application was filed before the competent Family Court and a decree of divorce by mutual consent under Section 13 B of Hindu Marriage Act has been granted. Learned counsel appearing for the Opposite Parties has no objection to the same.

3. Accordingly, the I.A. stands allowed.

CRLREV No. 896 of 2016

4. The name of the informant as indicated in the schedule attached to the I.A. application be incorporated as Opposite Party No.2 to the present Criminal Revision Application.

5. Since the Opposite Party No.2-informant is represented by the counsel no notice is required to be issued to the informant-Opposite Party No.2.

6. Heard learned counsel for the petitioner as well as learned counsels appearing for the Informant-Opposite Party No.2 as well as State-Opposite Party No.1. Perused the records. The present revision petition has been preferred against the judgment dated 23.09.2024 passed by the learned Judge Family Court, Jajpur in Criminal Appeal No.5 of 2013 wherein the learned Lower Appellate Court has confirmed the judgment dated 23.06.2013 passed by the learned Assistant Sessions Judge, Jajpur in C.T. No.223 of 2010. Initially an F.I.R. was lodged at the instance of the informant-Opposite Party No.2 alleging commission of offences punishable under Section 498A/323/307/34 I.P.C. read with Section 4 of DP Act. Learned trial court after taking evidence from both sides, vide judgment dated 26.03.2013, convicted the petitioner under Section 498A, 323 of I.P.C. The judgment of the learned trial court reveals that the petitioner has been acquitted of all charges under Section 307 and 34 I.P.C. read with Section 4 DP Act. So far as the sentence is concerned, the learned trial court has imposed a punishment of three years of Rigorous Imprisonment and a fine of Rs.10,000/- for the offence under Section 498-A of I.P.C. Similarly, the petitioner has been convicted under Section 323 I.P.C. and has been sentenced to undergo Rigorous Imprisonment of two months. Both the sentences have been directed to run concurrently.

7. The petitioner preferred an appeal against the aforesaid order of the learned trial court before the Lower Appellate Court which was registered as criminal appeal No.5 of

2013. The Learned Additional District & Sessions Judge, Jajpur, vide judgment dated 10.11.2016, set aside the conviction of the petitioner under Section 323 of the I.P.C. However, the conviction of the petitioner under Section 498-A was upheld along with the sentence i.e. three years of Rigorous Imprisonment and fine of Rs.10,000/- and in default thereof to undergo Rigorous Imprisonment for three months.

8. Being aggrieved by the aforesaid judgments, the petitioner has preferred the present Revision application by invoking the jurisdiction of this Court under Section 401 read with Section 397 of the Cr.P.C. Learned counsel appearing for the petitioner as well as private Opposite Party No.2 at the outset submitted that besides the present criminal case, the petitioner had also filed a Civil Proceeding bearing CP No.103 of 2024 before the learned Judge, Family Court, Jajpur for dissolution of their marriage under Section 13 B of Hindu Marriage Act, 1955. They further contended that in the meantime the aforesaid Civil Proceeding has terminated in judgment dated 23.09.2024. On perusal of a copy of judgment dated 23.09.2024, it appears that the Civil Proceeding has been allowed and a decree of mutual divorce has been allowed to the parties and the marriage between the parties, which was solemnized on 13.05.2007, has been dissolved on mutual of the parties consent. Learned counsels for the petitioner as well as the private Opposite Party No.2 further contended that after grant of the mutual decree of divorce, the parties have amicably settled their dispute and they are living peacefully.

9. Learned counsel for the petitioner as well as the Opposite Party No.2 has further contended that I.A. No.1015 of 2024 has been filed with a prayer for compounding of offences under Section 498-A of I.P.C. On perusal of the said I.A. application, it appears that the I.A. application is supported by the affidavit filed by the both petitioner as well as Opposite Party No.2 which was sworn before the Oath Commissioner of this Court. On further consideration of the I.A. application, it is observed by this Court that the parties have been mentioned about the mutual settlement of the dispute and it has also been stated that on mutual consent of both sides, the marriage between the parties has been dissolved by a decree of divorce in Civil Proceeding No.103 of 2024. Additionally, in Paragraph No.6 of the I.A. application, a prayer has been made for compounding of the offence under Section 498-A on the ground that the marriage has been dissolved with the consent of the parties and that further continuance of the present criminal case would not be in the larger interests of justice.

10. Taking into consideration the submissions made by the learned counsels appearing for the petitioner and the Opposite Party No.2, further taking note of the fact that the State counsel have no objection to the same, as well as keeping in view the larger interest of the parties who are now living peacefully after dissolution of their marriage on mutual consent, and on a careful analysis of the materials on record, the conviction and sentence of the petitioner under Section 498-A is hereby set aside.

11. Accordingly, the Criminal Revision Application stands allowed.

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

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2025 (I)-ILR-CUT-191

SOUMYAKANT MOHANTY
V.
DIRECTORATE OF ENFORCEMENT

[BLAPL 10054 OF 2024]

17 DECEMBER 2024

[V. NARASINGH, J.]

Issue for Consideration

Whether the petitioner can be released on bail inspite of the stipulations as embargo in Section 45 of the PML Act.

Headnotes

PREVENTION OF MONEY LAUNDERING ACT, 2002 – Sections 44, 45 – Cognizance has already been taken U/s. 44 of the Act and the petitioner was taken into custody by the Enforcement Directorate – The petitioner was examined and interrogated by the Enforcement Directorate with the permission of the Special Court – Application for bail – Whether the petitioner can be released on bail inspite of the twin stipulations as embargo under Section 45 of the PML Act.

Held: Yes – After cognizance of the offence based on a complaint U/s. 44(1)(b) of the Act, ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint – In the case at hand, the Petitioner was not taken into custody by the Enforcement Directorate before the learned Special Court took cognizance – Hence, this Court is of the considered view that the twin stipulations of Section 45 of PML Act as embargo for consideration of the bail application of the Petitioner do not come into play. (Paras 18-20)

Citations Reference

Tarsem Lal vs. Directorate of Enforcement Jalandhar Zonal Office**, (2024) 7 SCC 61;** Ramkripal Meena vs. Directorate of Enforcement**, 2024 SCC OnLine SC 2276;** Prem Prakash vs. Union of India through the Directorate of Enforcement, **2024 SCC OnLine SC 2270;** V. Senthil Balaji vs. The Deputy Director, Directorate of Enforcement, **2024 SCC OnLine SC 2626;** Sanjay Chandra vs. CBI, **(2012) 1 SCC 40;** Javed Gulam Nabi Shaikh vs. State of Maharashtra and another, **(2024) 9 SCC 813;** Directorate of Enforcement vs. Aditya Tripathi, **2023 SCC OnLine SC 619;** Prem Prakash vs. Union of India through the Directorate of Enforcement, **(2024) 9 SCC 787;** Tarun Kumar vs. Assistant Directorate Enforcement, **2023 SCC Online SC 1486;** Gautam Kundu vs. Directorate of Enforcement, **(2015) 16 SCC 1;**

Vijay Madanlal Choudhary and others vs. Union of India and others, **(2023) 12 SCC 1;** Rohit Tandon vs. Directorate of Enforcement, **(2018) 11 SCC 46;** Prasanta Kumar Sarkar vs. Ashis Chatterjee and Others, **(2010) 14 SCC 496;** Manish Sisodia vs. Directorate of Enforcement, **2024 SCC OnLine SC 1920;** Satender Kumar Antil vrs. Central Bureau of Investigation and another, **(2022) 10 SCC 51;** Bijay Ketan Sahoo vrs. Enforcement Directorate**, Special Leave to Appeal (Crl) No.8325/2024 – referred to.**

List of Act

Prevention of Money Laundering Act, 2002.

Keywords

Bail; Stipulations as embargo provided in the Section 45 of the PML Act; Power of the Enforcement Directorate once cognizance of offence is taken.

Case Arising From

Order of rejection of bail passed by the learned Special Judge (CBI) on 31.07.2024.

Appearances for Parties

For Petitioner : Mr. J. Pal
For Opp. Party : Mr. G. K. Agarwal

Judgment/Order

Order

V. NARASINGH, J.

1. Heard Mr. Pal, learned counsel for the Petitioner and Mr. Agarwal, learned counsel for the Directorate of Enforcement.

2. The Petitioner is an accused in connection with Complaint Case (PMLA) No.10 of 2023 pending on the file of learned Sessions Judge, Khurda at Bhubaneswar-cum-Special Court under the Prevention of Money Laundering Act, 2002, for commission of offence alleged under Sections 3 and punishable under Section 4 of PMLA Act, 2002.

3. Learned counsel, on instruction, submits that except the present BLAPL, no other bail application of the Petitioner relating to the aforementioned case is pending in any other Court.

4. Being aggrieved by the rejection of his application for bail U/s.483 of the Bharatiya Nagarik Suraksha Sanhita (BNSS) r/w Section 45 of the PMLA Act by the

learned Spl. Judge (CBI) Court No.1/PMLA, Bhubaneswar by order dated 31.07.2024 in the aforementioned case, the present BLAPL has been filed.

5. The Enforcement Directorate filed a Complaint Case (PMLA) Case No.10 of 2023 in the Special Court under the Prevention of Money Laundering Act, 2002, Bhubaneswar against the present Petitioner cited as Accused No.3 and others under Section 45 read with Section 44 of the Prevention of Money Laundering Act (PMLA), 2002.

6. The allegation against the Petitioner has been stated in Paragraph-9 of the said complaint. The same is extracted hereunder;

> *"9. SPECIFIC ROLE OF THE ACCUSED / COACCUSED/ PERSONS ABETTING IN THE COMMISSTON OF OFFENCE OF MONEY LAUNDERING IN TERMS OF SECTION 3 OF PMLA:*

Sl. No.	Name of the Accused	Role of the Accused in the instant case
01	xxx xxx xxx	
02	xxx xxx xxx	
03	Soumyakant Mohanty (A-3)	*1.1* Soumyakant Mohanty has cheated numbers of parents with promise to allot seats for admission to MBBS course to their children in different Medical colleges and thereby generated crores of rupees as proceeds of crime relating to commission of scheduled offence under PMLA, 2002. He has also accepted that he has cheated many parents by adopting the aforesaid Modusoperandi. Hence, the accused came in possession of such "proceeds of crime". *1.2* The accused have used the said proceeds of crime for various purposes in hidden and concealed manner without disclosing the origin of such funds. Movable and immovable properties acquired out of such proceeds of crime were identified and attached provisionally under PMLA, 2002. Even the properties acquired out of said proceeds of crime and also involved in offence of money laundering were projected in a manner as if obtained legally from legal money. Therefore, such properties were projected as if they are untainted properties. *1.3* Aforesaid acts committed by accused person is clearly covered by the definition of offence of money laundering, wherein any person deals with proceeds of crime in any manner (whether concealment possession or acquisition or use), whether directly or indirectly, such person shall be guilty of offence of money-laundering. In the instant

		case, accused person has knowingly acquired, possessed, transferred, layered and used the said proceeds of crime obtained or derived by commission of scheduled offences in such a manner as if it was untainted money and therefore, he is guilty of offence of money laundering as per the provisions of section 3 of PMLA, 2002' and therefore liable to be punished.
xxx xxx xxx		

7. It is submitted by learned counsel, Mr. Pal that the Petitioner was taken into custody in the predicate offences on 03.12.2019 and in six of such cases, he has been released on bail. The details of accused in committing the predicate offence has been stated in paragraph-3.3 of the complaint.

8. It is submitted by the learned counsel for the Petitioner, Mr. Pal, that Serial Nos.1, 3, 4, 9 and 10 relate to the present Petitioner in which he has been released on bail and in addition thereto in two other cases also the Petitioner has been released on bail.

9. Referring to the sequence of events, it is submitted by the learned counsel for the Petitioner that the cognizance in the case at hand was taken on 09.08.2023 and the Petitioner was taken to custody by the Enforcement Directorate on 23.04.2024.

10. It is submitted, relying on the judgment of the Apex Court in the case of ***Tarsem Lal vs. Directorate of Enforcement Jalandhar Zonal Office, (2024) 7 SCC 61***, that the Petitioner is entitled to be released on bail notwithstanding the rigors of Section 45 of the PMLA Act.

11. Learned counsel for the Petitioner specifically draws the attention of the Court to Paragraph 33.9 of the Judgment of the Apex Court in the said case under the heading "Operative Conclusions". For convenience of reference, said paragraph-33.9 is extracted hereunder;

> ***"Operative Conclusions***
>
> *33. Now, we summarise our conclusions as under:*
>
> *xxx xxx xxx*
>
> *33.9. After cognizance is taken of the offence punishable under Section 4 PMLA based on a complaint under Section 44(1)(b), ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint; and"*

And, learned counsel for the Petitioner also relied on the following judgments;

i. Ramkripal Meena vs. Directorate of Enforcement, 2024 SCC OnLine SC 2276.

ii. Prem Prakash vs. Union of India through the Directorate of Enforcement, 2024 SCC OnLine SC 2270.

iii. V. Senthil Balaji vs. The Deputy Director, Directorate of Enforcement, 2024 SCC OnLine SC 2626.

iv. Sanjay Chandra vs. CBI, (2012) 1 SCC 40.

v. Javed Gulam Nabi Shaikh vs. State of Maharashtra and another, (2024) 9 SCC 813.

12. Per contra, learned counsel for the Enforcement Directorate, Mr. Agarwal, submits that in the case at hand, the bail application of the Petitioner is liable to be rejected in view of the twin conditions as stipulated in Section 45 of the PMLA Act. For convenience of reference Section 45 of the PMLA Act is extracted hereunder;

> ***"45. Offences to be cognizable and nonbailable***.- *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless-]*
>
> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and*
>
> *(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:*
>
> *Provided that a person, who is under the age of sixteen years or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees] may be released on bail, if the Special Court so directs:*
>
> *Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by*
>
> *(i) the Director; or*
>
> *(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.*
>
> *[(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]*
>
> *(2) The limitation on granting of bail specified in [***] of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.*

13. And, to fortify his submission, learned counsel for the Enforcement Directorate referred to the written objection and relied on the judgments of the Apex Court in the cases of (i) ***Directorate of Enforcement vs. Aditya Tripathi, 2023 SCC***

OnLine SC 619 more particularly paragraphs-13 to 16, (ii) ***Prem Prakash vs. Union of India through the Directorate of Enforcement , (2024) 9 SCC 787*** , paragraphs-18 and 19, (iii) ***Tarun Kumar vs. Assistant Directorate Enforcement, 2023 SCC Online SC 1486***, paragraphs-17, 20 and 21, (iv)***Gautam Kundu vs. Directorate of Enforcement, (2015) 16 SCC 1***, paragraph 30, (v)***Vijay Madanlal Choudhary and others vs. Union of India and others, (2023) 12 SCC 1***, paragraphs-285 & 296, (vi) ***Rohit Tandon vs. Directorate of Enforcement, (2018) 11 SCC 46*** (vii) ***Prasanta Kumar Sarkar vs. Ashis Chatterjee and Others., (2010) 14 SCC 496.***

14. It is apt to note that both the learned counsel for the Petitioner as well as Opposite Party have referred to recent judgment of the Apex Court in the case of ***Prem Prakash (Supra).***

15. In the said case the Apex Court quoted with approval the judgment of the Apex Court in the case of ***Manish Sisodia vs. Directorate of Enforcement, 2024 SCC OnLine SC 1920***, wherein the general principle that bail is the rule and jail is the exception was reiterated even in the context of Section 45 of PMLA Act. Such view was reiterated by the Apex Court in the case of ***V. Senthil Balaji vs. Deputy Director, Directorate of Enforcement, 2024 SCC OnLine SC 2626*** relied upon by the learned counsel for the Petitioner.

16. In the instant case, the cognizance has already been taken, as noted and as evident from the objection filed, the Enforcement Directorate was allowed to ”examine and interrogate” the Petitioner by the learned Special Court and accordingly, the Petitioner was examined on 15.03.2022. The Petitioner has been released on bail in the predicate offences, as already noted.

17. Learned counsel, Mr. Agrawal for the Enforcement Directorate submits with vehemence that release in the predicate offences has no bearing while considering an application under the PMLA Act.

And, further submits that the factual matrix in the case of ***Tarsem Lal (Supra)*** is ex-facie different from the case at hand since, in the said case, the Apex Court was seized of the issue of denial of anticipatory bail on non-appearance consequential to warrant whereas in the case at hand taking of cognizance by the learned Special Court indicates that there is a prima facie case. Hence, in view of the twin stipulations of Section 45 of the PMLA Act, the Petitioner should not be enlarged on bail.

18. In the case of ***Tarsem Lal (supra)*** referring to the judgment of ***Satender Kumar Antil vrs. Central Bureau of Investigation and another*** reported in ***(2022) 10 SCC 51***, the Apex Court in Paragraph-30 and 33.9 held thus;

> *“30. Once cognizance is taken of the offence punishable under Section 4 PMLA, the Special Court is seised of the matter. After the cognizance is taken, the ED and other*

> *authorities named in Section 19 cannot exercise the power of arrest of the accused shown in the complaint. The reason is that the accused shown in the Complaint are under the jurisdiction of the Special Court dealing with the complaint. Therefore, after cognizance of the complaint under 44(1)(b) PMLA is taken by the Court, ED and other authorities named in Section 19 are powerless to arrest an accused named in the complaint. Hence, in such a case, an apprehension that the ED will arrest such an accused by exercising powers under Section 19 can never exist.*
>
> *xxx xxx xxx*
>
> *33.9. After cognizance is taken of the offence punishable under Section 4 PMLA based on a complaint under Section 44(1)(b), ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint; and"*
>
> *(Emphasized)*

The law laid down in the ***Tarsem Lal (supra***) has also been reiterated by the Apex Court in the case of ***Bijay Ketan Sahoo vrs. Enforcement Directorate*** in Special Leave to Appeal (Crl) No.8325/2024.

19. Applying such principle as admittedly in the case at hand, the Petitioner was not taken into custody by the Enforcement Directorate before the learned Special Court took cognizance, the Petitioner could not have been arrested in this case.

20. The stage at which the Petitioner's release is resisted, this Court is of the considered view that the twin stipulations of Section 45 of PMLA Act as embargo for consideration of the bail application of the Petitioner do not come into play.

21. As such, this Court directs the Petitioner to be released on bail on such terms to be fixed by the learned Court in seisin.

22. Additionally, it is directed that the Petitioner shall not leave the State of Odisha without express permission of the learned Special Court.

23. Accordingly, the BLAPL stands disposed of.

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

Result of the case:
BLAPL disposed of.

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2025 (I)-ILR-CUT-198

PRIYANKA GOUDA
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 22656 & 22661 OF 2024]

09 OCTOBER 2024

[BIRAJA PRASANNA SATAPATHY, J.]

Issues for Consideration

1. Whether the Writ Court can interfere in the disputed question of facts.
2. Whether duly authorized person though not competent can issue notice U/s. 54(2)(C) of the Odisha Municipality Act.

Headnotes

(A) CONSTITUTION OF INIDA, 1950 – Articles 226 & 227 – Power of the Writ Court – Disputed question of facts – Whether the Writ Court can interfere in the disputed question of facts.

Held: No – This Court in exercise of power under Articles 226 & 227 of the Constitution of India cannot go into disputed question of facts. (Para 9.4)

(B) ODISHA MUNICIPALITY ACT, 1950 – Section 54(2)(C) – No-confidence motion against Chairman – Issuance of notice – Competent Authority – Whether issuance of notice by a duly authorized person other than the competent authority is illegal.

Held: No – This Court is also unable to accept the contention raised by the learned Sr. Counsel with regard to the service of notice through Opp. Party No.4 as illegal as there is no such bar contained under Section 54(2)(c) of the Act for service of such notice by Opp. Party No.2 though any other authority duly authorized by him. (Para 9.7)

Citation Reference

K.D Sharma Vs. Steel Authority of India Ltd. and Others, **(2008) (12) SCC 481**; Ramjas Foundation and Another Vs. Union of India and Others, **(2010) 14 SCC 38**; Mamata Behera V. State of Odisha & Others, **2020 (I) OLR – 47**0; Smt. Kamala Tiria Vs. State of Orissa & Others, **91 (2001) C.L.T. 159;** Prahallad Dalei Vs. State of Odisha & Others, **2016 (I) CLR – 559;** Damyanti Hansda Vs. State of Odisha & Others., **2020 (III) ILR-CUT-126;** Mahinder Singh Gill Vs. Chief Election Commissioner, **1978 (1) S.C.C 405;** Babu Verghese vs. Bar Council of Kerala, **(1999) 3 SCC 422;** Hussein Ghadially vs. State of Gujarat**, (2014) 8 SCC 425;** Commissioner of Police

Vs.Gordhandas Bhanji**, (1951) SCC 1088, 1951 SCC Online SC 70;** Ganapati Singh Ji Vs. State of Ajmer **(1954 2 SCC 819);** State of Haryana V. Devander Sagar, **(2016) 14 SCC;** Babanna Machched Vs. Union of India & Others, **(2024) 5 SCC 306;** Union of India and Others Vs. Puna Hinda, **(2021) 10 S.C.C 690;** Harpati and Others Vs. State of NCT of Delhi and Others, **(2023) SCC Online Del 4607 ─ referred to.**

List of Act

Odisha Municipality Act, 1950.

Keywords

Disputed question of facts; Interference of Writ Court; No confidence motion; Issuance of notice; Duly authorized person; Competent Authority.

Case Arising From

Notice issued by the Collector and District Magistrate, Ganjam on 04.09.2024.

Appearances for Parties

For Petitioner : M/s. P.K. Rath, Sr. Adv., S.P. Sarangi, N. Dadhichi, A. Kar, & A. Triapthy (in W.P.(C) No. 22656 of 2024)
M/s. B.Routray, Sr.Adv.(in W.P.(C) No. 22661 of 2024)

For Opp.Parties : M/s. Pitambar Acharya, Advocate General,
Mr. M.K. Balabantaray, A.G.A., Mr. P.K. Mohapatra
(for O.P. No. 5 to 13 in W.P.(C) No. 22656 of 2024)

Judgment/Order

Judgment

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through hybrid mode.

2. Since both the Writ Petitions have been filed challenging the notice issued by the Collector and District Magistrate, Ganjam on 04.09.2024 to hold the No Confidence Motion against the Chairman of Purusottampur N.A.C, both the Writ Petitions were heard analogously and disposed of by the present common order.

3. While W.P(C) No.22656 of 2024 has been filed by the Chairperson of Purusottampur Notified Area Council (in short, 'Council')challenging the notice dt.04.09.2024, W.P.(C) No.22661 of 2024 has been filed by two of the Ward Members of the Council representing Ward No 11 and Ward No.6 respectively. Both the Writ Petitions were filed challenging the impugned notice dt.04.09.2024 so issued by the Collector-cum-District Magistrate, Ganjam-Opp. Party No.2 inter alia on the ground that provisions contained under Section 54(2)(c) of the Odisha Municipality Act, 1950 (hereinafter called, "the Act") since has not been followed,

the impugned notice is not sustainable in the eye of law. Section 54(2) of the Act reads as follows:

> **"Vote of no confidence against Chairperson or Vice-Chairperson -** (1) Where a meeting of the Municipality specially convened by the District Magistrate in that behalf a resolution is passed, supported by not less than two-third of the total number of Councillors recording want of confidence in the Chairperson or Vice-Chairperson the resolution along with the records of the proceedings at such meetings shall forthwith be forwarded to the State Government who shall publish the same in the Gazette and with effect from the date of passing of the resolution the person holding the office of Chairperson or Vice-Chairperson, as the case may be, shall be deemed to have vacated such office. In the event of both Chairperson and Vice-Chairperson vacating office the District Magistrate or his nominee shall discharge the responsibilities of the Chairperson till a new Chairperson is elected.
>
> [Provided that no such resolution recording want of confidence in the Chairperson or the Vice-Chairperson-
>
> (1) shall be passed within two years from the date of his election or nomination, as the case may be; and
>
> (ii) shall be moved more than once during a calendar year.]
>
> (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 the rules, made under this Act, 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 number of Councillors along with a copy of the resolution of proposed to be moved at the meeting;
>
> (b) the requisition shall be addressed to the District Magistrate;
>
> (c) the District Magistrate shall, within 10 days of receipt of such requisition, fix the date, hour and place of such meeting and give notice of the same to all the Councillors holding office on the date of such notice along with a copy of the requisition and of the proposed resolution, at least three clear days before the date so fixed;
>
> (d) the District Magistrate or if he is unable to attend, any Gazetted Officer above the rank to which the Executive Officer of the Municipal area belongs who is specially authorised by him in that behalf shall preside over, conduct and regulate the proceedings of the meeting;
>
> '[(e) the voting at all such meetings shall be made in such manner as may be prescribed;]
>
> (f) 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 Chairperson or Vice-Chairperson, as the case may be, shall be taken up for consideration at the meeting;
>
> (g) if the number of Councilors present at the meeting is less than two-thirds of the total number of Councilors the resolution stand annulled;
>
> (h) if the resolution is passed at the meeting supported by the requisite number of Councillors as specified in Sub-section (1) the Presiding Officer shall immediately forward the same in original along with the records of the proceedings to the State Government who shall forthwith publish the resolution in accordance with the provisions of Sub-section (1); and

(i) where any Gazetted Officer presides at the meeting he shall, without prejudice to the provisions of Clause (h) also send a copy of the resolution along with a copy of the proceedings to the District Magistrate for information and such action as may be necessary.]

3.1. Since it was contended in both the Writ Petitions that provisions contained under Section 54(2) (c) of the Act has not been followed while issuing the impugned notice dt.04.09.2024, this Court while issuing notice of the matter vide order dt.12.09.2024 passed an interim order to the following effect in W.P.(C) No.22456 of 2024.

xxx xxx xxx

"Order

12.09.2024

I.A. No.12081 of 2024

1. *Notice as above.*

2. *In the interim, the vote of no confidence as proposed, may take place but no further consequential action be taken on the same till the next date."*

3.2. It is also contended that since 7 out of 9 Councillors who have made the requisition and the resolution proposing No Confidence against the Chairman of the Council have defected to another party on 02.09.2024, the requisition signed by 9 Councillors should have been taken as a requisition signed by only two Councillors and thereby the said requisition is not in terms of the provisions contained under Section 54(2)(a) of the Act.

3.3. It is also contended that one of the Councillors i.e. Petitioner No.1 in W.P.(C) No.22661 of 2023 has already made a complaint before the State Election Commission on 04.09.2024 to disqualify 7 Councillors who have defected to another party taking recourse to the provisions contained under Section 46-A read with Section 46-D of the Act. It is further contended that if the complaint made before the State Election Commission will be accepted, then 7 of the Councilors out of 9 Councillors, who have made the requisition, will face disqualification and will no more remain as Councillors of the Council w.e.f 02.09.2024and thereby will not be eligible to make the requisition.

3.4. It is also contended that the impugned notice dt.04.09.2024 since never indicates that the notice is accompanied by the Requisition as well as the Resolution in terms of the provisions contained under Section 54(2)(c)of the Act, the said notice is not only illegal, but also unsustainable in the eye of law and requires interference of this Court.

4. On their appearance, a counter affidavit was filed on behalf of Opp. Party Nos.2 & 4. Placing reliance on the stand taken in the counter affidavit in both the Writ Petitions and additional affidavit filed by the State on 03.10.2024 in W.P(C) No.22661 of 20124, Mr. Pitambar Acharya, learned Advocate General along with

Mr. M.K. Balabantaray, learned Addl. Govt. Advocate contended that on receipt of the requisition made by 9 Councillors out of the 13 Councillors of the Council dt.02.09.2024 and the Resolution dt.26.08.2024, Opp. Party No.2 issued the notice on 04.09.2024 proposing therein to hold the Vote of No Confidence against the Chairman of the Council on 12.09.2024.

4.1. It is contended that Opp. Party No.2 by enclosing the Page 7 of 43 requisition as well as the resolution along with the impugned notice dt.04.09.2024 directed Opp. Party No.4 to serve the notice dt.04.09.2024 along with the requisition and resolution on all the Councillors of the Council including the Chairperson, Petitioner in W.P.(C) No.22456 of 2024.

4.2. It is contended that even though notice along with the requisition and resolution were duly served on 05.09.2024 on 10 of the Councillors, but such notice along with the requisition and resolution could not be served on the Petitioner in W.P.(C) No.22456 of 2024 as well as the Petitioners in the connected W.P.(C) No.22461 of 2024. The Process Server so engaged by Opp. Party No.4 to serve the notice along with the Resolution and Requisition when failed to serve the notice along with the resolution and requisition on the Petitioners in both the cases on two occasions, the notice along with Resolution and Requisition was affixed in the front door of the residence of all the Petitioners, as reflected from Annexure-B/4 series to the counter filed in both the cases and the additional affidavit filed in W.P.(C) No.22461 of 2024.

4.3. Learned Advocate General vehemently contended that since the notice along with the requisition and resolution were not accepted by the Petitioners in both the cases, the same since was affixed in the front door of the residence of the Petitioners, it is to be treated that the notice dt.04.09.2024 along with the requisitions and resolution has been duly served on all the Petitioners.

4.4. It is also contended that even though in the Writ Petition, a stand was taken that the impugned notice is not accompanied along with the requisition and resolution, but a stand has been taken in the Writ Petition that the requisition dt.02.09.2024 has been signed by 9 of the Councillors and 7 out of the 9 Councillors have defected to another party on 02.09.2024 and against whom complaint has been made for their disqualification. In view of such pleadings made in the Writ Petition, it is to be held that the impugned notice is accompanied by the requisition as well as the resolution.

4.5. It is also contended that even though copy of the impugned notice along with the requisition and resolution was affixed in the front door of the residence of the Petitioners on 06.09.2024, but the same was never disclosed by the Petitioners in both the cases while filing the Writ Petition on 10.09.2024. It is accordingly contended that since Petitioners in both the cases have not approached this Court with clean hand, they are not eligible and entitled to get any relief.

4.6. In support of the aforesaid contention, learned Advocate General relied on a decision of the Hon'ble Apex Court in the case of ***K.D Sharma Vs. Steel Authority of India Ltd. and Others, (2008) (12) SCC 481,*** Hon'ble Apex Court in Paragraph 34,35,36,38 & 39 of the said judgment has held as follows:

> ***34.*** *The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.*
>
> ***35.*** *The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of R. v. Kensington Income Tax Commissioners, (1917) 1 KB 48 : 86 LJ KB 257 :*
>
> *".....it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- it says facts, not law. He must not misstate the law if he can help it; the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement".*
>
> ***36.*** *A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done". The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.*
>
> ***38****. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play `hide and seek' or to `pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".*
>
> ***39.*** *If the primary object as highlighted in Kensington Income Tax Commissioners is kept in mind, an applicant who does not come with candid facts and `clean breast' cannot hold a writ of the Court with `soiled hands'. Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a*

distorted manner and misleads the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court.

4.7. Similarly, reliance was also placed to a decision of the Hon'ble Apex Court in the case **of *Ramjas Foundation and Another Vs. Union of India and Others, (2010) 14 SCC 38.*** Hon'ble Apex Court in Paragraph-21 of the said judgment has held as follows:

> ***"21.****The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case."*

4.8. Learned Advocate General accordingly contended that since the impugned notice dt.04.09.2024 accompanied by the requisition and resolution was duly served on the Petitioners in both the cases with due affixtures because of their refusal to accept the notice, it is to be treated that the impugned notice is in terms of the provisions contained under Section 54(2) (c) of the Act. But by suppressing the service of the notice along with the requisition and resolution, since the Petitioners have approached this Court, they are not eligible and entitled to get any relief.

4.9. It is further contended that in terms of the interim order passed by this Court on 12.09.2024, the Vote of No Confidence was held on the date fixed and in the said Vote of No Confidence,10 of the Councillors out of the total 13 Councillors have casted their vote in support of the No Confidence. But because of the interim order, no consequential action has been taken to publish the result and consequential publication of the same in the Orissa Gazette Extraordinary. It is accordingly contended that since the provisions contained under Section 54(2) of the Act has been duly followed, no interference is called for as Page 14 of 43 prayed for in both the Writ Petition.

5. To the stand taken in the counter affidavit, learned counsels appearing for the Petitioners in W.P.(C) No.22456 of 2024, made further submission basing on the stand taken in the rejoinder affidavit so filed. While reiterating the stand that the impugned notice is not accompanied along with the requisition and resolution which amounts to non-compliance of the provisions contained under Section 54 (2) (c) of the Act, learned Sr. Counsel appearing for the Petitioner contended that only copy of the impugned notice was affixed on the front door of the Petitioners on 06.09.2024,

as found from Annexure-8. It is contended that on 06.09.2024 as reflected in Annexure-8, only copy of the impugned notice dt.04.09.2024 was affixed in the front door of the Petitioner's residence.

5.1. It is also contended that since the impugned notice dt.04.09.2024 has been issued by Opp. Party No.2 without reflecting that the notice is accompanied by the requisition and resolution, the same could not have been served through Opp. Party No.4 and stand of Opp. Party No.4 that the impugned notice was served along with the requisition and resolution cannot be accepted. Similar stand was also taken by the learned Sr. Counsel appearing for the Petitioners in the connected W.P.(C) No.22461 of 2024.

5.2. It is also further contended by the learned Sr. Counsel appearing for the W.P.(C) No. 22656 of 2024 that on the face of the interim order passed by this Court, after holding the Vote of No Confidence at 12 Noon on 12.09.2024 in the Conference Hall of the NAC, counting of the secret ballots so casted was made. It is accordingly contended that the Opp. Parties have violated the impugned order passed by this Court on 12.09.2024 and the said fact be taken note of by this Court.

5.3. Learned Sr. Counsel appearing for the Petitioner in support of non-compliance of the provisions contained under Section 54(2) (c) of the Act relied on the decisions in the case of

1. Mamata Behera V. State of Odisha & Others, 2020 (I) OLR - 470

2. Smt. Kamala Tiria Vs. State of Orissa & Others, 91 (2001) C.L.T. 159

3. Prahallad Dalei Vs. State of Odisha & Others, 2016 (I) CLR - 559

4. Damyanti Hansda Vs. State of Odisha & Others., 2020 (III) ILR-CUT-126

In the case of ***Mamata Behera,*** this Court in Paragraph 11 & 14 has held as follows:

> ***11.*** *In case of Kamala Tiria (Supra), the resolution passed in the specially convened meeting regarding the want of confidence in the Chairperson of the Zilla Parishad as also the notification of the Government in the Department of Panchayat Raj publishing that resolution have been quashed for the reasons of noncompliance of the provisions in that regard as contained in Odisha Zilla Parishad Act, which are in pari material with the provision of Section 54 of the O.M. Act that the proposal to be moved in the meeting had not been sent to the authority along with the requisition and thus not circulated to all the members.*
>
> *In case of Muktamanjari Sahoo (Supra), the notice issued by the authority for convening a special meeting of the Gram Panchayat for discussion of the no confidence motion against its Sarpanch has been quashed in the absence of the copy of the proposed resolution being enclosed by those 1/3rd of the total members of the Gram Panchayat to the authority with the requisition and obviously for the reason of its noncirculation to all the members.*
>
> *In Prahallad Dalei's case (Supra), the court finally quashed the resolution passed by the Gram Panchayat in which want of confidence in the Sarpanch had been recorded on the ground that the authority while issuing the notice expressing the decision to convene the*

specially meeting of the Panchayat for the purpose had not enclosed the copy of the proposed resolution for being served upon all the members of the Panchayat.

14. *So being taken that this was the proposed resolution, the requisition as required under the law is wanting.*

xxx xxx xxx

The well-recognized rule and sound principles are that when the statute gives the power to do a certain thing in a certain manner, the thing must be done in that way or not at all. Statute conferring a power for doing an act when lays down the method in which the power has to be exercised, it necessarily prohibits the doing in any other manner than that has been prescribed. Here, the decision of opposite party no. 2 in convening the meeting is clearly the outcome of non-application of mind as to the satisfaction of the twin requirements as provided in clause (b) and (c) of subsection 2 of section 54 of the O.M. Act.

In the case of ***Smt. Kamala Tiria***, this Court in Paragraph-5 & 6 has held as follows:

5. *Before considering the contentions raised in the case, it would be appropriate to refer to Section 39 of the Orissa Zilla Parishad Act, 1991 (hereinafter referred to as 'the Act') which deals with the procedure of recording want of confidence in the President or Vice-President of the Zilla Parishad. Sub-section (1) thereof lays down that if a resolution is passed at a meeting of the Parishad specially convened for the purpose supported by a majority of not less than two-thirds of the total members having a right to vote expressing want of confidence in the President/Vice-president of such Parishad, such resolution will be forthwith published in the prescribed manner and with effect from the date of such publication the President or Vice President against whom resolution is passed shall be deemed to have vacated the office. Sub-section(2) containing different clauses deals with the mode of containing the special meeting. It is necessary to quote and extract its relevant clauses:*

"Sec. 39(2): xxxxxxxx

(a) no such meeting shall be convened except on a requisition signed by at least one-third of the members with a right to vote along with a copy of the resolution proposed to be moved at the meeting;

(b) the requisition shall be addressed to the Revenue Divisional Commissioner;

(c) the Revenue Divisional Commissioner 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 with a right to vote along with a copy of the requisition and of the proposed resolution at least seven clear days before the date so fixed;

(d) the Revenue Divisional Commissioner or when he is unable to attend, any other Gazetted Officer not below the rank of a Class I Officer of the State Civil Service, authorised by him, shall preside over and conduct the proceedings of the meetings;

(e) to (l) xxxxxxxx"

It provides that no such meeting shall be convened except a requisition signed by at least one-third members with a right to vote along with the copy of the resolution proposed to be moved at the meeting. The requisition will be addressed to the Revenue Divisional Commissioner who on receipt of it shall fix the date, hour and place of such

meeting and give notice of the same to all the members with a right to vote along with the copy of the requisition of the proposed resolution at least seven clear days before the date so fixed. The said meeting shall be presided over and conducted by the Revenue Divisional Commissioner or in his absence any such Gazetted Officer not below in the rank of Class-I Officer of State Civil Service authorised by him.

A close and careful reading of the aforesaid would show that before convening the special meeting for recording want of confidence in the President or the Vice-president of the Parishad, it should be preceded by a requisition to be addressed to the Revenue Divisional Commissioner signed by at least one-third of the members with a right to vote. The requisition is required to be accompanied with a copy of the resolution proposed to be moved at the meeting. On receipt of such requisition the Revenue Divisional Commissioner will give notice fixing the date, hour and place of such meeting to all the members with a right to vote along with a copy of the requisition and of the proposed resolution to be passed at such meeting.

6. *As already noted, Clause (a) of sub-Section (2) of Section 39 of the Act requires that the requisition shall be addressed to the Revenue Divisional Commissioner which is required to be signed by at least one-third of the members with a right to vote. Alongwith the requisition, a copy of the resolution proposed to be moved in the specially convened meeting has to be enclosed. Annexure-2 is practically a forwarding letter written by one of the members of the Zilla Parishad to the Revenue Divisional Commissioner requesting him to convene a special meeting to pass the agends "vote of no confidence against Smt. Kamala Tiria, President, Mayurbhanj Zilla Parishad". Now coming to Annexure-3 it is the submission of the learned counsel appearing for the contesting parties that it is a consolidated document comprising the requisition to the Revenue Divisional Commissioner requesting him to convene a special meeting as well as the resolution proposed to be moved in the said special meeting. Learned counsel had taken that stand because admittedly no other document evidencing a proposed resolution to be moved in the specially convened meeting was enclosed to the so-called requisition. We have carefully perused Annexure-3 extracted above. On its reading it appears that a meeting was held on 5-11-1999 in which there was discussion that the petitioner should no more continue as the President of Zilla Parishad because of her arbitrary actions, etc. and accordingly it was decided in the meeting to move the Revenue Divisional Commissioner for convening a special meeting as required under Section 39(1) of the Act. There is nothing in Annexure-3 to assume that it also contained the proposed resolution to be moved in the meeting to be specially convened by the Revenue Divisional Commissioner. This being the factual position, there is no compliance of sub-Clause (a) of sub-Section (2) of Section 39 of the Act. In the facts and circumstances, it is not possible to hold that there was substantial compliance of the provision. Therefore, pre-condition of the specially convened meeting held on 19-1-2000 having not been satisfied, resolution passed on that day (19-1-2000) regarding want of confidence in the petitioner cannot be supported in law and has to be declared null and void. We order accordingly.*

As the writ petition succeeds on this ground, we need not proceed to examine the other submissions raised on behalf of the petitioner.

In the case of ***Prahallad Dalei***, this Court in Paragraph 10 & 12 has held as follows:

10. *From the discussions supra, it is clear that –*

(i) no form or proforma has been prescribed either for the Notice to be issued by the Sub-Collector calling upon the members including the Sarpanch or Naib Sarpanch to attend the meeting of No Confidence, or for the requisition to be sent by 1/3rd members of the Grama Panchayat or for the proposed resolution to be moved.

(ii) If the intention of the requisite number of members is clear from the resolution adopted in the meeting held to prepare the requisition and the proposed resolution, then the said intention is to be accepted as indicatives of the fact that requisite number of members want to move a No Confidence Motion and that resolution adopted in such meeting is to be abstractly accepted as the proposed resolution.

(iii) The so called proposed resolution to be moved need not be on a separate sheet or document

***12.** In the result, the writ petition is dismissed. The result of the No Confidence Motion kept in sealed cover be declared forthwith and action in accordance with law be taken pursuant to such resolution.*

In the case of Damyanti Hansda, this Court in Paragraph 11,12 & 13 has held as follows:

***11.** The position is settled that when the statutory functionary issues the notice for a particular purpose, and there remains certain conditions to be fulfilled while issuing the said notice, its validity must be judged by looking at the said notice as to whether those aspects even though have not been stated in detail yet if sufficient hints to that effect have been provided or appears in support of the compliance of the mandatory conditions laid down in law in that behalf so as to hold substantial compliance of those. But certainly, its substitution cannot be through an affidavit or otherwise. The reason being that the said notice being made in the beginning without the compliance to that effect cannot be so rectified when it comes to the courts on account of challenge as indicated in the petition, by any other mode like taking averment in the counter or by affidavit. So, for the purpose whether the copy of the requisition given by the opposite party nos.4 to 12 and the resolution that they proposed to move in the said specially convened meeting had been sent with the notice under Annexure-1 is to be construed objectively with reference to the language used or the expression given in the notice.*

***12**. In the case at hand, the notice being in Odia language, the well accepted Odia Language Lexicon "Purna Chandra Bhasakosha" compiled by Late Gopal Chandra Praharaj, the famous celebrated writer and linguist in Odia language significantly contributing to the Odia literature by his words as well as completing such herculean task of listing, some one lakhs eightyfive thousand words and their meanings in four languages, i.e., in Odia, English, Hindi and Bengali, is bound to be referred to in order to address the rival submission. The word "ଆଲୋଚ୍ୟ"(alochya) as finds mention in the notice under Annexure-1 is there at page-823 of Vol.1 (The Vowels) of Purna Chandra Bhasakosha. The synonyms of word (alochya) "ଆଲୋଚ୍ୟ" is "ବିଚାର ଯୋଗ୍ୟ" (bichar jogya), i.e.., "fit to be considered"; "deserving consideration". The next synonym is "ବିଚାରଧୀନ" (bicharadhina), which is "under consideration."Thus, the word "ଆଲୋଚ୍ୟ" (alochya) does not mean or represent either the English word "requisition" or "resolution".*

Similarly, the next odia word (prastaba) as finds mention in the notice as at Annexure-1, is there at page-5142 of the 4th volume of Purna Chandra Bhasakosha. Its synonyms are "ପ୍ରସଙ୍ଗ" (prasanga) and "ବିଷୟ " (Bisaya), which are "subject";"matter" & "topic".

The Oxford English-English-ODIA Dictionary published by Oxford University Press in its 1st edition in the year 2004 gives the meaning of the word "requisition" at page 888 as "କୌଣସି କର୍ତବ୍ୟ ସମ୍ପାଦନ। ପାଇଁ ଲିଖିତ ଆଦେଶ", "କାମ ପାଇଁ ଡାକରା; "ଅଧିକାରଭୁକ୍ତ କରିବା ପାଇଁ ଦାବି କରିବା ବା ଆଦେଶ ଦେବା" "(Kaunasi Kartabya Sampadana Paaini Sarakari Adesha; Kama Paain Dakara; Adhikarbhukta KaribaPaain dabi Kariba or adesha deba). Similarly, the word "resolution" at page 890 of that dictionary is "ସଂକଳ୍ପ"; "ଦୃଢପ୍ରତିଜ୍ଞା"; "ଆନୁଷ୍ଠାନିକ ପ୍ରସ୍ତାବ" (sankalapa; drudha pratigyan; anusthanika prastaba).

13. In the wake of aforesaid, the notice issued by the opposite party no.3 in convening a special meeting of the Grama Panchayat to consider No Confidence Motion against the petitioner, the elected Sarpanch under Annexure-1 stands quashed. Consequently, the actions which have followed the said notice under Annexure-1 stand vitiated.

5.4. With regard to the stand taken in the counter affidavit that the notice along with the requisition and resolution was duly served by Opp. Party No.4, it is contended that since the impugned notice dt.04.09.2024 does not indicate that the notice is accompanied along with the requisition and resolution, the stand taken by Opp. Party No.4 that the notice along with the requisition and resolution were duly served by way of affixtures on all the three petitioners in both the cases through Opp. Party No.4 cannot be accepted, in view of the decision of the Hon'ble Apex Court in the case of ***Mahinder Singh Gill Vs. Chief Election Commissioner 1978 (1) S.C.C 405.*** Hon'ble Apex Page 24 of 43 Court in Para 8 of the Judgment has held as follows:-

"8. *The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16 (at p.18):*

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in Ms mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older:

A Caveat".

5.5. It is also contended that in view of the provisions contained under Section 54 (2)(c) of the Act, since the impugned notice is required to be accompanied with the requisition and the resolution and the same having not been indicated in the

impugned notice itself from its bare perusal, the stand taken by Opp. Party No.4 that the impugned notice was duly served along with the requisition and resolution cannot be accepted. It is contended that if something has been provided to be done in a particular manner in the Statute, it has to be done in that manner only or not to be done at all.

5.6. In support of the same, learned Sr. Counsel appearing on behalf of the Petitioners relied on a decision of the Hon'ble Supreme Court in the case of ***Babu Verghese vs. Bar Council of Kerala, (1999) 3 SCC 422.*** Hon'ble Apex Court in Para-31 of the said judgment has held as follows :

> ***31***. *It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor [(1875) 1 Ch D 426 : 45 LJCh 373] which was followed by Lord Roche in Nazir Ahmad v. King Emperor [(1936) 63 IA 372 : AIR 1936 PC 253] who stated as under:*
>
> *"[W]here a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."*

Similarly, in the case of ***Hussein Ghadially vs. State of Gujarat (2014) 8 SCC 425.*** Hon'ble Apex Court in Para-21.3 of the said judgment has held as follows:

> ***21.3.*** *Thirdly, because if the statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited. That proposition of law first was stated in Taylor v. Taylor [(1875) LR 1 Ch D 426] and adopted later by the Judicial Committee in Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : (1936) 44 LW 583 : AIR 1936 PC 253] and by this Court in a series of judgments including those in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh [AIR 1954 SC 322 : 1954 Cri LJ 910] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] , Chandra Kishore Jha v. Mahavir Prasad [(1999) 8 SCC 266] , Dhanajaya Reddy v. State of Karnataka [(2001) 4 SCC 9 : 2001 SCC (Cri) 652] and Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd. [(2008) 4 SCC 755] The principle stated in the above decisions applies to the cases at hand not because there is any specific procedure that is prescribed by the statute for grant of approval but because if the approval could be granted by anyone in the police hierarchy the provision specifying the authority for grant of such approval might as well not have been enacted.*

5.7. It is also contended that since as provided under Section 54 (2) (c) of the Act, the notice was required to be issued and saved by the Collector-Opp. Party No.2, the said Page 27 of 43 duty cannot be exercised by anyone else as has been done by Opp. Party No.4. In support of the same, learned Sr. Counsel appearing for the Petitioner relied on the following decisions:

> ***1. Commissioner of Police Vs.Gordhandas Bhanji (1951) SCC 1088, 1951 SCC Online SC 70.***
>
> ***2. Ganapati Singh Ji Vs. State of Ajmer (1954 2 SCC 819)***

In the case of ***Gordhandas Bhanji,*** Hon'ble Apex Court in Paragraph-11 has held as follows:

> ***11.*** *If the Commissioner of Police had the power to cancel the licence already granted and was the proper authority to make the order, it was incumbent on him to say so in express and direct terms. Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order.*

In the case of **Ganapati Singh Ji,** Hon'ble Apex Court in Paragraph-10 has held as follows:

> ***10.*** *In our opinion, the rules travel beyond the Regulation in at least two respects. The Regulation empowers the Chief Commissioner to make rules for the establishment of a system of conservancy and sanitation. He can only do this by bringing a system into existence and incorporating it in his rules so that all concerned can know what the system is andmake arrangements to comply with it. What he has done is to leave it to the District Magistrate to see that persons desiring to hold a fair are in a position "to establish a proper system of conservancy, etc". But who, according to this, is to determine what a proper system is : obviously the District Magistrate. Therefore, in effect, the rules empower the District Magistrate to make his own system and see that it is observed. But the Regulation confers this power on the Chief Commissioner and not on the District Magistrate, therefore the action of the Chief Commissioner in delegating this authority to the District Magistrate is ultra vires.*

6. Mr. Buddhadev Routray, learned Sr. Counsel in support of his submission relied on the following decisions:

1. State of Haryana V. Devander Sagar, (2016) 14 SCC

2. Babanna Machched Vs. Union of India & Others, (2024) 5 SCC 306

In the case of ***Devander Sagar***, Hon'ble Apex Court in Paragraph-8 has held as follows:

> *xxx xxx xxx*
>
> *"31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act Page 29 of 43 must be done in that manner or not at all."*
>
> *xxx xxx xxx*

In the case of ***Babanna Machched***, Hon'ble Apex Court in Paragraph-26 has held as follows:

> ***"26.*** *At the same time in Mohinder Singh Gill v. Chief Election Commissioner, it has been provide that the validity of the order impugned has to be tested on the basis of the reasoning contained therein and that the authorities are not supposed to supplement the same by means of extraneous material or affidavit before the Courts."*

7. To the submissions made by the learned Sr. Counsel appearing for the Petitioners, regarding service of the impugned notice by Opp. Party No.4 which is

not in terms of the provisions contained under Section 54(2)(c) of the Act, learned Advocate General contended that Section 54 (2)(c) of the Act nowhere contemplates that the impugned notice has to be served only by Opp. Party No.2 and there is also no bar under the said provision for service of notice by Opp. Party No.2 through any other authority duly empowered by him.

7.1. It is contended that after receipt of the requisition and resolution with issuance of the impugned notice on 04.09.2024, Opp. Party No.2 permitted Opp. Party No.4 to serve the notices on all the Councillors of the Council including the present Petitioners along with the requisition and resolution by passing an order to that effect. In terms of the said order, Opp. Party No.4 served the notice along with the requisition and resolution on 10 of the Councilors on 05.09.2024. But since the notice along with the requisition and regulation were not accepted by the Petitioners in both the cases in spite of being offered, the notice along with the requisition and resolution were affixed in the front door of the residences of the petitioners on 05.09.2024, which was never disclosed.

7.2. Even though it is not disputed that such a notice was affixed in the front door of the residence of the Petitioner in W.P.(C) No.22656 of 2024, but since as reflected in Annexure-D/4 series, the notice along with the requisition and resolution were affixed in the front door of the residence of the Petitioners in both the cases, the plea taken by the Petitioner that only the notice was affixed cannot be accepted, as it is a disputed question of fact which cannot be adjudicated by this Court while exercising the power under Article 226 of the Constitution of India.

7.3. In support of the aforesaid submission, learned Advocate General relied upon the following decisions of the Hon'ble Apex Court.

1. (2021) 10 S.C.C 690 (Union of India and Others Vs. Puna Hinda)

2. (2023) SCC Online Del 4607 (Harpati and Others Vs. State of NCT of Delhi and Others.

In the case of ***Puna Hinda***, Hon'ble Apex Court in Paragraph-24 has held as follows:

> ***24.*** *Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallised. Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e.*

arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.

Similarly, in the case of ***Harpati and Others***, Hon'ble Apex Court in Paragraph-17 to 19 has held as follows:

17*. It is settled law that a High Court should not exercise its jurisdiction under Article 226 of the Constitution of India when it raises disputed question of facts. The Hon'ble Supreme Court in the case of Chairman, Grid Corpn. of Orissa Ltd. (Gridco) v. Sukamani Das, (1999) 7 SCC 298 was dealing with the question of whether the High Court had made an error in entertaining a writ petition filed seeking compensation for the death of a person due to electrocution, which had allegedly been caused due to the negligence of the authorities. The Apex Court in the said case observed as under:*

"6. In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of Page 33 of 43 the Constitution. The High Court went wrong in proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the appellants, that "admittedly/prima facie amounted to negligence on the part of the appellants". The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to Appellant 1 had snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the appellants and under which circumstances the deceased had come in contact with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorised intervention of third parties or that the deceased had not died in the manner stated by the petitioners. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ petitioners to approach the civil court as it was done in OJC No. 5229 of 1995."

18. The aforesaid judgment has been relied/reiterated by the Apex Court in S.P.S. Rathore v. State of Haryana, (2005) 10 SCC 1 wherein it observed as follows:

*"**16.** In Chairman, Grid Corpn. of Orissa Ltd. (Gridco) v. Sukamani Das [(1999) 7 SCC 298] the question which arose for consideration was, can the High Court under Article 226 of the Constitution award compensation for death caused due to electrocution on account of negligence, when the liability was emphatically denied on the ground that the death had not occurred as a result of negligence, but because of an act of God or of acts of some other persons. The Court held that it is the settled legal petition position that where disputed questions of facts are involved, a under Article 226 of the Constitution is not a proper remedy. Therefore, questions as to whether death occurred due to negligence or due to act of God or of some third person could not be decided properly on the basis of affidavits only, but should be decided by the civil court after appreciating the evidence adduced by the parties. In T.N. Electricity Board v. Sumathi [(2000) 4 SCC*

543] it was held that when a disputed question of fact arises and there is clear denial of any tortious liability, remedy under Article 226 of the Constitution may not be proper. The Court carved out exception to this general rule by observing that, it should not be understood that in every case of tortious liability, recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there, it cannot be said that there will be any bar to proceed under Article 226 of Page 35 of 43 the Constitution."

***19**. Similarly, the Hon'ble Supreme Court in Shubhas Jain v. Rajeshwari Shivam, 2021 SCC OnLine SC 562 has held as under:*

"26. It is well settled that the High Court exercising its extraordinary writ jurisdiction under Article 226 of the Constitution of India, does not adjudicate hotly disputed questions of facts. It is not for the High Court to make a comparative assessment of conflicting technical reports and decide which one is acceptable."

7.4 Learned Advocate General accordingly contended that since notice along with the requisition and resolution were duly served on the Petitioner by way of affixture because of their refusal to receive the notice, it is to be held that notice along with the requisition and resolution were duly served on all the Petitioners, which amounts to compliance of the provisions contained under Section 54(2)(c) of the Act.

7.5. It is also contended that after holding Vote of No Confidence on 12.09.2024 in which 10 numbers of Councillors casted their votes, though it is found that all the 10 Councillors have supported the Vote of NO Confidence, but no further consequential action has been taken because of the interim order passed by this Court on 12.09.2024. Therefore, Opp. Parties have no way violated order dt.12.09.2024 as contended.

7.6. In order to satisfy the stand that the impugned notice along with the requisition and resolution has been duly served on the Petitioners in both the cases with due authorization to Opp. Party No.4, the relevant file was produced before this Court in original for verification. This Court after verifying the records in original found that after receipt of the requisition along with the resolution on 02.09.2024, Opp. Party No.4 while issuing the impugned notice dt.04.09.2024, authorized Opp. Party No.4 to serve the notice along with the requisition and resolution on all the councillors including the Chairman on dt. 04.09.2024 itself. Pursuant to the same, Opp. Party No.4 through the Process Server so engaged vide Order dt.05.09.2024 got the notice served on 10 numbers of the Councillors 05.09.2024. But since such notice along with the requisition and resolution could not be served on the Petitioners in both the cases on refusal the Process Server so engaged, affixed the notice along with the requisition and resolution in the front door of the residence of the Petitioners on 05.09.2024 as found from the report of the Process Server, so witnessed by two official witnesses.

8. I have heard Mr. P.K. Rath, learned Sr. Counsel appearing in W.P.(C) No.22656 of 2024 along with Mr. B Rath, learned Sr. Counsel appearing for the

Petitioners in W.P.(C) No.22661 of 2024 and Mr. Pitambar Acharya, learned Advocate General along with Mr. M.K. Balabantaray, learned Addl. Govt. Advocate and Mr. Pradip Kumar Mohapatra, learned counsel appearing on behalf of private Opp. Party in W.P.(C) No.22656 of 2024.

With due exchange of the pleadings, the matter was 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 submission made and the materials placed before this Court it is found that both the Writ Petitions were filed inter alia challenging the impugned notice dt.04.09.2024 so issued by Opp. Party No.2 fixing 12.09.2024 as the date to take up the Vote of No Confidence against the Chairperson of Purusottampur N.A.C. The Writ Petition was initially filed inter alia challenging the non-compliance of the provisions contained under Section 54(2) (c) of the Act.

9.1. Taking into account the contentions raised in the Writ Petition alleging non-compliance of the provisions contained under Section 54 (2)(c) of the Act, this Court while issuing notice of the matter vide Order dt.12.09.2024 passed an interim order that the Vote of No Confidence be held on the date fixed, but no consequential follow up action shall be taken. As per the said Interim order, Vote of No Confidence was held on 12.09.2024 and as found from the record, 10 out of the 13 Councillors of the N.A.C took part in the Vote of No Confidence and have casted their votes.

9.2. This Court after going through the stand taken in the counter affidavit and after perusing the original record so produced by the learned State Counsel finds that notice dt.04.09.2024 along with the requisition and resolution were sent for service on all the 13 Councillors of the Council through Opp. Party No.4. As found from the record, the impugned notice along with the requisition and resolution were duly served on 10 of the Councillors on 05.09.2024 by the Process Server so engaged by Opp. Party No.4 vide Order dt.05.09.2024. But Opp. Party No.4 when failed to serve the notice dt.04.09.2024along with the requisition and resolution on the Petitioners in both the cases on 05.09.2024 through the Process Server so engaged, the same was affixed along with the requisition and resolution on the front door of the residences of the Petitioners on 05.09.2024 as found from the report of the Process Server, so witnessed by two official witnesses.

9.3. Since the notice along with the resolution and requisition have been duly served on all the 10 councillors out of the 13 and the notice along with the requisition and resolution have been served on affixtures on all the 3 Petitioners in both the cases on 05.09.2024, as per the considered view of this Court, it amounts to non-compliance of the provisions contained under Section 54(2) (C) of the Act.

9.4. The stand taken by the Petitioners that only the notice dt.4.09.2024 was affixed in the front door under Annexure-8 cannot be accepted as the said stand is disputed in nature and this Court in exercise of the power under Article 226 and 227

of the Constitution of India cannot go into such disputed question of fact in view of the decision of the Hon'ble Apex Court in the case of ***Puna Hinda and Harpati & Others*** as cited supra.

9.5. It is also found from the record that the Writ Peiton was filed alleging non-compliance of Section 54 (2) (c) of the Act and with the stand that the impugned notice is not accompanied with the requisition and resolution. But in both the Writ Petitions, it has been clearly pleaded that the requisition dt.02.09.2024 was made by 9 of the Page 41 of 43 Councillors. In view of such stand taken in the Writ Petition, it is to be held that the Petitioners were having the knowledge of the requisition dt.02.09.2024. Not only that as found from the impugned notice dt.04.09.2024, the notice was accompanied with the No Confidence proposal so submitted by the 9(nine) Councillors. Taking into account the fact that notice along with the requisition and resolution was sent for service through Opp. Party No.4 and the original record since clearly reveals such service of notice along with the requisition and resolution, the word "ପ୍ରସ୍ତାବର ନକଲ" as reflected in the impugned notice, as per the considered view of this Court is both the resolution and requisition.

9.6. It is also found from the record that even though the impugned notice along with the requisition and resolution were affixed on 05.09.2024, which was admitted in the rejoinder affidavit, but the said fact was not brought to the knowledge of this Court even though the Writ Petition was filed on 10.09.2024. Therefore, since Petitioners in both the cases have not approached this Court with clean hands, placing reliance on the decisions of the Hon'ble Apex Court in the case of ***K.D. Sharma as well as RamJas Foundation,*** it is the view of this Court that the Petitioners are not eligible and entitled to get any relief.

9.7. This Court is also unable to accept the contention raised by the learned Sr. Counsel with regard to the service of notice through Opp. Party No.4 as illegal as there is no such bar contained under Section 54(2) (c) of the Act for service of such notice by Opp. Party No.2 though any other authority duly authorized by him.

9.8. In view of the aforesaid analysis, this Court is not inclined to interfere with the impugned notice so issued on 04.09.2024. While not inclined to interfere, this Court is inclined to dismiss both the Writ Petitions and dismiss both the Writ Petitions accordingly.

Interim order passed earlier stands vacated.

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

Result of the case:
Writ petitions dismissed.

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2025 (I)-ILR-CUT-217

BHUPENDRA KUMAR MOHANTY
V.
STATE OF ODISHA & ANR.

[W.P.(C) NO. 31236 OF 2023]

06 JANUARY 2025

[MURAHARI SRI RAMAN, J.]

Issue for Consideration

Whether the authority has the power to curtail the notice period of voluntary retirement in absence of application to that effect.

Headnotes

(A) ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 42 (2) proviso – Voluntary retirement – Effective date – The petitioner submitted an application on 03.07.2023 by specifying that he desires to retire voluntarily with effect from 31.10.2023 without any curtailment in such date by the authorities – The Opp. Parties accepted the application of the Petitioner but unilaterally passed the order of retirement, considering the date 03.07.2023 as the date of retirement which is premature in nature – Whether the impugned orders of the Opp. Parties are sustainable.

Held: No – There is no vested power available with the opposite parties to *suo motu* spring into action by curtailing the notice period. (Para 16)

(B) WORDS & PHRASES – The word "Not less than" – Meaning – Discussed with reference to case laws. (Para 11.6 to 11.9)

Citations Reference

K.L.E. Society Vrs. Dr. R.R. Patil, **(2002) 5 SCC 278**; AIR India Express Limited Vrs. Captain Gurdashan Kaur Sandhu, **(2019) 17 SCC 129**; M.S.P. Dora Vrs. Odisha State Road Transport Corporation, **2006 (I) OLR 240**; Shanti Dei Vrs. State of Odisha, **2006 (II) OLR 470 (Ori)**; Paresh Nath Kuanr Vrs. State of Odisha, **2006 (II) OLR 390**; Sarat Padhi Vrs. State, **1988 (I) OLR 80 (Ori) = 65 (1988) CLT 122 (Ori) (FB)**; Bharti Gupta Ramola Vrs. Commissioner of Income Tax**, 2012 SCC OnLine Del 2080**; M.N. Abdul Rawoof Vrs. Pichamuthu, **(2000) 3 SCC 121**; Rameshchandra Ambalal Joshi Vrs. State of Gujarat, **(2014) 1 SCR 1112**; Skoda Auto Volkswagen India Pvt. Ltd. Vrs. Commissioner (Appeals), **2021 SCC OnLine Bom 349**; State of Jharkhand Vrs. Ambay Cements, **(2005) 1 SCC 368**; Gazi Sududdin Vrs. State of Maharashtra, **(2003) 7 SCC 330**; K.L.E. Society Vrs. Dr. R.R. Patil, **(2002) 5 SCC 278**; Union of India Vrs. Gopal Chandra Misra, **(1978) 2 SCC 301**; Jai Ram Vrs. Union of India, **AIR 1954 SC 584**; Balram Gupta Vrs.

Union of India, **1987 Supp SCC 228**; Punjab National Bank Vrs. P.K. Mittal, **1989 Supp (2) SCC 175**; Indian Bank Vrs. Mahaveer Khariwal, **(2021) 1 SCR 144**; M.S.P. Dora Vrs. Orissa State Road Transport, **2006 SCC OnLine Ori 73=101 (2006) CLT 281=2006(I) OLR 2040;** Faziludeen Vrs. Union of India, **2023 SCC OnLine Ker 6709 (Division Bench)**; Mohinder Singh Gill Vrs. Chief Election Commissioner, **(1978) 1 SCC 405**; Sical Logistics Ltd. Vrs. Mahanadi Coalfields Ltd., **2017 (II) ILR-CUT 1035**; Shiv Prasad Sahu Vrs. State of Orissa, **2008 SCC OnLine Ori 266 = 106 (2008) CLT 672 (DB)**; Steel Authority of India Limited Vrs. Sales Tax Officer, **(2008) 10 SCR 655 = 2008 INSC 799**; Lalchand Bhagat Ambica Ram Vrs. **CIT, (1959) 37 ITR 288 (SC)**; Omar Salay Mohamed Sait Vrs. **CIT, (1959) 37 ITR 151 (SC)**; Spectra Shares & Scrips Pvt. Ltd. Vrs. **CIT, (2013) 354 ITR 35 (AP)**; Nareshbhai Bhagubhai Vrs. Union of India, **(2019) 15 SCC 1**; Santosh Kumar Paikray Vrs. State of Odisha, **2016 (II) OLR 1131 (Ori)**; State Bank of India Vrs. Ajay Kumar Sood, **2022 SCC OnLine SC 1067**; Ram Chander Vrs. Union of India, **AIR 1986 SC 1173**; Additional Commissioner of Income Tax Vrs. Gurjargravures Pvt. Ltd., **AIR 1978 SC 40 = (1978) 2 SCR 169 = 1977 INSC 215**; Chairman, LIC of India Vrs. A. Masilamani, **(2013) 6 SCC 530**; Nilamani Jal Vrs. Collector, **2016 (II) OLR 190 (Ori)**; State of NCT of Delhi Vrs. Sanjeev @ Bittoo, **(2005) 3 SCR 151**- **referred to.**

List of Rules

Orissa Civil Services (Pension) Rules, 1992.

Keywords

Relevant date, Voluntary retirement, Notice period, Suo motu.

Case Arising From

Office Order No. 4215–II EMET-15/2023 on dated 16.09.2023 passed by the Director of the Directorate of Export Promotion & Marketing.

Appearances for Parties

For Petitioner : M/s. Sambit Rath, S.K. Rout, B.K. Mishra, M.K. Das
For Opp.Parties : Mr. Shantanu Das, A.S.C.

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

Assailed here in this writ petition the Office Order No.4215— II EMET-15/2023, dated 16.09.2023 of the Director of the Directorate of Export Promotion and Marketing, whereby the petitioner has been allowed to retire from Government service voluntarily with effect from 30.09.2023 (Annexure-6), purported to have been passed in pursuance of Office Order No.5825— MSME-FE-FE-0026-2015/

MS&ME, dated 11.08.2023 (Annexure-6A) under the provisions of Rule 42 of the Odisha Civil Services (Pension) Rules, 1992.

1.1. Challenge has also been made to rejection of Grievance Petition dated 18.09.2023 in connection with withdrawal of voluntary retirement notice *vide* Letter No.6957— MSME-FE-FE-0026-2015/MSME, dated 29.09.2023 (Annexure-6A).

1.2. Craving to allow him to be reinstated in the Government service and continue till he attains the age of superannuation, the petitioner has made the following prayers:

> *"It is, therefore, prayed that this Hon'ble Court may graciously be pleased to admit this writ petition and issue rule nisi calling upon the opposite parties to show cause and if they fail to show cause or show insufficient cause, then issue appropriate writ(s), order(s), direction(s) directing the opposite parties:*
>
> *A) To quash the impugned Order dated 16.09.2023, at Annexure-6 which states that vide Order dated 11.08.2023 the petitioner's request for voluntary retirement has been accepted;*
>
> *B) To quash the Order dated 29.09.2023 and 11.08.2023 at Annexure-6A Series:*
>
> *C) Further, direct to allow the petitioner to continue in the service till he attains the age of retirement;*
>
> *And may pass any other/further order(s), as this Hon'ble Court may deem fit in the interest of justice and equity.*
>
> *And for this act of kindness, the petitioner as in duty bound shall ever pray."*

Facts as narrated in the writ petition:

2. The facts as adumbrated by the writ petitioner deserve to be referred to for the purpose of deciding the issues raised in the writ petition.

2.1. The petitioner, having joined as a Laboratory Assistant under the opposite party No.2-Directorate of Export Promotion and Marketing ("DEPM", for brevity) by Order dated 10.10.1991, was promoted to the post of Scientific Assistant on 05.05.2005 and subsequently he was promoted to the post of Assistant Director (Inspection) *vide* Order dated 22.10.2020.

2.2. Having completed around 31 years of service, citing that he has been working as Senior Scientific Officer (in-Charge) in the Testing Laboratory at Balasore with effect from 29.10.2020, he was placed to discharge duties as Senior Scientific Officer (in-Charge) of Testing Laboratory, Berhampur for four days in a week with effect from 16.06.2023 by DEPM Office Order dated 12.06.2023 and in-Charge of Testing Laboratory at Balasore for two days in a week, the petitioner made application for voluntary retirement *vide* Letter dated 03.07.2023 addressing to the Principal Secretary of the Micro, Small and Medium Enterprise Department, ("MSME", for short) through opposite party No.2 specifying his willingness for voluntarily retire from service with effect from 31.10.2023 (afternoon); however, without indicating curtailment of such notice period.

2.3. While matter was thus, he made an application for withdrawal of his application seeking voluntary retirement with effect from 31.10.2023 by an application dated 16.09.2023, sent via e-mail to the DEPM at depmodisha@ gmail.com at 04.59 p.m. and the opposite party No.1-MSME Department at secy-msme.od@nic.in at 05.05 p.m. and also sent the said document by way of speed post, citing reason that sanction of Modified Assured Career Progression has been under consideration by the Government and to cause enquiry on irregularities which were pointed. On receiving the application for withdrawal of voluntary retirement, the Senior Scientific Officer (in-Charge) forwarded the same to the Director, DEPM-opposite party No.2 by Letter No.411-VTLBE-02/2020/TLB, dated 16.09.2023.

2.4. Even though said application for withdrawal of voluntary retirement was communicated to all concerned including the Appointing Authority, the opposite party No.2 at 12.10 p.m. on 18.09.2023 by way of e-mail communicated that the petitioner has been allowed to retire with effect from 30.09.2023. The text of the Office Order is reproduced:

"Directorate of Export Promotion and Marketing :
1st Floor : Raptani Bhawan : BDA Commercial Complex : Near Indradhanu Market :
Nayapalli : Bhubaneswar-15
Tel. No.0674-2552675 Fax No.2555268, e-mail:depmodisha@gmail.com

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Office Order

No. 4215— IIEMET-15/2023/EPM, dated 16.09.2023

In pursuance of the Office Order No.5825/MSME, dated 11.08.2023 of MSME Department, Government of Odisha, Bhubaneswar, Shri Bhupendra Kumar Mohanty, Assistant Director (Inspection), Directorate of Export Promotion and Marketing, Odisha, Bhubaneswar has been allowed to retire from Government service voluntarily with effect from 30.09.2023 (afternoon) on personal ground in pursuance of Rule 42 of the Odisha Civil Services (Pension) Rules, 1992.

Sri Abhimanyu Majhi, Joint Director (Inspection) will remain in-Charge of Senior Scientific Officer, Testing Laboratory, Balasore and Sri Chandan Kumar Mati, Assistant Director (Inspection) will remain in-Charge of Senior Scientific Officer, Testing Laboratory, Berhampur, with effect from 01.10.2023 in addition to their own duties until further orders.

Sd/- 13.09.2023
Director

***

Memo No.4218/EPM, dated 16.09.2023

Copy forwarded to Sri Bhupendra Kumar Mohanty, Assistant Director (Inspection) of Directorate of EP&M, Odissa, Bhubaneswar for information and necessary action. He is informed to submit his pension papers in the prescribed form along with other relevant documents to this Directorate for availing his retirement dues as applicable.

Sd/- 13.09.2023
Director"

2.5. Aggrieved by such Order dated 16.09.2023 accepting the resignation of the petitioner after receipt of application on 16.09.2023 for withdrawal of application for resignation from service intending voluntary retirement with effect from 31.10.2023, the petitioner approached the MSME Department with Grievance Petition dated 18.09.2023 which came to be rejected on 29.09.2023 and the same was communicated by Letter No.6957— MSME-FE-FE-0026-2015/MSME, dated 29.09.2023 enclosing therewith copy of the following Office Order dated 11.08.2023, which had never been communicated to the petitioner before:

"Government of Odisha
MS&ME Department
Office Order
No.5825—MSME-FE-FE-0026-2015/MS&ME,
Bhubaneswar, dated 11.08.2023

After careful consideration of the voluntary retirement notice of Sri Bhupendra Kumar Mohanty, Assistant Director (Inspection), Directorate of Export Promotion and Marketing, Odisha, Bhubaneswar, Government have been pleased to allow him to retire from Government service voluntarily with effect from 30.09.2023 (afternoon) on personal ground in pursuance of Rule 42 of Odisha Civil Services (Pension) Rules, 1992.

Consequent upon his voluntary retirement, he will be entitled to all retirement benefits as per provisions contained under Odisha Civil Services (Pension) Rules, 1992.

By Order of the Governor
Sd/-
(S.C. Mandal)
Additional Secretary
to Government.

Memo No.5826/MSME, dated 11.08.2023

Copy forwarded to Sri Bhupendra Kumar Mohanty, Assistant Director (Inspection), Directorate of Export Promotion and Marketing, Odisha, Bhubaneswar for information and necessary action.

Sd/-
Additional Secretary
to Government."

2.6. Seeking indulgence of this Court by quashing the Office Order dated 11.08.2023 as communicated along with Order dated 29.09.2023 of the MSME Department rejecting the grievance petition in connection with withdrawal of voluntary retirement (Annexure-6A series) and Office Order dated 16.09.2023 of the Director, DEPM (Annexure-6), the petitioner has knocked the doors of this Court invoking extraordinary jurisdiction under Article 226/227 of the Constitution of India.

Counter affidavit of the opposite party No.1:

3. The opposite party No.1 having chosen not to file response independently to the contents and the averments of the writ petitioner, merely sought to adopt the counter affidavit filed by the opposite party No.2.

Counter affidavit of the opposite party No.2:

4. Answering the contention of the petitioner that before lapse of date of effect given in the notice for voluntary retirement, i.e., 31.10.2023, the resignation could not have been accepted, it is affirmed that Rule 42 of the Odisha Civil Services (Pension) Rules, 1992 ("Pension Rules", for convenience) does not restrict or restrain the appropriate authority of the Government from allowing voluntary retirement before expiry of three months from the date of application/notice. The Rule mandates the employee to give a notice of at least three months in their application for voluntary retirement.

4.1. Refuting the averment of the petitioner that prior to acceptance of resignation *vide* Office Order dated 16.09.2023, withdrawal notice was sent *via* e-mail on the same day, it is asserted by the opposite party No.2 that after the order being passed to hand over the charges of Testing Laboratory, the petitioner submitted his representation for withdrawal of his application for voluntary retirement.

4.2. The voluntary retirement of the petitioner was accepted by Government in MSME Department and intimated to the Directorate of EPM on 11.08.2023, *i.e.*, before receipt of his representation for withdrawal of application for voluntary retirement. Further, on 16.09.2023 an order was issued by Directorate to hand over the charges of the Testing Laboratory of Balasore and Berhampur to the Officers of the Directorate. Though the petitioner was well aware of acceptance of the application for voluntary retirement by the Government in MSME Department he has falsely averred that he was intimated for the first time regarding acceptance of such application for voluntary retirement on 16.09.2023.

4.3. After submission of the application for voluntary retirement the appointing authority, i.e., Government in MSME Department, has rightly accepted the application with effect from 30.09.2023. After submission of the application for voluntary retirement the applicant cannot claim the date of acceptance of the application for voluntary retirement. The petitioner has avoided to receive the Government order regarding acceptance of the application for voluntary retirement though he was well aware of its acceptance by the Government in MSME Department and Director has personally instructed him to submit his pension papers and receive the Government orders on 19.08.2023.

Rejoinder affidavit of the petitioner:

5. Refuting the assertions of the opposite parties, the petitioner has filed rejoinder affidavit by denying the fact that no proof has been furnished to demonstrate that they had discussed about the acceptance of voluntary retirement with the petitioner. It is on record to suggest that the Director of EPM had accepted the application for voluntary retirement only on 16.09.2023, which was communicated to the petitioner on 18.09.2023. Therefore, it is suggested that the

affirmation of the opposite party No.2 that a copy of Order dated 11.08.2023 accepting voluntary retirement was being asked to the petitioner for acknowledging receipt is far from truth.

5.1. Whereas the petitioner has specified that the retirement would take effect from 31.10.2023, the opposite parties are not vested with power to curtail such notice period. It is only after completion of 20 years of service the petitioner submitted the application for voluntary retirement on 03.07.2023 by specifying the effective date on 31.10.2023. Therefore, it is asserted by the petitioner that the opposite parties were not justified in curtailing said period unilaterally and curtailing the date of retirement cannot be treated as voluntary retirement. In the scheme of voluntary retirement, it is the employee who has the right to seek for curtailment of notice period of three months.

Hearing:

6. Since pleadings are completed and exchanged between the counsel for the respective parties, on consent this matter is taken up for final disposal at the stage of admission.

6.1. Heard Sri Sambit Rath, learned Advocate for the petitioner and Sri Shantanu Das, learned Additional Standing Counsel for the opposite parties.

6.2. Hearing being concluded, the matter was reserved for preparation and pronouncement of judgment.

Rival contentions and submissions:

7. Sri Sambit Rath, learned Advocate appearing for the petitioner submitted that the provisions of Rule 42 of the Pension Rules does not vest power on the opposite parties to curtail the period of notice as specified by the employee. Had the Order dated 11.08.2023 by virtue of which MSME Department is stated to have accepted the application for voluntary retirement was existing on the date of withdrawal of application by the petitioner on 16.09.2023, such fact could have been communicated to him by way of recognized mode of service. Therefore, it is pleaded that such Order dated 11.08.2023 cannot be said to be an effective order having force.

7.1. Sri Sambit Rath, learned Advocate has placed reliance on *K.L.E. Society Vrs. Dr. R.R. Patil, (2002) 5 SCC 278; AIR India Express Limited Vrs. Captain Gurdashan Kaur Sandhu, (2019) 17 SCC 129; M.S.P. Dora Vrs. Odisha State Road Transport Corporation, 2006 (I) OLR 240* to buttress his argument that application for voluntary retirement could not have been accepted before lapse of three months' notice period as envisaged under Rule 42 of the Pension Rules, 1992.

7.2. He would submit that though the Office Order dated 16.09.2023 is stated to have been signed on 13.09.2023 by the Director, DEPM, was communicated *via* e-mail on 18.09.2023 (12:10 Hours), which is indicative of the fact that the same has been passed after receipt of application for withdrawal of voluntary retirement on

16.09.2023 sent via e-mail at 17:05 Hours. The falsity of claim of the opposite parties can be discerned on bare glance at the Office Order dated 16.09.2023 of the Director, DEPM and Office Order dated 11.08.2023 of the MSME Department, copy of which was communicated to the petitioner along with Letter dated 29.09.2023 of the MSME Department rejecting the Grievance Petition filed with regard to acceptance of application contemplating voluntary retirement.

7.3. It is strenuously argued by Sri Sambit Rath, learned Advocate that when the provisions contained in Rule 42 of the Pension Rules have prescribed safeguards to the employee seeking voluntary retirement, it cannot be construed that the Authority had the discretionary power to grant voluntary retirement by waiving off three months' notice period. There cannot be relaxation or waiver of the three months' notice period and the authorities are not vested with the power to curtail the date of effect of retirement suggested by the petitioner in the application for voluntary retirement. Such notice period is meant for the Government servant (petitioner) for "cooling off" and reflection. Such three months' period would also give opportunity to the employer to make arrangements for search out substitute. As is apparent from the Office Order dated 16.09.2023, the arrangements have been made to hand over the charge to the Joint Director and the Assistant Director who would remain in-Charge of Testing Laboratories of Balasore and Berhampur respectively. It gives sufficient indication that no authority/official has been posted. Therefore, he urged that there was no point in rejecting the grievance of the petitioner since no one else is appointed in his place.

7.4. Amplifying his argument further Sri Sambit Rath, learned Advocate with all humility submitted that whereas the petitioner has been serving the Organisation since 10.10.1991 and having been promoted to the post of Assistant Director (Inspection) from the post of Scientific Assistant on 22.10.2020, the opposite parties-authorities should have been compassionate enough by considering the plight of the petitioner who was required to discharge duties as Senior Scientific Officer in-Charge of Testing Laboratory, Berhampur (for four days in a week) and Testing Laboratory, Balasore (for two days in a week). The distance between Balasore and Berhampur is around 400 kilometres. The undue haste shown by the opposite parties in accepting the application for voluntary retirement before the period stipulated by the petitioner, i.e., 31.10.2023 smacks arbitrariness and such fanciful action on the part of the employer (opposite parties) resulted in adverse civil consequences. Therefore, he would submit that the opposite parties while rejecting the Grievance Petition should have extended an opportunity of hearing to explain the difficulties faced and reasons for applying for voluntary retirement.

7.5. It is fervently submitted that the impugned Orders being devoid of reasons, are liable to be set aside.

8. Sri Shantanu Das, learned Additional Standing Counsel appearing for the opposite parties placed heavy reliance on the counter affidavit and submitted that

there is no restriction put upon the authority concerned to accept the application for voluntary retirement before the specified period by the petitioner. Emphasis is laid on the fact that the petitioner earlier made such application(s) in the years 2015 and 2020 on the ground of illness, which were allowed to be withdrawn before the lapse of notice period. Nonetheless, the petitioner has submitted yet another application for voluntary retirement on 03.07.2023 specifying the date of effect of retirement on 31.10.2023. Therefore, there being no prohibition on the employer to consider and accept the application for voluntary retirement before lapse of three months as the petitioner has remained indecisive to choose between to avail "voluntary retirement" or to carry on with the assigned job. He has been inconsistent in his decision. Vehemently contesting the matter in order to justify the action of the opposite parties in accepting the application for voluntary retirement, referring to paragraph 15 of the counter affidavit filed by the opposite party No.2, Sri Shantanu Das, learned Additional Standing Counsel submitted that the petitioner has been "in a habit of requesting the authorities in the name of voluntary retirement application stating that he is physically and mentally not sound to continue in the Government services from the time and again". Therefore, he would submit that the Office Order dated 11.08.2023 depicting acceptance of application for voluntary retirement, copy of which though was offered to him for acknowledgement of receipt in a meeting held on 19.08.2023 in the Directorate of EPM, the petitioner consciously avoided to receive the same. Hence, no infirmity in acceptance of voluntary retirement application without waiting for notice period could have been attributed to the opposite parties.

Analysis and discussions:

9. The following undisputed facts needs to be outlined for consideration of the issues raised:

(a) Application/notice dated 03.07.2023 addressed to Principal Secretary, MSME Department seeking voluntary retirement on completion of 20 years of Government service in terms of Rule 42 of the Odisha Civil Services (Pension) Rules, 1992, has been submitted by the petitioner by specifying:

"Therefore, I request you kind approval on my willingness for voluntary retirement from service to the State Government with effect from 31.10.2023 (AN) for which I shall be obliged."

(b) On 16.09.2023, before lapse of three months' notice period envisaged under Rule 42 of the Pension Rules, 1992, the petitioner withdrew the application/notice for voluntary retirement citing consideration of Modified Assured Career Progression by the Government on completion of 30 years of service.

(c) On the very date, Office Order No.4215— IIEMET-15/2023/EPM, dated 16.09.2023 stated to have been signed on 13.09.2023 by the Director, DEPM, was issued.

(d)Grievance Petition with regard to withdrawal of application/notice for voluntary retirement filed by the petitioner has come to be rejected by Letter No.6957— MSME-FE-FE-0026-2015/ MSME, dated 29.09.2023.

10. It is perceived from the record that: though the opposite party No.1 has claimed to have passed Order dated 11.08.2023 accepting the application/notice for voluntary retirement, did not choose to file counter affidavit on merit of the matter, rather filed affidavit affirming to have adopted counter affidavit filed by the opposite party No.2. In the opinion of this Court the opposite party No.1 would have been the appropriate party to assert whether such an order has been communicated and served on the petitioner.

10.1. The assertion of the opposite party No.2 at paragraph 11 of the counter affidavit that "the petitioner has attended the meeting of the Directorate on 19.08.2023 where he was intimated regarding acceptance of his voluntary retirement application and required to receive the copy of the Government order from the Directorate. Sri Mohanty was well aware of acceptance of his voluntary retirement application and intentionally avoided to receive the copy of the Government orders of acceptance of the voluntary retirement" has been strongly refuted by the petitioner by way of rejoinder affidavit "the petitioner was aware about the acceptance of VRS is completely frivolous and baseless" and the same has no force in law.

10.2. It is specific stance of the petitioner as is revealed from paragraph 11 of the writ petition that "the withdrawal application for voluntary retirement has been made much prior to the Order of retirement taking effect, i.e. 30.09.2023. Even the original Order dated 11.8.2023 wherein the acceptance has been made has also not been communicated." and it is stated to have come to his knowledge when the Grievance Petition qua withdrawal of application intending voluntary retirement was rejected and communicated *vide* e-mail dated 29.09.2023.

10.3. This Court appreciating rival contentions and submissions observed that the record is silent about the fact with respect to service of copy of Order dated 11.08.2023 of MSME Department on the petitioner. No material is placed by the opposite parties to evince that the copy of such Order had ever been served prior to passing of Order dated 29.09.2023 rejecting the Grievance Petition.

10.4. Furthermore, the record lacks evidence to show that as to why it took more than one month from 11.08.2023 for the opposite party No.2 to make Order dated 16.09.2023 (though stated to have been signed by the Director, DEPM on 13.09.2023). It is inquisitive enough to observe that even as the opposite party No.2 has admitted to have received "the withdrawal of voluntary retirement application of the petitioner from the Office of the Senior Scientific Officer, Testing Laboratory, Balasore" in the Office of the Directorate of EPM at 4:59 P.M. on 16.09.2023 (*vide* paragraph 10 of counter affidavit), there is no explanation whatsoever placed before this Court neither by way of affirmation nor submissions as to why it took around six days to communicate the signed Order dated 13.09.2023 to the petitioner *via* e-mail on 18.09.2023.

10.5. It seems after receipt of application for withdrawal of voluntary retirement stated to be effective from 31.10.2023 (afternoon) on 16.09.2023, the opposite party No.2 has sprung into action only to deprive the petitioner his legitimate right to withdraw his application/notice before lapse of three months from the date of its making.

10.6. Before communication of Order dated 16.09.2023 is completed by service *via* e-mail on 18.09.2023, the petitioner has effectively served application seeking to withdraw the application/notice for voluntary retirement. Such withdrawal application is also before lapse of three months from the date of its submission on 03.07.2023.

11. A glance at Office Order dated 11.08.2023 of the Additional Secretary of MSME Department (Annexure-6A) and Office Order dated 16.09.2023 of the Director of EPM (Annexure-6) would indicate that the opposite parties have exercised power under Rule 42 of the Pension Rules, 1992 to curtail the notice period of three months.

11.1. To examine whether such a power is vested in the opposite parties, it is expedient to extract the provisions contained in Rule 42 of the Pension Rules, which stand thus:

> *"42.Voluntary Retirement on completion of 20 years Qualifying Service.—*
>
> *(1)* ***At any time after*** *a Government servant has* ***completed twenty years qualifying service****, he may, by giving notice of* ***not less than three months*** *in writing to the Appointing Authority, retire from service.*
>
> *(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the Appointing Authority.*
>
> *NOTE.—*
>
> *Such acceptance may be generally given in all cases except those:*
>
> *(a) in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the Disciplinary Authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case or*
>
> *(b) in which prosecution is contemplated or have launched in a Court of Law against the Government servant concerned.*
>
> *If it is proposed to accept the notice of voluntary retirement in such cases, approval of the Government should be obtained:*
>
> ***Provided that where the Appointing Authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date that of expiry of the said period.***
>
> *(3)(a)* ***A Government servant desirous of retiring*** *under sub-rule (1) may make a request in writing to the Appointing Authority to accept notice of voluntary retirement of* ***less than three months giving reason therefor.***

(b) On receipt of a request under clause (a), the Appointing Authority subject to the provision of sub-rule (2), ***may consider such request for the curtailment of the period of notice of three months on merits and if he is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience****, the Appointing Authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.*

(4) This rule shall not apply to a Government servant who retires from Government service for being absorbed permanently in an autonomous body or a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.

Explanation.—

For the purpose of the rule the expression "Appointing Authority" shall means the authority which is competent to make appointment to the service or post from which Government servant seeks voluntary retirement.

(5) The qualifying service as on the date of intended retirement of the Government servant retiring under this rule, with or without permission shall be increased by the period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not any case exceed twenty five years and it does not take him beyond the date of superannuation with effect from 01.12.2008. (Vide Finance Department Notification No.24142/F., dated 04.09.2015).

(6)The pension and retirement gratuity of the Government servant retiring under this rule shall be based on the emoluments as specified under Rule 48 and the increase not exceeding five years in his qualifying service not entitle him to any notional fixation of pay for the purposes of calculating pension and gratuity."

11.2. Meticulous reading of said provisions contained in Rule 42 of the Pension Rules would transpire that:

(a) A Government servant, having completed 20 years of service, desirous of voluntarily retire from service can make an application to the Appointing Authority;

(b) The notice of voluntary retirement does require acceptance by the Appointing Authority, which is granted generally except under certain circumstances enumerated.

(c) Such notice for voluntary retirement shall be made "not less than three months in writing". To seek curtailment such period of three months, scope is given to the Government servant (but not the Appointing Authority) vide Rule 42(3).

(d) Right to refuse voluntary retirement has been conferred on the Appointing Authority. As per Rule 42(3)(b), the Appointing Authority is given power to relax subject to satisfaction that the curtailment of period of notice will not cause any administrative inconvenience.

11.3. The instant case is not one of refusal of the Appointing Authority to grant voluntary retirement. Under such fact-situation, proviso to clause (b) of Note appended to sub-rule (2) of Rule 42 would have application. Under said proviso it is laid down that where the Appointing Authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

11.4. *Ergo*, it is accepted as argued by Sri Sambit Rath, learned Advocate that it is at the option of the petitioner the notice period can be curtailed but not otherwise. Such curtailment can be allowed, of course, at the discretion of the Appointing Authority on consideration of request for the curtailment of the period of notice of three months on merits. If the Appointing Authority is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the Appointing Authority may relax the requirement of notice of three months. In other words, the Appointing Authority has no option but to wait till notice period elapses, if he does not refuse voluntary retirement. In the case at hand, as is manifest from notice dated 03.07.2023 seeking voluntary retirement (Annexure-1) that the petitioner has specified his willingness to retire voluntarily with effect from 31.10.2023. From the date of 03.07.2023 said effective date for retirement is more than three months.

11.5. Significant it is to take cognizance of the expression "give notice of not less than three months in writing to the Appointing Authority" as employed in Rule 42(1) of the Pension Rules. Acceptance of the application/ notice dated 03.07.2023 before lapse of three months or the date specified by the petitioner intending to retire voluntarily, in essence, frustrates the purport of Rule 42 or renders the avowed object of Rule 42 of the Pension Rules unworkable. It is maintained that the requirement as to "not less than three months' in writing" in Rule 42 is a matter of policy and safeguard for the employee. Noteworthy to state that the expressions "within three months" and "not less than three months" are two quite different aspects. Taking into consideration the expression as incorporated in Rule 42 of the Pension Rules, the period for the requisite notice as "not less than three months" is willed by rule-making authority and this obligation is to be construed as absolute. The span of notice is, thus, essence of the mandate. The necessity of notice and the span of notice both are integral to the scheme of the provisions contained in Rule 42. The provisions contained in the said Rule cannot, therefore, be split up into essential and non-essential components, the whole of it being mandatory.

11.6. Meaning of "not less than" has been understood as "Complete days; exclusive of named first or last days". See, *Concise Law Dictionary, by P.G. Osborn, published by Sweet and Maxwell, 1927*."

11.7. Where the statute provides that notice of "seven clear days" is required to be given, it would exclude the date of issue of the notice and the date of meeting. [*Vide, Shanti Dei Vrs. State of Odisha, 2006 (II) OLR 470 (Ori); Paresh Nath Kuanr Vrs. State of Odisha, 2006 (II) OLR 390; Sarat Padhi Vrs. State, 1988 (I) OLR 80 (Ori) = 65 (1988) CLT 122 (Ori) (FB)*].

11.8. The expression "not less than three months" can be better comprehended from the following discussion contained in *Bharti Gupta Ramola Vrs. Commissioner of Income Tax, 2012 SCC OnLine Del 2080*:

"10.We are conscious that in some decisions the expression "not less than" has been interpreted to mean a clear period, excluding the date of service (see Chambers Vrs. Smith, 67 Revised Reports 231, In re Railways Sleepers Supply Company, (1885) 29 Ch.D. 204 (3), Mcqueen Vrs. Jackson, 1903 (2) KB 163, etc.). However, the said cases were where the legislature had fixed time limit, which should not be less than the prescribed days for complying with the requirements of law or to furnish reply. In such circumstances, it has been held that in computation of time, fraction of a day should not be reckoned (see In re Hector Whalling Limited, 1935 All England Reporter, 302 (1936 Ch. 208). ***Even under the Income Tax Act, 1922, the stipulation not less than 30 days in Section 22(2) was interpreted in Commissioner of Income Tax Vrs. Ekbal and Company, AIR 1945 Bom 316 to mean 30 clear days. This expression was distinguished from the expression within 30 days, which means within two points of time****. Similar views have been expressed in N.V.R. Nagappa Chettiar Vrs. Madras Race Club, AIR 1951 Mad 831, Anokhmal Bhurelal Vrs. Chief Panchayat Officer Rajasthan, Jaipur, AIR 1957 Raj 388, Smt. Haradevi Vrs. State of Andhra Pradesh, AIR 1957 AP 229.*

11. In T.M. Lall Vrs. Gopal Singh, AIR 1963 P&H 378, Rule 4 of the All India Bar Council (First Constitution) Rules, 1961 had come up for consideration. In the said rule, the expressions "not less than" and "not more than" were used. Because of the use of the said words, it was held that the provision referred to complete or entire days intervening between the two terminal days. Accordingly, fraction of day should not be taken into consideration.

12. However, in English language many words have different meanings and a word can be used in more than one sense. Every dictionary gives several meanings to each word. We cannot mechanically apply every meaning given in the dictionary and have to choose an appropriate meaning that the word may carry in the context in which it is used in the legislation. It is the context which determines the meaning of the word (See P.V. Indiresan (2) Vrs. Union of India, (2011) 8 SCC 441).

13. It is appropriate to refer to the decision of the Supreme Court in Commissioner of Income Tax Vrs. Braithwaite and Company Limited, (1993) 201 ITR 343. In the said case, the assessee had obtained a term loan of Rs.50 lacs from a bank vide agreement dated 1st August, 1964. The loan was to be paid in five installments ending on 31st July, 1971. Question arose whether the repayment as stipulated under the agreement was during a period of "not less than" seven years as per the proviso to Rule 1(b) of the second schedule of the Companies (Profits) Surtax Tax Act, 1964. Reversing the judgment of the High Court and accepting the stand of the assessee, it was held that a fraction of a day would be counted to determine and decide whether the loan was for a period of "less than seven years" or "more than seven years". It was held as under:

'We are of the view that on a plain reading of the proviso to Rule 1(v), Second Schedule to the Act, it is clear that in order to claim the benefit of the said provision, the borrowed money has to be repaid during the period of more than seven years. ***The only interpretation which can be given to the expression "during a period of not less than seven years" is that the said period should go beyond seven years. The reasoning is simple. The period of seven years would not be complete till the last "minute" or even the last "second" of the said period are counted****. In other words, till the last minute of the seven-year period is completed, the period remains less than seven years. In the present case, the agreement was entered into on August 1, 1964. The last instalment was to be paid on July 31, 1971. The seven years were to complete at 12 p.m. (between the*

night of July 31, 1971, and August 1, 1971). Even if the loan was paid back at 11.59 p.m. on July 31, 1971, the period would be less than seven years by one minute. ***It is, therefore, obvious that the period of "not less than seven years"*** *can only mean till after the completion of seven years. We, therefore, hold that the repayment of the borrowed amount during the period of seven years does not mean repayment "during a period of not less than seven years". To claim the benefit under rule 1(v) of the Second Schedule to the Act the repayment of the borrowed money must be during a period which is more than seven years.*

We find support in the view taken by us in the following cases. In Ramanasari Vrs. Muthusami Naik, (1906) ILR 30 Mad 248, Section 18 of the Madras Rent Recovery Act, 1865 (VIII of 1865), required that, in fixing the day of sale, not less than seven days must be allowed "from the time of the public notice and not less than 30 days from the date of distraint". The sale was held on the 13th February, but the notice was published on 6th February. ***It was held that "not less than" means the same as "clear" and seven whole days must elapse between the day of the notice and the day fixed for sale****. In Railway Sleepers Supply Co., In re (1885) LJ 54 Ch 720; (1885) 29 Ch 204, it was held that* ***the expression "not less" than a given number of days means "clear days"****. It was held that the expression "not less" indicates "a minimum".'*

14.Bombay High Court in Ravi Vrs. Collector, Wardah, (2008) 3 Maharashtra Law Journal 758 had examined the expression within a period "not more than one month" used in Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The said words in question stipulated and envisaged that an application should be filed within a period of not more than one month "from" the date of notification of the election result. In view of the word "from", it was held that the first date had to be excluded in view of Section 10 of the Bombay General Clauses Act, 1904."

11.9. In *M.N. Abdul Rawoof Vrs. Pichamuthu, (2000) 3 SCC 121* in the context of explaining the connotation of expression "not less than" it has been observed as follows:

"7. As we read the said proviso it appears to us that the expression "not less than Rs.1200" means that the minimum amount of rental value, if it is Rs.1200, then the person would be covered by the proviso and would not be regarded as a debtor. In Stroud's Judicial Dictionary, 5th Edn., at p. 1700 it is noted that:

'Where a statute prescribes a penalty for an offence of 'not less' than a stated amount, that is the minimum penalty that justices can impose, notwithstanding that the section, prescribing the penalty, says that the offender 'shall be liable' thereto; and the power to mitigate given by the Summary Jurisdiction Act, 1879 (C. 49) S. 4, was in such a case qualified so that mitigation could not go below such minimum (Osborn Vrs. Wood Bros., (1897) 1 QB 197 = 66 LJQB 178 = 76 LT 60)'.

8. In Raja Kulkarni Vrs. State of Bombay, (1953) 2 SCC 552 = AIR 1954 SC 73 = 1954 SCR 384 a question arose regarding the recognition of a trade union. Section 13 of the Bombay Industrial Regulation Act, 1946 provided that a representative union should have a membership of "not less than 15 per cent of the total number of employees". While interpreting this provision it was observed at SCR p. 390 that:

*'The statute lays down the minimum qualification of 15 per cent of membership to enable the union to be called a 'representative union'.***'*

After laying down the test of not less than 15 per cent it was perfectly reasonable

"not to allow any other union such as the appellants to interpose in a dispute on behalf of the textile workers when they did not command the minimum percentage or when their membership fell below the prescribed percentage".

The view which was expressed in Raja Kulkarni case, (1953) 2 SCC 552 = AIR 1954 SC 73 = 1954 SCR 384 clearly was that when the statute uses the expression not less than a particular figure then that figure is the minimum.

9. In K.P. Varghese Vrs. ITO, (1981) 4 SCC 173 this Court was required to interpret Section 52 of the Income Tax Act, 1961 where in sub-section (2) the Income Tax Officer would get jurisdiction to acquire a capital asset if the fair market value of that asset exceeded the full value of consideration "by an amount of not less than 15 per cent of the value so declared". Analysing this provision it was held that according to sub-section (2) the difference between the fair market value and the consideration declared will have to be 15 per cent or more to enable the Income Tax Officer to exercise jurisdiction under that section. To the same effect is the decision of this Court in Karnail Singh Vrs. Darshan Singh, 1995 Supp(1) SCC 760. Section 4 of the Punjab Gram Panchayat Act, 1952 enables the Government to declare any village or group of contiguous villages to constitute one or more sabha area if they had a population of "not less than 500". Interpreting this provision it was held that what was required for the exercise of powers under the said Section 4 was that there should be a minimum population of 500. In other words, the expression population of not less than 500 was interpreted to mean that the minimum population should be 500.

10. The High Court has referred to the decision of this Court in Pioneer Motors (P) Ltd. Vrs. Municipal Council Nagercoil, AIR 1967 SC 684 = (1961) 3 SCR 609 where the expression was, which was being interpreted, "not being less than one month". This Court held that in order that a notice should be valid the expression not being less than one month would mean that there must be notice of 30 clear days. This would be possible only if the 1st and the last day on which the notice is issued is excluded. Rather than helping the respondent in our opinion the said decision fortifies the view which we have taken namely, that the period specified is the minimum period. ***Not less than one month meant that 30 clear days' notice had to be given and it is only in order to ensure that 30 clear days' notice is given that, basing on Section 9 of the General Clauses Act, it was observed that the 1st and the last dates should be excluded.***

11. Similarly, in CIT Vrs. Braithwaite & Co. Ltd., (1993) 2 SCC 262 where the Court had to consider the expression "of a period not less than 7 years" it was held that the period cannot be even one minute less than 7 years. The ratio of this decision is not different than the decision of this Court in Karnail Singh, 1995 Supp (1) SCC 760, K.P. Varghese, (1981) 4 SCC 173 and Raja Kulkarni, (1953) 2 SCC 552 = AIR 1954 SC 73 = 1954 SCR 384. To the same effect is the decision of this Court in Saketh India Ltd. Vrs. India Securities Ltd., (1999) 3 SCC 1."

11.10. The term "month" can be couched from the following discussions contained in *Rameshchandra Ambalal Joshi Vrs. State of Gujarat, (2014) 1 SCR 1112*:

"15. The first question which calls for our answer is the meaning of the expression "month": whether it would mean only a period of 30 days and, consequently, whether six months would mean a period of 180 days. The word "month" has been defined under Section 3(35) of the General Clauses Act to mean a month reckoned according to the British calendar. Therefore we cannot ignore or eschew the word 'British calendar'

while construing "month" under the Act. Accordingly, we are of the opinion that the period of six months cannot be calculated on 30 days in a month basis. Therefore, both the modes of calculation suggested by Mr. Ahmadi do not deserve acceptance and are rejected accordingly.

16. The next question which calls for our answer is the date from which six months' period would commence. In case of ambiguity with reference to the date of commencement, Section 9 of the General Clauses Act can be pressed into service and the same reads as follows:

'9. Commencement and termination of time.—

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'.

17.From the judgment of this Court in the case of Sivakumar Vrs. Natarajan 2009 (9) SCR 386 = (2009) 13 SCC 623 and as quoted in the preceding paragraph of this judgment, it is evident that this Court recorded its agreement to a limited extent that 'in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation' 'Section 9 of the General Clauses Act can be pressed into service.' We would hasten to add that this Court in Sivakumar (supra) did not give nod to the following proposition enunciated by the Kerala High Court in K.V. Muhammed Kunhi Vrs. P. Janardhanan, 1998 CRL.L.J. 4330.

*'3 *** But in the instant case before me, Section 138 proviso (a) is involved which is so clear (as extracted above) that the date of limitation will commence only from the date found in the cheque or the instrument.'*

18. In the case of K.V. Muhammed Kunhi (supra) the cheque was dated 17.11.1994 and that was presented on 17.05.1995, and in this background the Court observed as follows:

*'5 *** When on the footing of the days covered by the British calendar month the period of limitation in the case on hand is calculated, the cheque ought to have been presented in the Bani for collection on or before 16.05.1995. But in this case, as pointed out above the cheque had been presented for collection only on 17.05.1995, which is clearly barred by limitation.'*

19. In this case, six months' period expired a day prior to the corresponding month. In the case in hand, no such day falls in the corresponding month and therefore the last day would be last date of the immediate previous month.

*****

21. Proviso (a) to Section 138 of the Act uses the expression 'six months from the date on which it is drawn'. Once the word 'from' is used for the purpose of commencement of time, in view of Section 9 of the General Clauses Act, the day on which the cheque is drawn has to be excluded.

22. This Court, relying on several English decisions, dealt with the issue of computation of time for the purpose of limitation extensively in Haru Das Gupta Vrs. State of West Bengal, (1972) 1 SCC 639 wherein Paragraph 5 states as follows:

'5.These decisions show that courts have drawn a distinction between a term created within which an act may be done and a time limited for the doing of an act. ***The rule is well established that where a particular time is given from a certain date within which***

an act is to be done, the day on that date is to be excluded, *(see Goldsmiths Company Vrs. The West Metropolitan Railway Co. (1904 KB 1 at 5). This rule was followed in Cartwright Vrs. Maccormack, (1963) 1 All E.R. 11, where the expression 'fifteen days from the date of commencement of the policy' in a cover note issued by an insurance company was construed as excluding the first date and the cover note to commence at midnight of that day, and also in Marren Vrs. Dawson Bentley and Co. Ltd., (1961) 2 QB 135, a case for compensation for injuries received in the course of employment, where for purposes of computing the period of limitation the date of the accident, being the date of the cause of action, was excluded. (See also Stewart Vrs. Chadman, (1951) 2 KB 792 and In re North, Ex parte Wasluck (1895) 2 QB 264.)* ***Thus. as a general rule the effect of defining a period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day****. [See Halsbury's Laws of England (3rd ed.) Vol.37, pp.92 and 95.] There is no reason why the aforesaid rule of construction followed consistently and for so long should not also be applied here.'***"*

11.11. In *Skoda Auto Volkswagen India Pvt. Ltd. Vrs. Commissioner (Appeals), 2021 SCC OnLine Bom 349* the meaning of "month" has been explained as follows:

"36. As per sub-section (35) of Section 3 of the General Clauses Act, the word 'month' has been defined to mean a month reckoned according to the British calendar.

37. In the case of In re : V.S. Metha, AIR 1970 AP 234, Andhra Pradesh High Court was considering the provisions of Section 106 of the Factories Act, 1948 as per which no court shall take cognizance of any offence punishable under the said act unless complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of the inspector. In that context, Andhra Pradesh High Court examined the meaning of the word 'month' : whether it would mean 30 days in which case the complaint should be filed within 90 days from the date of knowledge. After referring to Section 3(35) of the General Clauses Act, it was held that the word 'month' would mean a calendar month and by extension the term 'three months' as appearing in section 106 of the Factories Act, 1948 would only mean a period of three calendar months.

38. Again, in Bibi Salma Khatoon Vrs. State of Bihar, (2001) 7 SCC 197 = AIR 2001 SC 3596, Supreme Court dealt with the provisions of section 16(3) of the Bihar Land Reforms Act, 1961 which provided that benefits under the said act could be availed of if an application is made within three months of the date of registration of the documents of transfer. Posing the question as to what was meant by the word 'month', Supreme Court held that British calendar would mean Gregorian calendar. It was held that when the period prescribed is a calendar month running from any arbitrary date, the period of one month would expire upon the day in the succeeding month corresponding to the date upon which the period starts.

39. Supreme Court in State of H.P. Vrs. Himachal Techno Engineers, 2010 AIR SCW 5088 considered the period of limitation prescribed under sub-section (3) of Section 34 of the Arbitration and Conciliation Act, 1996. While Section 34 relates to application for setting aside arbitral award, sub-section (3) thereof prescribes the period of limitation for filing of such application which is three months. In that context, Supreme Court examined the meaning of the word 'month' and held that a month does not refer to a period of 30 days but refers to the actual period of a calendar month. It was clarified that if the month is April, June, September or November, the period comprising the month will be 30 days; if the month is January, March, May, July, August, October or

> *December, the month will comprise of 31 days; but if the month is February, the period will be 29 days or 28 days depending upon whether it is a leap year or not. After referring to Section 3(35) of the General Clauses Act, it was held that the general rule is that the period ends on the corresponding date in the appropriate subsequent month irrespective of some months being longer than the rest. Therefore, it was held that when the period prescribed is three months (as contrasted from 90 days) from a specific date, the said period would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending on the months, it may mean 90 days or 91 days or 92 days or 89 days."*

11.12. With the above conspectus of meaning of the term "month" and the expression "not less than", it is noticed that the opposite parties have demonstrably committed error in having regard to the expression "by giving notice of not less than three months in writing to the Appointing Authority" as employed in sub-rule (1) of Rule 42 of the Pension Rules, 1992. Moreover, reading sub-rule (3) read with sub-rule (1) ibid. would make it unambiguous that the petitioner-Government servant may seek for curtailment of the period of notice of three months and it is the satisfaction of the Appointment Authority to allow or not to allow. It does require no authority to cite that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner.

11.13. As a precept it may be relevant to state that whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. Reference may be had to *State of Jharkhand Vrs. Ambay Cements, (2005) 1 SCC 368*.

11.14. Whereas it is undisputed that the petitioner has submitted the application/notice dated 03.07.2023 intending to retire voluntarily by specifying therein the effective date as "31.10.2023" (Annexure-1) which is "not less than three months in writing", and the petitioner has not requested the Authority for curtailment of such notice period of three months, the opposite parties could not have exercised power suo motu and accepted the said notice for voluntary retirement before lapse of such period stipulated in the notice. Doing so attracted violation of provisions contained in sub-rule (1) read with sub-rule (3) of Rule 42 of the Pension Rules.

11.15. Further reading of sub-rule (2) of Rule 42 would make the position more clarified that the notice of voluntary retirement "given under sub-rule (1) shall require acceptance by the Appointing Authority". Appended to said sub-rule (2) is a note with proviso which unequivocally speaks that where the Appointing Authority does not refuse to grant permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

11.16. To reiterate, the case at hand is not a case where the Government servant sought for curtailment of notice period nor is it a case of refusal to grant permission. Had the instant case been on account of consideration of curtailment of notice period at the behest of Government servant, in terms of sub-rule (3) of Rule 42 a discretion is vested in the Appointing Authority to relax such period subject to "satisfaction" that the curtailment of period of notice will not cause any administrative inconvenience. As observed in *Gazi Sududdin Vrs. State of Maharashtra, (2003) 7 SCC 330* "satisfaction" of the authority can be interfered with if the satisfaction recorded is demonstratively perverse based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity resulting in prejudice. To that extent, objectivity is inbuilt in the subjective satisfaction of the authority. In the case hand the opposite parties have not placed any material to show that the Government servant has made request to curtail period of notice and the opposite parties have recorded "satisfaction" as to causing "administrative inconvenience" as is required under sub-rule (3) of Rule 42.

11.17. Therefore, necessary corollary would be that when the petitioner has given notice of not less than three months in writing to the Appointing Authority intending to retire voluntarily from a specified date, i.e., 31.10.2023, there was no occasion for the opposite parties to accept the application for voluntary retirement prior to lapse of such period stipulated. Therefore, the impugned Orders in Annexure-6 and Annexure-6A run contrary to provisions of Rule 42.

12. It has been contended by the opposite parties that on earlier occasions request of the petitioner for withdrawal of application for voluntary retirement in the years 2015 and 2020 were conceded and again he has made similar request in the year 2023 having submitted application for voluntary retirement, which is not acceded to. Refuting such contention, it is argued by learned counsel for the petitioner that there can be no semblance of factual aspect and each context has to be judged on its own perspective. It would suffice to say that each case or each occasion is to be treated on its own merits. Therefore, the scope of consideration of factual aspect with respect to earlier occasions cannot have bearing on the present context qua application/notice dated 03.07.2023. Hence, it may be apposite to hold that when there is no request made by the petitioner to waive or curtail the three months' notice period, passing orders accepting the application for voluntary retirement prior to elapse of the period specified in the notice dated 03.07.2023 would be contrary to the purport of Rule 42 of the Pension Rules. As is apparent from the application for consideration of voluntary retirement with effect from 31.10.2023 that the petitioner was to discharge his duty for two days at Balasore and four days at Berhampur in a week (by travelling around 400 kilometres— one side). As it appears the withdrawal of such notice was on account of the fact that his Modified Assured Career Progression has been under consideration by the Government. The opposite parties, therefore, should have allowed such withdrawal

as they could not treat the applications for voluntary retirement submitted in the years 2015 and 2020 as if they are continuation of the application dated 03.07.2023.

12.1. Relevant here to take note of the decision rendered by the Hon'ble Supreme Court of India in the context of voluntary retirement in *K.L.E. Society Vrs. Dr. R.R. Patil, (2002) 5 SCC 278*, wherein following is the observation:

> *"11. The Rule speaks of two authorities, namely, the appointing authority of the employee and the authority competent to approve the appointment of the employee concerned. No particular form of giving the notice is specified in the Rule except that it must be in writing and should be addressed to the appointing authority. As far as the period of notice is concerned, a minimum three months' period is specified subject to both the appointing authority and the approving authority being satisfied that the employee's case merited a lesser notice period. In other words, as far as the authorities themselves are concerned they cannot on their own curtail the notice period. Once the right is exercised by the employee, he can withdraw the notice to retire provided he:*
>
> *(i) makes a request to withdraw within the "intended date of retirement"; and*
>
> *(ii) is in a position to establish that there is a material change in the circumstances by reason of which the notice to retire voluntarily had been given in the first place.*
>
> *12. If there is no such withdrawal of notice, the request for voluntary retirement can be accepted under clause (j) subject to two exceptions neither of which is relevant to this case. Finally, an order of voluntary retirement can be passed by the appointing authority subject again to the fulfillment of two preconditions under clauses (l) and (m) of the sub-rule viz. the specific prior approval of the approving authority and the verification in consultation with the Accountant-General that the employee has put in qualifying service of 20 years.*
>
> *13. In answer to the first question, the learned counsel for the appellant contended that under clause (j) of sub-rule (5) of Rule 50 of the Scheme, a notice of voluntary retirement is to be generally accepted in the absence of a valid notice of withdrawal. It is contended that the withdrawal of the respondent's request of voluntary retirement was not in terms of clause (i) in that it did not even claim any change in the circumstances for which voluntary retirement had been sought by him.*
>
> *14. To our mind irrespective of the validity of the notice of withdrawal the appellant's order accepting the respondent's request for voluntary retirement cannot be sustained primarily because the first notice given by the respondent on 02.12.1994 for voluntary retirement could not be acted upon.*
>
> *15. As noted above, Rule 50(5) provides for a minimum period of notice unless explicitly curtailed under clause (h) of Rule 50(5). The respondent had not specified an intended date of retirement in the first notice. He had asked for "permission to take voluntary retirement at the earliest" but there was no plea for curtailing the notice period. Therefore in the context of Rule 50(h), the "earliest" would have been after three months viz. 2nd March.* ***The importance of the notice period lies in the fact that the retirement if accepted would be effective on the expiry of that period****. However, no action was taken by the appellant to retire Respondent-1 then. On the other hand, after the notice period expired, Respondent-1 was not only continued in service but vested with additional obligations. Respondent-1 did not refuse nor did he protest this. He continued in service well after the expiry of the first notice period. Both the appellant and Respondent-1 by their conduct clearly treated the first notice as infructuous and inoperative. Had the appellant treated the first notice of retirement as the operative one,*

when the impugned order of acceptance was issued, Respondent-1 would have been treated as retired with effect from the expiry of the first notice period.

16. When Respondent-1 submitted the second notice on 05.07.1995 no reference was made to the earlier notice dated 02.12.1994. Besides there could not have been two applications for voluntary retirement. By accepting the second application on 05.07.1995 the first application must in any event be treated as having been superseded. Respondent-1's letter dated 05.07.1995 was in fact a fresh application for voluntary retirement. Here too Respondent-1 did not specify the intended date of retirement. He only requested that he may be permitted to take retirement "at the earliest". The non-specification of a date coupled with the fact that no request was made for curtailment of the notice period, meant that the date of his voluntary retirement could only be on or after 05.10.1995. During this period, Respondent-1 sent the letter dated 19.07.1995 requesting that the notice of voluntary retirement dated 05.07.1995 be kept in abeyance. This was not a letter for withdrawing the notice. It was a request that the notice may be kept in abeyance in the sense not considered immediately thus postponing the intended date of retirement. Assuming that the letter dated 19.07.1995 was a notice of withdrawal and that the appellant was right in discarding it, nevertheless the appellant was bound to allow the notice period of three months calculated from 05.07.1995 to expire before issuing an order accepting the notice. Admittedly the appellant did not do that. It issued the impugned order within 15 days.

17. The appellant purported to treat the notice dated 05.07.1995 as a continuation of the first notice dated 02.12.1994 for the purpose of calculating the notice period. It could not have done that for the reasons stated earlier. ***The appellant not having waited for three months from 05.07.1995, the order accepting Respondent-1's request for voluntary retirement was premature and amounted to unilateral curtailment of the notice period by the appellant contrary to the Scheme and more particularly Rule 50(5)(c) thereof.*** *The impugned order cannot but be held to be bad."*

12.2. In such view of the matter, the contention of the opposite parties that the consideration of earlier applications for voluntary retirement and withdrawal thereof has significant consequence is liable to be repelled.

13. The petitioner having made application dated 03.07.2023 for voluntary retirement specifying date of retirement as "31.10.2023" (notice period of "not less than three months" in writing to the Appointing Authority), the same is in consonance with sub-rule (1) of Rule 42. The petitioner could very well withdraw the same before lapse of such period as specified.

13.1. It has already been observed that before elapse of minimum notice period of three months, the opposite parties could not have acted upon the same and allowed the petitioner to retire with effect from 30.09.2023. Such an action is incoherent to the requirement under the provisions of Rule 42 of the Pension Rules. In the first place, Office Order dated 11.08.2023 of the MSME Department (Annexure-6A) could not be said to have been valid as it is apparently made without waiting for minimum period of three months' notice period. In the second place, no sanctity can be attached to the Office Order dated 16.09.2023 of the Director, DEPM (Annexure-6) inasmuch as the same is made prior to minimum notice period of three months.

This apart, for another reason the Orders in Annexures-6 and 6A cannot be held to be legal as before the orders are stated to have been communicated on 18.09.2023 via e-mail to the petitioner (Annexure-6), he had already communicated application of withdrawal of notice dated 03.07.2023 (Annexure-3).

13.2. At this juncture, it may be apposite to refer to *Air India Express Limited Vrs. Captain Gurdashan Kaur Sandhu, (2019) 17 SCC 129*, wherein it has been observed as follows:

> *"11. The circumstances under which an employee can withdraw the resignation tendered by him and what are the limitations to the exercise of such right, have been dealt by this Court in a number of decisions.*
>
> *11.1. In Jai Ram Vrs. Union of India, AIR 1954 SC 584, the Government servant concerned was to attain age of 55 years on 26.11.1946. He applied on 07.05.1945 for leave preparatory to retirement in terms of Fundamental Rule 86. The request was finally allowed and he was given 6 months' leave which was to expire on 25.05.1947. Ten days before such expiry i.e. on 16.05.1947, he sent an intimation that he would resume his duties which request was rejected. The submission that the age of retirement was 60 years was rejected by this Court. The submission that in terms of Rule 56(b)(i) of Chapter IX of the Fundamental Rules, if found efficient, he could have continued till he attained the age of 60 years, was rejected. It was observed that when a public servant himself expresses his inability to continue in service any longer and seeks permission for retirement, the required exercise in terms of said Rule 56(b)(i) to decide whether to continue him beyond the age of 55 years was rightly not undertaken and the age of retirement for him would be 55 years. In the context whether he could apply for resuming duties on 16.05.1947, it was observed by the Constitution Bench of this Court : (AIR pp. 586-87, para 7)*
>
> *'7. *** It may be conceded that it is open to a servant, who has expressed a desire to retire from service and applied to his superior officer to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained; but he can be allowed to do so long as he continues in service and not after it has terminated.*
>
> *As we have said above, the plaintiff's service ceased on 27.11.1946; the leave, which was allowed to him subsequent to that date, was post-retirement leave which was granted under the special circumstances mentioned in FR 86. He could not be held to continue in service after 26.11.1946, and consequently it was no longer competent to him to apply for joining his duties on the 16.05.1947, even though the post-retirement leave had not yet run out. In our opinion, the decision [Union of India Vrs. Jai Ram, 1952 SCC OnLine P&H 52 = ILR (1952) 1 P&H 562 of the Letters Patent Bench of the High Court is right and this appeal should stand dismissed.'*
>
> *11.2. In Raj Kumar Vrs. Union of India, (1968) 3 SCR 857 = AIR 1969 SC 180, an officer belonging to the Indian Administrative Service tendered resignation and addressed a letter to the Chief Secretary to the Government of Rajasthan on 30.08.1964 that it may be forwarded to the Government of India with remarks of the State Government. The State Government recommended that the resignation be accepted and on 31.10.1964 the Government of India requested the Chief Secretary to the State Government "to intimate the date on which the appellant was relieved of his duties so that a formal notification could be issued in that behalf". Before the date could be intimated and formal notification could be issued, the officer withdrew his resignation*

by letter dated 27.11.1964. On 29.03.1965 an order accepting his resignation was issued. The challenge raised by the officer was rejected and the High Court held [Raj Kumar Vrs. Union of India, 1965 SCC OnLine P&H 187 = ILR (1966) 1 P&H 236] that the resignation became effective on the date the Government of India had accepted it. While dismissing the appeal, a Bench of three Judges of this Court observed : (AIR p. 182, paras 4-5)

'4. The letters written by the appellant on 21.08.1964, and 30.08.1964, did not indicate that the resignation was not to become effective until acceptance thereof was intimated to the appellant. The appellant informed the authorities of the State of Rajasthan that his resignation may be forwarded for early acceptance. On the plain terms of the letters, the resignation was to become effective as soon as it was accepted by the appointing authority. No rule has been framed under Article 309 of the Constitution which enacts that for an order accepting the resignation to be effective, it must be communicated to the person submitting his resignation.

5. Our attention was invited to a judgment of this Court in State of Punjab Vrs. Amar Singh Harika, AIR 1966 SC 1313 in which it was held that an order of dismissal passed by an authority and kept on its file without communicating it to the officer concerned or otherwise publishing it did not take effect as from the date on which the order was actually written out by the said authority; such an order could only be effective after it was communicated to the officer concerned or was otherwise published. The principle of that case has no application here. Termination of employment by order passed by the Government does not become effective until the order is intimated to the employee. But where a public servant has invited by his letter of resignation determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority and in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. Till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus poenitentiae but not thereafter. Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation has not been accepted. In the present case the resignation was accepted within a short time after it was received by the Government of India. Apparently the State of Rajasthan did not immediately implement the order, and relieve the appellant of his duties, but the appellant cannot profit by the delay in intimating acceptance or in relieving him of his duties.'

11.3. In Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301 the issue for consideration was whether a High Court Judge, who had by letter in his own handwriting sent to the President intimated his intention to resign the office with effect from a future date would be competent to withdraw the resignation before the date had reached? The decisions in Jai Ram Vrs. Union of India, AIR 1954 SC 584 and Raj Kumar Vrs. Union of India, (1968) 3 SCR 857 = AIR 1969 SC 180 were considered and while dealing with the scope of clause (a) of the proviso to Article 217 of the Constitution, the Constitution Bench of this Court stated : Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301, SCC pp. 309-10, paras 20 & 22)

'20. Here, in this case, we have to focus attention on clause (a) of the proviso. In order to terminate his tenure under this clause, the Judge must do three volitional things : Firstly, he should execute a "writing under his hand". Secondly, the writing should be

"addressed to the President". Thirdly, by that writing he should "resign his office". If any of these things is not done, or the performance of any of them is not complete, clause (a) will not operate to cut short or terminate the tenure of his office.
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22. It may be observed that the entire edifice of this reasoning is founded on the supposition that the "Judge" had completely performed everything which he was required to do under proviso (a) to Article 217(1). We have seen that to enable a Judge to terminate his term of office by his own unilateral act, he has to perform three things. In the instant case, there can be no dispute about the performance of the first two, namely : (i) he wrote a letter under his hand, (ii) addressed to the President. Thus, the first two pillars of the ratiocinative edifice raised by the High Court rest on sound foundations. But, is the same true about the third, which indisputably is the chief prop of that edifice? Is it a completed act of resignation within the contemplation of proviso (a)? This is the primary question that calls for an answer. If the answer to this question is found in the affirmative, the appeals must fail. If it be in the negative, the foundation for the reasoning of the High Court will fail and the appeals succeed.'

11.4. The tenor and the effect of resignation were then considered in para 28 and ***it was held that the letter in question was merely an intimation or notice to resign the office on a future date*** *and it was open to withdraw the resignation before the arrival of the indicated future date. The observations were : (Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301, SCC p. 311, para 28)*

'28. The substantive body of this letter (which has been extracted in full in a foregoing part of this judgment) is comprised of three sentences only. In the first sentence, it is stated:

'I beg to resign my office as Judge, High Court of Judicature at Allahabad.'

Had this sentence stood alone, or been the only content of this letter, it would operate as a complete resignation in praesenti, involving immediate relinquishment of the office and termination of his tenure as Judge. But this is not so. The first sentence is immediately followed by two more, which read:

'I will be on leave till 31.07.1977. My resignation shall be effective on 01.08.1977.'

The first sentence cannot be divorced from the context of the other two sentences and construed in isolation. It has to be read along with the succeeding two which qualify it. Construed as a whole according to its tenor, the letter dated 07.05.1977, is merely an intimation or notice of the writer's intention to resign his office as Judge, on a future date viz. 01.08.1977. For the sake of convenience, we might call this communication as a prospective or potential resignation, ***but before the arrival of the indicated future date it was certainly not a complete and operative resignation because, by itself, it did not and could not, sever the writer from the office of the Judge, or terminate his tenure as such.'***

11.5. The Court went on to state the principles as: (Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301, SCC pp. 314-15 & 317, paras 41 & 50)

'41. ***The general principle that emerges from the foregoing conspectus, is that in the absence of anything to the contrary in the provisions governing the terms and conditions of the office/post, an intimation in writing sent to the competent authority by the incumbent, of his intention or proposal to resign his office/post from a future specified date can be withdrawn by him at any time before it becomes effective i.e. before it effects termination of the tenure of the office/post or the employment.***

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50. It will bear repetition that the general principle is that in the absence of a legal, contractual or constitutional bar, a "prospective" resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office-tenure of the resigner. This general rule is equally applicable to government servants and constitutional functionaries. In the case of a government servant/or functionary/who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office, normally, the tender of resignation becomes effective and his service/or office-tenure terminated, when it is accepted by the competent authority. In the case of a Judge of a High Court, who is a constitutional functionary and under proviso (a) to Article 217(1) has a unilateral right or privilege to resign his office, his resignation becomes effective and tenure terminated on the date from which he, of his own volition, chooses to quit office. If in terms of the writing under his hand addressed to the President, he resigns in praesenti, the resignation terminates his office-tenure forthwith, and cannot therefore, be withdrawn or revoked thereafter. ***But, if he by such writing, chooses to resign from a future date the act of resigning office is not complete because it does not terminate his tenure before such date and the Judge can at any time before the arrival of that prospective date on which it was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal.'***

11.6. As regards the applicability of the rule in Jai Ram Vrs. Union of India, AIR 1954 SC 584, it was stated: (Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301, SCC p. 317, para 49)

'49. In our opinion, none of the aforesaid reasons given by the High Court for getting out of the ratio of Jai Ram Vrs. Union of India, AIR 1954 SC 584 is valid. Firstly, it was not a "casual" enunciation. It was necessary to dispose of effectually and completely the second point that had been canvassed on behalf of Jai Ram Vrs. Union of India, AIR 1954 SC 584. Moreover, the same principle was reiterated pointedly in 1968 in Raj Kumar Vrs. Union of India, (1968) 3 SCR 857 = AIR 1969 SC 180. Secondly, a proposal to retire from service/office and a tender to resign office from a future date for the purpose of the point under discussion, stand on the same footing. Thirdly, the distinction between a case where the resignation is required to be accepted and the one where no acceptance is required, makes no difference to the applicability of the rule in Jai Ram Vrs. Union of India, AIR 1954 SC 584.'

11.7. In Balram Gupta Vrs. Union of India, 1987 Supp SCC 228 the officer concerned was an accountant in the Photo Division of the Ministry of Information and Broadcasting. While holding that the matter was covered by the decisions of this Court in Raj Kumar Vrs. Union of India, (1968) 3 SCR 857 = AIR 1969 SC 180 and Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301, this Court considered the relevant guidelines and observed: (Balram Gupta Vrs. Union of India, 1987 Supp SCC 228, SCC pp. 235-36, para 12)

'12. In this case the guidelines are that ordinarily permission should not be granted unless the officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not

given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in such quick succession that it cannot be said that any administrative set-up or arrangement was affected. The administration has now taken a long time by its own attitude to communicate the matter. For this the respondent is to blame and not the appellant.'

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*11.9. In Punjab National Bank Vrs. P.K. Mittal, 1989 Supp (2) SCC 175 a permanent officer in the bank sent a letter of resignation on 21.01.1986 in terms of Regulation 20 of PNB (Officers) Service Regulation, 1979, which was to become effective on 30.06.1986. By communication dated 07.02.1986, he was informed that his resignation was accepted with immediate effect. The resignation was withdrawn by the officer on 15.04.1986. The issue therefore arose in the context of said Regulation 20, whether the officer could withdraw the resignation. Regulation 20 was as under: ****

11.10. The submission that clause (2) of Regulation 20 and its proviso were intended only to safeguard the bank's interest and as such the bank could accept the resignation before the date when it was to come into effect was rejected by this Court in following terms: (Punjab National Bank Vrs. P.K. Mittal, 1989 Supp (2) SCC 175, SCC pp. 179-80, paras 7-8)

'7. Dr Anand Prakash emphasises that as clause (2) and its proviso are intended only to safeguard the bank's interests they should be interpreted on the lines suggested by him. We are of the opinion that clause (2) of the regulation and its proviso are intended not only for the protection of the bank but also for the benefit of the employee. It is common knowledge that a person proposing to resign often wavers in this decision and even in a case where he has taken a firm decision to resign, he may not be ready to go out immediately. In most cases he would need a period of adjustment and hence like to defer the actual date of relief from duties for a few months for various personal reasons. Equally an employer may like to have time to make some alternative arrangement before relieving the resigning employee. Clause (2) is carefully worded keeping both these requirements in mind. It gives the employee a period of adjustment and rethinking. It also enables the bank to have some time to arrange its affairs, with the liberty, in an appropriate case, to accept the resignation of an employee even without the requisite notice if he so desires it. The proviso in our opinion should not be interpreted as enabling a bank to thrust a resignation on an employee with effect from a date different from the one on which he can make his resignation effective under the terms of the regulation. We, therefore, agree with the High Court [Pradeep Kumar Mittal Vrs. Punjab National Bank, 1986 SCC OnLine Del 162] that in the present case the resignation of the employee could have become effective only on or about 21.04.1986 or on 30.06.1986 and that the bank could not have "accepted" that resignation on any earlier date. The letter dated 07.02.1986 was, therefore, without jurisdiction.

8. The result of the above interpretation is that the employee continued to be in service till 21.04.1986 or 30.06.1986, on which date his services would have come normally to an end in terms of his letter dated 21.01.1986. But, by that time, he had exercised his right to withdraw the resignation. Since the withdrawal letter was written before the resignation became effective, the resignation stands withdrawn, with the result that the respondent continues to be in the service of the bank. It is true that there is no specific

provision in the regulations permitting the employee to withdraw the resignation. It is, however, not necessary that there should be any such specific rule. Until the resignation becomes effective on the terms of the letter read with Regulation 20, it is open to the employee, on general principles, to withdraw his letter of resignation. That is why, in some cases of public services, this right of withdrawal is also made subject to the permission of the employer. There is no such clause here. It is not necessary to labour this point further as it is well settled by the earlier decisions of this Court in Raj Kumar Vrs. Union of India, (1968) 3 SCR 857 = AIR 1969 SC 180, Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301 and Balram Gupta Vrs. Union of India, 1987 Supp SCC 228.'

12. It is thus well settled that normally, until the resignation becomes effective, it is open to an employee to withdraw his resignation. When would the resignation become effective may depend upon the governing service regulations and/or the terms and conditions of the office/post. As stated in paras 41 and 50 in Union of India Vrs. Gopal Chandra Misra, (1978) 2 SCC 301, "in the absence of anything to the contrary in the provisions governing the terms and conditions of the office/post" or "in the absence of a legal contractual or constitutional bar, a 'prospective resignation' can be withdrawn at any time before it becomes effective". Further, as laid down in Balram Gupta Vrs. Union of India, 1987 Supp SCC 228, 'If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter.'

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15. In terms of the provisions of the CAR, the terms and conditions of appointment in the instant case specifically stated that ***the respondent would give six months' notice in case she desired to leave the services of the appellant.***

16. ***The underlying principle and the basic idea behind stipulation of the mandatory notice period is public interest****. It is not the interest of the employee which is intended to be safeguarded but the public interest which is to be subserved. It seeks to ensure that there would not be any last minute cancellation of flights causing enormous inconvenience to the travellers. It is for this reason that the pilot concerned is required to serve till the expiry of the notice period. The notice period may stand curtailed if NOC is given to the pilot concerned and the resignation is accepted even before the expiring of the notice period. It may, in a given case, be possible that the trained manpower to replace the pilot, who had tendered resignation, could be made available before the expiry of such notice period, in which case the employer is given a choice under Clause 3.7 of the CAR. Even in such eventuality, the guiding idea or parameter is public interest."*

13.3. It may deserve to have regard to the following observations of the Hon'ble Supreme Court of India in the case of *Indian Bank Vrs. Mahaveer Khariwal, (2021) 1 SCR 144*:

"8. It is not in dispute that in the present case the employee submitted the voluntary retirement application on 21.01.2004. In the application itself, the employee requested for waiver of three months' notice and requested to deduct the salary amount of the notice period from out of the amounts payable to him by the employer on retirement. It is not in dispute and it cannot be disputed that the notice of voluntary retirement requires acceptance by the appointing authority. However, as per proviso to Sub-Regulation 2 of Regulation 29, in case the appointing authority does not refuse to grant

the permission for retirement before the expiry of the period specified in the notice, the retirement shall become effective from the date of expiry of the said notice period. In the present case, on the 90th day vide communication dated 20.04.2004 the application of the employee for voluntary retirement was rejected without assigning any specific reasons and by observing that the employee is not eligible for voluntary retirement under Pension Regulations, 1995. The said communication was sent to the employee on the very date, i.e., 20.04.2004, however the same was received by the employee on 23.04.2004. The learned Single Judge dismissed the writ petition so far as challenge to the communication dated 20.04.2004 is concerned. However, on appeal, by the impugned judgment and order, the Division Bench has set aside the communication dated 20.04.2004 by which the request of the employee for voluntary retirement from the service of the employer came to be rejected. Therefore, the short question which is posed for the consideration before this Court is, whether the rejection of the request of the employee for voluntary retirement vide communication dated 20.04.2004 was legal and in consonance with Regulation 29 of the Pension Regulations, 1995 or not.

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10. On a fair reading of Regulation 29, it emerges that an employee is entitled to apply for voluntary retirement after he has completed 20 years of qualifying service. He can apply for voluntary retirement by giving notice of not less than three months in writing to the appointing authority (Regulation 29(1)). However, as per proviso to Sub-Regulation (1) of Regulation 29, Sub-Regulation (1) of Regulation 29 shall not apply to an employee who is on deputation or on study leave on abroad unless after having been transferred or having returned to India he has resumed charge of the post in India and has served for a period of not less than one year. The said proviso shall be dealt with and considered hereinbelow. It also appears that as per Sub-Regulation (2) of Regulation 29, the notice of voluntary retirement given under Sub-Regulation (1) shall require acceptance by the appointing authority. However, as per the proviso to Subregulation (2), the appointing authority has to take a decision before the expiry of the period specified in the notice. It provides that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the notice, there shall be deemed acceptance of the voluntary retirement application and the retirement shall become effective from the date of expiry of the period mentioned in the notice. However, at the same time, as per Sub-Regulation 3(a), an employee may make a request in writing to the appointing authority for waiver of the three months' notice and may make a request to accept the notice of voluntary retirement of less than three months giving reasons thereof. Sub-Regulation 3(b) provides that on receipt of a request for waiver of three months' notice as per Sub-Regulation 3(a), the appointing authority may, subject to the provisions of Sub-Regulation (2), consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the employee shall not apply for commutation of a part of the pension before the expiry of the notice of three months. In the present case, the application of the employee submitting the voluntary retirement application with a request for curtailment of notice of three months was absolutely in consonance with Regulation 29. The request made by the employee for curtailment of the period of notice of three months was required to be considered by the appointing authority on merits and only in a case where it is found that the curtailment of the period of notice may cause any administrative inconvenience, the request for curtailment of the period of three months' notice can be rejected. On considering the communication dated 20.04.2004 rejecting

the application of the employee for voluntary retirement, it does not reflect any compliance of Sub-Regulation 3(b) of Regulation 29. As such, no reasons whatsoever have been assigned/given except stating that the request is not in accordance with Pension Regulations, 1995. Even otherwise, it is required to be noted that even the communication dated 20.04.2004 was on the last day of the third month, i.e., 90th day from the date of submitting the voluntary retirement application. Therefore, there was no reason to reject the prayer of curtailment of the period of notice considering the grounds mention in Sub-Regulation 3(b) of Regulation 29. Be that as it may, the rejection of the application for voluntary retirement was not on the ground that notice of three months is not given. The request made by the employee for curtailment of notice of three months was also not considered on merits. Therefore, as rightly held by the Division Bench of the High Court, the application for voluntary retirement was absolutely in consonance with Regulation 29 and that the rejection was bad in law and contrary to Regulation 29. The Division Bench of the High Court is absolutely justified in quashing and setting aside the communication dated 20.04.2004. We are in complete agreement with the view taken by the Division Bench.

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12. Now so far as the submission on behalf of the employer that the acceptance or non-acceptance of the voluntary retirement application is required to be taken before the expiry of the period specified in the notice, i.e., in the present case three months and the same was taken on the last date of the three months' period and date of receipt of the decision/communication is not material, it is true that in the present case the decision was taken before the expiry of the period specified in the notice, i.e., on or before three months (last day of the third month), however, as observed hereinabove, the rejection of the application for voluntary retirement itself is found to be illegal and bad in law. Therefore, the aforesaid shall not affect the ultimate conclusion reached by the Division Bench of the High Court. As observed hereinabove, communication dated 20.04.2004 rejecting the voluntary retirement application was bad in law and contrary to Regulation 29. Therefore, the employee shall be entitled to all retiral benefits on the basis of his voluntary retirement. Once, it is held that he is voluntary retired as per his application dated 21.01.2004 and the rejection of the application of voluntary retirement is held to be bad in law, all other subsequent proceedings of departmental enquiry will be null and void and shall be non est, as after the voluntary retirement, there shall not be an employer-employee relationship."

13.4. Observation of a Division Bench of this Court in *M.S.P. Dora Vrs. Orissa State Road Transport, 2006 SCC OnLine Ori 73 = 101 (2006) CLT 281 = 2006 (I) OLR 240* may be apt to be referred to:

"7. Admittedly, Government on 21.9.2001 floated the Model Voluntary Retirement Scheme and on 10.10.2001 the petitioner submitted his offer to be included in the Scheme and take voluntary retirement from the services of the Corporation. ***The petitioner changed his mind and took a decision and on 20.12.2001 he submitted an application for withdrawal of option for voluntary retirement as there was no communication to him from the opposite parties within 30 days of his submission of application.*** *On 7.3.2002 the O.P. No. 2 rejected petitioner's request for withdrawal of his application for voluntary retirement without assigning any reason. On 19.3.2002 the petitioner submitted representation giving all details therein and making a prayer to allow withdrawal of his voluntary retirement application, but no communication in that*

regard was received from the opposite parties. The petitioner was relieved from service with effect from 25.7.2002.

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14. As we have already indicated, it is not in dispute that the petitioner submitted his application for withdrawal of the voluntary retirement offer on 20.12.2001 and by that date there was no communication to the petitioner by the opposite parties that his application for voluntary retirement had already been accepted. ***Even at the time of communicating, the order of rejection of his application for withdrawal of his offer for voluntary retirement vide Annexure-4, it was not communicated that his proposal for voluntary retirement had already been accepted****. In this connection, there is a clear mention in the writ petition that in Annexure-4 the rejection order, no reason whatsoever has been assigned.* ***Be that as it may, as per the stipulation in the Clause 3.2 of the Scheme no communication had been made to the petitioner by the opposite parties regarding acceptance/rejection of his V.R. application within 30 days or even thereafter.*** *As we find from the record, he was communicated with the order of his relief vide Annexure-7, the memo No. 19817 dated 25.7.2002 which he received on 26.7.2002. It is an admitted position that the petitioner on 20.12.2001 submitted his application for withdrawal of his voluntary retirement proposal and he had again after rejection of his aforementioned application made representation for withdrawal of his offer for voluntary retirement. It is the stand of the opposite parties 1 to 3 in their counter affidavit that the application of the petitioner dated 10.10.2001 had already been accepted on 19.10.2001 and since by the date of acceptance no application for withdrawal was pending and the same was received, later on, it was rejected. A stand has been taken in the counter affidavit and it was also urged before us that inference can be drawn that the petitioner had knowledge of the acceptance of his voluntary retirement proposal on the basis of his application as he was working as Accounts Officer in the Account Section of the Corporate Office and the Account Section was communicated to calculate the entitlements of the employees including the petitioner himself, individual communication to the employee concerned was not necessary. He also went to the extent of arguing that this communication for calculation of the entitlement was sufficient compliance of clause 3.2 of the Scheme which stipulates that the decision of the competent authority regarding acceptance or rejection should be communicated to the employee concerned within 30 days of the submission of the application.* ***We fail to understand as to how such a proposition is being advanced on the face of specific stipulation in the aforesaid clause that the decision of the competent authority regarding acceptance or rejection should be communicated to the employee concerned****. Learned counsel for the opposite parties, however, had to concede that there was no individual communication made to the petitioner regarding the acceptance of his voluntary retirement offer within 30 days of his making application and he was individually intimated only on 25.7.2002 that he was to be relieved on 25.7.2002/26.7.2002 on acceptance of his voluntary retirement proposal. There is no dispute over the fact that within the period from his filing of application for taking voluntary retirement on 10.10.2001 to 25.07.2002 the date of his relief, petitioner had made two representations to the opposite parties for withdrawal of his voluntary retirement application. It is also not in dispute that his first application dated 20.12.2001 was turned down without assigning any reason and the other application was not at all heeded to.*

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16. We have perused the scheme and have extracted the relevant clauses and we do not find any condition that once an option for voluntary retirement is exercised by an employee and the same is accepted by the employer, the employee is not entitled to withdraw from voluntary retirement. Rather clause 6.1 stipulates that the application for VRS cannot be withdrawn after its acceptance is communicated to the employee concerned. We have already found that at no point of time the petitioner was communicated about the acceptance of his voluntary retirement offer, by the O.Ps. it is only on issuance of office memo at Annexure-7 dated 25.07.2002, the petitioner was intimated that he was allowed to retire from service with effect from 25.07.2002 under MVRS. It is now amply clear that prior to 25.07.2002 there was no communication to the petitioner that his voluntary retirement offer was already accepted by the authority. Even in the rejection order of his application for withdrawal it was not indicated that since his offer had already been accepted, the petition was rejected.

17. The short and only question before us to be decided now is what is the effective date in this case at hand, before which the applicant could have withdrawn his offer of voluntary retirement under the scheme.

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22. In the case of Nand Keshwar Prasad Vrs. Indian Farmers Fertilisers Co-operative Ltd., (1998) 5 SCC 461 = AIR 1999 SC 558, the Court reiterated that it is open to the employee concerned to withdraw letter of resignation before the date indicated in the notice of voluntary retirement. It has been observed therein—

*'*** it appears to us that the law is well settled by this Court in a number of decisions that* ***unless controlled by condition of service or the statutory provision the retirement mentioned in the letter of the resignation must take effect from the date mentioned therein and such date cannot be advanced by accepting the resignation from an earlier date when the concerned employee did not intend to retire from such earlier date.'***

23. In Power Finance Corporation Ltd. Vrs. Pramod Kumar Bhatia, (1997) 4 SCC 280 the Court observed as follows:

'It is now settled legal position that unless the employee is relieved of the duty after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end.'

24. In Srikantha S.M. Vrs. Bharath Earth Movers Ltd., JT (2005) 12 SC 465 = (2005) Supp.4 SCR 156 the Court held thus:

'It is now settled legal position that unless the employee is relieved of the duty after acceptance of the offer of voluntary retirement or resignation, jural relationship of the Employee and the employer does not come to an end.'

25. Coming to the case in hand and looking to the factual position and the law settled by the Hon'ble Apex Court we have absolutely no doubt that there was no communication to the petitioner about the acceptance of his voluntary retirement offer under the Scheme as has been stipulated in clause 6.1. thereof. The petitioner made representation for withdrawal from the Scheme after changing his mind and the same was rejected without assigning any reason whatsoever. Thereafter, he made a second representation which was not heeded to. He continued in the service of the opposite parties till 25.07.2002 when a communication regarding his retirement under voluntary retirement Scheme was made over to him and he made over charge of his office on the said date. In this fact

situation, the jural relationship between the petitioner and the opposite parties continued up to 25.07.2002 and it is not in dispute that he was paid salary and other allowances as a regular employee of the opposite parties up to that date. ***In view of the legal position settled by the Hon'ble Apex Court which we have dealt with extensively in the preceding paragraphs, the petitioner had every right to withdraw the application for voluntary retirement any time before the jural relationship between him and his employer got severed and the opposite parties could not have rejected his withdrawal application petitioner which we hold to be illegal.***

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27. Before we part with and proceed to pass the final order; we would like to note here that a person proposing to resign often wavers in his decision and even in a case where he has taken a firm decision to resign, he may not be ready to go out on change of his mind as in the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardize government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the person concerned to withdraw his letter of retirement. As a model employer, Government or Government run Corporation, must conduct themselves with high probity and candour with its employees."

13.5. The Kerala High Court in consideration of voluntary retirement scheme vis-à-vis undue haste shown by the employer in the case of *Faziludeen Vrs. Union of India, 2023 SCC OnLine Ker 6709* (Division Bench) held as follows:

"11.We profitably recall that going by the applicant's claim, he tendered Annexure-A2 request seeking to withdraw Annexure-A1 application for voluntary retirement on the very next day of his application, that is to say, 08.10.2021. This, of course, was claimed to be tendered by hand, which was allegedly refused by the 3rd respondent. The applicant sent his withdrawal request by registered post on 11.10.2021, vide Annexure-A2. This was received by the 2nd respondent admittedly on 12.10.2021, besides being established from Annexures-A3 and A4 postal receipt and acknowledgment card. We notice that only five days have expired by that time, reckoned from the date of Annexure-A1 application, 07.10.2021, as against a statutory notice period of three months. True that there was a request to waive the notice period. ***However, it is axiomatic that the respondents/authorities have acted with undue haste, without arriving at a proper satisfaction required as per statute, to waive the notice period of three months. There is nothing on record indicating that the application for a notice period less than three months was considered on merits.*** *Nor is there anything to show that the curtailment of the notice period will not cause any administrative inconvenience. On the top of all, if a request for withdrawal of voluntary retirement is made within five days, as enabled by the proviso to Rule 48-A(4) of the Rules, we cannot justify the refusal of such a request on any count/premise, whatsoever. We are fortified in our view by two pronouncements of the Apex Court in*

(1) J.N. Srivastava Vrs. Union of India, (1998) 9 SCC 559 and

(2) Balram Gupta Vrs. Union of India [1987 Supp SCC 228.

The relevant findings in J.N. Srivastava are extracted here below:

'It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for

voluntary retirement. The said view has been taken by a Bench of this Court in the case of Balram Gupta Vrs. Union of India.'

12. ***We also notice that the very purpose of affording a notice period in the statute itself is to enable the applicant to take a well considered decision about his career and reiterate his decision to take voluntary retirement, so that the same is not actuated by any extraneous feelings or emotions, at the spur of a moment. That precisely should be the reason for an enabling provision to withdraw a request for voluntary retirement, before the retirement is to take effect in accord with the statute.*** *In the given facts, we are not in the least hesitant to observe that the purpose of notice period is frustrated. We are of the view that the respondents, being representatives of an entity under the Union Government, ought to have acted with all fairness, as a model employer, guided not merely by the letter of the Rules but by its spirit as well, with a topping of compassion and humane considerations, wherever it deserves."*

13.6. Given the above perspective, there can be no ambiguity in mind to hold that the opposite party No.1 could not have accepted the application/notice dated 03.07.2023 prior to 31.10.2023, i.e., the date specified by the petitioner for voluntary retirement.

14. The impugned Order dated 11.08.2023 of the MSME Department (vide Annexure-6A) and the Order dated 23.09.2023 of the Director, DEPM (Annexure-6) as also rejection of Grievance Petition which is communicated vide Letter dated 29.09.2023 does not reveal the reason for the conclusion on facts nor does any justification cited for the action by exercising power conferred under Rule 42 of the Pension Rules, 1992. However, by way of counter affidavit the opposite parties have sought to fortify the action by supplying fresh reasons (though vague).

14.1. Oft-quoted dicta noticed in *Mohinder Singh Gill Vrs. Chief Election Commissioner*, (1978) 1 SCC 405, as pressed into service by Sri Sambit Rath, learned Advocate arguing for the petitioner, deserves mention. In *Sical Logistics Ltd. Vrs. Mahanadi Coalfields Ltd., 2017 (II) ILR-CUT 1035*, following the ratio propounded in the said case by the Hon'ble Supreme Court, this Court observed as follows:

"9. It is well settled principle of law laid down by the Apex Court time and again that the authority should pass reasoned order. ***Reasons being a necessary concomitant to passing an order, the authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference.***

*****

11. It is well-settled principle of law laid down by the Apex Court in Mohinder Singh Gill and another Vrs. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851 that:

'When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise*. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.'*

In Commissioner of Police, Bombay Vrs. Gordhandas Bhanji, AIR 1952 SC 16, the Apex Court held as follows:

'Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. *Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.'*

Similar view has also been taken in Bhikhubhai Vithalbhai Patel and others Vrs. State of Gujarat and another, (2008) 4 SCC 144 as well as in M/s. Shree Ganesh Construction Vrs. State of Orissa, 2016 (II) OLR 237 = 2016 (II) ILR-CUT 237.

In the case of State of Punjab Vrs. Bandeep Singh, (2016) 1 SCC 724 the Apex Court held that ***the validity of administrative orders/decisions/executive instructions/ orders/circulars must be judged by reasons stated in decision or order itself.*** *Subsequent explanations or reasons cannot be accepted to sustain decision or order."*

14.2. In *Shiv Prasad Sahu Vrs. State of Orissa, 2008 SCC OnLine Ori 266 = 106 (2008) CLT 672*, a Division Bench of this Court laid down that,

"To deal with the third question it is necessary to refer the grounds of appeal filed before the learned Tribunal by the Revenue. The ground of appeal which has been annexed to the petition as annexure 4 does not reveal that any specific ground has been taken with regard to addition of 10 per cent towards driage and wastage made by the Assessing Officer and deleted by the first Appellate Authority. ***By a cryptic order the Tribunal has restored the order of assessment****. The order does not reveal whether any argument has been advanced by the Revenue against deletion of addition 10 per cent of purchased quantity of mohua flowers by the first Appellate Authority. Needless to say that the Tribunal is under a duty to decide all the questions of facts and law raised in the appeal before it. However, Tribunal on its own cannot make out a new case particularly when no such point was taken in ground of appeal and argued before it. It is not possible for the court, to decide an issue, not raised/agitated by the authority for the reason that other party did not have opportunity to meet it and such a course would violate the principles of natural justice. (vide New Delhi Municipal Committee Vrs. State of Punjab AIR 1997 SC 2847). Similarly, in V.K. Majotra Vrs. Union of India (2003) 8 SCC 40, the apex Court held as under:*

*'*** The writ courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case, keeping in view the facts and circumstances of the case, any additional points are to be raised then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise."*

14.3. Such being the requirement of quasi judicial decision making process, with the factual discussions and enunciation of law, this Court may proceed to hold that laconic Orders in Annexures-6 and 6A cannot withstand scrutiny in law. The Orders bereft of reason is untenable in the eye of law.

14.4. The Hon'ble Supreme Court of India for failure of the Authority to ascribe reasons, in the matter of *Steel Authority of India Limited Vrs. Sales Tax Officer, (2008) 10 SCR 655 = 2008 INSC 799* made the following observation:

"12. A bare reading of the order shows complete non-application of mind. As rightly pointed out by learned counsel for the appellant, this is not the way a statutory appeal is to be disposed of. Various important questions of law were raised. Unfortunately, even they were not dealt by the first appellate authority.

13. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. [See Raj Kishore Jha Vrs. State of Bihar, (2003) 11 SCC 519].

14. Even in respect of administrative orders Lord Denning, M.R. in Breen Vrs. Amalgamated Engg. Union, (1971) 1 All ER 1148, observed:

'The giving of reasons is one of the fundamentals of good administration.'

In Alexander Machinery (Dudley) Ltd. Vrs. Crabtree 1974 ICR 120 (NIRC) it was observed:

"Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. *The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi judicial performance."*

14.5. Where the fact finding authority has acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, the Court is entitled to interfere. See, *Lalchand Bhagat Ambica Ram Vrs. CIT, (1959) 37 ITR 288 (SC).*

14.6. With reference to *Omar Salay Mohamed Sait Vrs. CIT, (1959) 37 ITR 151 (SC) the Hon'ble Andhra Pradesh High Court in Spectra Shares & Scrips Pvt. Ltd. Vrs. CIT, (2013) 354 ITR 35 (AP)*, has been pleased to make the observation that Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it, the Court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. **The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so.** On no account whatever should the Tribunal base its

findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by the Court.

14.7. "Reason", being heartbeat of every decision making process, it has been restated in *Nareshbhai Bhagubhai Vrs. Union of India, (2019) 15 SCC 1* as follows:

> *"In Kranti Associates (P) Ltd. Vrs. Masood Ahmed Khan, (2010) 9 SCC 496 this Court held that:*
>
> *'12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognised a sort of demarcation between administrative orders and quasi judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in A.K. Kraipak Vrs. Union of India, (1969) 2 SCC 262.*
>
> ***
>
> *47. Summarising the above discussion, this Court holds:*
>
> *(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi judicial authority must record reasons in support of its conclusions.*
>
> *(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi judicial or even administrative power.*
>
> *(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.*
>
> *(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi judicial and even by administrative bodies.*
>
> *(g) Reasons facilitate the process of judicial review by superior courts.*
>
> *(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.*
>
> *(i) Judicial or even quasi judicial opinions these days can be as different as the Judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*
>
> *(j) Insistence on reason is a requirement for both judicial accountability and transparency.*
>
> *(k) If a Judge or a quasi judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the Judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. [See David Shapiro in "Defence of Judicial Candor", (1987) 100 Harvard Law Review 731-37].

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija Vrs. Spain, (1994) 19 EHRR 553 and Anya Vrs. University of Oxford, 2001 EWCA Civ 405 (CA), wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, 'adequate and intelligent reasons must be given for judicial decisions'.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process"."

14.8. Conceding that giving reasons facilitates the detection of errors of law, this Court in *Santosh Kumar Paikray Vrs. State of Odisha, 2016 (II) OLR 1131 (Ori)* discussed importance of assignment of reason in the following lines:

"8. The meaning of the expression 'reason' as stated by Franz Schubert:

'reason is nothing but analysis of belief.'

In Black's Law Dictionary, 5th Edition, 'reason' has been defined as:

'a faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts and from propositions.'

In other words, reason means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe. The importance of giving reason, it reveals a rational nexus between facts considered and conclusions reached.

9. In Union of India Vrs. Madal Lal Capoor, AIR 1974 SC 87 and Uma Charan Vrs. State of MP, AIR 1981 SC 1915, the Apex Court held reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. The fair play requires recording of germane and relevant precise reasons when an order affects the right of a citizen or a person irrespective of the fact whether it is judicial, quasi judicial or administrative. The recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record and it is vital for the purpose of showing a person that he is receiving justice."

14.9. It is stated in *State Bank of India Vrs. Ajay Kumar Sood, 2022 SCC OnLine SC 1067* that individual judges can indeed have different ways of writing judgments and continue to have variations in their styles of expression. The expression of a judge is an unfolding of the recesses of the mind. **However, while recesses of the mind may be inscrutable, the reasoning in judgment cannot be**. While judges may have their own style of judgment writing, they must ensure lucidity in writing across these styles.

14.10. Ascribing reasons being one of the important facets of decision-making process for arriving at the just conclusion, the opposite parties in the counter affidavit without specifying propriety of action taken under Rule 42 of the Pension Rules could not improve upon the case by supplementing fresh reasons. Mere stating exercise power under Rule 42 in the Order dated 11.08.2023 and Order dated 16.09.2023 in order to justify the decision taken for accepting application for voluntary retirement curtailing the period specified by the petitioner in the notice dated 03.07.2023 unilaterally would not render the action valid. To clarify it may be stated that in Rule 42(3) of the Pension Rules it is the Government servant seeking voluntary retirement who may request the Appointing Authority to accord permission to waive notice period. On such request if made by such Government servant who is desirous of retiring voluntarily, the Appointing Authority under such circumstance is conferred power to "consider" such request.

14.11. To appreciate the term "consider" as found mentioned in clause (b) of sub-rule (3) of Rule 42, it may be noteworthy to refer to *Ram Chander Vrs. Union of India, AIR 1986 SC 1173*, wherein it has been held that the word 'consider' occurring in the Rule must mean the Authority shall duly apply its mind and give reasons for its decision. The duty to give reason is an incident of the judicial process and emphasized that in discharging *quasi judicial* functions the Authority must act in accordance with the principles of natural justice and give reasons for its decision.

14.12. "Consideration" does not mean incidental or collateral examination of a matter by the Authority in the process of assessment/adjudication/ determination. There must be something in the order to show that the Authority applied his mind to the particular subject-matter or the particular source of information with a view to arriving at its conclusion. See, *Additional Commissioner of Income Tax Vrs. Gurjargravures Pvt. Ltd., AIR 1978 SC 40 = (1978) 2 SCR 169 = 1977 INSC 215*.

14.13. The word 'consider' is of great significance. Its dictionary meaning of the same is, 'to think over', 'to regard as', or 'deem to be'. Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term 'consider' postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory Authority should reflect intense application of mind with reference to the material on record. The order of the Authority should reveal such application of mind. The Authority cannot simply adopt the language employed in the document before it and proceed to affirm the

same. [*Vide, Chairman, LIC of India Vrs. A. Masilamani, (2013) 6 SCC 530; Nilamani Jal Vrs. Collector, 2016 (II) OLR 190 (Ori)*].

14.14. Thus, cursory glance at Order dated 11.08.2023 of the MSME Department, Order dated 16.09.2023 of the Director, DEPM and Letter dated 29.09.2023 of MSME reveals that the Appointing Authority had exercised its power being conferred under Rule 42 of the Pension Rules. In the counter affidavit mere making statement that Rule 42 "does not preclude the Government from granting voluntary retirement before expiry of three months from the date of application" would not suffice to countenance the action of the opposite parties. If such exercise of power unilaterally before elapse of three months' notice period is construed in favour of the opposite parties, then the scope of withdrawal of notice or making request for "curtailment of period of notice of three months on merits" as contained in Rule 42(3)(b) would get constricted. Further such a view would render "giving notice of not less than three months in writing to the Appointing Authority" would get ineffective and otiose.

Scope of judicial review for intervention in administrative action of the Authority:

15. It would suffice to refer to observations made in a decision of the Hon'ble Supreme Court of India in the case of *State of NCT of Delhi Vrs. Sanjeev @ Bittoo, (2005) 3 SCR 151*, which are to the following effect:

> *"One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi legislative and quasi judicial nature.*
>
> *It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See State of U.P. and Vrs. Renusagar Power Co., AIR 1988 SC 1737.*
>
> *At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows.*
>
> *The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case.* ***In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.***
>
> *These several principles can conveniently be grouped in two main categories:*

(i) failure to exercise a discretion, and

(ii) excess or abuse of discretionary power.

The two classes are not, however, mutually exclusive.

Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those classes of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised.

One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality', the second 'irrationality', and the third 'procedural impropriety'. These principles were highlighted by Lord Diplock in Council of Civil Service Unions Vrs. Minister for the Civil Service, (1984) 3 All.ER. 935 (commonly known as CCSU Case). ***If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.*** *[See Commissioner of Income-tax Vrs. Mahindra and Mahindra Ltd., AIR (1984) SC 1182].*

The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book "Applications for Judicial Review; Law and Practice" thus:

'There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of Governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of Civil Service Unions Vrs. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case, national security. ***May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved.*** *Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.'*

(Also see Padfield Vrs. Minister of Agriculture, Fisheries and Food, LR (1968) AC 997.

The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

The famous case commonly known as 'The Wednesbury's case'•is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction. Before summarizing the substance of the principles laid down therein• we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses Ltd Vrs. Wednesbury Corpn., (KB at p. 229: All ER A p. 682). It reads as follows:

*'***.It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done.* ***For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority. ... In another, it is taking into consideration extraneous matters****. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.'*

Lord Greene also observed (KB p.230: All ER p.683)

'.it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to****. It is not what the court considers unreasonable. .... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another.'*

Therefore, to arrive at a decision on 'reasonableness' the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one*. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.*

The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in CCSU case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

*'***.Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community.'*

Lord Diplock explained 'irrationality' as follows:

> *'By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is to outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'*
>
> ***In other words, to characterize a decision of the administrator as 'irrational' the Court has to hold, on material, that it is a decision 'so outrageous' as to be in total defiance of logic or moral standards.*** *Adoption of 'proportionality' into administrative law was left for the future.*
>
> *These principles have been noted in aforesaid terms in Union of India Vrs. G. Ganayutham, (1997) 7 SCC 463. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. (See Indian Railway Construction Co. Ltd Vrs. Ajay Kumar, (2003) 4 SCC 579."*

15.1. Viewed the present case at hand on the anvil of aforesaid legal perspective as expounded by the Hon'ble Supreme Court of India the opposite parties have not acted in consonance with what is conferred under Rule 42 more particularly when the case does not fall within the ambit of sub-rule (3) of Rule 42 of the Pension Rules for curtailment of notice period of three months as required under sub-rule (1) *ibid*.

15.2. The opposite parties having passed Order dated 11.08.2023 of the MSME Department (Annexure-6A) and Order dated 16.09.2023 of the Director, DEPM (Annexure-6) specifying the date of retirement of the petitioner unilaterally with effect from 30.09.2023 curtailing the date of voluntary retirement desired by the petitioner in transgression authority and powers conferred under Rule 42 of the Pension Rules, said impugned Orders are vitiated. Under such circumstance of the matter, this Court is inclined to show indulgence in said Order in exercise of power of judicial review in administrative action by applying the exposition of law as enunciated by the Hon'ble Supreme Court of India cited above.

15.3. Under the aforesaid premises, the petitioner has made out a case warranting exercise of extraordinary jurisdiction under Article 226/227 of the Constitution of India by holding that the Grievance Petition dated 18.09.2023 ought not to have been rejected without assigning any reason whatsoever as is revealed from communication vide Letter dated 29.09.2023 issued by the Under-Secretary to Government of Odisha in MSME Department.

15.4. No material justifying action taken against the petitioner being placed by the learned Additional Standing Counsel appearing for the opposite parties to throw light on exercise of power under Rule 42 of the Pension Rules, 1992. In absence of any material that there was a request by the petitioner to curtail the notice period, and lack of recording "satisfaction" that curtailment of such notice period would not cause any administrative inconvenience, the acceptance of voluntary retirement with effect from 30.09.2023 before lapse of three months from 03.07.2023, i.e., the date of application/notice for voluntary retirement indicates the exercise of discretion is improper and inappropriate, besides being irrational and illegal. Therefore, the Orders under challenge in the writ petition are said to be vitiated.

Conclusion:

16. Aforesaid discussion on facts and proposition of law would boil down to demonstrate that the petitioner having submitted his application dated 03.07.2023, i.e., notice of not less than three months by specifying that he desires to retire voluntarily with effect from 31.10.2023, there is no vested power available with the opposite parties to suo motu spring into action by curtailing the notice period. In the present fact scenario the petitioner has never submitted any application seeking to curtail or waive such notice period.

16.1. From the narration of events it transpires that neither the opposite party No.1 could pass the Order dated 11.08.2023 much prior to elapse of three months' notice period in view of sub-rule (1) read with sub-rule (3) of Rule 42 nor could the opposite party No.2 pass Order dated 16.09.2023 specifying date of retirement of the petitioner on 30.09.2023 inasmuch as said date would fall prior to lapse of three months from the date of submission of notice, i.e., 03.07.2023.

16.2. For yet another reason the Orders impugned cannot be held to be tenable is this: that they are not supported by reasons. The acceptance of the retirement notice prior to the effective date specified by the petitioner would significantly prejudice his position. This could lead to adverse civil consequences, limiting the petitioner's ability to request for waiver/curtailment of the notice period. Furthermore, it would restrict his opportunity to consider cooling-off period, which is essential for contemplating the possibility of withdrawing his notice desiring voluntary retirement from a particular date.

17. For the foregoing reasons, in the considered opinion of this Court, the writ petition deserves to be allowed and is, accordingly, allowed.

17.1. The action of the opposite parties in accepting the application/notice dated 03.07.2023 desiring to retire voluntarily is held to be premature and therefore, the Order dated 11.08.2023 of the MSME Department (Annexure-6A), the Order dated 16.09.2023 of DPEM (Annexure-6) and the Letter dated 29.09.2023 (Annexure-6A) are declared illegal and unlawful being contrary to the provisions of Rule 42 of the Odisha Civil Services (Pension) Rules, 1992. It is, therefore, hereby set aside.

17.2. The opposite parties are directed to reinstate the petitioner in his service and treat him in continuous service and give him all benefits including arrears of salary.

18. The writ petition is, accordingly, allowed, 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:
Writ Petition allowed.

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2025 (I)-ILR-CUT-261

PRABIR KUMAR DASH
V.
MANAGING DIRECTOR, ODISHA FOREST DEVELOPMENT CORPORATION LTD. & ORS.

[W.P.(C) NO. 3747 OF 2023]

09 JANUARY 2025

[M.S. RAMAN, J.]

Issues for Consideration

1. Whether immediate financial crisis existed when the application for compassionate appointment had been filed after four years of the death of an employee.

2. Whether the Corporation can be directed by means of a Mandamus to do something which is *per se* illegal.

Headnotes

(A) SERVICE JURISPRUDENCE – Compassionate Appointment – Delay – Application for compassionate appointment submitted after four years of death of an employee – Whether the application should be entertained by the authority.

Held: No – If the family of the deceased employee has survived for several years (since 2004 i.e. year of death of an employee) without compassionate appointment, it is presumed that the immediate financial crisis has been addressed – Hence, there is no justification for granting such an appointment after a prolonged delay. (Para 7.10)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of Mandamus – There is a ban on recruitment under Rehabilitation Assistance Scheme imposed by the State Government upon the Odisha Forest Development Corporation – Whether the Corporation can be directed by means of Writ of Mandamus to do something which is per se illegal.

Held : Writ of *mandamus* is not warranted to be issued. (Para 9.3)

Citations Reference

Union of India Vrs. Amrita Sinha, **(2021) 9 SCR 602;** Indian Bank Vrs. Promila, **(2020) 1 SCR 408;** Central Bank of India Vrs. Nitin, **2022 LiveLaw (SC) 690**; Steel Authority of India Ltd. Vrs. Gouri Devi, **(2021) 11 SCR 37;** State Bank of India Vrs. Somvir Singh, **(2007) 4 SCC 778;** Umesh Kumar Nagpal Vrs. State of Haryana, **(1994) 4 SCC 138;** State of Haryana Vrs. Naresh Kumar Bali, **(1994) 4 SCC 448;** State of Haryana Vrs. Rani Devi,

(1996) Supp.3 SCR 560; LIC Vrs. Asha Ramchhandra Ambekar, **(1994) 2 SCC 718; – referred to.**

List of Rules/Scheme

Odisha Civil Services (Rehabilitation Assistance) Rules, 1990; Rehabilitation Assistance Scheme.

Keywords

Compassionate appointment, Delay in application, Writ of *mandamus*.

Case Arising From

Office Order No. 2251/O.E.II (DY.SDM)/05/1995, dated 28.11.2022 passed by the Managing Director, Odisha Forest Development Corporation Limited.

Appearances for Parties

For Petitioner : M/s. Bijaya Kumar Parida-2, M.B. Swain, A.P. Sahoo, P. Sahoo

For Opp. Parties : M/s. Bigyan Kumar Sharma, Sudeepta Kumar Singh, Jayesh Pradhan and Itishree Tripathy (O.P.Nos.1 & 2)

Mr. Deba Ranjan Mohapatra, A.G.A (O.P.No. 3)

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

Assailed in the writ petition is the Office Order No.2251/O.E.II (DY.SDM)/05/1995, dated 28.11.2022 passed by the Managing Director, Odisha Forest Development Corporation Limited-opposite party No.1 (Annexure-3), wherein and whereby the representation of the petitioner's mother for consideration of her son's appointment as per the Rehabilitation Assistance Scheme envisaged under the Odisha Civil Services (Rehabilitation Assistance) Rules, 1990, was rejected purported to be have been in compliance of direction for consideration of representation as contained in the Order dated 25.08.2022 passed in W.P.(C) No.8196 of 2011 by this Court.

1.1. Being dissatisfied with said Order in Annexure-3, the petitioner (Prabir Kumar Das, son of deceased employee) has approached this Court by way of filing the instant writ petition craving to invoke extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, with the following prayer(s):

> *"It is therefore prayed that this Hon"ble Court may graciously be pleased to admit this writ petition, call for the records, issue notice to the opp. Parties and on hearing issue writ of mandamus directing the opp. Parties more particularly opposite party No.1-Managing Director, Odisha Forest Development Corporation Ltd. (OFDC Ltd.),*

Bhubaneswar to given an appointment to the petitioner under Rehabilitation ground by setting aside/quashing the Order dated 24.11.2022 under Annexure-3.

And pass any other order/orders as would be deem fit and proper in the facts and circumstances of the case.

And for this act of kindness the petitioner as in duty bound shall ever pray."

Case of the petitioner:

2. The case of the writ petitioner, in brief, is that his father-Bhagirathi Dash, Deputy Sub-Divisional Manager under the Odisha Forest Development Corporation Limited ("OFDC", abbreviated) on regular basis, died in harness on 21.05.2004 (as reflected in Order dated 25.08.2004 passed in W.P.(C) No.8196 of 2014) leaving behind his wife (widow), three daughters and two sons (including the petitioner). It is asserted that none of the family members of the petitioner got employment under the Government and his father was the sole bread-winner of the family. After his death, financial stringency compelled him to approach the authority for compassionate appointment.

2.1. The mother of the petitioner (wife of the deceased employee) approached the Divisional Manager, OFDC, Bhanjanagar (C) Division for grant of family pension and also requested for providing an employment to her son (the petitioner) under the Rehabilitation Assistance Scheme as available under the Odisha Civil Services (Rehabilitation Assistance) Rules, 1990 ("RA Rules", for brevity) after obtaining the Death Certificate and Legal Heir Certificate.

2.2. The petitioner made a representation before the Managing Director, OFDC, Bhubaneswar-opposite party No.1 on 10.12.2008. Since the opposite parties did not consider his application, the petitioner approached this Court by way of filing writ petition being W.P.(C) No.18487 of 2009, which was disposed of vide Order dated 23.12.2009 with a direction to the opposite party No.1 to consider the application/ representation of the petitioner.

2.3. The opposite party No.1 in compliance of this Court's Order dated 23.12.2009 rejected the claim of the petitioner for appointment under Rehabilitation on 01.03.2011 with the following observation:

*"*** The Hon"ble High Court, Orissa vide its Order No.2 dated 23.12.2009 passed in W.P.(C) No.18487 of 2009 has been pleased to direct the opposite party No.1, Managing Director, OFDC Ltd., to consider the application of the petitioner Sri Pabitra Kumar Dash, said to have been filed by the petitioner in accordance with the Rules.*

The fact of the case is that, Late Bhagirathi Dash, father of the petitioner was working in OFDC Ltd., as Dy. SDM, and he expired on 25.01.2004. Due to above reasons, the petitioner has filed the writ petition before the Hon'ble High Court, Orissa for his employment under Rehabilitation Assistance Scheme in OFDC Ltd.

Further, the petitioner stated that he has filed an application on 10.12.2008 before the Managing Director, OFDC Ltd, Bhubaneswar to give him employment. But, it is ascertained that no such application has been received at Corporate Office, Bhubaneswar from the petitioner Sri Dash.

Further, Orissa Forest Development Corporation Ltd., is a Government of Orissa Undertaking. ***There are large numbers of employees working in this Organization and till date large number surplus staff/officers are continuing in this OFDC Ltd, as a result of which there is no vacancy to appoint the persons in any category post in OFDC Ltd. Further Ban order for recruitment/appointment under Rehabilitation Scheme in Public Sector Undertaking has not yet been vacated by the Government of Orissa.***

In view of the above and since the OFDC has huge surplus staff, the question of appointment to the petitioner in the Rehabilitation Assistance Scheme in Orissa Forest Development Corporation Ltd., does not arise. Hence, the grievance of the petitioner for appointment on Rehabilitation Scheme has got no merit for consideration and it is accordingly rejected."

2.4. Aggrieved by said Order dated 01.03.2011, the petitioner again knocked the doors of this Court by way of filing writ petition, giving rise to registration of W.P.(C) No.8196 of 2011 with the prayer for according an appointment under the RA Rules and set aside the said Order dated 01.03.2011. This Court disposed of the matter with the following observation vide Order dated 25.08.2022:

*"****

7. ***On perusal of the rejection order, it is seen that Orissa Forest Development Corporation has taken specific stand that the application dated 10.12.2008, which was referred to in the earlier order of this Court, was never received at the end of Orissa Forest Development Corporation and it has also been stated that in view of the ban order for recruitment of the appointment under the Rehabilitation Assistant Scheme in Public Sector undertaking imposed by the Government they are not in position to consider the grievance of the petitioner.***

8. In the counter affidavit filed by the Opposite Party Orissa Forest Development Corporation, the stand taken in the impugned order has been reiterated regarding non-receipt of application dated 10.12.2008 and the ban order passed by the State Government for appointment under the Rehabilitation Assistant Scheme.

The stand of the Opposite Party-Orissa Forest Development Corporation in paragraph-21 of the counter is quoted hereunder for convenience of ready reference.

"That at present about 123 numbers of applications under Rehabilitation Assistant Scheme are still pending with the Corporation and until the State Government lifts the ban and unless the position of the Corporation improves and vacancies are available for giving fresh appointments there is no scope for considering the cases for appointment under Rehabilitation Assistant Scheme."

9. There is no reply filed on behalf of the petitioner to the specific stand of the Corporation regarding non-receipt of his application dated 10.12.2008, which was the basis of this Court to entertain his earlier Writ petition. But it is submitted that the Petitioner's mother had made an application on 03.09.2005 at Annexure-4 and it is submitted that the Corporation has not responded to the application filed by the mother at Annexure-4 and the counter filed also does not advert to such pleadings in the Writ Petition.

10. ***Taking note of the same notwithstanding the specific stand of the Corporation regarding non availability of vacancy, the ban order as referred to above and non-***

receipt of the application by the petitioner, the Court is of the considered opinion that in view of the stand of the Corporation extracted hereinabove in paragraph (paragraph-21) of the counter, interest of justice would be sub- served if the Corporation is called upon to consider the claim of the petitioner, if, there are any changing circumstances notwithstanding the rejection order at Annexure-6.

11. Since the matter relates to Rehabilitation Assistance, expeditious steps be taken preferably within a period of six months from the date of receipt/production of this order. Decision so taken be communicated to the petitioner at the address reflected in the W.P.(C).

12. With such observation, this writ petition stands disposed of."

2.5. Pursuant to said order of this Court, the Managing Director, OFDC-opposite party No.1 vide Office Order No.2251/O.E.II(DY.SDM)/05/1995, dated 25th November, 2022 considered the representation of the mother of the petitioner and rejected the prayer of the petitioner for according appointment under the RA Rules. The said Order of rejection reads as follows:

"Whereas Sri Prabir Kumar Dash, Son of Late Bhagirathi Dash, Ex-Deputy Sub-Divisional Manager has filed a writ petition before the Hon'ble High Court of Orissa in W.P.(C) No.8196 of 2011 with a Prayer give an appointment under Rehabilitation Assistance Scheme.

Whereas, the Hon'ble High Court of Orissa after hearing finally disposed of the Writ petition on 25.08.2022 with the observation that interest of justice would be sub-served if the Corporation is called upon to consider the claim of the Petitioner, if there are any changing circumstances notwithstanding the Rejection Order issued by the Opposite Party under Office Order No.182 dated 01.03.2011 under Annexure-06.

Whereas the Petitioner has submitted the Xerox copy of Order on 17.09.2022 along with his Representation which was received on 20.09.2022.

Whereas ***the ban of Recruitment under Rehabilitation Assistance Scheme imposed by the State Government has not yet been lifted. Even more than 123 (one hundred twenty-three) numbers of Applications under Rehabilitation Assistance Scheme are still pending with the Corporation****.*

Whereas the Petitioner though deposed before the Hon'ble Court about submission of Application dated 10.12.2008 but, no such Application was received by the Opposite Party which has already been explained while disposing his Application as per the previous Order dated 23.12.2009 passed by this Hon'ble Court in W.P.(C) No.18487 of 2009.

Whereas the Application dated 10.12.2008 enclosed as Annexure-05 of the Writ Petition has also been duly considered and rejected mainly on the ground of non lifting of ban on appointment under Rehabilitation Assistance Scheme and ***non-availability of vacancy to accommodate more than 123 (One hundred twenty-three) Applicants applied for their compassionate appointment.***

In view of the above facts, the Representation under Annexure-04 filed by the Petitioner's Mother has been duly considered and rejected which disposes the direction of the Hon'ble High Court of Orissa."

2.6. Being dissatisfied with the Order dated 25.11.2022 passed copy of which is made available at Annexure-3 of the writ petition, the petitioner has approached this

Court beseeching to invoke extraordinary jurisdiction under the provisions of Articles 226 and 227 of the Constitution of India.

Hearing:

3. As the pleadings are completed and the issue involved is for consideration to direct the opposite parties to accord appointment to the petitioner under the RA Rules, the matter is taken up for final hearing at the stage of admission on the consent of the counsel for the respective parties.

3.1. Heard Sri Bijaya Kumar Parida (2), learned Advocate for the petitioner, Sri Bigyan Kumar Sharma, learned Counsel for opposite party Nos.1 and 2 and Sri Deba Ranjan Mohapatra, learned Additional Government Advocate for the opposite party No.3.

3.2. Hearing being concluded, the matter was reserved for preparation and pronouncement of judgment.

Submissions and arguments:

4. Sri Bijaya Kumar Parida (2), learned Advocate, placing the factual details of the matter, urged that the Scheme of Rehabilitation appointment was introduced to save the distress family after the death of the employee-breadwinner. Nonetheless, the opposite party No.1 without following the provisions of the RA Rules in proper perspective rejected the prayer of the petitioner for appointment and thereby frustrated the objective of such rules.

4.1. He further vehemently contended that since there are large numbers of vacancies available, the authority concerned did not consider the appointment of the petitioner and rejected his claim by stating that there has been ban on recruitment under the RA Rules. Non-consideration of the plight of the petitioner on such ground being flimsy, the same deserves intervention of this Court holding the impugned Order as contrary and illegal in the eye of law.

5. *Per contra*, Sri Bigyan Kumar Sharma, learned counsel appearing for the OFDC relying on the counter affidavit filed on behalf of opposite party Nos.1 and 2 submitted that the State Government by way of Notification dated 08.04.1994 imposed ban on all types of appointments including employment under the RA Rules.

5.1. It is submitted that the RA Rules, 1990 is applicable only with respect to the Government employee. The father of the petitioner was not in Government service, but was working in a Corporation (OFDC) under the administrative control of the Department of Forest, Environment and Climate Change. Therefore, the authority concerned rightly considered and rejected the claim of the petitioner.

5.2. Opposing the averments and contents of the writ petition, Sri Bigyan Kumar Sharma, learned counsel for OFDC, therefore, urged that the writ petition deserves

to be dismissed as time and again on the selfsame cause the petitioner has been making attempts to question the rejection of claim for appointment under the Rehabilitation Assistance Scheme contemplated under the RA Rules.

5.3. He relied on Annexure-A/1 enclosed to the counter affidavit, which comprehension:

Government of Orissa
Forest and Environment Department

No.6F(B)-20/94.6370/F&E., *Dated 08.04.1994*

From

B.C. Patnaik,
Principal Secretary to Government.

To

Sri S.K. Prasad,
Managing Director,
OFDC, Bhubaneswar.

Sub: Ban for recruitment including N.M.R. and enforcing economy measures in Public Sector Undertakings.

Sir,

In inviting a reference to the Public Enterprise Department Letter No.1300/PE dtd.12.06.1993 and No.1911 (35) dtd.08.07.1993 addressed to the Chief Executives of all Public Sector Undertaking (Copies enclosed) on the above subject, I am directed to say that it is evident from your Letter No.4866 dtd.21.02.1994 that a large number of persons have been appointed in OFDC Ltd. on regular, ad hoc and daily wage basis violating the Government circular referred to above.

It is also noticed therein that under rehabilitation scheme a number of persons have been appointed in OFDC Ltd. Rehabilitation Scheme presupposes that there is a vacancy. It does not mean that even though there is no vacancy, a family member of the deceased employee is to be appointed. Since the OFDC has huge surplus staff, no appointment should be made under rehabilitation scheme henceforth.

It also appears from your above letter that a number of persons have been appointed on daily wages basis/ad hoc basis. Since a large number of regular staff are sitting idle and getting their salary without any work, it is not understood how daily wage staff have been entertained. Responsibility should be fixed on persons responsibility for such irregular appointment. As Corporation is facing serious financial difficulties and there is not enough work for regular staff, daily wage and ad hoc staff who have been appointed in violation of Government directives, should be phased out.

In no case daily wage staff/work charged staff are to be appointed in future as corporation has surplus staff. The Finance Department Circular No.17815 dated12.04.1993 (copy enclosed) and Public Enterprise Department Letter No.1300 (53)/PE, dated12.05.1993 are to be followed strictly. Anybody who makes appointment on daily wage/ad hoc basis should be proceeded against. If any post is created or appointment is made in OFDC., the Managing Director, OFDC shall be held responsible personally.

Action taken in the matter is to be intimated to Government.

Yours faithfully,
Sd/-
08.04.1994
Principal Secretary to Govt."

Discussions:

6. There is no dispute that the father of the petitioner died in harness in the year 2004. The present petitioner, son of the deceased employee, comes within the definition of the term "family members" as enumerated in Rule 2(b) of the RA Rules, 1990[1]. Though the submission of representation/application for consideration of appointment under the RA Rules, 1990 is disputed, in view of direction of this Court in W.P.(C) No. 8196 of 2011, vide Order dated 25.08.2022, the claim of the petitioner has been (re)consideration of his appointment as envisaged under the provisions contained in the RA Rules, 1990, as were in vogue at the relevant period with reference to "changing circumstances notwithstanding the rejection order" on earlier occasion by the authority concerned.

6.1. It is the categorical stance of the opposite party Nos.1 and 2 that there is no trace of Application dated 10.12.2008 being submitted by the petitioner. Without going into controversy whether the petitioner had made the application or not, even if it is assumed that the same was submitted, there cannot be any denial that the same was furnished in the year 2008 (as the copy of such application was furnished to this Court on affidavit vide Annexure-5 of W.P.(C) No.8196 of 2011). It is, thus, apparent that though the death of the father of the petitioner occurred in the year 2004 the application was made beyond the period of one year. It is envisaged under Rule 9(6) of the RA Rules that "Application for appointment under these rules shall be considered if it is received within one year from the date of death of the Government servant". There is no explanation forthcoming from the side of the petitioner.

6.2. It is further ground of the OFDC that more than 123 applications for employment under the RA Rules have been pending consideration and the ban is still to be lifted. The OFDC has rejected the request of the petitioner for appointing him inter alia on the following grounds:

i. The ban on appointment under the RA Rules has not been lifted;

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[1] Rule 2(b) defining the term "family members" stands thus: "In these Rules, unless the context otherwise requires:
(b) 'Family Members" shall mean and include the following members in order of preference—
(i) Wife/Husband;
(ii) Sons or step sons or sons legally adopted through a registered deed;
(iii) Unmarried daughters and unmarried step daughter;
(iv) Widowed daughter or daughter- in-law residing permanently with the affected family.
(v) Unmarried or widowed sister permanently residing with the affected family;
(vi) Brother of unmarried Government servant who was wholly dependent on such Government servant at the time of death."

ii.At present there is no vacancy;

iii.There being more than 123 applications pending consideration before the OFDC, there is no scope for the Corporation to accommodate the petitioner.

iv. Surplus staff position would not justify according appointment of the petitioner.

7. With the above backdrop, this Court takes note of Rule 4 of the RA Rules, which reads thus:

"4. Objective of the Scheme.—

The rehabilitation assistance is conceived as a compassionate measure of saving the family of a Government servant from immediate distress when the Government servant suddenly dies while in service. The concept is based on the premises that in case of sudden death his family would not face starvation. The scheme has a direct relationship with the economic condition of the family of the Government servant. Appointment of the family member of the Government servant under these rules shall be subject to the provisions contained in Rule 9 and cannot be claimed as a matter of right."

7.1. It has been held in *Union of India Vrs. Amrita Sinha, (2021) 9 SCR 602*, that,

"Compassionate appointment is not a matter of right, but is to enable the family to tide over an immediate crisis which may result from the death of the employee. If the policy of the Government envisages that the family pension would be paid for a ten years after which it would have to be modified, it cannot be said that by taking into account the present pensionary payment, the authorities have considered an extraneous circumstance. The same criterion is applied even handedly to all applicants seeking compassionate appointment."

7.2. In *Indian Bank Vrs. Promila, (2020) 1 SCR 408* it has been observed that,

"2. It is trite to emphasise, based on numerous judicial pronouncements of this Court, that ***compassionate appointment is not an alternative to the normal course of appointment****, and that there is no inherent right to seek compassionate appointment. The objective is only to provide solace and succour to the family in difficult times and, thus, the relevancy is at that stage of time when the employee passes away. An aspect examined by this judgment is as to whether a claim for compassionate employment under a scheme of a particular year could be decided based on a subsequent scheme that came into force much after the claim. The answer to this has been emphatically in the negative. It has also been observed that the grant of family pension and payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The crucial aspect is to turn to the scheme itself to consider as to what are the provisions made in the scheme for such compassionate appointment.*

***

17. We have to keep in mind the basic principles applicable to the cases of compassionate employment, i.e., succour being provided at the stage of unfortunate demise, coupled with compassionate employment not being an alternate method of public employment. ***If these factors are kept in mind, it would be noticed that the respondents had the wherewithal at the relevant stage of time, as per the norms, to deal with the unfortunate situation which they were faced with****. Thus, looked under any Schemes, the respondents cannot claim benefit, though, as clarified aforesaid, it is only the relevant Scheme prevalent on the date of demise of the employee, which could have been considered to be applicable, in view of the judgment of this Court in Canara*

Bank & Anr. Vrs. M. Mahesh Kumar (2015) 7 SCC 412 = (2015) 9 SCR 724. It is not for the Courts to substitute a Scheme or add or subtract from the terms thereof in judicial review, as has been recently emphasized by this Court in State of Himachal Pradesh & Anr. Vrs. Parkash Chand, (2019) 4 SCC 285.

18. We may have sympathy with the respondents about the predicament they faced on the demise of Shri Jagdish Raj, but then sympathy alone cannot give remedy to the respondents, more so when the relevant benefits available to the respondents have been granted by the appellant-Bank and when respondent No.1, herself, was in employment having monthly income above the benchmark."

7.3. It is observed in *Central Bank of India Vrs. Nitin, 2022 LiveLaw (SC) 690* that:

"As held by this Court in State Bank of India Vrs. Raj Kumar reported in (2010) 11 SCC 661 cited by Mr. Debal Kumar Banerji, learned senior counsel appearing on behalf of the appellant-Bank, ***the claim for compassionate appointment is traceable only to the Scheme framed by the employer for such employment, and there is no right whatsoever outside such scheme. There could be no automatic appointment merely on application.*** *The respondent-writ petitioner did not have any special claim or special right to employment as dependent family member of the retired employee."*

7.4. Apposite it is to take note of the following observation rendered in *Steel Authority of India Ltd. Vrs. Gouri Devi, (2021) 11 SCR 37:*

"5.2 As held by this Court in the case of Punjab State Power Corporation Limited and Ors. Vrs. Nirval Singh, (2019) 6 SCC 774 delay in pursuing claim/approaching court would militate against claim for compassionate appointment as very objective of providing immediate amelioration to family would stand extinguished. ***Before this Court, there was a delay of 07 years in approaching the Court and this Court observed and held that on the ground of delay itself, the heir/dependent of the deceased employee shall not be entitled to the appointment on compassionate ground.***

5.3 In the case of State of J&K and Ors. Vs. Sajad Ahmed Mir (2006) 5 SCC 766, this Court had occasion to consider the delay and laches in case of appointment on compassionate ground. By dismissing the claim for appointment on compassionate ground, which was made after a period of four and a half years of death of the deceased employee, it was held that appointment on compassionate ground is an exception to general rule that appointment to public office should be made on the basis of competitive merits. ***It is further observed that once it is proved that in spite of the death of the breadwinner, the family survived and substantial period is over, there is no need to make appointment on compassionate ground at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution****."*

7.5. It may be pertinent to have regard to the observation contained in *State Bank of India Vrs. Somvir Singh, (2007) 4 SCC 778 that,*

"7. Article 16(1) of the Constitution of India guarantees to all its citizens equality of opportunity in matters relating to employment or appointment to any office under the State. Article 16(2) protects citizens against discrimination in respect of any employment or office under the State on grounds only of religion, race, caste, sex and descent. ***It is so well settled and needs no restatement at our end that appointment on***

compassionate grounds is an exception carved out to the general rule that recruitment to public services is to be made in a transparent and accountable manner providing opportunity to all eligible persons to compete and participate in the selection process. Such appointments are required to be made on the basis of open invitation of applications and merit. Dependants of employees died in harness do not have any special or additional claim to public services other than the one conferred, if any, by the employer.

13. In our considered opinion, the High Court itself could not have undertaken any exercise to decide as to what would be the reasonable income which would be sufficient for the family for its survival and whether it had been left in penury or without any means of livelihood. ***The only question the High Court could have adverted itself to is whether the decision-making process rejecting the claim of the respondent for compassionate appointment is vitiated? Whether the order is not in conformity with the scheme framed by the appellant Bank?*** *it is not even urged that the order passed by the competent authority is not in accordance with the scheme.* ***It is well settled that the hardship of the dependant does not entitle one to compassionate appointment dehors the scheme or the statutory provisions as the case may be.*** *The income of the family from all sources is required to be taken into consideration according to the scheme which the High Court altogether ignored while remitting the matter for fresh consideration by the appellant Bank. It is not a case where the dependants of the deceased employee are left "without any means of livelihood" and unable to make both ends meet. The High Court ought not to have disturbed the finding and the conclusion arrived at by the appellant Bank that the respondent was not living hand-to-mouth. As observed by this Court in G.M. (D&PB) Vrs. Kunti Tiwary, (2004) 7 SCC 271 the High Court cannot dilute the criterion of penury to one of "not very well-to-do". The view taken by the Division Bench of the High Court may amount to varying the existing scheme framed by the appellant Bank. Such a course is impermissible in law."*

7.6. In the case of Umesh Kumar Nagpal Vrs. State of Haryana, (1994) 4 SCC 138, it was impressed that as a rule, appointments in public services should be made strictly on basis of open invitation of applications and merit. The appointment on compassionate ground was an exception to the aforesaid rule taking into consideration the fact of the death of the employee while in service and leaving his family without any means of livelihood. In such cases, the object is to enable the family to tide over sudden crisis. However, such appointments on compassionate grounds have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. It has been laid down that,

It is obvious from the above observations that the High Court endorses the policy of the State Government to make compassionate appointment in posts equivalent to the posts held by the deceased employees and above Class III and IV. It is unnecessary to reiterate that these observations are contrary to law. If the dependant of the deceased employee finds it below his dignity to accept the post offered, he is free not to do so. ***The post is not offered to cater to his status but to see the family through the economic calamity."***

7.7. In the case of *State of Haryana Vrs. Naresh Kumar Bali, (1994) 4 SCC 448*, on an appeal filed by State of Haryana, a 3-Judges Bench of the Hon'ble Supreme

Court of India deprecated the directions given by the High Court to appoint the respondent of the said case against a post of an Inspector and it was observed that the High Court should have merely directed consideration of the claim of the said respondent in accordance with rules. In fact, this Court in the earlier round of litigation, being W.P.(C) No.8196 of 2011, vide Order dated 25.08.2022 did the same for consideration of the plight of the petitioner. Nevertheless, the OFDC considered the grievance of the petitioner and rejected citing justification.

7.8. In *State of Haryana Vrs. Rani Devi, (1996) Supp.3 SCR 560* it has been observed as follows:

> *"It need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the ground that he was a dependent on the deceased employee. Strictly this claim cannot be upheld on the touch stone of Articles 14 or 16 of the Constitution. But this Court has upheld this claim as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16."*
>
> *With reference to Umesh Kumar Nagpal (supra) the Hon'ble Court stated thus:*
>
> *"It was also impressed that appointments on compassionate ground cannot be made after lapse of reasonable period which must be specified in the rules because the right to such employment is not a vested right which can be exercised at any time in future."*

7.9. Necessary implication of aforesaid decisions would lead to indicate that if the family survives the financial stringency over the years and no longer faces an acute financial crisis, the rationale for compassionate appointment becomes invalid. Compassionate appointments are governed by specific Government policies, which often prescribe time limits for applications. These time limits are to ensure fairness and efficiency.

7.10. Based on the above principles, it may be pertinent to have regard inter alia to the following aspects while considering the grievance in the present nature of case:

> *i. If the family of the deceased employee (Bhagirathi Dash) has survived for several years (since 2004, i.e., year of death of employee) without compassionate appointment, it is presumed that the immediate financial crisis has been addressed. Hence, there is no justification for granting such an appointment after a prolonged delay.*
>
> *ii. The ban on employment at the time of the death, though unfortunate, does not entitle the family to compassionate appointment indefinitely. Such an appointment must be made within a reasonable period to serve its intended purpose.*
>
> *iii. Financial stringency prevailing at the time of the employee's death cannot serve as a perpetual basis for a claim if the family has sustained itself over time.*
>
> *iv. In case of this nature of giving employment as a measure of rehabilitation assistance, emphasis must be on the time-bound nature of such assistance and the importance of adhering to Government policies and principles of equity in public employment.*

Conclusion:

8. As is emanated from the factual matrix narrated herein above, it is not in dispute that though the death of the father of the petitioner occurred way back in the year 2004, the application, as affirmed by the petitioner to have submitted in the year 2008 (as per affidavit sworn to in the writ petition vide Annexure-5 of W.P.(C) No.8196 of 2011) by the petitioner (though the opposite parties have stated not to have received), there has been delay on the part of the petitioner in approaching the authority-opposite parties.

8.1. The conspectus of decisions of the Hon'ble Supreme Court of India as referred to supra would lead to demonstrate that:

i. there could be no automatic appointment merely on application;

ii. compassionate appointment is not an alternative to the normal course of appointment;

iii. there is no inherent/vested right to seek compassionate appointment;

iv. it is not being an alternate method of public employment, if the family could manage to survive for several years without such assistance, the very justification for appointment ceases to exist;

v. compassionate immediate succour is provided at the stage of unfortunate demise coupled with compassionate employment and, thus, it is basically a way out for the family which is financially in difficulties on account of the death of the bread earner; in other words, the purpose of compassionate appointment is to alleviate the immediate financial crisis caused by the employee's death;

vi. delay in approaching the Court would disentitle the heir/dependent of the deceased employee ("family member", as defined in the RA Rules) to the appointment on compassionate ground;

vii. once it is proved that despite of the death of the breadwinner, the family survived and substantial period is over, there is no need to make appointment on compassionate ground at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution;

viii. it is not an avenue for a regular employment as such, but it is, in fact, an exception to the provisions under Article 16 of the Constitution.

8.2. In the present case since the death of the employee, i.e., father of the petitioner substantial period of 20 years have been elapsed and the family of the petitioner has survived. There is no material placed on record to suggest that financial difficulties have been ongoing. Matter would have been different had it been demonstrated with evidence that due to bureaucratic hurdles or policy restrictions (such as, ban on employment notwithstanding provisions contained in the Rules), the family in distress would not be expected that the "family members" could have survived without adequate support or income. Under such circumstances, it is inept to exercise power conferred under Article 226/227 of the Constitution of India.

9. This Court by Order dated 25.08.2022 in W.P.(C) No.8196 of 2014 taking note of non-availability of vacancy, ban order of the Government and non-receipt of application dated 10.08.2008, directed the opposite party-OFDC to consider the claim of the petitioner with rider that "if there are any changing circumstances".

9.1. It has specifically been stated in the impugned Order dated 28.11.2022 (Annexure-3) that "the ban on recruitment under Rehabilitation Assistance Scheme imposed by the State Government has not yet been lifted" and more than 123 applications under RA Rules are pending consideration. No vacancy is available as of now for the petitioner to be accommodated along with such huge numbers of applications which are pending consideration.

9.2. The reconsideration of the representation for compassionate appointment cannot obliterate the effect of the initial delay in moving the opposite parties. This direction to dispose of the representation could serve no purpose to the cause of justice. The petitioner-litigant is back again before this Court. By the time, this Court issued its direction on 25.08.2022 on earlier round of litigation, nearly 18 years had elapsed since the date of the death of the employee. There is no material on record to suggest that the financial stringency still persists.

9.3. Therefore, at this stage no writ of mandamus is warranted to be issued. Noteworthy here to quote from *LIC Vrs. Asha Ramchhandra Ambekar, (1994) 2 SCC 718*:

> *"8. Where the Corporation has acted bona fide and declined to appoint the second respondent, that exercise of power cannot be interfered with. Shortly put, the Corporation cannot be directed by means of a mandamus to do something which is per se illegal.*
>
> *****
>
> *10. Of late, this Court is coming across many cases in which appointment on compassionate ground is directed by judicial authorities. Hence, we would like to lay down the law in this regard. The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration. No doubt Shakespeare said in "Merchant of Venice":*
>
> *"The quality of mercy is not strain"d;*
> *It droppeth, as the gentle rain from heaven*
> *Upon the place beneath it is twice bless"d;*
> *It blesseth him that gives, and him that takes;"*
>
> *These words will not apply to all situations. Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that „law is the embodiment of all Wisdom". Justice according to law is a principle as old as the hills. The courts are to administer law as they find it, however, inconvenient it may be.*
>
> *11. At this juncture we may usefully refer to Martin Burn Ltd. Vrs. Corporation of Calcutta, AIR 1966 SC 529, 535 = (1966) 1 SCR 543. At page 535 of the Report the following observations are found:*

'A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not.'

The courts should endeavour to find out whether a particular case in which sympathetic considerations are to be weighed falls within the scope of law. Disregardful of law, however, hard the case may be, it should never be done. In the very case itself, there are regulations and instructions which we have extracted above. The court below has not even examined whether a case falls within the scope of these statutory provisions. Clause 2 of sub-clause (iii) of Instructions makes it clear that relaxation could be given only when none of the members of the family is gainfully employed. Clause 4 of the circular dated January 20, 1987 interdicts such an appointment on compassionate grounds. The appellant Corporation being a statutory Corporation is bound by the Life Insurance Corporation Act as well as the Statutory Regulations and Instructions. They cannot be put aside and compassionate appointment be ordered.

***

13. It is true that there may be pitiable situations but on that score, the statutory provisions cannot be put aside."

9.4. The recourse to the opposite parties in the year 2008 suffered from a delay in the first instance. This staleness of the claim took away the very basis of providing compassionate appointment. Furthermore, taking into consideration the reasons ascribed in Order dated 28.11.2022 of the OFDC passed in order to comply with the direction contained in Order dated 25.08.2022 passed in W.P.(C) No.8196 of 2011 does lead the claim of the petitioner liable to be rejected and ought to be rejected.

10. This Court finds no mitigating circumstance to show indulgence in the Order dated 28.11.2022 of the Managing Director, OFDC (Annexure-3). Hence, the writ petition is, accordingly, dismissed.

11. For all the aforesaid reasons and having regard to legal position as discussed in the decisions referred to supra, the Writ petition, being devoid of merit, stands dismissed, but in the circumstances there shall be no order as to costs.

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

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2025 (I)-ILR-CUT-276

DURDYODHAN MALLIK & ORS.
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO. 20831, 20829 & 20830 OF 2014]

19 SEPTEMBER 2024

[SANJAY KUMAR MISHRA, J.]

Issue for Consideration

Whether certificate proceedings initiated against the petitioner for recovery of the unpaid differential bid amount as an arrear of land revenue under the OPDR Act in absence of a valid lease deed is maintainable.

Headnotes

TRANSFER OF PROPERTY ACT, 1882 – Section 107 r/w provisions of Registration Act, 1908 as well as Orissa Public Demand Recovery Act, 1962 – Auction of fishery Sairat – Settlement of auction was made in favour of the petitioner but neither the lease deed was executed in stamp paper nor registered between the petitioner and Govt. authorities/Opp. Party authorities – Whether the certificate proceedings initiated against the petitioner for recovery of the unpaid differential bid amount as an arrear of land revenue under the OPDR Act in absence of a valid lease deed is maintainable.

Held: No – Even if the demands made against the Petitioner are Government dues and the recourse available for recovery of the same is by way of initiating a certificate proceeding against the lessee under the OPDR Act, since the so called lease deeds are unstamped and unregistered, thus this court is of the view that even though the said lease deeds have a clause to the effect that all arrears of the premium and other dues payable under the said lease shall be recoverable as arrear of land revenue, in absence of a valid lease deed/agreement, the very initiation of the certificate proceeding against the Petitioner is bad and liable to be interfered with – Accordingly, the Certificate proceeding initiated against the petitioner is hereby set aside and quashed. (Paras 35-36)

Citations Reference

Ananda Behera & ors. Vs. State of Orissa & ors., **AIR 1956 SC 17;** Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh & ors., **AIR 1977 SC 2149;** State of Orissa Vs. Sashibhusan Mohapatra, **1986 (II) OLR 267;** Aprati Sahu Vs. State of Orissa & ors., **64 (1987) C.L.T. 644 – referred to.**

List of Acts

Transfer of Property Act, 1882; Orissa Public Demand Recovery Act, 1962; Registration Act; 1908, Stamp Act, 1899.

Keywords

Lease deed; Arrear of land revenue; Lease deed, Non-payment of Govt. dues; Initiation of Certificate Proceeding; Maintainability of Certificate Proceeding without valid lease deed.

Appearances for Parties

For Petitioners(in all Petitions) : Mr. J. Dash
For Opp. Parties (in all Petitions) : Mr. B. Panigrahi, A.S.C.

Judgment/Order

Judgment

S.K. MISHRA, J.

1. These Writ Petitions have been preferred challenging the certificate proceedings initiated against the Petitioners for recovery of differential unpaid bid amount of the Fishery Sairat Sources for different years ranging from 1998-99 till 2000-01.

2. The point of law involved in all these Writ Petitions is, whether certificate proceedings initiated against the Petitioners for recovery of the unpaid differential bid amount as an arrear of land revenue under the Orissa Public Demands Recovery Act, 1962, shortly, hereinafter "OPDR Act", in absence of a valid lease deed is maintainable. The point of law, being same in all the three Writ Petitions, on the request of learned Counsel for the Petitioners, have been heard together and are being disposed of vide this common judgment. For the sake of convenience and brevity, the facts dealt in W.P.(C) No.20831 of 2024, ***(Durdyodhana Mallik Vs. State of Odisha & others)*** is taken up as lead case.

3. The factual matrix of the case in Durdyodhan Mallik (supra) is that there was a public auction for Rananadi Fishery Sairat under Banki Tahasil in the year 1998-99 vide auction notice dated 27.04.1998. The Petitioner took part in the said public auction and the said fishery was settled in his favour for an amount of Rs.18,125/-. Out of Rs.18,125/-, the Petitioner deposited Rs.4,510/- towards the first installment and Rs.4,400/- towards the second installment.

4. It is further case of the Petitioner that though the auction notice was published on 27.04.1998, the concerned Tahasildar adjourned the auction process from time to time. Ultimately, the fishery sairat was settled in favour of the Petitioner in the month of July, 1998, without proper agreement regarding auction and payment structure.

5. The Petitioner failed to pay the rest amount, as he suffered huge loss in the business due to less rain. The Tahasildar issued notice on 26.11.1998 to the Petitioner to clear the unpaid dues by 30.11.1998 and execute the lease deed on stamp paper, failing which auction will be cancelled and there will be re-auction. Since the Petitioner failed to act in terms of the said communication, he was restrained from fishing from the Sairat. Thereafter the Tahasildar, Banki initiated certificate proceeding against the Petitioner, which was registered as Certificate Case No.100/01-02 and Warrant in Form No.A for attachment of movable property was issued to the Petitioner. In the certificate, issued by the Certificate Officer dated 05.02.2002, an amount of Rs.41,730/- was indicated to be due against the Petitioner, which exceeded more than the principal amount indicated in the demand notice.

6. It is further case of the Petitioner that a right to catch fish is a right to profits and is unquestionably immoveable property, requiring registration for its assignment. But in the instant case, no such agreement was executed with the Petitioner by the Opposite Party No.3 (The Tahasildar, Damapada). However, without considering the case of the Petitioner with proper perspective, the certificate case was initiated against the Petitioner, which is illegal, as because section 2(g) of the OPDR Act defines "Public Demand" means any arrear of money specified in Schedule-I and includes any interest, which may by law be chargeable thereon up to the date, on which a certificate is signed under Chapter-II. Paragraph (iii) of Schedule-I prescribes that for any demand payable to the Collector by a person holding any interest, an agreement has to be executed by the person concerned with the Government. But in the instant case, there is no such agreement with the Government with regard to holding any interest about the fishery sairat. As such, the initiation of certificate proceeding against the Petitioner is bad in law.

7. It has also been urged in the Writ Petition that the Certificate Holder and the Certificate Officer being the same authority, the certificate case being in the nature of judicial proceeding, therefore the principle of judge of his own cause is applicable in this case. Hence, the initiation of certificate case is vitiated. Although the notice has been issued to the Petitioner with regard to cancellation of fishery sairat and the money deposited by the Petitioner to be forfeited, without any reason, again certificate case has been instituted against the Petitioner, who is a very poor person and at present is unable to pay the demand issued by the Certificate Officer. However, based on such illegal action, the Certificate Officer is now threatening to auction the movable and immovable property of the Petitioner. Hence, such action is illegal and deserves interference by this Court. Accordingly, a prayer has been made to quash the proceeding in Certificate Case No.100/01-02 pending before the Court of Certificate Officer, Dampada against the Petitioner.

8. The State-Opposite Parties have filed a common Counter Affidavit stating therein that the auction notice was issued on 27.04.1998 fixing the auction date to

12.05.1998. However, due to some law and order situation, re-auction took place on 17.06.1998. The bid was knocked out in favour of the Petitioner at Rs.18,125/- in Sairat Case No.13-98-99 and Rs.76,150/- in Sairat Case No.14-98-99. On the date of auction i.e. on 17.06.1998, the Petitioner deposited Rs.4510/- in Sairat Case No.13-98-99 and Rs.19,000/- in Sairat Case No.14-98-99 and he was directed to deposit the balance amount in three installments. The Petitioner/Auction Holder has signed the lease deed for lease of fishery, in which installment dates along with the terms and conditions have been detailed.

9. So far as the stand of the Petitioner regarding loss due to less rain in the said year, for which he failed to catch fish and pay the installments, has been denied in the Counter stating therein that the Petitioner had never approached the authority concerned regarding said difficulties during the said financial year. Rather, he continued to catch fish and also paid subsequent installments by depositing Rs.8,910/- in Sairat Case No.13-98-99 and Rs.50,000/- in Sairat Case No.14-98-99.

10. Though the Petitioner/Auction Holder was noticed repeatedly for payment of installment, but at no point of time he was debarred from catching the fish from the source and the lease was also not cancelled for the said year, as has been alleged in the Writ Petition. Rather, it has been alleged in the Counter that the Petitioner operated the source throughout the year without paying the balance amount intentionally. For such act of the sairat holder, at the end day of financial year i.e. on 31.03.1999, intimations were issued to the R.I., Talabasta for collection of the balance arrear dues in both the cases. Finally, when the R.I. failed to collect the dues, the certificate proceeding was initiated on 05.02.2002, which was registered as Certificate Case No.100/2001-02.

11. A further stand has been taken in the Counter that the total amount mentioned in the notice is principal with interest @ 12.5% per annum for 2 years, in terms of Section 14 of the OPDR Act. Since the Petitioner has signed the fishery lease on 17.06.1998, in terms of the point no.7 of the said agreement, the lessee shall not have any claim for remission or refund of the sum paid as consideration for his failure to utilize the fishery under any event and shall not be entitled to any compensation for any structures put by him. Hence, balance due payable along with interest thereon was rightly treated to be a public demand under section 2 (g) read with paragraph (iii) of Schedule I of the OPDR Act.

12. In response to the stand of the Petitioner that the Certificate Holder so also Certificate Officer being the same officer, initiation of certificate proceeding against the Petitioner is bad, it has been stated that in the instant case, the Tahasildar, Banki (at present Tahasildar, Damapada) is the Certificate Holder who has filed requisition through Revenue Inspector, Talabasta before the Certificate Officer, Banki (now Damapada), who is also working as Tahasildar. All the Tahasildars and Additional Tahasildars, by designation, have been appointed as Certificate Officer vide letter

dated 28.09.1976 of the Revenue Divisional Commissioner (Central Division), Cuttack which was subsequently communicated to all the Collectors vide letter dated 08.03.2001.

13. It has been stated that the Certificate Officer issued notice under section 6 of the OPDR Act, giving the Petitioner an opportunity to deposit the arrear dues or to deny the liability within one month from the date of service of notice, in terms of section 8 of the said Act. Despite several notices, the Petitioner remained silent over the matter and even did not appear before the Certificate Officer. Hence, the Certificate Officer was being constrained to issue warrant of attachment. However, the Petitioner finally appeared on 10.03.2014 before the Certificate Officer and prayed for time up to July, 2014 for payment of arrear due.

14. Considering his prayer he was allowed time up to 15.05.2014 and the same was also intimated to him on 22.03.2014. But within the said period the Petitioner did not respond, for which he was again noticed on 23.05.2014 to pay the certificate dues by 09.06.2014, which also went in vain.

15. Finally the last notice was issued to the Petitioner on 25.09.2014 to deposit the arrear due by 22.10.2014, indicating therein that if the Petitioner fails to act in terms of the said notice, his movable/immovable property shall be attached and such facts have been suppressed by the Petitioner in the present Writ Petition.

16. Apart from denying the allegations made in the Writ Petition, it has been urged that the Writ Petition is not maintainable as the Petitioner has approached this Court with uncleaned hands by suppressing material facts, as detailed above, so also on the ground of availability of alternative remedy under the OPDR Act, 1962.

17. Learned Counsel for the Petitioner, drawing attention of this Court to the so called lease deed at Annexure-E/3 series so also referring to Section 107 of the Transfer of Property Act, 1882 so also section 17 of the Registration Act, 1908, submitted that the said documents appended to the Counter are mere model form for large fishery form of lease deed for lease of fishery. As per the settled position of law, no lease deed was executed between the Petitioner and the Tahasildar, Banki in terms of the Registration Act, 1908.

18. Learned Counsel for the Petitioner further submitted that the Petitioner had taken lease of fishery sairat for the financial year 1998-99, for which an amount of Rs.18,125/- was fixed as annual rent by the State Government. Based on the form of agreement, which is not a valid one, even though clause 13 of the so called lease deed prescribes that all appears of premium and other dues payable under lease shall be recoverable as arrear of land revenue, in absence of valid lease deed executed in terms of the Registration Act, 1908, the very initiation of certificate proceeding is bad and deserves interference.

19. Learned Counsel for the Petitioner further submitted that the plea of alternative remedy taken by the State-Opposite Parties is misconceived as the very initiation of certificate proceeding, based on an invalid document, is under challenge. As the Appellate Authority under the OPDR Act is incompetent to decide such an issue, the Petitioner has rightly approached the Writ Court challenging the certificate proceeding initiated against him.

20. To substantiate the stand taken in the Writ Petition regarding maintainability of the certificate proceeding, learned Counsel for the Petitioner relied on the judgments of the Supreme Court reported in AIR 1956 SC 17 ***(Ananda Behera & ors. Vs. State of Orissa & ors.),*** in AIR 1977 SC 2149 ***(Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh & ors.)*** judgments of this Court reported in 1986 (II) OLR 267 ***(State of Orissa Vs. Sashibhusan Mohapatra),*** and in 64 (1987) C.L.T. 644 ***(Aprati Sahu Vs. State of Orissa & ors.).***

21. Per contra, learned Counsel for the State, drawing attention of this Court to the so called lease deed for lease of fishery, executed between the Petitioner and the State, submitted that the said lease deed was signed on 17.06.1998 and was for the financial year 1998-99, which ended on 31.03.1999. The period of lease deed being less than one year, there was no need to execute a registered lease deed, as has been stated by the Petitioner.

22. Learned State Counsel further submitted that in view of existence of the lease deed executed between the Petitioner and the State so also in terms of clause 13 of the said lease deed, the certificate proceeding was rightly initiated against the Petitioner for recovery of the unpaid bid amount for fishery sairat source for the year 1998-99, to be recovered as arrear of land revenue and the authority concerned has rightly initiated the certificate proceeding.

23. Learned Counsel for the State, drawing attention of this Court to section 107 of the T.P. Act so also section 17 (1) (d) of the Registration Act, 1908, submitted that since the lease period was less than one year i.e. from June, 1998 to March, 1999, it was not necessary to register the said lease deed and the Tahasildar has rightly entered into such lease deed in the prescribed form in plain papers, as has been disclosed vide Annexure-C/3 series to the Counter Affidavit.

24. From the pleadings on record so also submissions made by the learned Counsel for the parties, the following legal points emerge to be answered in the present case:

> i) Whether the lease deeds in question, as at Annexure-E/3 series to the counter filed by the State, were required to be stamped under the Stamp Act, 1899 and registered in terms of Section 17 (1) (d) of the Registration Act, 1908?
>
> ii) Whether the certificate proceeding, which was admittedly initiated against the Petitioner, based on an unstamped and unregistered lease deed for lease of fishery sairat, is maintainable?

25. Since the answer to the Point No.2 would be dependent on Point No.1., both the said points are dealt with together for the sake of brevity and convenience.

26. Before dealing with the above points, it would be apt to extract below Section 107 of the Transfer of Property Act, 1882 Section 2 (6) and Section 17 (1) (d) of the Registration Act, 1908 so also Section 2 (g) and Clauses (iii) and (iv) in Schedule-I of the OPDR Act, 1962 :-

Transfer of Property Act, 1882

""107. *Leases how made.* ***A lease of immovable property*** *from year to year, or for any term exceeding one year, or* ***reserving a yearly rent****, can be made only by a registered instrument.*

[All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

"[Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.["

Registration Act, 1908

"2. ***Definitions*** *–*

xxx xxx xxx

*(6) "****Immovable property****" includes land, buildings, hereditary allowances, rights to ways, lights, ferries,* ***fisheries or any other benefit to arise out of land****, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.*

17. Documents of which registration is compulsory (1) *The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:--*

(a) xxxx

(b) xxxx

(c) xxxx

(d) ***leases of immovable property*** *from year to year, or for any term exceeding one year,* ***or reserving a yearly rent****.*

xxx xxx xxx"

OPDR Act, 1962

*"**2(g) "public demand"** means **any arrear or money specified in Schedule- I,** and includes any interest which may, by law, be chargeable thereon up to the date on which a certificate is signed under Chapter II"*

Schedule -I

xxx xxx xxx

***"(iii) Any demand payable to the Collector by a person holding any interest in** land, pasturage, forest-rights, **fisheries**, ghats, ferries, hats, trees, or the like whether such interest is or is not transferable **when such demand is a condition to the use and enjoyment of such** land, pasturage, forest-rights, **fisheries,** ghats, ferries, hats, tress or other things and for which an agreement has been executed by the persons concerned.*

***(iv)** Rents, fees and royalties due to Government for the use or occupation of land or water, whether property of Government or not, or on account of any products thereof and all moneys falling due to Government under any grant, lease or contract which provides that they shall be recoverable as arrears of land revenue."*

xxx xxx xxx

In respect of which the person liable to pay the same has agreed, by a Written instrument that it shall be recoverable as a public demand.

xxx xxx xxx"

(Emphasis supplied)

27. So far as a registration of lease deeds for lease of fishery sairat, which were entered into between the parties on 17.06.1998, as at Annexure-E/3 series, as is revealed from the said so called lease deeds, admittedly were filled up in the Model Form prescribed for the said purpose in plain papers. The said lease deeds well demonstrate that the bid amount, as bided by the lessee in the public auction held on 17.06.1998 for the Rananadi Fishery Sairat, under the Banki Tahasil, was for the year 1998-99 and such amount was payable by the Petitioner towards "yearly rent".

28. That apart, the notice of the Tahasildar, Dampada (O.P.No.3) dated 26.11.1998, as at Annexure-2, in Sairat Case No.13/98-99 also clearly indicates that the Petitioner was not only noticed to pay rest of the installment amount by 30.11.1998, he was also instructed to execute the lease deed in stamp paper. Admittedly, the documents, which have been annexed to the Counter filed by the State as at Annexure-E/3 series, are not registered lease deeds executed in stamp papers. Rather, the heading of the said so called lease deeds indicates "REVISED MODEL FORM FOR LARGE FISHERY FORM OF LEASE DEED FOR LEASE OF FISHERY". The said Form, though has been filled up and duly signed by the Petitioner at the end of the last stage of the said lease deed, witnessed by one Godabarisha Mohanty, AC, no officer has signed the so called lease deed representing the Lesser- Governor of Odisha.

29. In ***Ananda Behera*** (supra), the Supreme Court, while deciding a dispute regarding fishery right in chilika lake held as follows:-

"10.The facts disclosed in Paragraph 3 of the petition make it clear that what was sold was the right to catch and carry away fish in specific sections of the lake over a specified future period. That amounts to a license to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a profit a prendre. In England this is regarded as an interest in land because it is a right to some profit of the soil for the use of the owner of the right. In India it is regarded as a benefit that arises out of the land and as such is immovable property.

11. Section 3 (26) of the General Clauses Act defines "immovable property" as including benefits that arise out of the land. ***The Transfer of Property Act does not define the term except to say that immovable property does not include standing timber, growing crops or grass. As fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre is regarded as a benefit arising out of land it follows that it is immovable property within the meaning of the Transfer of Property Act.***

12. Now a "sale" is defined as a transfer of ownership in exchange for a price paid or promised. As a profit a prendre is immovable property and as in this case it was purchased for a price that was paid it requires Writing and registration because of section 54 of the Transfer of Property Act. If a profit a prendre is regarded as tangible immovable property, then the "property" in this case was over Rs. 100 in value. ***If it is intangible, then a registered instrument would be necessary whatever the value. The "sales" in this case were oral, there was neither Writing nor registration. That being the case, the transactions passed no title or interest and accordingly the petitioners have no fundamental right that they can enforce."***

(Emphasis Supplied)

30. Similarly, in ***Sipahi Singh & ors.*** (supra), the Supreme Court, while deciding an issue regarding the fishery rights in favour of the Respondent No.1 and putting him in possession thereon, referring to the case in ***Anand Behera*** (supra), held as follows:-

"11. That apart, there is an additional reason for holding that the settlement of Jalkar with respondent No.1 was not valid and enforceable. ***The right to catch and carry away the fish being a profit a prendre' i.e. a profit or benefit arising out of the land, it has to be regarded as immovable property within the meaning of the Transfer of Property Act, read in the light of Section 3(26) of the General Clauses Act.*** *If a 'profit a prendre' is tangible immovable property, its sale has to be by means of a registered instrument in case its value exceeds Rs. 100/- because of Section 54 of the Transfer of Property Act. If it is intangible, its sale is required to be effected by a registered instrument whatever its value. Therefore, in either of the two situations, the grant of the 'profit a prendre' has to be by means of a registered instrument. Accordingly, the transaction of sale of the right to catch and carry away the fish if not effected by means of a registered instrument, would pass no title or interest. (See Ananda Behera & Anr. v. The State of Orissa and Anr..* ***Even if the settlement of Jalkar with respondent No. 1 is regarded as lease as described by him in Annexure-2 to the Writ petition, it would not make any difference because a lease of fishery which is property as defined by Section 2(6) of the Registration***

Act if it is for any term exceeding one year or reserves a yearly rent has also to be registered as required by Section 17(1)(d) of the Indian Registration Act, 1908 and Section 107 of the Transfer of Property Act. *As in the instant case, the transfer of the 'profit a prendre in favour of respondent No. 1 was admittedly for two years reserving a yearly rent and was not evidenced by a registered instrument, he had no right, title or interest which could be enforced by him. Manifestly therefore, the Writ petition was misconceived and ought to have been dismissed."*

(Emphasis Supplied)

31. The division Bench of this Court in ***Aprati Sahu*** (supra), while dealing with and deciding an issue regarding initiation of proceeding against the Petitioner under the OPDR Act, for recovery of balance auction amount as arrear of land revenue, which issue is almost similar, as of the present case of the Petitioner, held as follows:

"Apart from the other contentions raised by the petitioner, it appears that the proceeding under the Orissa Public Demands Recovery Act, 1962 was stillborn one since the demand against the petitioner is not collectible as arrears of revenue. It is the admitted case of the parties that the petitioner had never executed any registered agreement for the lease even though he had signed only a form of agreement. Neither a full-fledged agreement had come into existence nor was it registered. ***A right to catch fish is a right to profits a pendre and is unquestionably immoveable property requiring registration for its assignment as has been held by Ananda Behera and another v. State of Orissa and another and The Bihar Eastern Gangetic Fisherman Co-operative Society Ltd., v. Sipahi Singh and others.*** *Under the provisions of paragraph (iii) of the Schedule I to the Orissa Public Demands Recovery Act, the demand arising out of a fishery amongst other things would become a public demand collectible as arrears of land revenue only if it is so stipulated under an agreement executed by the person concerned.* ***An agreement would undoubtedly mean a valid agreement which in this case was to have been a registered one. Since there was no such agreement, the petitioner had never agreed that the demand raised against him was to be collected under the provisions of the Orissa Public Demands Recovery Act, 1962 and hence no such proceeding could be started."***

(Emphasis Supplied)

32. Similarly, the coordinate Bench in ***Sashibhusan Mohapatra*** (supra), while deciding a similar issue regarding initiation of certificate proceeding for recovery of the balance consideration amount of the lease deed, under the OPDR Act, held as follows:-

8. "xxx ***The demand sought to be realised from the respondent more properly falls under Clause (iii) of the Schedule I which stipulates that demand there under becomes payable to the Collector only if there is a Written agreement in existence between the parties concerned. Hence, if there is no agreement executed between the State and the person concerned, the demand does not become a public demand****. Even if the amount would have been payable under Clause (iv) of*

the Schedule, yet the demand does not become a public demand since that clause provides that the grant, lease or contract under which money might have fallen due, must provide that the dues shall be recoverable as arrears of land revenue.

9. ***In this view of the fact, the conclusion is irresistible that since no agreement exists between the parties, the demand was not a public demand and hence the very initiation of the certificate case was thoroughly misconceived and Incompetent. Resort to the provisions of the O.P.D.R. Act is not a normal process of recovery of dues but is an extraordinary one and hence the application of such law must be very strictly construed.*** *The respondent is thus entitled to the declaration that the alleged dues of the Government are not collectible from him by way of a certificate proceeding as also to an injunction restraining the appellant to recover the dues of Rs, 3000/- under the certificate proceeding."*

(Emphasis Supplied)

33. From the legal provisions under the Transfer of Property Act, 1882, the Registration Act, 1908 so also the OPDR Act, 1962 and the judgments, as detailed above, this Court is of the following irresistible conclusions:-

i) As defined under Section 2 (6) of the Registration Act, "**Immovable property**" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, "**fisheries" or any other benefit to arise out of land**, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

ii) As required under Section 107 of the Transfer of Property Act , **a lease of immovable property** from year to year, or for any term exceeding one year, or **reserving a yearly rent**, **can be made only by a registered instrument.**

iii) A right to catch fish is a right to profits a prendre and is an immovable property requiring registration for its assignment.

iv) If the State intends to lease out fishery sairat and lease term exceeds one year or reserves a yearly rent, such lease has to be registered, as required under Section 17 (1)(d) of the Registration Act read with Section 107 of the T.P.Act.

v) Demand by the State for non-payment of bid amount towards lease of fishery sairat falls under definition of "public demand" as defined under Section 2(g), read with Clause (iii) under Schedule-I of the OPDR Act.

vi) For recovery of unpaid amount under the OPDR Act, there must be a valid lease deed (properly stamped and registered) bearing a clause therein to the effect that dues payable under the lease deed shall be recoverable as "arrears of land revenue", if the lessee fails to act in terms of the lease deed.

(Emphasis supplied)

34. Public Demand, as defined under section 2 (g), read with Clause (iii) in Schedule (I) of the OPDR Act, includes any demand payable to the Collector by a person holding any interest in fisheries towards royalties/fees. Since the bid amount payable by the Petitioner towards fishery sairat sources is towards annual rent for the financial year 1998-99, this Court is of the view that in terms of section 17(1) (d) of

the Registration Act, 1908 read with the provisions under 107 of the Transfer of Property Act, 1882, the lease deeds should have been properly stamped and registered.

35. Admittedly, even though the so called lease deeds were executed between the Petitioner and the State Government, but the said lease deeds were neither executed in stamp paper as per the Stamp Act nor registered, as required under the Registration Act. The so called unregistered lease deeds clearly demonstrate that those are mere Model Forms for execution of lease deed for lease of fishery sairat in plain paper, which were filled up bearing signature of the Petitioner only in the last page. Even if the demands made against the Petitioner are Government dues and the recourse available for recovery of the same is by way of initiating a certificate proceeding against the lessee under the OPDR Act, since the so called lease deeds are unstamped and unregistered, thus this Court is of the view that even though the said lease deeds have a clause to the effect that all appears of the premium and other dues payable under the said lease shall be recoverable as arrear of land revenue, in absence of a valid lease deed/ agreement, the very initiation of the certificate proceeding against the Petitioner is bad and liable to be interfered with. Both the points, as detailed above, are answered accordingly.

36. Accordingly, the certificate proceeding initiated against the Petitioner vide Certificate Proceeding No.100/01-02, pending in the Court of Certificate Officer, Damapada (O.P.No.3), is hereby set-aside and quashed.

37. So far as the other two Writ Petitions i.e. W.P.(C) No.20829 of 2014 preferred by ***Upendra Mallik,*** and W.P.(C) No.20830 of 2014 preferred by ***Benga Mallik,*** with similar stand and prayers, as of the case of the Petitioner in W.P.(C) No.20831 of 2014, it is an admitted fact that in those cases even no lease deed in prescribed form was executed with the Petitioners, as was done in case of ***Duryodhan Mallik*** (Writ Petitioner in W.P.(C) No.20831 of 2014).

38. Hence, in absence of any lease deed for lease of fishery sairat and initiation of certificate proceeding against Upendra Mallik and Benga Mallik to recover the unpaid differential bid amount as an arrear of land revenue, by initiating a certificate proceeding under the OPDR Act, are also held to be illegal, unjustified and untenable.

39. Accordingly, the Certificate Case No.102/01-02 initiated against Upendra Mallik (Writ Petitioner in W.P.(C) No.20829 of 2014) so also Certificate Case No.101/01-02, initiated against Benga Mallik (Writ Petitioner in W.P.(C) No.20830 of 2014), both pending in the Court of the Certificate Officer, Dampada, stand quashed.

40. It is made clear that since the certificate proceedings were initiated against the Petitioners for admitted Government dues towards differential unpaid bid

amount for fishery sairat and the Writ Petitions have been allowed on technical ground of non execution of valid lease deed/absence of registered lease deed, it would be open for the State authorities to recover the differential unpaid bid amount from the Petitioners through any other mode of recovery, if any, in accordance with law.

41. Admittedly, in all these cases, because of the inaction of the then Tahasildar, Banki to execute proper lease deeds with the Petitioners in stamp paper and getting the same registered in terms of the Registration Act, the Petitioners took advantage of the same and the certificate proceedings initiated against all the Writ Petitioners have been quashed on that score alone.

42. It is, therefore, imperative that the State Government should be more vigilant and should ensure execution of valid lease deeds for leasing out fishery sairat or any kind of lease, involving generation of revenue, by proper documentation, stamping and registration, if so required under law, to check further loss to the State exchequer. The State Government shall also formulate detailed guidelines/advisories to regulate the same and circulate it amongst the concerned departments, fixing responsibility on the officers concerned to adhere to such instructions and on failure to act so, recover the losses caused to the State from the salary of the concerned officer, apart from initiation of departmental proceeding against the errant officer(s).

43. With the said observations and directions, all the Writ Petitions stand allowed and disposed of. No order as to cost.

44. A true copy of this judgment be shared with the learned Advocate General for onward transmission to the Secretary, Board of Revenue, Odisha and other Departments of the State Government to ensure the observations made above regarding formulation of guidelines and its implementation at the earliest.

Headnotes prepared by: *Result of the case:*
Shri Jnanendra Kumar Swain, Judicial Indexer Writ Petitions allowed and disposed of.
(Verified by Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I)-ILR-CUT-289

LAND ACQUISITION OFFICER, KALAHANDI
V.
JAYA KUMAR SINGH DEO

[L.A.A. NO. 32 OF 2017]

08 NOVEMBER 2024

[SANJAY KUMAR MISHRA, J.]

Issue for Consideration

What necessary factors should be considered while fixing the compensation for the land acquired by the State?

Headnotes

LAND ACQUISITION ACT, 1894 – Section 54 – The referral court ordered for higher compensation of ₹4,00,000/- while taking into consideration of the location of the acquired land together with its potential value & stiff rise in the market value of the lands in the recent years – Whether the order of the referral court should be interfered.

Held: No – On perusal of the impugned judgment so also L.C.R., it is ascertained that there is no infirmity or illegality in the said judgment passed in L.A.R. No.150 of 2014 and the Appeal preferred by the State deserves to be dismissed. (Para 11)

Citations Reference

Anjani Malu Dessai Vs. State of Goa & another, **(2010) 13 SCC 710;** Sri Rani M. Viajalakshmamma Rao Bahadur, Ranee of Vuyyur Vs. Collector of Madras, **(1969) I MLJ 49 (SC);** Meherawal Vs. State, **CLR (2012) I 1006**; Commissioner of Income Tax, Faridabad Vs. Ghanshyam (HUF), **2010 LAC (SC) 150**; Sundar Vs. Union of India, **2001 (2) LAC (SC) 409;** L.A. Collector, Balasore Vs. Hemanta Samal & another**, 2008 (I) CLR 518 – referred to.**

List of Act

Land Acquisition Act, 1894

Keywords

Land acquisition; Compensation; Potential value; Market value.

Case Arising From

Judgment dated 19.01.2016 passed by the Civil Judge (Senior Division), Bhawanipatna in L.A.R. No.150 of 2014.

Appearances for Parties

For Appellant : Mr. B. Panigrahi, A.S.C.
For Respondent : Mr. M.K. Mohapatro.

Judgment/Order

Judgment

S. K. MISHRA, J.

This Appeal has been preferred against the Judgment dated 19.01.2016 passed by the Civil Judge (Senior Division), Bhawanipatna in L.A.R. No.150 of 2014 vide which the Court below allowed the claim of the Claimant and ordered for higher compensation.

2. The brief facts, which lead to filing of the Appeal, are that an area of Ac.1.00 decimal of land in Plot No.323/423, under Khata No.103/78, Mouza-Patiguda of Atta Kisam belonging to the Claimant was acquired for the purpose of construction of Talijore M.I.P. in pursuance of Notification No.48916 dated 18.12.2009 made under Section 4(1) of the Land Acquisition Act, 1894, shortly, 'the Act, 1894'. The Land Acquisition Officer (LAO) assessed the compensation in total at Rs.49,518/- for an area of Ac.1.00 decimal, which the Claimant/Respondent received under protest. Thereafter, in a reference under Section 18 of the Act, 1894, which was registered as L.A.R. No.150 of 2014, the referral Court, vide order dated 19.01.2016 allowed the claim of the Claimant/Respondent and ordered for higher compensation @ Rs.4,00,000/- per acre for acquisition of the land and ordered for payment of interest, solatium and other benefits as per the statute. Hence, this Appeal.

3. The impugned Judgment has been challenged basically on the ground that the Court below did not examine the validity of the award determined by the LAO within the parameters and mandatory guidelines stipulated under Sections 23 & 24 of the Act, 1894 and acted in excess of its jurisdiction, for which the impugned award is vitiated. Neither sufficient reason was assigned nor the circumstance under which it preferred to differ with the assessment of the market value of the land determined by the LAO, has been detailed in the impugned judgment. The Court below utterly failed in considering the contemporaneous materials under Ext.1 as well as the trustworthy evidence of O.P.W. No.1 in their proper perspective. There was no clinching piece of evidence on record enabling the Court below to compare the nature, situational advantages and potentiality of the acquired agricultural land so also factum of similarity of the said land pertaining to its locational advantage, which could not be established by the Claimant by adducing any cogent documentary evidence. The Court below granted higher compensation @ Rs. 4,00,000/- per acre by placing reliance on unsupported statements of interested witnesses.

4. Reiterating the grounds urged in the Memorandum of Appeal, learned Counsel for the State submitted that the impugned Judgment passed in L.A.R. No.150 of 2014 is perverse and deserves to be set aside.

5. Per contra, learned Counsel for the Respondent, drawing attention of this Court to the findings of the Court below in paragraph-7 of the judgment, submitted that not only the present Respondent/Claimant led sufficient oral as well as documentary evidence to substantiate his demand for further enhancement of compensation but also the concerned Amin, who was examined as the sole O.P.W.1 on behalf of the State, during course of his cross-examination admitted that village M. Rampur is adjoining to village Patiguda having one boundary and that there are School, College, Court, Hospital and Govt. Offices in village M. Rampur and the National Highway from Gopalpur to Raipur is passing through village M. Rampur and Patiguda. The O.P.W.1 further admitted that village Kusurula is situated at a considerable distance from the village M. Rampur.

6. Learned Counsel for the private Respondent further submitted that village Patiguda is adjoining to village M. Rampur which is a semi urban and fast growing locality having College, School, High School, Courts, Hospital, Block Office, Banks and Market Complexes within its boundary and situated adjacent to National Highway No.217 from Raipur to Gopalpur. Due to demand of house site at M. Rampur, the Respondent had developed his acquired land into house site long before the said acquisition. The Respondent, who examined himself as P.W.1, in addition to deposing so, has further deposed that Mala kisam of land, which is inferior to Berna kisam of land, was sold @ Rs.5,00,000/- per acre in his village as per the sale statistics obtained by the Opposite Party. Apart from that, Respondent also led evidence before the Court below that he was cultivating vegetables in the acquired Berna kisam of land and was earning around Rs.50,000/- per acre after meeting all agricultural expenses by selling vegetables.

7. Learned Counsel for the Respondent submitted that though specific evidence was led by the Respondent that the Atta kisam of land acquired by the State was converted to Gharabari kisam of land much before the date of notification for acquisition, such oral evidence of the P.Ws. remained unchallenged during their cross-examination. Hence, taking into consideration the oral as well as documentary evidence on record so also the Ext.1 i.e. Judgment passed by the same Court in L.A.R. No.182 of 2014, vide which the market value of Atta, Mala, Berna and Bahal kisam of land of nearby remote interior village of Kushurla acquired vide L.A. Case No.01 of 2009 was determined to be @ Rs.2,13,000/- per acre, the Court below was justified to re-determine the compensation for acquisition of the land of the Respondent @ Rs.4,00,000/- for Atta kisam of land per acre and there is no infirmity in the impugned judgment and the present Appeal deserves to be dismissed.

8. In view of the submission made by the learned Counsel for the parties, on perusal of the L.C.R. so also the impugned Judgment, it is found that the Court below, apart from the admitted oral evidence on record, took into consideration Ext.1 produced and exhibited by the present Respondent, while re-determining the compensation amount, as has been detailed above.

9. That apart, based on the evidence on record, the Court below, vide para-8 of the impugned Judgment held as follows:

> ***"8.*** *Xxx* ***Admittedly the sale deed vide Ext.1 produced by the petitioner was a registered document and authenticity thereof has not been questioned by the OP. That apart the same has been executed on 06.10.2009 which was about two months prior to the notification U/s.4(1) of the Act made in this case i.e on 18.12.2009.***
>
> ***The said sale deed was for sale of gharbari kissam of land @ Rs.23,000/- per decimal in adjoining village M. Rampur of the acquired village.*** *In the present case, the acquired land is of Atta kissam of land. While assessing the proper value of a land basing on the sale deeds, the factors for consideration are the position, the existence and the possible use of the lands. There may be occasions where for so many reasons a small patch of Gharabari kisam land is sold in much higher price because of the competitive buyers for their respective needs. Similarly, there can be instances where small patch of agricultural lands sold in very low price for the reason of inconvenience in cultivation or high expenditure in cultivation of that small patch. So, because small patch of land sold in high rate or low rate, the valuation of the big patch of land should be taken into consideration is not a sound logic in all cases. There cannot be second opinion from the established truth that population increase and galloping price, rise of the lands is an important factor to be taken into consideration while assessing the market price of the land. As mentioned above, the existence or position of the land acquired near to human dwelling or near to irrigation facility also important factors to be taken into consideration while assessing the potential value of the land. It is experienced that the agricultural or low lands near the human dwelling or village hamlets are being rapidly converted to homesteads. Implementation of modern scientific method of cultivation and raising of new and high yielding cash crops are also very common to this part of the State where agriculture is almost only source of income to the major operation of the population.* ***The petitioners' claim that, their village Patiguda is an adjoining village M.Rampur which is a semi urban and fast growing locality having College, High School, Courts, Hospital, Block Office, Banks and Market complexes within its boundary and situated adjacent to National Highway-217 from Raipur to Gopalpur and that due to demand of house site at M.Rampur, he had developed his acquired land into house site long before acquisition.*** *In plethora of decision, the Hon'ble Apex Court has decided that the method of working out the average price paid under different sale transactions is not proper and Court should not recourse to said method. The Hon'ble Apex Court has further observed that when there are different sale transactions, the transactions representing highest value should be preferred to the rest. Reliance can be placed in the matter of Anjani Malu Dessai Vrs. State of Goa & another, (2010) Vol.13 SCC Page 710 and in the matter of Sri Rani M. Viajalakshmamma Rao Bahadur, Ranee of Vuyyur Vrs. Collector of Madras, (1969) I MLJ 49 (SC) and in the matter of Meherawal Vrs. State, CLR [2012] I Page 1006.*
>
> *In the matter of L.A Collector, Balasore Vrs. Hemanta Samal & another 2008- (1) CLR-518, it is held that:-*
>
> *"Determination of market value of the acquired land-Claimant proved sale deeds in support of valuation-Contention that the sale deeds are got up documents created by the claimant who was an employee of DRDO and had prior knowledge about the acquisition proposal-Other evidence on record to support the rate of land notes in the sale deeds-No evidence or circumstance to show that the documents were created by playing fraud or that they were manufactured for the simple purpose of obtaining higher compensation-No reason for discarding those documents from evidence."*

One cannot overlook the stiff rise in the market value of the lands in the recent years. There are many instances where the market value of agricultural lands near the human habitation is increasing virtually everyday.

So when the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality is shown to have fetched in a bonafide transaction entered in between a willing purchaser and a willing seller near about the time of acquisition. ***The LAO should have preferred the highest transaction unless there are strong circumstances justifying a different course for fixing fair compensation. It is neither pleaded nor any evidence produced by the OP that the sale transaction under Ext.1 was not genuine or the vendor and vendee had colluded to inflate the value of the land with oblique motive. Therefore the sale deed vide Ext.1 can be safely relied. In the instant case, the lands were acquired for the purpose of construction of Talijore M.I.P. vide LA case no. 02/09. This court on a reference has re-determined the market value of Atta, Mala, Berna and Bahal kissam of lands of nearby remote interior village Kushurla acquired vide LA case no. 01/09 @ Rs. 2,13,000/- per acre in LAR No.182 of 2014 of Prembati Sahu & another by its judgment dated 12.05.2015. So in this circumstance and considering all the relevant factors, a pragmatic approach should be adopted in determining the value of the acquired land.*** *Keeping in view of the smallness of the plot which was sold under Ext.1 and deduction towards development charges and conversion charges of acquired land into gharbari kissam from land value in Ext.1 and as such for the interest of justice and considering all the relevant factors and in consideration of the location of the acquired land together with its potential value, it is felt by the court if a compensation amount of Rs. 4,00,000/- (Rupees Four lakh rupees) only for Atta kissam of land per acre along with other statutory benefits will be re-determined, then it will be just and reasonable in the instant case."* ***(Emphasis supplied)***

10. Apart from observing so, the Court below, while passing the impugned Judgment, has relied upon the Judgments of the Supreme Court reported in (2010) 13 SCC 710 **(Anjani Malu Dessai Vs. State of Goa & another),** (1969) I MLJ 49 (SC) **(Sri Rani M. Viajalakshmamma Rao Bahadur, Ranee of Vuyyur Vs. Collector of Madras),** reported in CLR (2012) I 1006 **Meherawal Vs. State),** reported in 2010 LAC (SC) 150 **(Commissioner of Income Tax, Faridabad Vs. Ghanshyam (HUF)** and reported in 2001(2)LAC (SC) 409 **(Sundar Vs. Union of India)** so also Judgment of this Court reported in 2008 (I) CLR 518 **(L.A. Collector, Balasore Vs. Hemanta Samal & another).**

11. On perusal of the impugned judgment so also L.C.R., it is ascertained that there is no infirmity or illegality in the said Judgment passed in L.A.R. No.150 of 2014 and the Appeal preferred by the State deserves to be dismissed.

12. Accordingly, the Appeal stands dismissed.

13. In view of the dismissal of the Appeal, the State-Appellant is directed to implement the Judgment dated 19.01.2016 passed in L.A.R. No.150 of 2014 within a period of four months from the date of production of the certified copy of this Judgment.

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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2025 (I)-ILR-CUT-294

THE MANAGER, NEW INDIA ASSURANCE CO. LTD., CUTTACK & ANR.

V.

AMULYA KUMAR NAYAK

[W.P.(C) NO. 98 OF 2025]

17 JANUARY 2025

[G. SATAPATHY, J.]

Issue for Consideration

Whether the ground of delay in approaching the DCDRC can be adjudicated in Writ Jurisdiction.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – The Petitioner, Insurance Company filed the Writ Application challenging the order dated 16.10.2024 passed by the National Consumer Dispute Redressal Commission on the ground that the claimant has violated the relevant policy conditions and filed the claim petition before the District Consumer Dispute Redressal forum after lapse of six years of the occurrence – The policy schedule-cum-certificate of insurance discloses many conditions but did not specify the time period for claim of compensation – Whether the plea of ground of violation of policy condition is sustainable.

Held: No – In the policy condition nowhere it discloses that the claim of the insured should be made within any specific time – So, the claimant has not violated any policy condition, the contention as advanced for insurance company has no basis to interfere with the impugned judgment passed by NCDRC. (Para 5)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – Delay – The Insurance Company repudiated the claim of Opp. Party (Owner) and it was challenged before the DCDRC – The petitioner Insurance Company challenged the order of DCDRC before the SCDRC – The Opp. Party (Owner) challenged the order of SCDRC before NCDRC – The Insurance Company challenged the order of NCDRC on the ground of delay in approaching the District Consumer forum – Whether the ground of delay in approaching the DCDRC is maintainable in the present Writ Petition.

Held : No – The plea as advanced by the writ petitioner after five years of passing of the order by the DCDRC in condoning the delay as a ground to stamp approval for repudiation of claim of the Opposite Party-owner merits no consideration as the same has already been rightly considered by the NCDRC and the plea of delay in approaching the DCDRC as set forth by the Insurance Company having properly adjudicated by the concerned forums requires no interference by the Writ Court in exercising power under Articles 226 & 227 of the Constitution of India. (Para 6)

Citations Reference

Gurshinder Singh Vs. Shriram General Insurance Co. Ltd. And another: **(2020) 11 SCC 612 ─ referred to.**

List of Act

Constitution of India, 1950

Keywords

Delay; Policy decision;DCDRC; SDDRC; NCDRC; Policy conditions.

Case Arising From

Order dated 16.10.2024 passed by the NCDRC in Revision Petition No. 2843 of 2023.

Appearances for Parties

For Petitioners : Mr. P.K. Mahali
For Opp. Party :

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This writ petition by the Manager and Authorized Officer of New India Assurance Company Limited under Articles 226 and 227 of the Constitution of India seeks to quash/set aside the order dated 16.10.2024 passed under Annexure-7 by upholding the order dated 19.06.2023 passed under Annexure-6.

2. By Annexure-6, the State Consumer Dispute Redressal Commission, Orissa, Cuttack (SCDRC) by its order dated 19.06.2023 passed in FA No.132 of 2023 has set aside the order dated 03.02.2023 passed by the District Consumer Dispute Redressal Commission, Orissa, Cuttack (DCDRC) in CD Case No.113 of 2021 allowing the complaint of the OP-insured by directing the writ petitioner to pay the insured an amount of Rs.8,00,000/- together with interest thereon @ 12% per annum w.e.f. the date of filing of the claim on 30.07.2021 with cost of Rs.3,00,000/- towards mental agony and harassment and a sum of Rs.50,000/- towards cost of the

litigation. The aforesaid order of SCDRC was challenged by OP-insured before the National Consumer Dispute Redressal Commission, New Delhi (NCDRC), which by its order dated 16.10.2024 passed in Revision Petition No.2843 of 2023 has set aside the aforesaid order of the SCDRC and restored the order passed by the DCDRC.

3. Facts involved in this case in precise are, one Ashok Leyland Truck of Model L/2516 bearing Regd. No.OR-05AC-9477 belonging to the OP was stolen on 05.02.2015, but the OP having insured his aforesaid vehicle with the New India Assurance Company Ltd. (hereinafter referred to as "the Insurance Company") with a valid insurance policy covering the period from 14.05.2014 to 13.05.2015 including the date of theft, lodged a claim before the Company for payment of the insured value of the vehicle, but since the driver of the vehicle was the accused and he had been charge-sheeted for commission of offences punishable U/S.379/406/407/419/120-B of IPC to face his trial in the Court of law, the Insurance Company repudiated such claim of the OP-owner of the vehicle on 29.03.2016. Being aggrieved, the OP-owner of the said stolen Truck approached the DCDRC on 30.07.2021, but the Insurance Company contested the claim of the OP by raising various points including the limitation of five years. However, the DCDRC passed an order on 03.02.2023 allowing the claim of the present OP-owner of the stolen Truck by rejecting the claim of the writ petitioner. The aforesaid order was in fact challenged before the SCDRC which reversed that order, but ultimately the same was restored by the NCDRC in the revision under the impugned order at Annexure-7.

4. In the course of argument, Mr. Prasanta Kumar Mahali, learned counsel for the writ petitioner by taking this Court through the policy conditions and relying upon the decision in ***Gurshinder Singh Vs. Shriram General Insurance Co. Ltd. And another; (2020) 11 SCC 612***, submits that since the OP-owner of the stolen Truck approached the DCDRC with a delay of five years, his claim should not have been entertained, but ignoring such fact, the DCDRC not only entertained the claim of the OP-owner by condoning the delay in filing the complaint before it without any justification, but also allowed the complaint of the OP-owner by directing for payment of insured value of the Truck together with cost for mental agony and harassment as also for the litigation, however, the same was rightly reversed by the SCDRC in the First Appeal in FA No.132 of 2023, but when the aforesaid order passed in FA No.132 of 2023 was challenged by the OP-owner of the stolen Truck in a Revision before the NCDRC, it was wrongly allowed by restoring the order passed by the DCDRC. It is, however, submitted by Mr. Mahali that since not only the OP-owner of the stolen Truck had approached the DCDRC with a delay of five years, but he has not adhered/violated the policy conditions and, thereby, he is not entitled to any claim for the insured value, but ignoring such fact, the NCDRC has allowed the claim of the OP-owner of the

stolen Truck. Mr. Mahali, accordingly, prays to admit the writ petition and issue notice to the OP.

5. Since the writ petition is heard at the stage of admission, this Court considers it apposite to pass an appropriate order on the contentions of the writ petitioner. Practically, the Insurance Company has raised two points in this writ petition, (i) violation of policy conditions and (ii) delay in approaching the DCDRC. This Court considers it apt to extract the relevant policy conditions before proceeding to address the contentions of the Insurance Company. The Policy Schedule-Cum-Certificate of Insurance as filed by the writ petitioner discloses many conditions, out of which the following one condition is relevant for the purpose of adjudication of the claim, which reads as under:-

> *"**1.** Notice shall be given in writing to the Company immediately upon the occurrence of any accidental loss or damage and in the event of any claim and thereafter the insured shall give all such information and assistance as the Company shall require. Every letter, claim writ summons and/or process or copy thereof shall be forwarded to the Company immediately on receipt by the insured. Notice shall also be given in writing to the Company immediately the insured shall have knowledge of any impending prosecution Inquest or Fatal Inquiry in respect of any occurrence which may give rise to a claim under this policy.* ***In case of theft or criminal act which may be the subject of a claim under this policy the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender."***

A bare perusal of the aforesaid condition, nowhere it discloses that the claim of the insured should be made within any specific time and it only says that in case of theft or criminal act which may be the subject of a claim under this policy, the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender. In this case, the FIR story reveals that the vehicle was entrusted to the driver and helper on 03.01.2015, but it was found missing on 05.02.2015 at about 6 PM and on the next day, at about 11 AM, the helper of the vehicle taking some false plea, send the driver to the spot for unloading, but after one hour, the said Truck was not found at the spot. However, being informed by the helper, the OP-owner of the stolen Truck suddenly came to Dhenkanal Town and inquired about the Truck and also went to the house of one Biki Routray to collect some information, but as he did not give any information about the driver, on 08.02.2015, the OP-owner contacted the police at Sahidnagar and on 09.02.2015, an FIR was registered. It is, however, true that some explanation has been given by the owner as to the manner in which his vehicle was stolen, but fact remains that there was no inordinate delay in registration of FIR inasmuch as on the admitted facts, the vehicle went missing on 05.02.2015, but FIR was lodged on 11.02.2015. Since, the policy conditions never stipulates any time to lodge an FIR, it cannot be said that mere delay of five or six days is sufficient to repudiate the genuine claim of a person. It is, however, relied on by

Mr. Mahali the decision in ***Gurshinder Singh (supra),*** but in this decision the Apex Court while dealing with the matter in a similar situation has held the following at paragraph-20:-

> *"**20**. When an insured has lodged the FIR immediately after the theft of a vehicle occurred and when the police after investigation have lodged a final report after the vehicle was not traced and when the surveyors/investigators appointed by the insurance company have found the claim of the theft to be genuine, then **mere delay in intimating the insurance company about the occurrence of the theft cannot be a ground to deny the claim of the insured."***

In this case, one of the contentions of the Insurance Company is delay in intimating the Company, but the same is not a ground to repudiate the claim as there was no condition stipulated in the policy specifying any time for intimating the company or lodging of FIR, much less condition does not prescribe for intimating the company. The conditions embodied in the Insurance Policy, however, only cast a duty on the insured to give immediate notice to the police and cooperate with the company in securing the conviction of the offender, in case of theft or criminal act which is the subject of a claim under the policy. In the aforesaid background, when the conditions embodied in the policy does not prescribe to intimate the Insurance Company or specifying any time to give notice to police, the first contention as advance for the Insurance company has no basis to interfere with the impugned judgment passed by the NCDRC.

6. On coming to the next contention with regard to approaching the DCDRC by the OP-owner after a delay of five years, it appears that the same having been adjudicated by the DCDRC holding the delay to be inconsequential and thereby, condoning the delay by entertaining the complaint of OP-owner, but the same having not been challenged by the Insurance Company, it cannot afterwards challenge the same after more than five years of entertaining the complaint by DCDRC after condoning the delay. It is, however, contended by Mr. Mahali that the Insurance Company has taken the delay as one of the grounds before the NCDRC, but the NCDRC while adjudicating the matter, has restored the finding of the DCDRC, which by itself is evident that the NCDRC has considered the aforesaid ground of objection of the Insurance Company in negative. Further, the NCDRC by its order dated 16.10.2024 has held the following in paragraph-12:-

> *"12. From the above, it is seen that State Commission has not given any valid reasons for reversing the decision of District Forum in condoning the delay. District Forum has recorded valid reasons for condoning the delay. The case of Complainant was closed by the Insurance Company on the ground of arraying of driver as accused and his charge-sheeting. This in itself is not a valid reason for repudiation. If the incident of theft is established and claim is coverable under the policy and there is no violation of policy terms & conditions. While the Complainant claimed that charge-sheet was filed on 05.09.2019 and same is*

recorded in the order of District Forum as well, during the hearing on 09.05.2024, learned Counsel for Insurance Company was not in a position to categorically state as to whether the date when this form was signed by the police officer represents the date of filing the charge-sheet before the court. We have seen the Final Form (U/s 173 CrPC) available in the records filed in the Court of S.D.J.M. Dhenkanal, The document bears the dates when the concerned Investigating Officer signed this report, but does not reflect as to on which date the charge- sheet was filed in the Court. The true copy of this document is seen certified by the Sheristadar of Civil Courts, Dhenkanal on 31.10.2019."

True it is that the cause of delay being a disputed question of fact cannot be decided in a writ petition, but the same can be adjudicated by the forum having jurisdiction over such dispute and in this case, the aforesaid plea has already been adjudicated by three forums, which are DCDRC, SCDRC and NCDRC. It, therefore, can be well considered that the plea as advanced by the writ petitioner after five years of passing of the order by the DCDRC in condoning the delay as a ground to stamp approval for repudiation of claim of the OP-owner merits no consideration as the same has already been rightly considered by the NCDRC and the plea of delay in approaching the DCDRC as set forth by the Insurance Company having properly adjudicated by the concerned forums requires no interference by the writ Court in exercise of power under Article 226 & 227 of the Constitution of India.

7. In view of the aforesaid discussions made in the foregoing paragraph and taking into account the submission as advanced by the learned counsel for the writ petitioner, this Court does not find any merit in the contention of the petitioner to admit the writ petition and issue notice.

8. Accordingly, the writ petition being devoid of merit stands 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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2025 (I)-ILR-CUT-300

SIMANCHAL SWAIN & ORS.
V.
STATE OF ODISHA

[CRLA NO. 126 OF 2019 & BATCH]

13 JANUARY 2025

[G. SATAPATHY, J.]

Issue for Consideration

Whether non-compliance of the mandatory provisions of the NDPS Act vitiates the prosecution case.

Headnotes

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42, 43 – The appellants were found in possession of contraband Ganja in a Wagnor car – It is also stated by raiding Officer-cum-PW.4 that he had seized the said car and released it in zima of its owner under a zimanama – No evidence was tendered by the prosecution to establish that said Wagnor car was a public vehicle – Whether in the above circumstances the compliance of provision of Section 42 of the Act is necessary.

Held: Yes – The vehicle being used as a private conveyance in this case, any information regarding keeping concealed any contraband Ganja in the said car or the reason of belief of the raiding officer about concealing Contraband Ganja in the said car would require compliance of Section 42 of the NDPS Act – Once there is infraction of compliance of Section 42, it would ensure to the benefit of the accused and in this case the conviction of the appellants would be vitiated on that score only. (Para 5)

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 52-A – Samples which were collected in presence of Magistrate has not been certified by the Magistrate about its genuineness – Whether the mandatory requirement of section 52-A has been complied.

Held: No – It would disclose a case of infraction in section 52-A of the Act. (Para 7)

Citations Reference

State of Rajasthan vrs. Jag Raj Singh @ Hansa, **(2016) 11 SCC 687;** Karnail Singh Vrs. State of Haryana, **(2009) 8 SCC 539;** Simarnjit Singh Vrs. State of Punjab, **(2023) SCC OnLine SC 906;** Union of India Vrs. Mohanlal and another, **(2016) 3 SCC 379 – referred to.**

List of Act/Code

Code of Criminal Procedure, 1973; Narcotic Drugs and Psychotropic Substances Act, 1985.

Keywords

Mandatory provisions, Compliance, Chance Recovery, Contraband Article, Seizure of Contraband in Transit.

Case Arising From

Judgment dated 02.06.2018 passed by 2nd ADSJ-cum-Special Judge, Puri in T.R. Case No. 6-2-9 of 2017-2016, Regd. No. 67 of 2015.

Appearances for Parties

For Appellants : Mr. S.K. Baral, (in CRLA No. 126 of 2019)
Mr. R.B. Mishra (in CRLA Nos. 498, 565 & 767 of 2018)

For Respondents : Mr. A. Pradhan, Addl. P.P.

Judgment/Order

Judgment

G. SATAPATHY, J.

1. These appeals U/S.374 of the Code of Criminal Procedure, 1973 (in short "the Code") by the convicts named above is directed against the judgment dated 02.06.2018 passed by learned 2nd Addl. District & Sessions Judge-cum-Special Judge, Puri in T.R. Case No.6-2-9 of 2017-2016/Regd. No.67 of 2015 convicting the present appellants and another(dead) for commission of offence punishable U/S.20(b)(ii)(C) of NDPS Act, 1985 and sentencing each of them to undergo Rigorous Imprisonment (R.I.) for a term of 10 years and to pay a fine of Rs.1,00,000/- each in default whereof to undergo R.I. for further one year with stipulation to set off the pretrial detention against the substantive sentence.

Since the above appeals being directed against one and the same impugned judgment of conviction and sentence, the same are heard together and disposed of by this common judgment with the consent of the learned counsel for the parties.

2. The prosecution case in short is that on 15.10.2015 at about 10.10 P.M. in the night while performing patrolling duty at Red Cross Road in between Railway Station and Badasankha, Puri, PW.4-Sri S.N. Rath, S.I. of Excise and staff detained one Maruti Wagnor Car bearing Regd. No.-OR-07U8485 coming speedily towards Puri Railway Station in front of Nigam Medical Store, Puri and found five persons including the driver with eight numbers of Air Bags and one Attachi (briefcase) inside the said car. On suspicion, PW.4 after procuring independent witness PWs.2 & 3 and observing all the formalities searched and recovered Contraband Ganja kept in packets wrapped with polythene by tearing each packets and thereafter, confirmed the contents of said packets to be Ganja by burning a small piece of it with fire and thereafter, PW.4 weighed the Contraband Ganja kept in five packets each in eight

Air Bags and one Attachi, all total 45 packets each weighing 2Kgs and thereby, recovered 90Kgs of Contraband Ganja. On being asked, the five persons disclosed their names and addresses and four of them are the present appellants. PW.4 also accordingly, seized the Contraband Ganja, Air Bags, Attachi and the Maruti Wagnor Car under proper seizure lists and arrested the five accused persons including the appellants by informing them the grounds of their arrest U/S.52 of NDPS Act and sealed the eight Air Bags and Attachi by his personal brass seal after keeping the respective packets of Contraband Ganja and left the brass seal in the zima of PW.2 and took up the preliminary investigation of the case. On the next date on 16.10.2015, PW.4 forwarded all the accused persons to the Court as well as produced the seized Contraband Ganja before the learned Special Judge, Puri with a prayer to draw samples from each bag and accordingly, samples in duplicates from eight Air Bags and one Attachi were drawn in presence of learned S.D.J.M., Puri and the samples were handed over to PW.4, who transmitted the same to State Drugs Testing and Research Laboratory, Orissa, Bhubaneswar (SDTRL) under a copy of forwarding report of the learned S.D.J.M., Puri through Manas Kumar Mishra, an Excise Constable and thereafter, he submitted preliminary report of search, seizure and arrest of the accused persons in Form No.C/4 to the Office of Inspector of Excise, Puri, and later on the Wagnor Car was released in the interim zima of its owner namely Smt. Indira Mohapatra. After receipt of chemical examination report on 07.12.2015 and on completion of investigation, PW.4 submitted prosecution report against the present appellants and another.

2.1. On finding a prima facie case, the learned Sessions Judge-cum-Special Judge, Puri took cognizance of offence U/S.20(b)(ii)(C) and transferred the record to the Court of 2nd Addl. Sessions Judge-cum-Special Judge, Puri, who upon going through the materials placed on record and after hearing the parties, proceeded with the trial of the case by framing charge against the appellants and another for commission of offence U/S.20(b)(ii(C) of the NDPS Act resulting in trial in the present case. In support of its case, the prosecution examined all together four witnesses and relied upon 16 documents under Exts.1 to 16, the sample packets under Exts.A-1 to J-1 and Material Objects under MOs-I to LIV as against no evidence whatsoever by the appellants and another accused person. The plea of the accused persons-cum-convicts in the course of trial was denial simplicitor and false implication.

2.2. After analyzing the evidence on record upon hearing the parties, the learned 2nd ADJ-cum-Special Judge, Puri convicted the appellants and another for offence U/S.20(b)(ii)(C) of the NDPS Act and sentenced each of them to the punishment indicated in the 1st paragraph. Being aggrieved, the present appellants and another have preferred this appeal, but the another person who had preferred appeal having died during the pendency of the appeal, such appeal stood abated.

3. In assailing the impugned judgment of conviction, Mr. S.K. Baral and Mr. R.B. Mishra learned counsels for the respective appellants mainly challenges the conviction of the appellants on two grounds; firstly, non-compliance of mandatory provisions of NDPS Act and secondly, improper appreciation of evidence.

3.1. In reply, Mr. Amitav Pradhan, learned Addl. Public Prosecutor, however, vociferously submits that since the Contraband Ganja was detected from the convicts during transit, the compliance of Sec. 42 of NDPS Act is not required, rather it would be covered by the provision of Sec. 43 of NDPS Act where no compliance regarding recording of information and sending a copy thereof to the higher officer are required. Mr. Pradhan also submits that the Contraband articles were produced before the learned SDJM, Puri who collected the samples and dispatched it to SDTRL for chemical analysis and thereby, there is sufficient compliance of Sec. 52-A of the NDPS Act. It is also submitted by Mr.Pradhan that the Contraband articles being deposited in Court Malkhana immediately after producing it before the learned Special Judge ensures the compliance of Sec.55 of NDPS Act. Mr. Pradhan, however, does not dispute about independent seizure witness not supporting the prosecution case, but he, however, submits that the evidence of official witness be reliable, clear and cogent, conviction can be based on such evidence and the learned trial Court has not committed any illegality in basing conviction of the appellants on the evidence of the official witnesses.

4. After having bestowed an anxious and careful consideration to the rival submissions upon perusal of the evidence, this Court considers it apposite to re-evaluate the evidence on record in the light of rival submissions to find out as to whether the mandatory provisions of NDPS Act has been complied with or not, or the learned trial Court has fallen in error in appreciating the evidence to base conviction of the appellants. Admittedly, in this case, the independent witnesses have not supported the prosecution case, but law is also very clear that the evidence needs to be weighed, but not to be counted and if the evidence of official witnesses is found to be reliable, worthy and convincing, the same can be relied upon to base conviction of the accused persons in a criminal case. It is also not in dispute that where the penal statute provides for higher punishment, the proof of the guilt of the accused for the offence must be stricter. The prosecution case as forthcoming from the materials on record discloses a case about Excise officials detecting the case while performing patrolling duty and thereby, it is a case by chance. However, it is trite law that if the officer concerned receives any information or has reason to believe with regard to concealing of Contraband articles in any building, conveyance or enclosed place between sunrise and sunset while he is on move either on patrol duty or otherwise and such information or his belief calls for immediate action and any delay would likely to result in the Contraband or evidence relating to keeping such Contraband concealed being removed or destroyed and thereby, it would not be feasible or practical to take down in writing such information of belief in such situation, the said officer could take action in terms of the provisions of Sec. 42 of the NDPS Act, but such taking up action in terms of Sec. 42 of NDPS Act must be

subsequently recorded in the Register prescribed for it and copy thereof shall within 72 hours be sent to his official superior. The aforesaid statement is not an empty formality, rather is a mandatory requirement under law as emanates from Sec. 42 of NDPS Act.

5. In this case, the learned Addl. Public Prosecutor has undoubtedly tried to convince the Court that since the Contraband Ganja was detected as a chance recovery and the same being recovered while in transit being found to be carried on a vehicle, there is no requirement of compliance of Sec. 42, rather the case would be covered by Sec. 43 of NDPS Act, but such assertion of learned Addl. Public Prosecutor is not in terms of statute as provided in Sec. 42 of NDPS Act. In this regard this Court is also fortified with the decision in ***State of Rajasthan vrs. Jag Raj Singh @ Hansa; (2016) 11 SCC 687*** wherein after taking note of the evidence on record about private Jeep although being used for transporting passengers, but the same having been without any permit for transporting passenger as a public transport vehicle, the Apex Court held such personal Jeep not to be a public conveyance within the meaning of explanation to Sec. 43 and thereby held for requirement of compliance of Sec. 42 of NDPS Act in that case. Admittedly, it is the consistent case of the prosecution that the appellants were found in possession of Contraband Ganja in a Wagnor Car bearing Registration No. ORO7U-8485. It is also stated by raiding officer-cum-PW4 that he had seized the said car and released it in zima of its owner under a zimanama and thereby, no evidence being tendered by prosecution to establish that the said Wagnor car being a public vehicle, it can be safely said that the car in question was a private car. On a careful glance of provision of 42 of the NDPS Act, the Wagnor car being used as a private conveyance in this case, any information regarding keeping concealed any Contraband Ganja in the said car or the reason of belief of the raiding officer about concealing Contraband Ganja in the said car would require compliance of Sec. 42 of NDPS Act. In this regard, this Court considers it apt to reiterate the law down by Apex Court in ***Karnail Singh Vrs. State of Haryana; (2009) 8 SCC 539,*** wherein a constitutional Bench of the Apex Court while answering a reference has recorded its conclusion in paragraph-35 which is extracted under:-

> *"35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:*
>
> *(a) The officer on receiving the information of the nature referred to in sub-section(1) of Section 42 from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).*
>
> *(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible*

or practical to take down in writing the information given to him, in such a situation, ***he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.***

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. ***But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.***

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer ***does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act.*** *Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the to Section 42 by Act 9 of 2001."*

Further, Sec. 42(1) of the NDPS Act makes it ample clear that if the officer has reason to believe from personal knowledge or information given by any person and taken down in writing has to make such officer to comply Sec. 42 of NDPS and Sec. 42(2) makes it imperative for such officer who has taken down any information in writing under Sub-section (1) or records ground for his belief under the provision thereto, he shall within 72 hours send a copy thereof to his immediate official superior. In this case, of course PW4 had not got any opportunity to record information prior to conducting such seizure, but he had to comply the requirement of Sec. 42 of NDPS Act after completing the search and seizure in view of the law laid down by Apex Court in ***Karnail Singh(supra),*** but the evidence of prosecution witness, more particularly the testimony of PW4 does not disclose about him complying Sec. 42(1) or (2) of NDPS Act which is mandatory in nature and noncompliance of such provision would vitiate the conviction of the appellant as held by the Apex Court in ***Karnail Singh(supra).*** It is thus, very clear that once there is infraction of compliance of Sec. 42, it would ensure to the benefit of the accused and in this case the conviction of the appellants would be vitiated on that score only.

6. On coming back to see the mandatory compliance of Sec.52-A of the NDPS Act, it appears that the representative sample(s) is/are required to be taken in the presence of Magistrate who in addition of allowing to draw representative sample(s) of such drugs or substances in his presence has to certify the correctness of any list of samples so drawn. A brief reference to the evidence of PW4, the Raiding Officer, it

transpires that PW4 opened all the packets and took a small piece from each packets and tested it by smell and burning it and thereafter he sealed all these packets by means of paper through his personal brass seal and seized the same under proper seizure list Ext.1 and released his personal brass seal in zima of witness Bankanidhi Pradhan under Zimanama Ext.2, however, the said Bankanidhi Pradhan having been examined as PW2 has disowned such facts. At the same time, the evidence of PW4 further transpires that as per order of the Court, he produced the seized articles before the Court of learned SDJM, Puri and collected samples from each packets found from each bags and sealed the same by marking it as Ext.A-1 to J-1, but nowhere in the evidence it is stated by PW4 that the learned SDJM has certified the correctness of the list of samples so drawn as mandatorily required U/S. 52-A(2)(c) of the NDPS Act. In addition, the personal brass seal of PW4 which was handed over to PW2-Bankanidhi Pradhan has never seen in the light of day because it was neither produced in the Court nor any independent evidence was tendered to say that it was kept in the zima of PW2 till it was taken over by PW4. What is most important is that the samples so collected on 16.10.2015 was sent to SDTRL, Bhubaneswar through Constable Manas Kumar Mishra who produced the same before the SDTRL on 17.10.2015, but neither the said Manas Kumar Mishra was examined in this case nor any evidence was produced by the prosecution to say that the samples were under the safe custody till it were produced before the SDTRL which is an important requirement of Sec. 55 of the NDPS Act. It is also not known as to under whose custody the samples were kept till it was produced before SDTRL on 17.10.2015. The aforesaid evidence gains further significance by the admission of PW4 that he had not produced the seized articles before any police officer of nearby police station and he cannot say, if the seized articles were kept in their office Malkhana during the night of its recovery. Further, no Malkhana Register was tendered in evidence to establish the safe custody of the sample packets, so also the bulk Ganja packet till it was deposited before the Court Malkhana. The above evidence clearly makes out a case for infraction of Sec. 55 of NDPS Act which is not an empty formality, but it casts a duty on the Raiding Officer to take charge of the seized articles till delivery for safe custody of the Contraband as contemplated U/S. 55 of the NDPS Act, which further provides that if any Contraband Ganja is seized, the same shall be delivered to Officer-in-charge of a nearest Police Station for safe custody pending orders of Magistrate.

7. It is also found from the record that the list of sample packets which were collected in presence of Magistrate has not been certified by the Magistrate about its genuineness and if the same is read together with the evidence and discussions made hereinabove, it would disclose a case of infraction of Sec. 52-A of NDPS Act. What would be the consequence of non-compliance of Sec. 52-A (2) of the NDPS Act has been well explained by the Apex Court in ***Simarnjit Singh Vrs. State of Punjab; (2023) SCC OnLine SC 906,*** wherein the Apex Court after extensively quoting paragraphs-15 to 17 of the decision in ***Union of India Vrs. Mohanlal and another; (2016) 3 SCC 379*** has allowed the appeal by setting aside the conviction of the appellant therein for offence punishable under Section 15 of NDPS Act. For better appreciation, paragraphs-15 to 17 of the decision in Mohanlal and another (supra) are extracted below:

> *"**15.** It is manifest from Section 52A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer- in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.*
>
> ***16.** Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. 17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub- sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure."*

8. In view of the discussions made hereinabove and on re-appreciation of evidence on record together with the fact that the prosecution has failed to prove the mandatory compliance of Sec. 42, 52-A(2) and 55 of NDPS Act, this Court has no option left, but to conclude that the impugned judgment of conviction is unsustainable in the eye of law and is required to be set aside.

9. In the result, the appeals stand allowed on contest, but in the circumstance there is no order as to costs. Consequently, the impugned judgment of conviction and the order of sentence passed by learned 2nd Addl. District & Sessions Judge-cum-Special Judge, Puri in T.R. Case No.6-2-9 of 20172016/Regd. No.67 of 2015 are hereby set aside.

Accordingly, the appellants/convicts are acquitted of the charge and they be set at liberty forthwith, if their detention is otherwise not required in any other case.

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

Result of the case:
CRLA allowed.

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2025 (I)-ILR-CUT-308

DEEPAK KUMAR PRADHAN
V.
SWETA PAREKH

[CRLMC NO. 1359 OF 2022]

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether denial of right to defence amounts to denial of fair trial.

Headnotes

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 243(2) r/w Section 139 of the Negotiable Instruments Act, 1881 – Evidence for defence – Offence under Section 138 of the N.I. Act – Trial Court rejected the prayer of the petitioner/ accused to examine the witness on the ground that WhatsApp Communication is not admissible under section 65(B) of the Evidence Act – The right of accused to examine the defence witness denied – Whether denial of such right amounts to denial of fair trial to the accused.

Held: Yes – In view of Section 139 of the N.I. Act and Section 243 (2) of the Cr.P.C., adducing the evidence in support of the defence is undoubtedly a valuable right and denial of such right amounts to denial of fair trial to the accused – It is well known in law that the nature of the evidence likely to come up may not be a ground for the court to reject the prayer of an accused to summon a particular witness in his defence **–** The complainant in this case has enough right to cross- examine and confront the witness on the question as to whether the communication was genuine or not **–** While deciding an application of an accused on his defence, the learned trial Court ought not to delve upon the admissibility of the evidence likely to be adduced by the accused. (Paras 12 & 14)

(B) FAIR TRIAL – Principles **–** It is no more *res integra* that a fair trial includes providing a fair and reasonable opportunity to an accused to prove his innocence by leading adequate evidence **–** Therefore, when the question of right to an accused for fair trial comes to the fore, there cannot be any discrimination or denial to lead defence evidence by the accused to defend himself, except on the ground provided under Section 243(2) of Cr. P.C. (Para 13)

Citations Reference

T. Nagappa vs. Y.R. Muralidhar, **(2008) 5 SCC 633;** Arivazhagan vs. State

represented by Inspector of Police, **(2000) 3 SCC 328;** Rangappa vs. Sri Mohan, **2010 (1) OCR 706 – referred to.**

List of Act/Code

Code of Criminal Procedure, 1973; Negotiable Instruments Act, 1881.

Keywords

Right to defence, Denial of fair trial, Right of an accused.

Case Arising From

Order dated 11.03.2022 passed by the learned J.M.F.C., Bhubaneswar in 1.C.C. Case No. 1246 of 2018.

Appearances for Parties

For Petitioner : Ms. Sephalee Das
For Opp. Party: Mr. Santanu Kumar Sarangi, Sr. Adv.

Judgment/Order

Judgment

SIBO SANKAR MISHRA, J.

In the present case, the petitioner is facing charges for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short "the N.I. Act") in 1.C.C. Case No.1246 of 2018 pending before the Court of the learned J.M.F.C., Bhubaneswar. The complainant has been prosecuting the petitioner for dishonouring of the cheque amounting to Rs.5 lakhs bearing Cheque No.000598 dated 09.02.2018. The statutory legal notice was issued to the petitioner by the complainant under Section 138 of the N.I. Act, to which the petitioner did not reply. Therefore, he has been prosecuted by the opposite party/complainant for purportedly having committed the offence under Section 138 of the N.I. Act.

2. The petitioner in his defence the plea that during the year 2015, he incurred a hand loan of Rs.38 lakhs from the opposite party for the expansion of his business. As required by the opposite party/complainant, the petitioner had to submit seven numbers of post-dated cheques as security for the aforesaid hand loan. It was also agreed between the parties that the petitioner will pay Rs.40 lakhs towards the full and final discharge of the loan amount along with the interest.

3. Since July, 2015, the petitioner allegedly started making repayments towards the same loan amount on installments. The petitioner claims that the opposite party asked him to deposit the instalment money in 2 bank accounts of one Ms. Ridhi Vora, the niece of the opposite party/complainant, who was then pursuing her studies in Canada. He is relying upon certain electronic communications to substantiate the same. The petitioner further claims that the opposite party had assured that the amount deposited in the account of her niece Ridhi Vora would be factored into the loan amount due. Accordingly, learned counsel for the petitioner

contends that the petitioner has already paid about Rs.17 lakhs to Ridhi Vora, which ought to have been factored into the discharge of the liability towards the loan. However, it is contended by the learned counsel for the petitioner that, instead of taking into account the amount that the petitioner had already paid, the opposite party has utilized the post-dated cheques to prosecute him in as many as seven cases for allegedly having dishonoured all the seven post-dated cheques, which have been deposited by the opposite party with her banker.

4. The trial of the case was going on at an expected pace. To substantiate his defence, the present petitioner, on 20.12.2021, moved an application before the trial Court seeking issuance of summon to Ridhi Vora to examine her. The application came to be decided by the trial Court vide impugned order dated 11.03.2022. Learned trial Court rejected the said application, *inter alia*, stating as under:

> *"Heard. Perused the case record. The accused person wants to examine Ridhi Vora, niece of the complainant on the pretext that he had paid huge sum of amount to her as per the instructions of the complainant in support of which he had filed his bank statement as well as whatsapp communication between him Ridhi Vora as well as the complainant. Regarding the whatsapp communication submitted by the accused, it is worth mentioning here that it is inadmissible as evidence u/s.65B of the Indian Evidence Act, 1872. On the other hand the complainant objected the petition and averred that this is the delaying tactics of the accused. The payment which the accused person claims to have been made to the niece of the complainant was made in the year 2016 while agreement for clearance of cheque marked as Ext.6 by the prosecution was entered into in the last month of the year 2017."*

5. Heard Ms. Sephalee Das, learned counsel appearing for the petitioner, and Mr. Santanu Kumar Sarangi, learned Senior Advocate appearing on behalf of the opposite party/complainant.

6. Ms. Das, learned counsel for the petitioner, submits that the petitioner, being an accused in the present case, has fundamental and statutory right to defend himself. She relied upon the judgment of the Hon'ble Supreme Court in the case of ***T. Nagappa vs. Y.R. Muralidhar***, reported in ***(2008) 5 SCC 633***, to buttress her argument. In the said judgment in paragraphs 8 & 9, the following principle has been laid down:

> *"8. An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognised by Parliament in terms of sub-section (2) of Section 243 of the Code of Criminal Procedure, which reads as under:*
>
> *"243. Evidence for defence. – (1) * * **
>
> *(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other*

thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice."

9. What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant."

7. Ms. Das, learned counsel for the petitioner, further by relying upon the judgment of the Hon'ble Supreme Court in the case of ***Arivazhagan vs. State represented by Inspector of Police***, reported in ***(2000) 3 SCC 328***, has contended that the impugned order passed by the Court below would fail the scrutiny of law. Relevant paragraph-9 of the said judgment is quoted by her is reproduced for ready reference:

"9. Section 5(1) of the PC Act requires the Special Judge to follow the procedure prescribed by the court for trial of warrant cases by Magistrates. Chapter XIX of the Code contains the provisions for such trial and Section 243 falls within the said chapter. [The corresponding provisions in the old Criminal Procedure Code were sub-sections (8) to (10) of Section 251-A.] It is not disputed before us that a court has the power to refuse to summon any person as a witness on any of the three different grounds: (1) if any witness is cited for the purpose of vexation; (2) if any witness is cited for causing delay; and (3) if any witness is cited for defeating the ends of justice. In fact Section 243(2) of the Code incorporates such powers of the court."

8. Mr. S.K. Sarangi, learned Senior Advocate appearing for the opposite party, contended that the cheques were issued in the year 2017, whereas, admitted, the case of the petitioner is that all the payments, if at all, made to Ridhi Vora, has been made in the year 2015. So, the said transactions are not relatable to the debt, the petitioner is obliged to discharge. Mr. Sarangi, learned Senior Advocate, has drawn my attention to one of the exhibits in the present case and has submitted that the reading of the exhibit itself falsifies the claim of the petitioner in its entirety. Therefore, he submitted that this Court, while exercising its revisional jurisdiction, shall not entertain the present petition. He further submitted that the statute provides limited

time for the conclusion of the proceeding under Section 138 of the N.I. Act. However, his client has been prosecuting the present case since 2018, whereas the petitioner could successfully prolong the trial of the case. The application moved by the petitioner is one such ploy to delay the proceeding further.

Mr. Sarangi, learned Senior Counsel submitted that the petitioner has not replied to the statutory notice despite service, therefore, presumption under Section 139 of the N.I. Act operates against him. Therefore, the only inference that could be drawn from the conduct of the petitioner is that he is liable for the offence punishable under Section 138 of the NI. Act. He has relied upon the judgment reported in **2010 (1) OCR 706, Rangappa vs. Sri Mohan.**

9. I am alive to the fact that the present revision petition is pending since last more than two years and an interim order has been operating against the opposite party since 20.05.2022. Pendency of the present proceeding has caused delay of about two years.

10. Taking into consideration the aforementioned, I am not inclined to further adjourn the present matter, and rather dispose of the same at this stage.

11. It is admitted on record that the statutory notice was issued by the opposite party to the petitioner under Section 138 of the N.I. Act, which has not been replied to by the petitioner. Therefore, the presumption under Section 139 of the N.I. Act operates against the petitioner. The said presumption being a rebuttable presumption, the petitioner has every right to lead adequate defence evidence to dispel the statutory presumption that operates against him. Apart from that, Section 243(2) of the Cr. P.C. also gives an indefeasible right to the petitioner being an accused to lead his defence evidence. For ready reference, Section 243(2) of Cr. P.C. is produced hereunder:

> *"243. Evidence for defence.—*
>
> *(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing: Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice."*

12. In view of Section-139 of the N.I. Act and Section 243(2) of the Cr. P.C., adducing the evidence in support of the defence is undoubtedly a valuable right and denial of such right amounts to denial of fair trial to the accused.

13. It is no more *res integra* that a fair trial includes providing a fair and reasonable opportunity to an accused to prove his innocence by leading adequate evidence. Therefore, when the question of right to an accused for fair trial comes to the fore, there cannot be any discrimination or denial to lead defence evidence by the accused to defend himself, except on the ground provided under Section 243(2) of Cr. P.C.

14. In the light of the above discussion, when the impugned order was analyzed by this Court, it is found that the trial Court had rejected the prayer of the petitioner to summon the witness primarily on the ground that the petitioner has been attempting to prolong the dispute and the WhatsApp communication relied upon by the petitioner being not admissible under Section 65(B) of the Indian Evidence Act, 1872 summoning the said witness would result in a futile exercise. It is well known in law that the nature of the evidence likely to come up may not be a ground for the Court to reject the prayer of an accused to summon a particular witness in his defence. The complainant in this case has enough right to cross-examine the witness and confront the witness on the question as to whether the communication was genuine or not. While deciding an application of an accused on his defence, the learned trial Court ought not to delve upon the admissibility of the evidence likely to be adduced by the accused.

15. However, in the instant case, the learned trial Court has travelled beyond its jurisdiction while deciding the application of the petitioner accused seeking to summon a particular witness in his defence.

16. Therefore, I am inclined to allow the present petition and set aside the impugned order dated 11.03.2022 passed by the learned J.M.F.C., Bhubaneswar in 1.C.C. Case No.1246 of 2018, keeping in view the demand of the statute that the trial of a proceeding initiated under Section 138 of the N.I. Act should be concluded within a stipulated period, I direct the learned trial Court to afford only one opportunity to the petitioner to examine the defence witness proposed to be summoned by him. The learned trial Court shall issue appropriate summons to the proposed witness affording a singular opportunity for cross-examination. Since the witness is stated to be staying overseas, the learned trial Court shall have the option of examining the said witness by Video Conferencing mode as well, so as to prevent any further delay in the conclusion of the trial.

17. The CRLMC is accordingly allowed.

Headnotes prepared by: *Result of the case:*
Shri Jnanendra Kumar Swain, Judicial Indexer CRLMC allowed.
(Verified by Shri Pravakar Ganthia, Editor-in-Chief)

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2025 (I)-ILR-CUT-314

ABDUL HAMID
V.
STATE OF ORISSA (VIGILANCE)

[CRA NO. 150 OF 1992]

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether the sentence imposed against the accused can be reduced on the ground of old age.

Headnotes

PREVENTION OF CORRUPTION ACT, 1988 – Section 5(2) Proviso – Power of Court – The learned Trial Court convicted the accused/ appellant for the offences U/s. 161 of IPC and Section 5(1)(d) r/w Section 5(2) of the Act – When the learned Trial Court passed the impugned order, the appellant was 80 years old – Whether a lenient view should be taken to reduce the sentence of the appellant considering his age.

Held: Yes – The proviso to Section 5(2) of the un-amended Act empowers the Court to reduce the sentence below the minimum sentence of one year by recording sufficient reasons – The sentence order passed by the trial Court is accordingly modified and appellant is sentenced to undergo R.I. of one week with a fine of ₹ 5,000/-, in default the appellant shall undergo further R.I. for two days. (Paras 15-16)

List of Acts/Codes

Prevention of Corruption Act, 1988; Indian Penal Code, 1860; Code of Criminal Procedure, 1973

Keywords

Order of Sentence, Reduction of sentence on the ground of old age, Power of the Court.

Case Arising From

Judgment and order dated 26.03.1992 passed by the learned Special Judge (Vigilance), Sambalpur in T.R. Case No.22 of 1986.

Appearances for Parties

For Appellant : Ms. A.K. Dei, Amicus Curiae
For Respondent : Mr. M.S. Rizvi, A.S.C (Vigilance)

Judgment/Order

Judgment

S.S. MISHRA, J.

The present Criminal Appeal, filed by the appellant under Section 374 of the Cr. P.C., is directed against the judgment and order dated 26.03.1992 passed by the learned Special Judge (Vigilance), Sambalpur in T.R. Case No.22 of 1986, whereby the learned trial Court has convicted the accused-appellant for the offences under Section 161 of the I.P.C. and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1988.

2. The prosecution case, in brief, is that the accused-appellant was a record-keeper in the Kuanrmunda Tahasil Office and he demanded a bribe of Rs.2,000/- from the complainant, Srimanta Narayan Das, to issue a certified copy of the order sheet, patta, etc., of the Encroachment Case No. 11 of 1978-79. Aggrieved by this, the complainant reported this to the vigilance authorities. The Vigilance staff arranged a trap to catch the accused red-handed, who asked the informant to pay the bribe money at 4:00P.M. on 26.10.1985 at the office of Voltam Engineering Office, which belong to one Ganeshram Modi, the master of the complainant. The complainant, along with the accompanying witness, went to the said office and collected the certified copies from the accused-appellant who then demanded the bribe of the said amount. While the accused counted the tainted money, after receiving the same, the accompanying witness gave a signal to the raiding party and was apprehended the accused red handed. The commission of the act of bribery was confirmed by the Vigilance officers form part of the raiding party. After completion of investigation and obtaining sanction from the District Magistrate to prosecute the accused/appellant, the charge-sheet was filed and the accused was put to trial.

3. The prosecution, in order to substantiate the charges, examined as many as 8 witnesses, including the complainant as P.W.5., and exhibited 14 documents. P.W.7 who was the magisterial witness who took part in the preparation and trap, P.W.8 is the Vigilance Inspector who arranged the trap and one I.O. Also prosecution had exhibited 14 documents. On the other hand, the defence examined 3 witnesses in support of his defence. The appellant took the plea that for the purpose of purchasing iron rods and cement for construction work from the complainant at a reduced price, the amount of Rs.2,000/- was given in advance and the money was not meant for bribery.

4. The learned trial Court, after analyzing the entire evidence on record and relying heavily on the testimonies of P.Ws.5, 7 and 8, came to the conclusion that the accused-appellant is guilty of the offences punishable under Section 161 of the I.P.C. and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1988 and accordingly sentenced the appellant on each count. The learned trial Court sentenced the accused-appellant to undergo R.I. for one year for the offence under Section 161 of I.P.C., and to undergo R.I. for two years and imposed a fine of

Rs.500/- (rupees five hundred) and in default, to undergo R.I. for further three months for the offence under Section 5(1)(d) of the P.C. Act 1988.

5. Being aggrieved by the aforementioned judgment of conviction and order of sentence passed by the learned trial Court, the present Appeal has been preferred by the sole appellant.

6. The present appeal has been pending since 1992. Since nobody appeared for the appellant despite repeated adjournments, this Court vide order dated 28.02.2024 appointed Ms. A. K. Dei, learned counsel to assist this Court as Amicus Curiae.

7. Heard Ms. A.K. Dei, learned Amicus Curiae and Mr. M.S. Rizvi, learned Additional Standing Counsel for the Vigilance Department.

8. Ms. Dei, learned Amicus Curiae submitted that the prosecution to prove that the accused made a demand of bribe and accepted the gratification other than legal remuneration has not brought sufficient material. In the instance case the prosecution absolutely failed to establish the fact that the accused obtained for himself any pecuniary advantage or gratification on demand. The impugned order of conviction is bad in law.

9. She further submitted that the evidence of the witnesses i.e. P.Ws.1, 2, 5, 7 and 8 are sufficiently contradictory and discrepant in regard to the denomination of the tainted currency notes, place of detection and acceptance of the tainted money by t1he accused as illegal gratification. The learned Court below wrongly reposed confidence on the versions of all these witnesses in convicting the accused under Section 161 of the I.P.C. and Section 5(1)(d) of the P.C. Act 1988. She also submitted that the law being well settled that the evidence of a bribe giver being in the nature of an accomplice cannot be relied upon without corroboration on material particulars. In the instant case, there being no corroboration on material particulars to the evidence of P.W.5, the complainant that the accused received Rs.2,000/- towards illegal gratification abusing his position as public servant for grant of the certified copies applied for under Ext.5, the learned Court below ought not to have placed reliance on the evidence of P.W.5 and recorded conviction of the accused under Section 161 of I.P.C. and Section 5(1)(d) of the P.C. Act 1988.

10. *Per contra*, Mr. Rizvi, learned Additional Standing Counsel for the Vigilance Department submitted that in the present case, the testimony of the prosecution witnesses are unimpeachable. The factum of demand and acceptance has been proved beyond all reasonable doubts. Therefore, no fault could be found from the judgment of the learned trial Court, which is true reflection of the appreciation of evidence in the right prospective.

11. I have carefully perused the judgment passed by the learned Court below and analyzed the evidence on record. The learned trial Court accepted the

prosecution version regarding the demand being made by the appellant for imparting official favour by relying upon the testimony of P.Ws.4 and 5. Relevant would be to reproduce the findings recorded by the Court below regarding the acceptance of demand, which reads as under:-

> "7. Regarding the demand of bribe the evidence of P.Ws.4 and 5 are relevant. P.W.5 states that he was the power of attorney of his master Govindram Modi and was looking after the official work of his master. He say that his master applied on 17.10.85 for certified copies of the order sheet and patta etc. in the lease case and on the instruction of his master he went to the Tahasil office on 20.10.85 and approached the accused for the certified copies. P.w.5 says that the accused told him that the certified copies was ready but he would deliver there copies only after a sum of Rs.2,000/- is paid to him. P.W.5 then says that he contacted his master p.w.4 and told him about the demand and then both came to the accused who again told the that unless Rs.2,000/- is paid so brike to him the copies would not be delivered. Then he and p.w.4 contacted the accused on 24.10.85 and told that money should be paid on 26.10.85 at the office of Voltam Engineering Kuarunda belonging to p.w.4. P.W.5 says that on the instruction of P.W.4 he reported the master to the vigilance authority Rourkela by a written report Ext.9, and the D.S.P. who accepted the report asked him to come at 11 a.m. on 26.10.85 with cash of Rs.2,000/- and on the appointed date and time he sent to the Vigilance office with the money and found the vigilance staff and two others present. He says that he was introduced to those persons and the D.S.P. asked him to narrate the complaint and he told before all of them that the accused was demanding a bribe of Rs.2,000/- to deliver the certified copies.
>
> P.W.4 said that he applied for the certified copies of the patta, order sheets etc. of encroachment case No.11 of 1978-79 as those documents are were essential for the purpose of mutation of the land in his name. He proved his application Ext.5. This witness says that he entrusted the matter to his power of attorney holder p.w.5 and this p.w.5 after some days came and told him that the accused was demanding bribe of Rs.2,000/- for issuing those certified copies. He says that he had no alternative and so unwillingly he decided to pay bribe but he asked p.w.5 to report the matter to the vigilance people and accordingly p.w.5 reported the matter to the S.P. Vigilance, Sambalpur through D.S.P. Vigilance Rourkela and on 25.10.85 he gave Rs.2,000/- to p.w.5 so that money would be utilized as bribe money to the accused. In the F.I.R. Ext.9 P.W.5 has clearly mentioned that the accused demanded bribe of Rs.2,000/- from him for issuing the certified copies of Order sheet and documents applied for. P.W.1, 2, 7 and 8 who were present at the vigilance office on 26.10.85 in the fore noon during the preparation also confirmed that in their presence p.w.5 narrated that the accused was demanding a bribe of Rs.2,000/- from him for issuing the certified copies applied for by p.w.5. Nothing substantial has been brought out in the cross-examination of these witnesses to disbelieve their statements regarding the aspect of demand of bribe."

Similarly in paragraph-9 of the judgment, the trial Court by relying upon the testimony of P.Ws.2, 5, 7 and 8 have believed and accepted the evidence of the

prosecution regarding the acceptance of the tainted money by the appellant. Paragraph-9 of the judgment reads as under:-

> "9. Regarding the payment and acceptance of bribe and detection the version of p.w.2, 5, 7 and 8 are important. All these witnesses say that they went from vigilance office, Rourkela to Kuarmunda in Government Vehicle P.W.5 says that while others took their positions near the voltam Engineering office he and p.w.2 went to the office room and waited for the accused. He says that the accused came at about 4.20 to 4.25 p.m. and asked him whether p.w.4 has given him Rs.2,000/- for him and then he replied in the affirmative the accused demanded money from him and he paid the tainted money to the accused. The accused received the money in his right hand and gave him the certified copies and started counting the money. At this time the vigilance staff and the Magistrate came getting the signal from p.w.2. He says that after disclosing their identity the vigilance officers challenged the accused that he received bribe of Rs.2,000/- and the accused started trembling and some currency notes fell down from his hands. He says that the currency notes were collected by the Magistrate p.w.7 and then p.w.7 compared the number of these currency notes in the list which he had prepared earlier. The number of these notes agreed the list. He says that the Vigilance staff took the hand wash of the accused with the sodium carbonate solution and the sodium carbonate solution became pink and that solution was preserved in a bottle which was sealed. He says that p.w.8 then prepared a detection report and seized the currency notes, the paper containing the number of the currency notes and certified copies which the accused had brought, the bottle containing the hand wash from the spot and prepared seizure list Ext.1 and 10, detection report Ext.4 p.w.5 then says that p.w.8 also seized the encroachment case record, bearing No.11 of 78-79 from the Tahasil office in his presence and prepared seizure list. Ext.7. p.w.7 and 8 fully corroborate the statement of p.w.5 p.w.2 some how gave a different picture. He said that he and p.w.5 went to the Tahasil office and there p.w.5 met and talk with the accused and he gave signal and the vigilance officer and Magistrate came and washed the hands of the accused with sodium carbonate solution which became pink and they seized the currency notes which were lying on the ground and so the currency notes which were there in the hands of the accused, and the number of these notes agreed with the list which had been prepared earlier. He spoke about the seizure of the articles and proves seizure lists Ext.1 and 2, He also proved the preparation report and detection report."

P.W.5 stated that the accused had the certified copies of the documents in his possession and he said he would only deliver the same upon receipt of the bribe amount of Rs.2,000/-. Further, P.W.4, the accompanying witness, corroborated that the accused demanded the bribe amount of Rs.2,000/- from the complainant when the trap was laid and that the complainant delivered the amount to him. This was again corroborated by the testimony of P.W.7, the magisterial witness, who participated in the preparation of the trap. P.W.8, the Vigilance Inspector who investigated the case also deposed on the same line.

12. In the instant case, the appellant has admitted that he has received Rs.2,000/- from the complainant, which is being witness by the trap laying party through adequate evidence. However, so as to escape from the presumption under Section-20 of the P.C. Act 1988, he put forth a defence story. The appellant had led defence evidence to explain the cause of accepting the tainted money and stated that the alleged tainted money so received by him was not made for gratification rather he had given on advance for purchasing of rod and cement articles for construction to be done in his house. The learned trial Court dealt with the defence plea and returned the following findings:-

> "11. The plea of the accused is that he had given an advance of Rs.2,000/- to P.W.5 because P.W.5 offered to supply cement and iron rod and when p.w.5 failed to supply those articles he demanded refund of the advance money and after much persuasions p.w.5 refunded the money on 26.10.85 to him at voltam Engineering. The accused examined, P.W.3 to prove the payment of advance. He said that on the date of payment of advance he had only Rs.1,500/- with him and so he borrowed the rest Rs.500/- from D.W.3 and paid Rs.2,000/- to p.w.5. D.W.3 said that one day the accused came with another person on a scooter and told him that he has purchased something for Rs.2,000/- but he running short by Rs.500/- and requested him to lend Rs.500/- to him and so he gave Rs.500/- to the accused. The accused as D.W.2 stated that he borrowed the money to pay advance to P.ws.5 but D.ws.3 says that the accused had already purchased something and to make payment for the said purchase he borrowed this money in 1985 D.W.3 says that this money was borrowed in 1986. The accused D.W.2 said that he used to record all the expenditure and purchases regarding this construction in a book of account but he has not mentioned about payment of Rs.2,000/- to p.w.5 in this account book and has also not mentioned in that note book or anywhere about borrowing Rs.500/- from D.W.3. D.W.3 also says that he did not note or mention any where that he gave a loan of Rs.500/- to the accused. That apart the accused says that he has no knowledge or information that p.w.4 or p.w.5 self iron rod and cement or that they ever supply iron rod or cement to any one. With this knowledge he could never have advanced a heavy advance of Rs.2,000/- to p.w.5 whom be considers a vagabond. In short the above circumstances do not at all raise a believable case that the accused gave an advance of Rs.2,000/- to p.w.5."

13. I have gone through the entire evidence particularly the evidence of P.Ws.1, 4, 5, 7 and 8. I have no reason to disagree with the findings recorded by the Court below. In fact, the Court below has very meticulously dealt with the entire evidence and appositely appreciated the same to arrive at a conclusion that the appellant is guilty of offences punishable under Section 161 of the I.P.C. and Section 5(1)(d)/ 5(2) of the P.C. Act. Therefore, I am not inclined to entertain this appeal.

14. At this stage, Ms. Dei, learned Amicus Curiae submits that while the impugned judgment was passed by the learned trial Court, the appellant was 50 years old. The present appeal is pending since last 31 years. Therefore, the

appellant at present is more than 81 years old. At the late evening of life of the appellant, sending him to custody would be very harsh. Therefore, Ms. Dei, seeks leniency on sentence.

15. Regard being had to the fact that the appellant is more than 80 years of age, I am inclined to accept the submission made by Ms. Dei, learned Amicus Curiae. The proviso to Section 5(2) of the un-amended Prevention of Corruption Act, 1988 empowers the sentencing Court to reduce the sentence below the minimum sentence of one year by recording sufficient reasons. The provision reads as under:-

> "5. Criminal misconduct in discharge of official duty- (1) A public servant is said to commit the offence of criminal misconduct:-
>
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) xxx xxx xxx
> (d) xxx xxx xxx
> (e) xxx xxx xxx
>
> (2) Any public servant, who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:
>
> **Provided that the court may, for any special reasons recorded in writing impose a sentence of imprisonment of less than one year."**

16. Accordingly, while confirming the conviction recorded against appellant, the sentence awarded by the learned trial Court for the reasons stated above is liable to be varied. Sentence order passed by the trial Court is accordingly modified and the appellant is sentenced to undergo R.I. of one week with a fine of Rs.5,000/-, in default of making the payment, the appellant shall undergo further R.I. for two days.

17. With this observation, the CRLA is partly allowed.

18. This Court acknowledges the effective assistance rendered by Ms. A. K. Dei, learned Amicus Curiae in this case. Learned Amicus Curiae is entitled to an honorarium of Rs.7,000/- (Rupees seven thousand) to be paid by the State as a token of appreciation.

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

Result of the case:
CRLA is partly allowed.

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2025 (I)-ILR-CUT-321

JHATU SWAIN (SINCE DEAD THROUGH HIS L.Rs)
V.
JOGI SWAIN & ANR.

[S.A. NO. 366 OF 1998]

23 DECEMBER 2024

[A.C. BEHERA, J.]

Issues for Consideration

1. Whether the concurrent finding of facts made by the Trial Court and 1st Appellate Court can be interfered with.

2. Whether a daughter (Pre-Act daughter) has any right over the ancestral property before the Hindu Succession Act came into force.

Headnotes

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Concurrent findings made by the Trial and 1st Appellate Court after appreciation of oral and documentary evidence of parties – The father of Defendant No. 2 expired much prior to the Hindu Succession Act, 1956 coming into force – Whether the concurrent findings of facts made by the Trial and 1st Appellate Court can be interfered with in the second appeal.

Held: No – The High Court has no jurisdiction U/s. 100 of CPC to correct the error by re-appreciating the evidence. (Para 19)

(B) PROPERTY LAW – Share of pre-Act daughter in ancestral property – Original owner of the property expired in the year 1953 prior to the Hindu Succession Act, 1956 coming into force – Whether a pre-Act daughter has/had any right to make gift deed of ancestral property.

Held: No – When the pre-Act daughter has/had no interest in the suit properties, she had no power under law to transfer any interest in the suit properties in favour of defendant No.1 either through the so-called gift deed dated 07.10.1988 or otherwise – It is the settled position of law that a donee cannot get a better title through a gift, than his/her donor. (Para 22)

Citations Reference

Vineeta Sharma Vs. Rakesh Sharma & Other, **2020 (II) OLR (SC) 569;** Hazara Singh & Another Vs. Faqira (D) by L.R. and Others, **AIR 2004 Punjab & Haryana 353;** Ramathal And Ors. vs K.Rajamani (Dead) Through Lrs And Anr., **2024 (1) Civ.L.Judgment (SC) 243;** Mst. Kharbuja Kuer Vs. Jangbahadur Rai And Others, **AIR 1963 SC 1203 (at Para No.5);** Khitish Chandra Bose Vs. Commissioner of Ranchi**, (1981) 2 SCC 103 at Para**

No.11; V. Ramachandra Ayyar And Another Vs. Ramalingam Chettiar And Another, **AIR 1963 SC 302 (Para No.12);** P. Prathap Goud Vs. N.P. Yerriswamy & Others, **2024 (4) Civ.C.C. 719 (A.P);** Mahavir Prasad Vs. Balveer Singh & Another, **2024 (4) Civ.C.C. 515 (Allh.) (at Para No.21);** Jose Vrs. Ramakrishnan Nair Radhakrishnan & Others, **AIR 2004 (Kerala) 16;** State of Gujarat Vrs. Maliben Nathubhai (D) Through LRs & Ors, **2017(1) CLR (S.C.) 710;** M.Sivadasan (dead) through LRs. And others Vrs. A.Soudamini (dead) through LRs. And others, **2024(1) Civ.L.J. (S.C.) 314 – referred to.**

List of Act/Code

Code of Civil Procedure, 1908; Hindu Succession Act, 1956.

Keywords

Second Appeal, Appreciation of evidence, Concurrent findings, Interference by the Second Appellate Court, Share of pre-Act daughter, Ancestral Property, Gift deed, Donor, Donee.

Case Arising From

Judgment and decree passed by the 1st appellate Court in T.A. No. 58 of 1994.

Appearances for Parties

For Appellants : Mr. P.K. Singh, Mr. R. Behura
For Respondents : Mr. G.D. Kar

Judgment/Order

Judgment

A.C. BEHERA, J.

This second appeal has been preferred against the confirming judgment.

2. The appellant in this 2nd appeal i.e. Jhatu Swain was the defendant No.1 before the Trial Court in the suit vide T.S. No.140 of 1988 and sole appellant before the 1st appellate Court in the 1st appeal vide T.A. No.58 of 1994.

After the death of the appellant Jhatu Swain during the pendency of this 2nd appeal, his legal heirs have been substituted as appellant Nos.1(a) to 1(d) in his place.

The respondent No.1 in this second appeal was the sole plaintiff in the suit vide T.S. No.140 of 1988 and respondent No.1 in the 1st appeal vide T.A. No.58 of 1994.

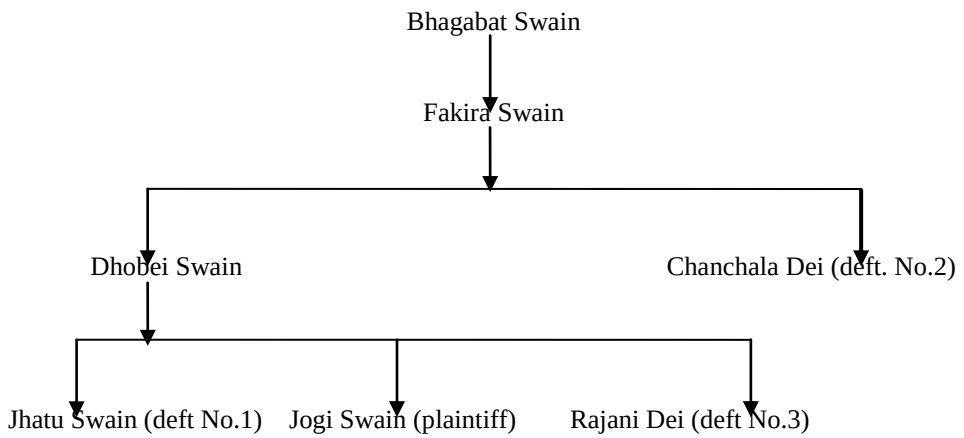
The respondent No.2 in this 2nd appeal was the defendant No.3 in the suit vide T.S. No.140 of 1988 and respondent No.3 in the 1st appeal vide T.A. No.58 of 1994.

3. The suit of the plaintiff (respondent No.1 in this second appeal, Jogi Swain) vide T.S. No.140 of 1988 before the Trial Court against the defendants (original appellant in this 2nd appeal i.e. Jhatu Swain and respondent No.2 along with one Chanchala Dei) was a suit for partition.

4. According to the plaintiff, the defendant Nos.1 & 3 are his brother and sister respectively. The defendant No.2 (Chanchala Dei) is the sister of his father. The suit properties are his ancestral properties.

5. In order to have a better appreciation and so also for an instant reference, the family pedigree of the parties according to the plaint is depicted hereunder:-

Genealogy



6. As per the pleadings of the plaintiff, the parties to the suit are all Hindus and they are guided and governed by Mitakshara School of Hindu Law.

According to the aforesaid genealogy, Bhagbat Swain was his common ancestor.

Bhagabat Swain died leaving behind his only son i.e. Fakira Swain as his only successor. So, after the death of Bhagabat Swain, all the suit properties left by him devolved upon his son Fakira Swain.

Fakira Swain died 35 years prior to 1988 i.e. in the year 1953 leaving behind his son Dhobei Swain and daughter Chanchala Dei (defendant No.2).

After the death of Fakira Swain, all the suit properties left by him (Fakira Swain) devolved upon his son Dhobei Swain, as, Fakira Swain expired in the year 1953 prior to the coming into force of The Hindu Succession Act, 1956, because, a pre-Act daughter like Chanchala Dei (defendant No.2) had no right of succession by that time as per law. So, all the suit properties left by Fakira Swain devolved upon his son Dhobei Swain and Dhobei Swain became the owner of the entire suit properties.

When Dhobei Swain was the owner of the entire suit properties, the said Dhobei Swain died much after 1956 leaving behind his two sons and one daughter i.e. defendant No.1 (Jhatu Swain), Jogi swain (plaintiff) and Rajani Dei (defendant No.3).

So after the death of Dhobei Swain, the suit properties left by him (Dhobei Swain) devolved upon his successors i.e. plaintiff, defendant No.1 and defendant No.3.

Therefore, the suit properties are the joint and undivided properties of the plaintiff, defendant Nos.1 & 3. The suit properties have not at all been partitioned/divided between them (plaintiff, defendant Nos.1 & 3) till yet through any metes and bounds partition.

After the death of Fakira Swain, the defendant No.1 being his eldest son, he (defendant No.1) was managing the family and he was looking after the possession and management of all the joint and undivided suit properties as the manager of the joint family, but suddenly, five days before filing of the suit, he (defendant No.1) declared in his village that, the defendant No.2 (Chanchala Dei) has executed a gift deed in respect of half of the suit properties in his favour on the strength of joint recording of her name in the suit properties with her brother Fakira Swain in the major settlement R.o.R. In fact, the defendant No.2 (Chanchala Dei) had/has no interest in the suit properties being a pre-Act daughter. So, he (plaintiff) searched for the so-called gift deed and came to know that, the defendant No.1 has managed to execute a gift deed on dated 07.10.1988 illegally and fraudulently in his favour in respect of part of the suit properties only for his unlawful gain, though the cited donor of that gift deed i.e. defendant No.2 (Chanchala Dei) had/has no interest in the suit properties to transfer. For which, the said so-called gift deed dated 07.10.1988 shown to have been executed by the defendant No.2 in favour of defendant No.1 in respect of the suit properties is *void ab initio* and *non-est* in the eye of law. Therefore, he (plaintiff) requested his brother i.e. defendant No.1 for partition of his share from the joint and undivided suit properties, to which, the defendant No.1 did not agree. For which, he (plaintiff) approached the Civil Court by filing the suit vide T.S. No.140 of 1988 against the defendants praying for partition of his share from the suit properties.

7. The defendant No.3 (sister of the plaintiff and defendant No.1) was set *ex parte* in the suit without filing written statement.

The defendant No.2 filed her written statement supporting the case of the plaintiff stating that, the defendant No.1 has created the so called gift deed dated 07.10.1988 practising fraud without her knowledge. In fact, she (Chanchala Dei-defendant No.2) has not executed the so called gift deed dated 07.10.1988 within her knowledge in favour of defendant No.1. She (defendant No.2) had/has no interest in the suit properties. She (defendant No.2) is not entitled to get any interest from her father's ancestral properties i.e. from the suit properties, as her father Fakira Swain expired much prior to 1956. For which, after the death of her father Fakira Swain, her brother Dhobei Swain became the owner over the entire suit properties being the sole successor of his father as per law, but her name i.e. the name of defendant No.2 has been erroneously

recorded with her brother Dhobei Swain jointly in the Hal R.o.Rs of the suit properties. In fact, she (defendant No.2) had/has no interest in the suit properties.

The defendant No.1 challenged the suit of the plaintiff by filing his written statement taking his stands inter alia therein that, his father's father i.e. Fakira Swain had expired after 1956, for which, Chanchala Dei (defendant No.2) as the daughter of Fakira Swain had half share in the suit properties, because, after the death of Fakira Swain, the suit properties devolved upon Dhobei Swain and Chanchala Dei (defendant No.2) equally. He (defendant No.1) was looking after Chanchala Dei (defendant No.2). So, out of love and affection, Chanchala Dei (defendant No.2) gifted away her half share in the suit properties in his favour by executing and registering the gift deed on dated 07.10.1988. For which, he (defendant No.1) had/has been possessing more amount of suit properties than the plaintiff getting the same in his share through division/partition of the suit properties between him (defendant No.1) and plaintiff. So, the question of re-partition of the suit properties through this suit does not arise. For which, the suit of the plaintiff for partition of the suit properties is not maintainable under law.

Therefore, the suit of the plaintiff is liable to be dismissed against him (defendant No.1).

8. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 5 (five) numbers of issues were framed by the Trial Court in the suit vide T.S. No.140 of 1988 and the said issues are:-

ISSUES

(i) Whether the suit is maintainable?

(ii) Whether the plaintiff has any cause of action to file the suit?

(iii)Whether the Registered deed of gift deed dated 07.10.1988 executed by the defendant No.2 is valid, genuine and legal?

(iv)Whether the plaintiff is entitled to get the relief claimed?

(v) Whether there was any partition between the parties?

9. In order to substantiate the aforesaid relief i.e. partition sought for by the plaintiff in respect of the suit properties, he (plaintiff) examined four witnesses from his side including him as P.W.1.

On the contrary, the defendants examined three witnesses on their behalf including defendant No.2 (Chanchala Dei) and defendant No.1 (Jhatu Swain) as D.Ws.1 & 2 respectively and relied upon two documents from their side vide Exts.A & B.

10. 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 and against the defendant No.1 and basing upon the findings and observations made by the Trial Court in the issues in favour of the plaintiff and against the defendant No.1, the Trial Court decreed the suit of the plaintiff on contest against the defendant Nos.1 & 2 and *ex parte* against the defendant No.3 preliminarily for partition of the suit properties between plaintiff, defendant Nos.1 & 3 ignoring the gift deed dated 07.10.1988 vide Ext.B shown to have been executed by defendant No.2 (Chanchala Dei) in favour of defendant No.1 in respect of half of the suit properties observing/holding

that, the gift deed dated 07.10.1988 vide Ext.B as *void* and *non-est* as per its judgment and decree dated 23.04.1994 and 30.04.1994 respectively assigning the reasons that, the suit properties are the joint and undivided properties of the plaintiff, defendant Nos.1 & 3, in which, the defendant No.2 (Chanchala Dei) had/has no interest. The suit properties have not at all been partitioned/divided between plaintiff, defendant Nos.1 & 3 till yet through any metes and bounds partition. When, the father of the defendant No.2 i.e. Fakira Swain expired prior to the coming into force of The Hindu Succession Act, 1956, then as per law, she (defendant No.2) had/has no interest in the suit properties being a pre-Act daughter.

Therefore, she (defendant No.2) was/is not competent under law to transfer any interest in the suit properties in favour of any one including defendant No.1, as she (defendant No.2) had/has no interest in the suit properties. For which, the so called gift deed dated 07.10.1988 vide Ext.B does not create any interest in respect of the suit properties in favour of the defendant No.1, because the defendant No.2 (donor) had/has no interest in the suit properties. In addition to that, due execution of the gift deed vide Ext.B has also not been proved by the defendant No.1.

11. On being dissatisfied with the aforesaid judgment and decree dated 23.04.1994 and 30.04.1994 respectively passed by the Trial Court in T.S. No.140 of 1988 ignoring the gift deed dated 07.10.1988 vide Ext.B with specific findings and observations that, the gift deed dated 07.10.1988 vide Ext.B shown to have been executed by the defendant No.2 in favour of the defendant No.1 is *void ab initio* and *non-est* in the eye of law, the defendant No.1 challenged the same by preferring the first appeal vide T.A. No.58 of 1994 being the appellant against the plaintiff and defendant Nos.2 & 3 arraying them as respondents.

12. After hearing from both the sides, the First Appellate Court dismissed that First Appeal vide T.A. No.58 of 1994 of the defendant No.1 and confirmed to the findings of the Trial Court that, the gift deed dated 07.10.1988 executed by Chanchala Dei (defendant No.2) in favour of the defendant No.1 in respect of the suit properties is *void ab initio* and *non-est* in the eye of law, but modified the shares of the plaintiff, defendant Nos.1 & 3 in the suit properties as per its judgment and decree dated 28.10.1998 and 12.11.1998 respectively.

13. On being aggrieved with the said judgment and decree of the dismissal of the First Appeal vide T.A. No.58 of 1994 of the defendant No.1 passed by the First Appellate Court, he (defendant No.1 Jhatu Swain) challenged only to the above specific/particular finding of the Trial Court and 1st Appellate Court that, the gift deed shown to have been executed by Chanchala Dei (defendant No.2) in favour of him (defendant No.1) on dated 07.10.1988 vide Ext.B in respect of half of the suit properties as *void ab initio* and *non-est* in the eye of law preferring this 2nd appeal being the appellant without challenging the other findings of the 1st Appellate Court.

14. When, during the pendency of this second appeal, the appellant (defendant No.1- Jhatu Swain) expired, then his legal heirs were substituted in his place as appellant Nos.1(a) to 1(d).

15. This Second Appeal was admitted on formulation of the following substantial questions of law i.e.:-

> *(i) Whether the findings of the learned Court below is perverse due to non-application of material evidence i.e. the settlement records vide Ext.A, Ext.A/1 and Ext.A/2 recorded the name of Chanchala (defendant No.2), which are sufficient to draw presumption and is consistent with the theory that her father Fakira died after 1956 and as such, she as a successor has been recorded?*
>
> *(ii) Whether the Courts below are correct to put the onus on the defendant No.1 to prove death of Fakir after 1956, when the plaintiff challenges the gift made by Chanchala on the ground that Chanchala (defendant No.2) has no right to make gift as her father died before 1956?*

16. I have already heard from the learned counsels of both the sides.

17. In order to make the gift deed dated 07.10.1988 vide Ext.B shown to have been executed by defendant No.2 (Chanchala Dei) in favour of the defendant No.1 in respect of the half of the suit properties as valid and lawful and in order to nullify the above concurrent findings of the Trial Court and 1st Appellate Court that, the said gift deed dated 07.10.1988 vide Ext.B is *void ab initio* and *non-est*, the learned counsel for the appellants relied upon the following decisions:

> (i) ***2020 (II) OLR (SC) 569—Vineeta Sharma Vs. Rakesh Sharma & Others***.
>
> (ii) ***AIR 2004 Punjab & Haryana 353—Hazara Singh & Another Vs. Faqira (D) by L.R. and Others***.

18. According to the pleadings of the parties, judgments and decrees of the Trial Court and 1st Appellate Court, when the above formulated substantial questions of law are interlinked having ample nexus with each other, then both the substantial questions of law are taken up together analogously for their discussions hereunder.

19. It is the concurrent findings of facts by the Trial Court and First Appellate Court taking into account the pleadings and appreciating the oral and documentary evidence of the parties that, the father of defendant No.2 (Chanchala Dei) i.e. Fakira Swain expired much prior to the coming into force of The Hindu Succession Act, 1956 leaving behind his one son and one daughter i.e. Dhobei Swain and Chanchala Dei (defendant No.2). Dhobei Swain is the father of the plaintiff, defendant Nos.1 and 3 and the said Dhobei Swain expired much after coming into force of The Hindu Succession Act, 1956.

It is the settled propositions of law that, High Court has no jurisdiction to disturb the concurrent finding of facts made by the trial Court and First Appellate Court, even, the said finding of facts are on wrong appreciation of evidence. For which, the High Court has no jurisdiction to entertain a Second Appeal on findings of facts, even though, such finding of facts is erroneous. Because, re-appreciation of evidence by the High Court in a 2nd appeal in order to arrive at a different conclusion then the conclusion drawn by the Trial Court and First Appellate Court is quite restricted as per mandate of Section 100 of the CPC, 1908. Therefore, as per law, even a wrong finding of facts by the Trial Court and 1st Appellate Court, the same is not sufficient to constitute a point of law in the 2nd Appeal.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions.

(a) In a case between ***Ramathal And Ors. vs K.Rajamani (Dead) Through Lrs And Anr.*** *Reported in* ***2024(1)Civ.L.Judgment (SC) 243*** *(at Para No.31) it has been held by the Apex Court by appreciating the provisions of law envisaged in Section 100(4) of the CPC, 1908 that, High Court has no jurisdiction to disturb pure and concurrent findings of facts, that too, on wrong appreciation of evidence.*

(b) In a case between ***Mst. Kharbuja Kuer Vs. Jangbahadur Rai And Others*** *reported in* ***AIR 1963 SC 1203 (at Para No.5) & Khitish Chandra Bose Vs. Commissioner of Ranchi*** *reported in* ***(1981) 2 SCC 103 at Para No.11*** *that, High Court had no jurisdiction to entertain a 2nd Appeal on the ground of erroneous finding of fact.*

(c) In a case between ***V. Ramachandra Ayyar And Another Vs. Ramalingam Chettiar And Another*** *reported in* ***AIR 1963 SC 302 (Para No.12)*** *that, High Court cannot interfere with the conclusions of fact recorded by the lower Appellate Court however erroneous, the said conclusions may appear to be to the High Court because, as the privy council has observed, however, gross or inexcusable the error may seem to be, there is no jurisdiction under Section 100 of the CPC, 1980 to correct that error.*

(d) In a case between ***P. Prathap Goud Vs. N.P. Yerriswamy & Others*** *reported in* ***2024 (4) Civ.C.C. 719 (A.P)*** *at Para No.15 that, wrong finding of fact is not sufficient to constitute a question of law.*

(e) In a case between ***Mahavir Prasad Vs. Balveer Singh & Another*** *reported in* ***2024 (4) Civ.C.C. 515 (Allh.) (at Para No.21)*** *that, re-appreciation of evidence to arrive at a different conclusion is quite restricted in exercise of jurisdiction under Section 100 of the CPC, 1908.*

20. When, it is the concurrent findings of facts by the Trial Court and 1st Appellate Court after appreciation of oral and documentary evidence of the parties that, the father of the defendant No.2 i.e. Fakira Swain expired much prior to the coming into force of The Hindu Succession Act, 1956, but the father of the plaintiff, defendant Nos.1 and 3 i.e. Dhobei Swain expired much after coming into force of The Hindu Succession Act, 1956, then, at this juncture, in view of the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, the question of disturbing such concurrent findings of facts arrived by the Trial Court and First Appellate Court through this 2nd Appeal does not arise. For which, it is held being agreed with the concurrent findings of facts made by the trial court and 1st Appellate Court that, as the father of the defendant No.2 (Chanchala Dei) i.e. Fakira Swain expired much prior to the coming into force of The Hindu Succession Act, 1956, for which, Chanchala Dei (defendant No.2) being a pre-Act daughter has/had no interest in the ancestral suit properties left by her father Fakira Swain. So, after the death of Fakira Swain, the suit properties left by him (Fakira Swain) devolved upon his son Dhobei Swain i.e. father of the plaintiff, defendant Nos.1 and 3, but, not upon Chanchala Dei (defendant No.2) as per prevailing law of that time.

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.

(a) In a case between ***Jose Vrs. Ramakrishnan Nair Radhakrishnan & Others*** *reported in* ***AIR 2004 (Kerala) 16*** *that, The expressions made in Section 14 (1) of the Hindu Succession Act regarding female Hindu, the same includes daughter also.*

(b) In a case between ***State of Gujarat Vrs. Maliben Nathubhai (D) Through LRs & Ors*** *reported in* ***2017(1) CLR (S.C.) 710*** *that, Property law—Share in ancestral property—Original owner of the property dying intestate in 1947—Plaintiffs (daughters of the original owner) claiming their share in the suit properties through their mother (wife of original owner)—The suit filed by the daughters as plaintiffs is not maintainable, because their mother had no interest in the suit properties being a pre act widow of the original owner.*

(c)In a case between ***M.Sivadasan (dead) through LRs. And others Vrs. A.Soudamini (dead) through LRs. And others*** *reported in* ***2024(1) Civ.L.J. (S.C.) 314*** *that, Hindu law—Ancestral property—Hindu Succession Act, 1956, Section 14(1)—Suit for partition was filed by the daughters of owner i.e. "O" of property, who had died in the year 1942 (prior to coming into force of Hindu Succession Act), for which, after the death of "O" property left by him i.e. "O" devolved upon his male successor i.e. son "S". Therefore, the widow of "O" i.e. the mother of "S" had no right over it being a Pre-Act widow.*

21. As per law, when after the death of Fakira Swain, the suit properties left by him devolved upon his only male successor and son Dhobei Swain, then, at this juncture, it is safely concluded that, the defendant No.2 (Chanchala Dei) had/has no interest in the suit properties. For which, in other words, it is held that, the inclusion or recording of the name of defendant No.2-Chanchala Dei in the Hal R.o.R of the suit properties after the death of her father Fakira Swain jointly with his brother Dhobei Swain cannot create her any interest in the suit properties, because, mere recording of name in the R.o.R, neither creates title nor extinguishes title in whose favour the same is recorded, because, title in the suit properties is created through inheritance/succession or through document/conveyance or through adverse possession.

As out of the above three modes for creation of title, no one is available in favour of the defendant No.2 (Chanchala Dei) for creation of her interest in the suit properties, then at this juncture, it is safely concluded that, the inclusion/insertion/reflection of the name of Chanchala Dei (defendant No.2) in the R.o.R. of the suit properties had/has not created any interest in her favour in the suit properties, as she (Chanchala Dei-defendant No.2) had/has no interest in the suit properties.

22. When it is held that, the defendant No.2 (Chanchala Dei) had/ has no interest in the suit properties, then, she had no power under law to transfer any interest in the suit properties in favour of the defendant No.1 either through the so-called gift deed dated 07.10.1988 vide Ext.B or otherwise.

It is the settled propositions of law that, a donee cannot get a better title through a gift, than his/her donor.

When, the defendant No.2 (Chanchala Dei) had/has no interest in the suit properties, then the question of creation of any interest in favour of the so-called donee i.e. defendant No.1 through the gift deed dated 07.10.1988 vide Ext.B does not arise.

23. As per the discussions and observations made above, when it is held that, the defendant No.2 had/has no interest in the suit properties, then, at this juncture, the so-called gift deed dated 07.10.1988 vide Ext.B said to have been executed by her (defendant No.2) in favour of the defendant No.1 in respect of the suit properties is *void ab initio* and *non-est* in the eye of law. Because, the said gift deed vide Ext.B does not convey any title or interest in favour of the so-called donee (defendant No.1). For which, the said so-called gift deed vide Ext.B is to be ignored simply as per law holding the same as not worth the paper written on.

24. When, it is held that, the papers of the so-called gift deed vide Ext.B said to have been executed by the Defendant No.2 (Chanchala Dei) in favour of the defendant No.1 are not worth the papers written on and when it is held that, after the death of Fakira Swain, the father of the plaintiff, defendant Nos.1 and 3 i.e. Dhobei Swain was the sole successor of the suit properties, then, as per law, after the death of Dhobei Swain, the suit properties left by him devolved upon the plaintiff, defendant Nos.1 and 3, for which, the suit properties are the joint and undivided properties of the plaintiff, defendant Nos.1 and 3. Therefore, the decisions relied upon by the learned counsel for the appellants indicated in paragraph No.17 of this judgment have become inapplicable to this 2nd appeal on facts as discussed above.

When, the Trial Court and First Appellate Court both have decreed the suit of the plaintiff vide T.S. No.140 of 1988 preliminarily for partition of the suit properties between the plaintiff, defendant Nos.1 and 3 ignoring the so-called gift deed dated 07.10.1988 vide Ext.B relied upon by the defendant No.1 holding/observing that, the said Ext.B is *void ab initio* and *non-est* in the eye of law and when such concurrent findings of the Trial Court and First Appellate Court are not held to be erroneous for the reasons assigned above, then, at this juncture, the question of interfering with the same through this 2nd appeal filed by the defendant No.1 does not arise.

Therefore, there is no merit in this 2nd appeal filed by the defendant No.1. The same must fail.

25. In result, the 2nd Appeal filed by the defendant No.1 (substituted his L.Rs.) is dismissed on contest, but without cost.

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

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2025 (I)-ILR-CUT-331

M/s. MAGMA LEASING LTD.
V.
RAGESWARI MOHANTY & ANR.

I.A. NO. 38 OF 2024
(ARISING OUT OF R.F.A. NO. 67 OF 2006)

18 DECEMBER 2024

[A.C. BEHERA, J.]

Issue for Consideration

Whether correction of judgment or decree is permissible.

Headnotes

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 152 – Whether correction of judgment or decree is permissible.

Held: Yes – When such correction shall cause prejudice to no party and when such correction shall not touch the merit of the judgment and decree passed in R.F.A. in any manner and when for making such correction, there is no necessity to change or alter any letter or word in the body of the judgment and decree of R.F.A., then it is the duty of this Court to rectify/ correct the minor inadvertent typographical error because the said corrections shall never cause any prejudice to the parties, rather the same will be in furtherance of rendering substantial justice to them (parties).

(Para 7)

Citations Reference

State of Punjab Vrs. Darshan Singh, **2003 (2) Apex Court Judgments 606 (S.C.)**; Manohar Prasad Navandar, Hyderabad Vrs. Vijay Kumar Joshi, Hyderabad, **2021(4) Civil Court Cases 067 (Telengana);** Chandran Vrs. Amruthavally, **2017 (1) Civil Court Cases 227 (Kerala);** Bhimaraj Onkarmal Firm and another Vrs. Satynarayan Satpathy and others, **36 (1970) C.L.T. 1152;** Meena Kumari and another Vrs. General Public & others, **2007(4) Civil Court Cases 165 (Punjab & Haryana)**; Hotel Balaji and others Vrs. State of Andhrapradesh and others, **AIR 1993 (SC) 1408 ─ referred to.**

List of Code

Code of Civil Procedure, 1908.

Keywords

Correction of Judgment or decree, Typographical error.

Case Arising From

R.F.A No. 67 of 2006.

Appearances for Parties

For Petitioner/ Appellant : Mr. B.B. Mishra
For Opp. Parties/ Respondent : Mr. S.R. Patnaik

Judgment/Order

Order

A.C. BEHERA, J.

This is an interlocutory application, which has been filed by the respondent No.1 in a disposed of first appeal vide R.F.A. No.67 of 2006 praying for correction of one letter from her name i.e. from "*j*" to "*g*" in the cause title of the judgment and decree passed in that first appeal vide R.F.A. No.67 of 2006 to be read her name as Rageswari Mohanty instead of Rajeswari Mohanty.

The said first appeal vide R.F.A. No.67 of 2006 was preferred by a company i.e. M/s. Magma Leasing Ltd. challenging the judgment and decree passed in the suit vide M.S. No.13 of 1999.

In the suit vide M.S. No.13 of 1999, one company i.e. Consortium Finance and Leasing Ltd. was the defendant No.1.

As the suit vide M.S. No.13 of 1999 was decreed against the defendant No.1 i.e. Consortium Finance and Leasing Ltd. and as the assets and liabilities of defendant No.1-company i.e. Consortium Finance and Leasing Ltd. were transferred in favour of M/s. Magma Leasing Ltd., then M/s. Magma Leasing Ltd. had preferred an first appeal vide R.F.A. No.67 of 2006 challenging the judgment and decree passed in M.S. No.13 of 1999 against the plaintiff of that suit arraying her (plaintiff) as respondent No.1 and arraying the transferor company i.e. Consortium Finance and Leasing Ltd. as proforma respondent No.2 and also arraying defendant No.2 (Team Finance Co. Private Ltd.) as proforma respondent No.3.

2. Heard from the learned counsels of both the sides.

3. It was the contention of the learned counsel for the respondent No.2 (who was the sole plaintiff in the suit vide M.S. No.13 of 1999) in R.F.A. No.67 of 2006 that, the judgment and decree of the suit vide M.S. No.13 of 1999 was passed and prepared by the Trial Court indicating her name as Rageswari Mohanty in the cause title of the judgment and decree thereof, for which, her name is required to be corrected from Rajeswari Mohanty to Rageswari Mohanty in the cause title of the judgment and decree passed in R.F.A. No.67 of 2006, to which, the learned counsel for the appellant of the first appeal vide R.F.A. No.67 of 2006 objected contending on the basis of its objection that, the cause title of the judgment and decree of the first appeal vide R.F.A. No.67 of 2006 has already been prepared on the basis of the appeal memo filed by the appellant indicating her name as Rajeswari Mohanty, for which, there is no defect in indicating the name of the respondent No.1 in the judgment and decree of the first appeal vide R.F.A. No.67 of 2006 as Rajeswari

Mohanty and that apart, after passing of the judgment and decree in the first appeal vide R.F.A. No.67 of 2006, the appellant M/s. Magma Leasing Ltd. has already preferred an appeal before the Apex Court, which has been registered as Special Leave Petition (CIVIL) Diary No(s).32236/2024 before the Hon'ble Apex Court and in that appeal, the Apex Court has already passed an interim order on dated 13.09.2024 in order to stay the further proceedings of the execution case arising out of the judgment and decree of R.F.A. No.67 of 2006 subject to deposit of Rs.12,00,000/- (rupees twelve lakh) by the appellant M/s. Magma Leasing Ltd. before the Registry of this Hon'ble Courts.

So, according to the appellant in R.F.A. No.67 of 2006 i.e. M/s. Magma Leasing Ltd., when the matter is subjudice before the Apex Court having been numbered as Special Leave Petition (CIVIL) Diary No (s).32236/2024, then, in these circumstances, no correction can be made as per law in the cause title of the judgment and decree of the first appeal vide R.F.A. No.67 of 2006.

4. It is the undisputed case of the parties that, in the plaint of the suit vide M.S. No.13 of 1999, the name of the plaintiff was reflected as Rageswari Mohanty.

Likewise, in the judgment and decree passed in M.S. No.13 of 1999 by the Trial Court, the name of the plaintiff has also been indicated as Rageswari Mohanty, but not as Rajeswari Mohanty.

5. When, due to the mistaken indication/reflection of the appellant in its appeal memo vide R.F.A. No.67 of 2006, the name of the respondent No.1 (plaintiff in M.S. No.13 of 1999) has been typed as Rajeswari Mohanty instead of Rageswari Mohanty in the judgment and decree of R.F.A. No.67 of 2006, then at this juncture, it is held that, the typing of name of respondent No.1 in the judgment and decree of first appeal vide R.F.A. No.67 of 2006 as Rajeswari Mohanty instead of Rageswari Mohanty are only the inadvertent typographical mistakes, which has occurred (crept in), for no other reason, but only for the fault/mistake of the appellant-M/s. Magma Leasing Ltd.

6. The law on this aspect for correction of the judgment and decree has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

> ***(i) 2003 (2) Apex Court Judgments 606 (S.C.)—State of Punjab Vrs. Darshan Singh****—Section 152—Omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 of the CPC, 1908.*
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> *(ii)* ***2021(4) Civil Court Cases 067 (Telengana)—Manohar Prasad Navandar, Hyderabad Vrs. Vijay Kumar Joshi, Hyderabad****—Section 152—Correction of judgment or decree—An application for correction of judgment or decree can be filed by either D.H. or J.D.—Court has also suo motu power to amend a judgment or decree.*
>
> ***(iii) 2017 (1) Civil Court Cases 227 (Kerala)—Chandran Vrs. Amruthavally****—CPC, 1908—Section 152—Scope— Applicability of provision is not confined to cases of slip or omission by Court—It definitely takes within its compass the 'accidental slip or omission' of parties also.*

(iv) 36 (1970) C.L.T. 1152—Bhimaraj Onkarmal Firm and another Vrs. Satynarayan Satpathy and others*—Mistaken description in cause-title, admittedly inadvertent—The same can be corrected.*

(v) 2007(4) Civil Court Cases 165 (Punjab & Haryana)— Meena Kumari and another Vrs. General Public & others*— Section 152—Correction in judgment—Can be allowed even if error has occurred due to wrong pleadings—It is not necessary first to amend the pleadings.*

(vi) AIR 1993 (SC) 1408—Hotel Balaji and others Vrs. State of Andhrapradesh and others*—To perpetuate an error is no heroism, but to rectify it is the compulsion of judicial conscience.*

7. As stated above, when the typing of the name of respondent No.1 in the cause title of the judgment and decree in R.F.A. No.67 of 2006 is only for the mistake of the appellant-company i.e. M/s. Magma Leasing Ltd., but not for any fault or mistake of the respondent No.1 and when such correction shall cause prejudice to no party and when such correction shall not touch the merit of the judgment and decree passed in R.F.A. No.67 of 2006 in any manner and when for making such correction, there is no necessity to change or alter any letter or word in the body of the judgment and decree of R.F.A. No.67 of 2006, then at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, it is held that, it is the duty of this Court to rectify/correct the aforesaid minor inadvertent typographical error of a particular letter in the name of respondent No.1 from "*j*" to "*g*" in the cause title of the judgment and decree passed in R.F.A. No.67 of 2006.

Because, the said corrections shall never cause any prejudice to the parties, rather the same will be in furtherance of rendering substantial justice to them (parties).

8. As per the discussions and observations made above, for the interest of justice, this I.A. for correction of the name of the respondent No.1 from Rajeswari Mohanty to Rageswari Mohanty in the cause title of the judgment and decree of R.F.A. No.67 of 2006 is required to be allowed.

9. In result, this I.A. filed by the respondent No.1 is allowed on contest, but without cost.

The name of respondent No.1 in the cause title of the judgment and decree passed in the first appeal vide R.F.A. No.67 of 2006 be corrected from Rajeswari Mohanty to Rageswari Mohanty.

10. I.A. is disposed of finally.

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

Result of the case:
I.A. disposed of.

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