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# ORISSA HIGH COURT, CUTTACK

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**ARBITRATION AND CONCILIATION ACT, 1996 –** Section 11(6-A) – Provisions under for Appointment of Arbitrator – Appointment of Arbitrator is sought for on the basis of an agreement containing the Arbitration clause – The agreement in question has been quashed in a PIL by the High Court – Plea that the petition for appointment is not maintainable as the agreement in question was declared null and void and the arbitration clause also does not survive – The question arose as to whether in such a situation Arbitrator can be appointed? – Held, Yes – Reasons indicated.

*ARSS Bus Terminal Private Ltd. -V- Odisha State Road Transport Corporation.*

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**BUILDING AND OTHER CONSTRUCTION (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICES) ACT, 1996 –** Section 2 – Provisions under – Writ petition – Challenge is made to the collection of 1% cess on construction – Plea that the petitioner will come within the ambit of the Factories Act, 1948, therefore, the provisions of Building and other Construction (Regulation of Employment and Conditions of Services) Act, 1996 is not applicable to it – Whether acceptable? – Held, No.

*Paradip Port Builders Association -V- Chairman, Paradip Port Trust & Ors.*

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**CIVIL PROCEDURE CODE, 1908 –** Order VI Rule 17 – Petition seeking amendment of written statement-cum-counter claim – Rejected – Writ petition challenging the rejection order – Amendment filed after eight years of the filing of the written statement-cum-counter claim – Whether can be considered? – Held, No – Reasons indicated.

*Jugal Kishor Banka -V- Gopal Gosala, Bargarh.*

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**Order VIII Rule 6A** – Provisions under – Reference – The question arose before the court as to (1) Whether Order VIII Rule 6A of the CPC mandates an embargo on filing the counterclaim after filing the written statement? and (2) if the answer to the aforesaid question is in negative, then what are the restrictions on filing the counterclaim after filing of the Written Statement?

*Ashok Kumar Kalra -V- Wing CDR Surendra Agnihotri & Ors.*
2020 (I) ILR-Cut…… 1

**CONSTITUTION OF INDIA, 1950 –** Articles 226 and 227 – Writ petition seeking issuance of a writ of habeas corpus – Petitioner is the son of the missing person who was a Sarpanch – Since the missing person was not found, the petitioner claimed compensation alleging violation of the right to life by the State – The question arose as to Whether a writ of habeas corpus is maintainable in respect of a missing person? and whether compensation can be granted? – Held, No, as the illegal detention of missing person is not established.

*Chaitanya Madhi -V- State of Odisha And Ors.*
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**Articles 226 and 227** – Writ petition – When a particular prayer is not made – Whether court can grant such a relief by "Moulding of relief" – Held, Yes – In view of the law laid down by the apex Court, so far as "moulding of relief" is concerned, this Court is of the considered view that even if there is no such specific prayer made in the writ application, this Court can grant such relief, as has been advanced before this Court in course of hearing of the matter, at the final stage by "moulding the relief".

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*Rabinarayan Sahu -V- Collector & District Magistrate, Ganjam & Anr.*

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**CONSTITUTION OF INDIA, 1950** – Articles 226 and 227 – Writ petition – Challenge is made to the award of Industrial Tribunal holding the petitioner not entitled to claim any relief – Petitioner was working as a contract labour under a contractor – After abolition of the contract labour, the Government of Odisha decided that petitioner along with others should be taken as regular workmen under the company and accordingly, there was an interview and about forty nine workers were appointed in the Canteen Department of the Company – The petitioner also continued to work on probation for six months which was extended for another three months and during absence of the petitioner, his services were terminated – Petitioner was working on probation and has worked for 265 continuous days – On account of the death of his mother after receipt of the telegram, he left for his village to perform obsequies ceremony after taking permission of the authorities – No allegation that he was habitually remaining absent during the period of probation or his work was unsatisfactory during such period – Held, it appears that clandestinely his service was terminated with malafide intention arbitrarily because of the petitioner's participation in trade union activities without following the principle of natural justice – Award set aside – Petitioner was put back in service with 50% back wages.

*B. Krishna Murty -V- Presiding Officer, Industrial Tribunal& Anr.*

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**CRIMINAL PROCEDURE CODE, 1973 –** Sections 100(4) & (5) read with section 165(4) – Search and Seizure – Preparation of seizure list – Whether all prosecution/seizure witnesses required to be signed on the seizure list? – Held, seizure list is not required to be signed by all the witnesses present at the time of search and seizure and the evidence of a witness to the search and seizure which is otherwise reliable and trustworthy and his presence at the relevant time cannot be brushed aside merely because he is not a

signatory to the seizure list – In other words, even if the officer making search fails to obtain the signature of a person who is a witness to the seizure in the seizure list, it may amount to irregularity and the effect of the same would depend upon the facts and circumstances of each case.

*Herasha Majhi @ Hiresa Majhi & Anr. -V- State of Odisha*
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**Section 313** – Statement of the accused – Incriminating circumstances against the accused – No opportunity to the accused to explain the incriminating circumstances against him – Effect of – Held, if a material piece of evidence is not put to the accused when he is examined under section 313 of Cr.P.C, the prosecution is disentitled from placing reliance on such evidence.

*Dr. Balaram Bag -V- State of Odisha (Vig.)*
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**Section 366 –** Confirmation of death sentence – The gravamen of the charge that the accused persons in furtherance of common intention suspecting the practice of Witchcraft abducted, criminally intimidated and murdered three persons and caused disappearance of the evidence with the intention to screen the offenders – Duty of High court while dealing with the reference – Held, the duty of the High Court in dealing with reference U/s.366 of Cr.P.C. is not only to see whether the order passed by the Addl. Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted persons.

*State of Odisha -V- Dengun Sabar & Ors.*
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**Section 366** – Confirmation of death sentence – Addl. Sessions Judge has committed an error in convicting the accused persons U/s.365 of the IPC without framing charge – Effect of – Held, the offence U/s.365 of the IPC provides the kidnapping or abducting with intent to cause that person to be secretly and wrongfully confined – This offence U/s. 365 of the IPC is not a minor offence to Section 302 of the IPC – The ingredients of this offence are not

ingrained in the offence of murder – Offence of abducting is not a cognate offence to murder – What follows from the above reasoning is that a failure of justice has been occasioned due to such conviction U/s.365 of the IPC without charge – It is not a curable irregularity – As grave error has been committed in not framing charge and thereby failure of justice has been occasioned, we feel it just and proper for the interest of justice to direct further inquiry U/s.367 of Cr.P.C. – Matter remanded.

*State of Odisha-V- Dengun Sabar & Ors.*
2020 (I) ILR-Cut…… 86

**Section 374** – Criminal Appeal – Offence U/s.7 of the Essential Commodities Act r/w clause 4 of the Kerosene (Fixation of ceiling prices) Order – Conviction of the accused – Trial of the summon case – Explanation to the accused about the substances of the accusation – Non mentioning of any clauses of the order – Whether vitiate the proceeding? – Held, Yes. – Reasons explained.

*Bhaganeswar Sahu -V- State of Orissa.*
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**CRIMINAL TRIAL –** Offence under section 302 of the Indian Penal Code, 1860 – Conviction – Appeal – Appellant submits that the prosecution has failed to prove its case as no motive has been established – The question cropped up as to whether the absence of motive will hamper a safe conviction when the prosecution has established its case beyond all reasonable doubt from other circumstantial evidence? – Held, No.

*Banamali Jani -V- State of Orissa*
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**CRIMINAL TRIAL –** Appreciation of evidence – Independent witness turned hostile – Value of official witness – Whether conviction can be based solely on the testimony of the official witness? – Held, Yes. – Principle explained – Condition precedent is that the evidence of such witness must be reliable, trustworthy and must inspire confidence – There is absolute no command of law that the testimony of the police officials should always be treated with suspicion – Of course while scrutinising the evidence,

if the court finds the evidence of the police officials as unreliable and untrustworthy, the court may disbelieve them but it should not so solely on the presumption that a witness from the department of police should viewed with distrust – This is based on the principle that quality of the evidence weigh over the quantity – The rule of prudence requires more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them – Absence of any corroboration from the independent witness does not in any way affect the creditworthiness of the prosecution case.

*Herasha Majhi @ Hiresa Majhi & Anr. -V- State of Odisha.*
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**INDIAN EVIDENCE ACT, 1872 –** Section 6 – Res gestae – Whether a confessional statement or a statement can be regarded as res-gestae? – Held, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter – But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.

*Herasha Majhi @ Hiresa Majhi & Anr. -V- State of Odisha.*
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**Section 35** – Provisions under –Admissibility of documents – Principles – Indicated.

*Dr. Balaram Bag -V- State of Odisha (Vig.)*
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**Section 114(g)** – Provisions under – Offence under sections 13(2) r/w 13 (1)(d) of P.C. Act and under sections 477-A,34 of IPC – Pecuniary advantage by abusing official position – Order placed for GCI sheets beyond the requirement and without quotation – Allegation of interpolation in the official entries – Neither the relevant entries/ record been produced before the court nor the competent person been examined to prove the entries – Effect of – Held, in view of the provision contained in section 114(g) of the Indian Evidence Act, which has the effect that if evidence which could have been produced, has not been produced, the presumption

would be that it would have gone against the party who withholds it – It would be reasonable to draw such inference in this case – Since the relevant entries on which the prosecution heavily banks upon have not been marked as exhibits and proved by competent persons in accordance with law, it would be difficult to place any reliance on such entries and more particularly use it against the accused/appellant.

*Dr. Balaram Bag -V- State of Odisha (Vig.)*

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**LETTERS PATENT APPEAL –** Power of Division Bench while entertaining a Letters Patent appeal against the judgment of a Single Judge – Held as under.

*UCO Bank Represented By Its General Manager & Anr. -V- Sk Fayajuddin.*

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**LIMITATION** – Money suit filed in the year 1977 by an unregistered Partnership Firm – Suit was dismissed holding, inter alia, that the firm being an unregistered one the suit was a bar under Section 69 of the Partnership Act and as such was not maintainable. – First Appeal filed – An application under Order 1 Rule 10 to implead Harihar Patra, managing partner of the firm as the plaintiff which was ultimately allowed by High Court – Appeal allowed – Second appeal – Plea of limitation for filing of the suit raised – The question arose as to whether impleadment of Harihar Patra would relate back to the date of institution of the suit or date of order dated 26.06.1989 passed by this Court in Civil Revision No.273 of 1981 – Held, from the date of impletion as per the order passed in the Civil Revision**.**

*Jambu Bisoiani @ Jambhubati Bisoi & Ors.-V- M/s. General Traders & Anr.*

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**MOTOR ACCIDENT CLAIM –** Death of a student – Claim of 'Filial consortium' – Right of – Held, Filial consortium is the right of the parents to get compensation in the case of an accidental death of a child.

*The Divisional Manager, M/s. Oriental Insurance Co. Ltd.-V- Dillip Kumar Dalai & Ors.*
2020 (I) ILR-Cut…… 109

**NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCES ACT, 1985 –** Section 55 – Charge of seized articles – Personal brass seal – Handing over to an independent witness – Necessity of such formality – Discussed – Held, handing over the brass seal to an independent, reliable and respectable person and asking him to produce it before the court at the time of production of the seized articles in court for verification are not the empty formalities or rituals but is a necessity to eliminate the chance of tampering with the seized articles while in police custody**.**

*Herasha Majhi @ Hiresa Majhi & Anr. -V- State of Odisha*
2020 (I) ILR-Cut…… 197

**Section 57** – Report of Seizure and Arrest – Non compliance of the mandatory provision – Effect of – Held, if there is no compliance of the provision under section 57 of the NDPS Act or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have bearing on the appreciation of evidence regarding arrest or seizure as well as on the merit of the case.

*Herasha Majhi @ Hiresa Majhi & Anr. -V- State of Odisha*
2020 (I) ILR-Cut…… 197

**THE NEGOTIABLE INSTRUMENTS ACT, 1881** – Sections 118, 138 & 139 – Dishonour of cheque – Presumption in favour of the holder of the cheque – In the present case, complainant had executed a power of attorney in favour Jayant kumar Mohanty(one of the accused) to develop and sale her property & in return Jayant Kumar issued cheque in her favour but the same was dishonoured – Such cheque was returned & a new cheque was delivered to complainant having the signature of another accused(petitioner) named as Dillip Kumar Swain who have no direct relation with the complainant and the subsequent cheque also dishonoured due to insufficient funds – Complaint filed against both the accused – In the trial, accused Jayant kumar(Power of attorney) acquitted but petitioner convicted – Order of the trial court challenged –

Petitioner(accused Dillip Kumar swain) pleaded that he had no legal liability towards the complainant though he admitted the issuance of cheque – The legality of the trial court order while convicting the petitioner questioned – Held, the complainant in the present case is holder in due course, section 118 of the N.I Act provides that until the contrary is proved in so far as the consideration of the establishment of the negotiable instrument is concerned, presumption stands that every negotiable instrument was made or drawn for consideration, and that such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration – The complainant not being the direct holder of the cheque, the presumption as the transferee is available in his favour.

*Dillip Kumar Swain -V- Smt. Anuradha Das.*

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**ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 –** Section 4(4) – Partition Suit – Preliminary decree passed by the civil court – Final decree pending – Neither appeal nor revision from the preliminary decree pending – Meanwhile consolidation proceeding initiated – Question raised as to, whether the preliminary decree shall be abetted in view of section 4 (4) of the Act? – Held, the suit having been adjudicated and on the admission of both sides no appeal or revision is pending, the provision of sub-section (4) of section 4 of the OCH & PFL Act has no application.

*Gaja Naga & Ors. -V- Joint Commissioner of Consolidation, Sambalpur & Ors.*

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**ORISSA POLICE RULES –** Rule 119 – Maintenance of police Malkhana Register – Non production of the same before the Court – No reason assigned for such non production – Safe custody of the seized articles questioned – Held, it can be said that the prosecution has failed to adduce cogent evidence that the seized articles and the sample packets were in safe custody before its production in the court.

*Herasha Majhi @ Hiresa Majhi & Anr. -V- State of Odisha.*

2020 (I) ILR-Cut…… 197

**ORISSA SPECIAL COURTS ACT, 2006 –** Section 7 – Jurisdiction of the Special Court – Petitioner was serving as District School Inspector and has been arraigned as an accused along with her husband – Offences U/s.13(2) & 13 (1)(e) of the P.C. Act – Allegation of joint possession of disproportionate assets to the extent of 99% of their income – Application filed under section 239 of CR.P.C to discharge her on the ground that, she was not holding the office of a high public office as provided under section 5 of the Act – Jurisdiction of the special court questioned – Held, section 7 prescribes that a Special Court shall have jurisdiction to try any person alleged to have committed the offence in respect of which declaration has been made under section 5, either as principal, conspirator or abettor and for all the other offences accused persons can be jointly tried therewith at one trial in accordance with the code of criminal procedure.

*Kamala Basini Mohanty -V- State Of Odisha.*

2020 (I) ILR-Cut…… 99

**PREVENTION OF CORRUPTION ACT, 1988 –** Sections 7 and 13 read with section 17 – Conviction under – The factum of demand and payment proved – Bribe money recovered – Minor contradictions with regard to some facts like place and time of payment etc. – Whether required to be considered ? – Held, No.

*Vinod Kumar Garg -V- State (Government of National Capital Territory of Delhi.)*

2020 (I) ILR-Cut…… 25

**Sections 7 –** 13 read with section 17 – Conviction under – The factum of demand and payment proved – Minor irregularity in sanction order – Whether material? – Held, No.

*Vinod Kumar Garg -V- State (Government of National Capital Territory of Delhi)*

2020 (I) ILR-Cut…… 25

**PROCEDURAL LAW –** Purpose and intent behind it – Held, any provision under the procedural law should not be construed in such a way that it would leave the Court helpless – In fact a wide discretion has been given to the civil court regarding the procedural elements of a suit. As held by this Court, procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice.

*Ashok Kumar Kalra -V- Wing Cdr Surendra Agnihotri & Ors.*
2020 (I) ILR-Cut…… 1

**RECRUITMENT –** Pursuant to resolution passed by the RBI to fill up the post of pharmacist, the name of the petitioner and others were sponsored by the Employment Exchange – They were advised to furnish particulars pertaining to their candidature before the Bank which they submitted along with application – After due scrutiny, they were issued with call letters to attend the interview – The petitioner appeared before the selection board along with all the documents for the viva voice test as no written examination was provided – Not selected – Writ petition challenging the select list on the ground that no written examination was conducted – Whether such a plea can be accepted? – Held, No.

*Sumanta Kumar Sahoo -V- Reserve Bank of India & Ors.*
2020 (I) ILR-Cut…… 145

**SERVICE LAW –** Disengagement **–** Petitioner working as Gram Panchayat Technical Assistant (GPTA) – On the basis of preliminary inquiry report he was disengaged – No opportunity given – Effect of – Held, this Court is of the considered view that the order of disengagement having been passed in gross violation of principles of natural justice, cannot sustain in the eye of law and is liable to be quashed – The opposite parties are directed to allow the petitioner to work, as before, by engaging him as GPTA.

*Ganeshwar Hansda -V- State of Odisha & Ors.*
2020 (I) ILR-Cut…… 113

**SERVICE LAW –** Promotion – On being promoted to the vacant posts by following DPC, the petitioners have worked in the higher post and discharged higher responsibility – Subsequently reverted – Whether the benefits already received can be recovered? – Held, No**.**

*Ganesh Chandra Behera & Anr. -V- Berhampur University & Ors.*
2020 (I) ILR-Cut…… 131

**SERVICE LAW –** Medical Attendance Rules – Claim of medical reimbursement – As per clause-8(3) of the Office Memorandum dated 21.01.1987, medical reimbursement should have been preferred within three months of expiry of treatment as certified by concerned medical officer – Delay in submission of the claim – Circumstances show that the Petitioner was not responsible for the delay – Claim allowed – Cost of Rs. 20,000/- imposed.

*Satya Ranjan Pattanaik -V- M.D, O.F.D.C Ltd., Bhubaneswar & Ors.*
2020 (I) ILR-Cut…… 166

**WORDS AND PHRASES – 'Preference' – Meaning of.**

*Sudra Pratap Karuan & Ors. -V- State of Orissa & Ors.*
2020 (I) ILR-Cut…… 122

**WORDS AND PHRASES –** The word 'then' – Meaning of – Use of word 'then' in preference clause provided in the guidelines for recruitment of GRS which says the candidates of the same Grama Panchayat area will be given preference – Writ petition by more meritorious candidates challenging the selection of candidates on the basis of preferential clause – Effect of – Held, if these interpretations are attached to the preference clause (f) of the advertisement then it has to be given effect of sequence – If that sequence is followed and candidates belonging to concerned Kurmel Gram Panchayat area are available, then question of consideration of candidates from other Gram Panchayat area does not arise, even if they are more meritorious than the candidates belonging to same Panchayat Samiti area, otherwise the meaning of preference will be redundant.

*Sudra Pratap Karuan & Ors. -V- State of Orissa & Ors.*
2020 (I) ILR-Cut…… 122

**WORKMEN'S COMPENSATION ACT, 1923 –** Section 30 – Appeal by the wife of the deceased workman – The respondent No.2 had given his motorcycle for repairing to respondent No.1, who was a motorcycle mechanic – The deceased-Rathi Bhoi, was working as a helper under him – After repairing of the motorcycle, when the deceased took it for a trial, met with an accident and the deceased succumbed to the injuries – Award saddling the liability to pay the compensation on respondent No.1, the employer (Mechanic) – Plea of the appellant that the owner of the motor cycle should be saddened with the liability – Whether can be accepted? – Held, No.

*Rajkumari @ Khedi Dei -V- Raghunath Bhoi & Ors.*
2020 (I) ILR-Cut…… 221

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**2020 (I) ILR - CUT- 1 (S.C)**

**N.V.RAMANA J, MOHAN M. SHANTANAGOUDAR, J & AJAY RASTOGI, J.**

SLP (CIVIL) NO. 23599 OF 2018

**ASHOK KUMAR KALRA** ……..Petitioner

*.Vs.*

**WING CDR. SURENDRA AGNIHOTRI & ORS.** ……. .Respondents

**(A) PROCEDURAL LAW – Purpose and intent behind it – Held, any provision under the procedural law should not be construed in such a way that it would leave the Court helpless – In fact a wide discretion has been given to the civil court regarding the procedural elements of a suit – As held by this Court, procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice.** (Para 13)

**(B) CODE OF CIVIL PROCEDURE, 1908 – Order VIII Rule 6A – Provisions under – Reference – The question arose before the court as to (1) Whether Order VIII Rule 6A of the CPC mandates an embargo on filing the counterclaim after filing the written statement? and (2) if the answer to the aforesaid question is in negative, then what are the restrictions on filing the counterclaim after filing of the Written Statement?**

**The Bench answered the reference as under:**

*We sum up our findings, that Order VIII Rule 6A of the CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the Counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, After taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:*

*i. Period of delay. ii. Prescribed limitation period for the cause of action pleaded. iii. Reason for the delay. iv. Defendant's assertion of his right. v. Similarity of cause of action between the main suit and the counterclaim.*

*vi. Cost of fresh litigation. vii. Injustice and abuse of process. viii. Prejudice to the opposite party. ix. and facts and circumstances of each case. x. In any case, not after framing of the issues.* *(Para 20)*

**Case Laws Relied on and Referred to** :-

1. AIR 2005 SC 3353: Salem Advocate Bar Association, Tamil Nadu . Vs. Union of India

2. (1969) 1 SCC 869 : Jai Jai Ram Manohar Lal . Vs. National Building Material Supply, Gurgaon.
3. (1987) 3 SCC 265 : Mahendra Kumar and Anr. . Vs. State Of Madhya Pradesh and Ors.
4. (1996) 4 SCC 699 : Jag Mohan Chawla And Another . Vs. Dera Radha Swami Satsang & Ors.
5. (1997) 8 SCC 174 : Shani Rani Das Dewanjee (Smt.) . Vs. Dinesh Chandra Day (Dead) by LRs.
6. (2016) 11 SCC 800 : Vijay Prakash Jarath . Vs. Tej Prakash Jarath.
7. (2008) 13 SCC 179 : Bollepanda P. Poonacha & Anr. . Vs. K.M. Madapa.
8. (2003) 7 SCC 350 : Ramesh Chand Ardawatiya . Vs. Anil Panjwani.

For Petitioner : Mr. Sarvam Ritam Khare
For Opp. Party : Mr. Rohit Ku. Singh

JUDGMENT Date of Judgment 19.11.2019

***N.V. RAMANA, J.***

1. Questions about procedural justice are remarkably persistent and usual in the life of Common Law Courts. However, achieving a perfect procedural system may be feasible or affordable, rather more manageable standards of meaningful participation needs to be aspired while balancing cost, time and accuracy at the same time.

2. The present reference placed before us arises out of the order dated 10.09.2018 passed by a two-Judge Bench of this Court, wherein clarification has been sought as to the interpretation of Order VIII Rule 6A of the Civil Procedure Code (hereinafter referred to as "**the CPC**"), regarding the filing of counter-claim by a defendant in a suit. The reference order dated 10.09.2018 is extracted below:

> *".....*
> *The papers to be placed before the Hon'ble Chief Justice of India for constitution of a three-Judge Bench* ***to look into the effect of our previous judgments AS well AS whether the lAnguAge of Order VIII Rule 6A of the Civil Procedure Code is mAndAtory in nAture."*** (**emphasis supplied**)

3. Before we proceed further, we need to allude to the brief factual background necessary for the disposal of this reference. A dispute arose between the Petitioner (defendant no. 2) and Respondent No. 1 (plaintiff) concerning performance of agreement to sell dated 20.11.1987 and 04.10.1989. Respondent

No.1 (plaintiff) filed the suit for specific performance against the petitioner (defendant no.2) on 02.05.2008. Petitioner (defendant No.2) herein filed a written statement on 2.12.2008 and counter-claim on 12.3.2009, in the same suit. By order dated 12.05.2009, the trial court rejected the objections, concerning filing of the counter-claim after filing of the written statement and framing of issues. Order dated 12.05.2009 was challenged before the High Court, in Civil Revision No. 253 of 2009, the High Court allowed the same and quashed the counter-claim. Aggrieved by the aforesaid order of the High Court, the petitioner (defendant No.2) herein approached the Division Bench of this court, which has referred the matter to a three-Judge Bench.

4. The learned counsel appearing on behalf of the Petitioner submitted that the intent behind Order VIII Rule 6A of the CPC is to provide an enabling provision for the filing of counter- claim so as to avoid multiplicity of proceedings, thereby saving the time of the Courts and avoiding inconvenience to the parties. Therefore, no specific statutory bar or embargo has been imposed upon the Court's jurisdiction to entertain a counter-claim except the limitation under the said provision which provides that the cause of action in the counter-claim must arise either before or after the filing of the suit but before the defendant has delivered his defence. The learned counsel also submitted that if permitting the counter-claim would lead to protracting the trial and cause delay in deciding the suit, the Court would be justified in exercising its discretion by not permitting the filing of the counter-claim. Relying on the judgments of this Court in ***Salem Advocate Bar Association, Tamil Nadu v. Union Of India*****,** AIR 2005 SC 3353, and ***Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon,*** (1969) 1 SCC 869**,** the learned counsel lastly submitted that rules of procedure must not be interpreted in a manner that ultimately results in failure of justice.

5. On the other hand, the learned Senior counsel for the respondent submitted that the language of the statute, and the scheme of the Order, indicates that the counter-claim has to be a part of the written statement. The learned senior counsel strengthened the above submission by relying on the statutory requirement that the cause of action relating to a counter-claim must arise before the filing of the

written statement, and submitted that the counter-claim must therefore form a part of the written statement. The learned senior counsel also relied on the language of Order VIII Rule 6 of the CPC, which requires a defendant's claim to set-off to be a part of the written statement, to suggest that the same rules should also apply to the filing of a counter-claim, keeping in mind the placement of the provision relating to counter-claim in Order VIII Rule 6A of the CPC.

6. We have heard the learned counsel on either side at length and perused the material available on record. In the light of the reference and the arguments advanced on behalf of the parties, the following issues arise for consideration before this Court:

> 1) Whether Order VIII Rule 6A of the CPC mandates an embargo on filing the counter-claim after filing the written statement?
>
> 2) if the answer to the aforesaid question is in negative, then what are the restrictions on filing the counter- claim after filing of the Written Statement?

7. At the outset, there is no gainsaying that the procedural justice is imbibed to provide further impetus to the substantive justice. It is this extended procedural fairness provided by the national courts, which adds to the legitimacy and commends support of general public. On the other hand, we must be mindful of the legislative intention to provide for certainty and clarity. In the name of substantive justice, providing unlimited and unrestricted rights in itself will be detrimental to certainty and would lead to the state of lawlessness. In this regard, this Court needs to recognize and harmoniously stitch the two types of justice, so as to have an effective, accurate and participatory judicial system.

8. Having observed on nuances of procedural justice, we need to turn our attention to the Order VIII of the CPC, which deals with written statement, set-off and counter-claim. Rules 1 to 5 of Order VIII of the CPC deal with the written statement. This Order dealing with the written statement was amended extensively by the Code of Civil Procedure (Amendment) Act, 2002 (Act No. 22 of 2002) (*hereinafter referred to as* "Act 22 of 2002"), whereby the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. In case he fails to file the

written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

9. Order VIII Rule 6 of the CPC specifies the particulars of set-off to be given in written statement and the same reads as under:

**Order VIII Rule 6**:

> 6. **Particulars of set-off to be given in written statement**:- (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.
>
> (2) **Effect of set-off**: - The written statement shall have the same effect as a plaint in a cross- suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.
>
> (3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Order VIII Rule 6A, which pertains to the counter-claim, reads as under:

**Order VIII Rule 6A**:

> **6A. Counter-claim by Defendant**-(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to

the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

10. Thus, as per Order VIII Rule 6 CPC, the defendant can claim set-off of any ascertained sum of money legally recoverable by him from the plaintiff, against the plaintiff's demand, in a suit for recovery of money. Whereas, Rule 6A deals with counter- claim by defendant, according to which a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time prescribed for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

11. The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Order VIII Rule 6-G says that the rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim. As per Rule 8, any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counter-claim may be raised by the defendant or plaintiff, as the case may be, in his written statement. Rule 9 of Order VIII prohibits presentation of pleadings subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim, except by the leave of the Court, and upon such terms as the Court thinks fit; and the provision further stipulates that the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same. This amendment with respect to subsequent pleadings was made to the CPC by way of Act 22 of 2002. At the cost of repetition, we may note the conditions for filing a counter-claim under Order VIII Rule 6A-

i. Counter-claim can be for claim of damages or otherwise.

ii. Counter-claim should relate to the cause of action, which may accrue before or even after filing the suit.

iii. If the cause of action in the counter-claim relates to one accrued after

> filing of suit, it should be one accruing before filing of the written statement or the time given for the same.

When we look at the whole scheme of Order VIII CPC, it unequivocally points out at the legislative intent to advance the cause of justice by placing embargo on the belated filing of written statement, set-off and counter-claim.

12. We have to take note of the fact that Rule 6A was introduced in the CPC by the Code of Civil Procedure (Amendment) Act of 1976 (Act No.104 of 1976), and before the amendment, except in money suits, counter-claim or set-off could not be pleaded in other suits. As per the recommendation of the Law Commission of India, to avoid multiplicity of proceedings, the counter-claim by way of Rule 6A was inserted in the Civil Procedure Code. The statement of objects and reasons for enacting the Code of Civil Procedure (Amendment) Act, 1976 (Act No.104 of 1976), were-

1. A litigant should get a fair trial in accordance with the accepted principles of natural justice.
2. Every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
3. The procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

13. Before we proceed further, we deem it appropriate to note that any provision under the procedural law should not be construed in such a way that it would leave the Court helpless [*refer to* ***Salem Advocate Bar Association Case*** (supra)]. In fact, a wide discretion has been given to the civil court regarding the procedural elements of a suit. As held by this Court, procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice.

14. Now we need to observe certain earlier judgments of this Court which have dealt with Order VIII Rule 6A. In ***Mahendra Kumar and Anr. v. State Of Madhya Pradesh and Ors.,*** (1987) 3 SCC 265 [*hereinafter referred to as* '**Mahendra Kumar Case**'], where the appeals were preferred against concurrent findings of the Courts below in dismissing the counter-claim as barred under Section 14 of the Indian Treasure Trove Act, 1878, this Court, while considering the scope of Rule 6A(1) of Order VIII of the CPC, has

held that on the face of it, Rule 6A(1) does not bar the filing of a counter-claim by the defendant after he had filed the written statement. As the cause of action for the counter-claim had arisen before the filing of the written statement, the counter-claim was held to be maintainable. This Court further observed that under Article 113 of the Limitation Act, 1963, the period of limitation is three years from the date of the right to sue accrues, when the period of limitation is not provided elsewhere in the Schedule. As the counter-claim was filed within three years from the date of accrual of the right to sue, this Court held that the learned District Judge and the High Court were wrong in dismissing the counter-claim. The issue concerning applicability of limitation period for filing the counter-claim was also discussed in ***Jag Mohan Chawla And Another v. Dera Radha Swami Satsang & Ors.,*** (1996) 4 SCC 699 and ***Shani Rani Das Dewanjee (Smt.)*** v. ***Dinesh Chandra Day (Dead) by LRs.,*** (1997) 8 SCC 174.

15. In the case of ***Vijay Prakash Jarath*** v. ***Tej Prakash Jarath,*** (2016) 11 SCC 800, this Court directed the Court below to entertain the counter-claim which was filed 2½ years after framing of issues, as the evidence was still pending and this Court felt that no prejudice would be caused to the plaintiff. However, in the case of ***Bollepanda P. Poonacha & Anr. v. K.M. Madapa,*** (2008) 13 SCC 179 [*hereinafter referred as* '***Bollepanda Poonacha Case***'], this Court while referring to ***Ramesh Chand Ardawatiya v. Anil Panjwani,*** (2003) 7 SCC 350, discouraged the belated filing of counter-claims. Further, the Court elucidated on the serious harm caused by allowing such delayed filing. In any case, in ***Bollepanda Poonacha Case*** (supra), the Court could not expound any further as the counter-claim was rejected on the basis that the cause of action had arisen after the filing of the written statement.

16. The time limitation for filing of the counter-claim, is not explicitly provided by the Legislature, rather only limitation as to the accrual of the cause of action is provided. As noted in the above precedents, further complications stem from the fact that there is a possibility of amending the written statement. However, we can state that the right to file a counter-claim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under

Order VIII Rule 6A. Having said so, this does not mean that counter-claim can be filed at any time after filing of the written statement. As counter-claim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as the time-barred suits cannot be entertained under the guise of the counter-claim just because of the fact that the cause of action arose as per the parameters of Order VIII Rule 6A.

17. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6A in Order VIII of the CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filling of the counter-claim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counter-claim has to be filed along with the written statement and beyond that, the Court has no power. The Courts, taking into consideration the reasons stated in support of the counter- claim, should adopt a balanced approach keeping in mind the object behind the amendment and to sub-serve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counter-claim has to be filed, by curtailing the discretion conferred on the Courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counter-claim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counter-claim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle o f speedy justice as enshrined in the objects and reasons for t h e particular amendment to the CPC.

18. In this regard having clarified the law, we may note that the

***Mahendra Kumar Case*** (supra) needs to be understood and restricted to the facts of that case. We may note that even if a counter-claim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counter-claim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counter- claim is limited by various considerations based on facts and circumstances of each case. We may point out that there cannot be a straitjacket formula, rather there are numerous factors which needs to be taken into consideration before admitting counter-claim.

19. We may note that any contrary interpretation would lead to unnecessary curtailment of the right of a defendant to file counter-claim. This Court needs to recognize the practical difficulties faced by the litigants across the country. Attaining the laudable goal of speedy justice itself cannot be the only end, rather effective justice wherein adequate opportunity is provided to all the parties, need to be recognized as well [*refer to* ***Salem Advocate Bar Association Case*** (supra)].

20. We sum up our findings that Order VIII Rule 6A of the CPC does not put an embargo on filing the counter-claim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counter-claim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counter-claim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

i. Period of delay.
ii. Prescribed limitation period for the cause of action pleaded.
iii. Reason for the delay.
iv. Defendant's assertion of his right.
v. Similarity of cause of action between the main suit and the counter-claim.
vi. Cost of fresh litigation.
vii. Injustice and abuse of process.

viii. Prejudice to the opposite party.
ix. and facts and circumstances of each case.
x. In any case, not after framing of the issues.

21. We answer the reference accordingly. The instant Special Leave Petition may be placed before an appropriate Bench after obtaining orders from the Hon'ble Chief Justice of India, for considering the case on merits.

***MOHAN M. SHANTANAGOUDAR, J.***

***I have read the opinion given in this reference by my learned Brothers. I agree with their conclusion that a Court may exercise its discretion and permit the filing of a counterclaim after the written statement, till the stage of framing of the issues of the trial. However, in addition to this, I find that in exceptional circumstances, the subsequent filing of a counterclaim may be permitted till the stage of commencement of recording of the evidence on behalf of the plaintiff. I deem it fit to state the reasons for arriving at this conclusion through this opinion.*** *(Paras 24 and 25)*

***JUDGMENT***

1. I have read the opinion given in this reference by my learned Brothers. I agree with their conclusion that a Court may exercise its discretion and permit the filing of a counter-claim after the written statement, till the stage of framing of the issues of the trial. However, in addition to this, I find that in exceptional circumstances, the subsequent filing of a counter-claim may be permitted till the stage of commencement of recording of the evidence on behalf of the plaintiff. I deem it fit to state the reasons for arriving at this conclusion through this opinion.

2. This reference arises out of the order of this Court dated 10.09.2018 in SLP (C) No. 23599/2018 in ***Ashok Kumar Kalra . v. Wing CDR Surendra Agnihotri & Ors***., which states as follows:

> "The papers to be placed before the Hon'ble Chief Justice of India for constitution of a three-judge Bench to look into the effect of our previous judgments as well as whetherr the

language of Order VIII Rule 6A of the Code of Civil Procedure is mandatory in nature."

Essentially, in light of the previous judgments of this Court, the question referred to this Court is whether it is mandatory for a counter-claim of the defendant to be filed along with the written statement.

3. Counsel for both parties argued about the scope of Order VIII Rule 6A of the Code of Civil Procedure, 1908 [*hereinafter* "CPC"] and whether a counter-claim must necessarily be filed along with the written statement. Since the arguments have been elaborated upon by my learned Brother Judge, they are not reproduced herein for the sake of brevity.

4. To fully understand the expanse of the legal questions in this case, it is essential to appreciate the context in which the rules relating to counter-claims were introduced in the CPC. The originally enacted CPC of 1908 did not provide a statutory right to file a counter-claim. At that time, Order VIII only pertained to written statements and set-offs. Taking note of this omission, the Law Commission of India, in its 27$^{th}$ and 54$^{th}$ Reports, had recommended that express provisions on counter-claims should be included in the CPC to avoid multiple proceedings and to dispel ambiguity on whether counter-claims could be entertained at all. These recommendations were implemented through the Code of Civil Procedure (Amendment) Act, 1976, which introduced the following rules to Order VIII of the CPC:

"**Rule 6A. Counter-claim by defendant. —**

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the

original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

**6B. Counter-claim to be stated. —**Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

**6C. Exclusion of counter-claim.—**Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

**6D. Effect of discontinuance of suit. —**If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

**6E. Default of plaintiff to reply to counter-claim.—** If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.

**6F. Relief to defendant where counter-claim succeeds.—**Where in any suit a set-off or counter- claim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

**6G. Rules relating to written statement to apply—** The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim."

5. For the first time, through the introduction of Rules 6A-6G to Order VIII, an explicit right of filing a counter-claim was accorded to the defendant, and rules governing the same were laid down. In this scheme, Rule 6A(1) is the cornerstone provision. It specifically grants the right of filing a counter-claim. In addition to this, it also places a categorical limitation on the accrual of the cause of action for a counter-claim. This is in the form of the requirement that the cause

of action pertaining to the counter-claim must arise either before or after the filing of the suit, but before the defendant has delivered his defence (i.e. before the filing of the written statement), or before the expiry of the time period for delivering such defence.

Further, under Rule 6A (2), a counter-claim is stated to have the same effect as the plaint in a cross suit, so as to enable the Court to pronounce a final judgment on the original claim as well as the counter-claim in the same suit itself. Thus, it is evident that Rule 6A has been carefully designed to meet the purpose of avoiding multiplicity of proceedings.

6. It is clear that Rule 6A(1) only places a limitation on the time within which the cause of action for a counter-claim must arise. Besides this limitation, there is no explicit guidance in Rule 6A(1) as to the time within which the counter-claim *itself* must be filed. In this respect, Rule 6A(4) provides that a counter-claim is governed by the rules applicable to plaints. It is well-established that a plaint must be presented within the period prescribed under the Limitation Act, 1963 [*hereinafter* "the Limitation Act"]. For counter-claims as well, the period within which they must be filed can be inferred from Section 3(2)(b)(ii) of the Limitation Act, 1963, which states thus:

> "(2) For the purposes of this Act,--
>
> (b) <u>any claim by way of a set off or a counter claim, shall be treated as a separate suit</u> and shall be deemed to have been instituted—
>
> (ii) in the case of a counter claim, on the date on which the counter claim is made in court;" (emphasis supplied)

This provision mandates that in order to determine the limitation period applicable to a counter-claim, it must be treated as a separate suit, which is deemed to have been instituted on the date on which it is made in Court. Thus, evidently, in consonance with the provisions of Order VIII Rule 6A(4), the Limitation Act also treats a counter-claim like a plaint. This means that much like a plaint, the limitation for filing a counter- claim also depends on the nature of the claim and is accordingly governed by the period of limitation stipulated in the Limitation Act.

7. From the foregoing discussion, it is clear that a counter- claim can be filed if two conditions are met: *first*, its cause of action

complies with Order VIII Rule 6A(1); and *second*, it is filed within the period specified under the Limitation Act. Clearly, by itself, Rule 6A does not specifically require that a counter-claim has to be filed along with the written statement. In the absence of a particular mandate under this Rule, it is necessary to look to other provisions of the CPC to determine whether a counter-claim can be filed after a written statement.

8. It would be appropriate to begin with a reference to Order VIII Rule 9, which states thus:

> "**9. Subsequent pleadings.—**No pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same."
>
> (emphasis supplied)

According to this Rule, after the filing of the written statement, it is open to plead a defence to a set-off or counter- claim without the leave of the Court. However, any other pleading sought to be filed after the written statement requires the leave of the Court. The Rule also vests the Court with a discretion to allow filing of a written statement or additional written statement within a period not exceeding thirty days.

A plain reading of Order VIII Rule 9 makes it clear that the Court has the discretion to allow any subsequent pleading upon such terms as it thinks fit. It is important to appreciate here that such subsequent pleading or additional written statement may include a counter-claim. This is because Rule 9 does not create a bar on the nature of claims that can be raised as subsequent pleadings. As long as the Court considers that it would be proper to allow a counter-claim by way of a subsequent pleading, it is possible to file a counter-claim after filing the written statement.

In addition to this, it is also possible to introduce a belated counter-claim by way of an amendment to the original written statement under Order VI Rule 17, CPC. However, as is the case with Order VIII Rule 9, the filing of such a counter-claim through an amended written statement is subject to the leave of the Court, and not accorded to the defendant *as a matter of right*.

9. In this regard, it would be relevant to note the observations of this Court in ***Ramesh Chand Ardawatiya*** **v.** ***Anil Panjwani***, (2003) 7 SCC 350:

> "28. Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter- claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading."
>
> (emphasis supplied)

I fully agree with this proposition, and affirm on the basis of the foregoing discussion that the Court has the discretion to allow a counter-claim to be filed after the written statement in exercise of its power under Order VIII Rule 9 and Order VI Rule 17 of the CPC.

10. It can also be gleaned from Order VIII Rule 10 that it is permissible to file a belated counter-claim under the scheme of Order VIII, CPC:

> "**10. Procedure when party fails to present written statement called for by Court.—**Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up." (emphasis supplied)

Under this Rule, the Court is afforded with the discretion to pass any order that it deems fit in the event that a written statement is not filed within the prescribed statutory limit. To determine whether this discretion extends to allowing the filing of a belated counter-claim as well, it would be useful to appreciate the scope of the discretion accorded under this provision.

In ***Salem Advocate Bar Association, T.N.*** **v.** ***Union of India***, (2005) 6 SCC 344, this Court, while construing the nature of Order VIII Rule 1, relied on the broad discretionary power under Order VIII Rule 10, and observed as follows:

> "21. In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the court, the court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit... In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 Order 8, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory." (emphasis supplied)

Thus, under Order VIII Rule 10, the Court has the power to condone the delay in filing of a written statement, if it deems it fit in the facts and circumstances of the case. If it is so, there is no reason as to why the delay in filing a counter-claim cannot be condoned by the Court as well.

11. A conjoint and harmonious reading of Rules 6A, 9 and 10 of Order VIII as well as Order VI Rule 17, CPC thus reveals that the Court is vested with the discretion to allow the filing of a counter-claim even after the filing of the written statement, as long as the same is within the limitation prescribed under the Limitation Act, 1963. In this regard, I agree with the propositions laid down in the decisions discussed below.

In ***Mahendra Kumar*** **v.** ***State of Madhya Pradesh***, (1987) 3 SCC 265, it was held that:

> "15. The next point that remains to be considered is whether Rule 6-A(1) of Order 8 of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6-A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6-A(1) is that a counter-claim can be filed,

> provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6-A(1) in holding that as the appellants had filed the counter-claim after the filing of the written statement, the counter-claim was not maintainable…Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter-claim, which is treated as a suit under Section 3(2)(b) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the right to sue." (emphasis supplied)

In ***Shanti Rani Das Dewanjee v. Dinesh Chandra Day,*** (1997) 8 SCC 174, it was held that the right to file a counter- claim is referable to the date of accrual of the cause of action:

> "2. In our view, the impugned decision does not warrant interference. Such question was specifically raised before this Court in Mahendra Kumar v. State of M.P. [(1987) 3 SCC 265] It has been held by this Court that right to file a counter-claim under Order VIII Rule 6-A of the Code of Civil Procedure is referable to the date of accrual of the cause of action. If the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing written statement or extended date of filing written statement, such counter-claim can be filed even after filing the written statement. The said Civil Case No. 248 of 1982, in which the application under Order VIII Rule 6-A has been filed by the defendant- respondents was instituted on 15-7-1982 and the application under Order VIII Rule 6-A was presented on 22-6-1985. It cannot be held that the cause of action for the suit or counter-claim was ex facie barred by limitation under the Limitation Act"
>
> (emphasis supplied)

I am unable to persuade myself to arrive at a different conclusion than the one found in the aforementioned judgments.

12. It was argued by Counsel for the Respondent that Order VIII Rule 6A(1) requires that the cause of action for a counter-claim should arise before the filing of the written statement, and hence it is logical that the counter-claim, or the grounds upon which it is based, should also find a mention in the written statement. To support this, he relied on Order VIII Rule 6B, which states that a defendant seeking to rely upon any ground in support of his right of counter-claim, shall specifically state in his written statement that he does so by way of a counter-claim.

I do not agree with this view for two reasons. *First*, it is possible that at the time of filing the written statement, the defendant is unaware of the facts giving rise to the cause of action for his counter-claim. For instance, in a suit for declaration of title brought by the plaintiff against his sister, the defendant may be unaware that the plaintiff has wrongfully detained her belongings kept at the said property, at the time of filing her written statement. In such a situation, even though the cause of action for her counter-claim of wrongful detention of belongings may have arisen *before* the filing of the written statement, it may not have been possible for her to raise the said counter-claim. Similarly, limited access to justice, especially in rural areas, shaped by the socio-economic context of parties, may compel the filing of belated counter-claims.

*Second*, a perusal of Order VIII Rule 6B suggests that it is only limited to cases where the counter-claim is made along with the written statement. In instances where a belated counter- claim is raised by way of an amendment to the written statement, or as a subsequent pleading, Rule 6B cannot be said to be applicable. This is because in any such case, if the Court relies on a technical interpretation of Rule 6B to disallow the filing of a belated counter-claim, the defendant would still be free to file a fresh suit for such a claim. He may, in such matters, after filing the separate suit, request the Court to club the suits or to hear them simultaneously. This may further delay the process of adjudication and would certainly not help the plaintiff in the first suit, who may have opposed the filing of the belated counter-claim. Such multiplicity of proceedings goes against the object with which Rules 6A-6G were introduced to the CPC. Thus, the provisions under Order VIII should not be read in isolation, but in a conjoint and harmonious manner, and Rule 6B cannot be read as a limitation on the Court's discretion to permit the filing of a belated counter-claim. Therefore, I do not find force in the argument raised by Counsel for Respondent.

13. Further, the contention that the limitation on filing of set-offs under Order VIII Rule 6 should be read into Rule 6A(1) is untenable. The nature of a set-off and a counter-claim is different. For instance, a set-off must necessarily be of the same nature as the claim of the plaintiff and arise out of the same

transaction. These requirements do not hold for counter-claims, which may be related to "*any right or claim in respect of a cause of action accruing to the defendant against the plaintiff*" as stated in Order VIII Rule 6A(1). Further, in case of set-offs, there is no provision akin to Order VIII Rule 6A(4), which provides that a set- off must be treated as a plaint. Thus, it appears that the Legislature has consciously considered it fit to omit a specific time limit for filing of counter-claims in Rule 6A. In such a scenario, a limitation cannot be read into this Rule.

14. Lastly, as regards the Respondent's reliance on Order VIII Rule 1A, which requires the documents in support of a counter- claim to be presented along with the written statement itself, I am of the view that this requirement should not be read as being mandatory. Rule 1A(2) itself provides instances where such documents are not in the possession of the defendant, by requiring him to specify the person in whose possession the documents rest. Accordingly, Rule 1A(3) (as amended in 2002) also provides that these documents may be produced later, with the leave of the Court. The discretion accorded in these provisions goes on to support the conclusion that it is possible to file a counter-claim even after the written statement, with the leave of the Court.

15. Finally, then, the scope of discretion vested with the Court under Order VI Rule 17 and Order VIII Rule 9 to allow for belated counter-claims remains to be examined. It must be determined when it may be proper for the Court to refuse a belated counter- claim, in spite of it being permissible within the scheme of Order VIII Rule 6A and the Limitation Act, 1963.

16. In several cases, it is possible that the period of limitation for filing of counter-claims may extend up to a long period of time and prolong the trial. For instance, in a suit for declaration of title, the defendant may bring a counter-claim for possession of the immovable property based on previous possession. In terms of Order VIII Rule 6A, such a claim would be admissible as long as the dispossession had occurred before the filing of the written statement, or before the expiry of the time provided for filing of the written statement. However, as per the Limitation Act, such a claim would be valid even if it were brought within twelve years from the date of the defendant's dispossession.

In such a situation, it is possible that by the time the counter-claim is brought, the issues in the original suit have already been framed, the evidence led, arguments made, and the judgment reserved. Allowing a counter-claim to be filed at this stage would effectively result in a re-trial of the suit, since the Court would have to frame new issues, both parties would have to lead evidence, and only then would the judgment be pronounced. If this is permitted, the very purpose of allowing counter-claims, i.e. avoiding multiplicity of litigation, would be frustrated.

17. It is well-settled that procedural rules should not be interpreted so as to defeat justice, rather than furthering it. This is because procedural law is not meant to serve as a tyrant against justice, but to act as a lubricant in its administration. Thus, when Courts set out to do justice, they should not lose sight of the end goal amidst technicalities. In some cases, this means that rules that have traditionally been treated as mandatory, may be moulded so that their object and substantive justice is not obstructed. It would be apposite to remember that equity and justice should be the foremost considerations while construing procedural rules, without nullifying the object of the Legislature in totality. Thus, rules under the Limitation Act which may allow for filing of a belated counter-claim up to a long period of time, should not be used to defeat the ends of justice.

18. Keeping this in mind, in ***Ramesh Chand Ardawatiya*** (*supra*), this Court considered the scope of discretion in allowing for belated counter-claims. It is useful to refer to the observations made by the Court in the context of Order VIII Rule 6A (as it was in 1976):

> "28. …The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading

> by way of counter-claim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced… A refusal on the part of the court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim."
>
> (emphasis supplied)

To ensure that the objective of introducing the statutory amendments with respect to counter-claims was not defeated, it was rightly held that a belated counter-claim raised by way of an amendment to the written statement (under Order VI Rule 17) or as a subsequent pleading (under Order VIII Rule 9) should not be allowed after the framing of issues and commencement of trial.

19. Later, in ***Rohit Singh*** **v.** ***State of Bihar***, (2006) 12 SCC 734, this Court read in a similar limitation on the filing of belated counter-claims:

> "18. … A counterclaim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counterclaim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so-called counterclaim of Defendants 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction. On that short ground the so-called counterclaim, filed by Defendants 3 to 17 has to be held to be not maintainable."
>
> (emphasis supplied)

It is crucial to note that even though the Court held that a counter-claim can be filed after the filing of a written statement, it must *necessarily* be filed before the issues are framed and the evidence is closed. In fact, since the counter-claim in the said matter was filed at the stage where the judgment was reserved, the Court went as far as saying that entertaining such a claim was illegal and without jurisdiction.

20. The decision of this Court in ***Bollepanda P. Poonacha*** **v.** ***K. M. Madapa, (2008) 13 SCC 179 is*** also significant in this regard. Referring to ***Ramesh Chand Ardawatiya*** (*supra*), it acknowledged that belated counter-claims were to be discouraged, and called upon the Court to consider questions of serious injustice and irreparable loss while

permitting any such claim. However, in ***Bollepanda*** *(supra)*, the Court did not have an occasion to expound further on this proposition, as the counter-claim had been rejected on the basis that its cause of action had arisen after the filing of the written statement.

21. It was in ***Gayathri Women's Welfare Association*** v.***Gowramma***, (2011) 2 SCC 330, that this Court once again had the occasion to look into the filing of a belated counter-claim. In this case, filing of the initial counter-claim was not in challenge. Instead, the Court was considering the effect of an amendment to an existing counter-claim. While the Trial Court had refused to allow such an amendment, the High Court had granted the same. Reiterating the concerns noted in ***Ramesh Chand Ardawatiya*** (*supra*), this Court held as follows:

> "44. The matter herein symbolises the concern highlighted by this Court in Ramesh Chand [(2003) 7 SCC 350]. Permitting a counterclaim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial court."

The Court also relied on ***Rohit Singh*** (*supra*) and observed that a counter-claim cannot be filed after the framing of issues.

22. In ***Vijay Prakash Jarath*** **v.** ***Tej Prakash Jarath***, (2016) 11 SCC 800, this Court further refined the limitation in ***Rohit Singh*** (*supra*) that counter-claims cannot be raised after the issues are framed and the evidence is closed. In the said case, even though the issues had been framed, and the case was in the early stages of recording of the plaintiff's evidence, a counter- claim filed at that point was allowed, as no prejudice was caused to the plaintiff.

23. The above discussion lends support to the conclusion that even though Rule 6A permits the filing of a counter-claim after the written statement, the Court has the discretion to refuse such filing if it is done at a highly belated stage. However, in my considered opinion, to ensure speedy disposal of suits, propriety requires that such discretion should only be exercised till the framing of issues for trial. Allowing counter-claims beyond this stage would not only prolong the trial, but also prejudice the rights that may get vested with the plaintiff over the course of time.

At the same time, in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective re-trial, the Court may entertain a counter-claim even after the framing of issues, so long as the Court has not started recording the evidence. This is because there is no significant development in the legal proceedings during the intervening period between framing of issues and commencement of recording of evidence. If a counter-claim is brought during such period, a new issue can still be framed by the Court, if needed, and evidence can be recorded accordingly, without seriously prejudicing the rights of either party to the suit.

At this juncture, I would like to address the observation in ***Rohit Singh*** (*supra*) that a counter-claim, if filed after the framing of the issues and closing of the evidence, would be illegal and without jurisdiction. In my opinion, this is not a correct statement of law, as the filing of counter-claims after the commencement of recording of evidence is not illegal *per se*. However, I hasten to add that permitting such a counter-claim would be improper, as the Court's discretion has to be exercised wisely and pragmatically.

24. There are several considerations that must be borne in mind while allowing the filing of a belated counter-claim. *First*, the Court must consider that no injustice or irreparable loss is being caused to the defendant due to a refusal to entertain the counter-claim, or to the plaintiff by allowing the same. Of course, as the defendant would have the option to pursue his cause of action in a separate suit, the question of prejudice to the defendant would ordinarily not arise. *Second*, the interest of justice must be given utmost importance and procedure should not outweigh substantive justice. *Third*, the specific objectives of reducing multiplicity of litigation and ensuring speedy trials underlying the provisions for counter-claims, must be accorded due consideration.

25. Having considered the previous judgments of this Court on counter-claims, the language employed in the rules related thereto, as well as the intention of the Legislature, I conclude that it is not mandatory for a counter-claim to be filed along with the written statement. The Court, in its discretion, may allow a counter-claim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However,

propriety requires that such discretion should ordinarily be exercised to allow the filing of a counter- claim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counter-claim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.

26. The reference is answered accordingly.

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**2020 (I) ILR - CUT- 25 (S.C)**

**INDU MALHOTRA, J & SANJIV KHANNA, J.**

CRIMINAL APPEAL NO. 1781 OF 2009

**VINOD KUMAR GARG** …….Appellant(S)

*.Vs.*

**STATE (GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI)** …….Respondent(S)

**(A) PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13 read with section 17 – Conviction under – The factum of demand and payment proved – Bribe money recovered – Minor contradictions with regard to some facts like place and time of payment etc. – Whether required to be considered ? – Held, No.**

*Given the time gap of five to six years, minor contradictions on some details are bound to occur and are natural. The witnesses are not required to recollect and narrate the entire version with photographic memory notwithstanding the hiatus and passage of time. Picayune variations do not in any way negate and contradict the main and core incriminatory evidence of the demand of bribe, reason why the bribe was demanded and the actual taking of the bribe that was paid, which are the ingredients of the offence under Sections 7 and 13 of the Act, that as noticed above and hereinafter, have been proved and established beyond reasonable doubt.*

(Paras 11 & 12)

**(B) PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13 read with section 17 – Conviction under – The factum of demand and payment proved – Minor irregularity in sanction order – Whether material? – Held, No.**

*"This Court in **Ashok Tshering Bhutia** v. **State of Sikkim** referring to the earlier precedents has observed that a defect or irregularity in investigation however serious, would have no direct bearing on the competence or procedure relating to cognizance or trial. Where the cognizance of the case has already been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless a miscarriage of justice has been caused thereby. Similar is the position with regard to the validity of the sanction. A mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in a failure of justice or has been occasioned thereby. Section 19(1) of the Act is matter of procedure and does not go to the root of the jurisdiction and once the cognizance has been taken by the court under the Code, it cannot be said that an invalid police report is the foundation of jurisdiction of the court to take cognizance and for that matter the trial." (Para 20)*

**Case Laws Relied on and Referred to** :-

1. (1984) 1 SCC 254 : State of U.P. Vs. Dr. G.K. Ghosh
2. (1979) 4 SCC 172 : Mohd. Iqbal Ahmed Vs. State of A.P.
3. (2007) 11 SCC 273: State of Karnataka Vs. Ameerjan
4. (2013) 8 SCC 119 : State of Maharashtra Vs. Mahesh G. Jain
5. (2011) 4 SCC 402 : Ashok Tshering Bhutia Vs. State of Sikkim

For Appellant : M/s. Prakash & Co.
For Respondent : Mr. Anil katiyar

JUDGMENT Date of Judgment : 27. 11. 2019

***SANJIV KHANNA, J.***

The impugned judgment dated 7th January 2009 passed by the High Court of Delhi upholds conviction of Vinod Kumar Garg ('the appellant', for short) under Sections 7 and 13 of the Prevention of Corruption Act, 1988 ('the Act', for short) imposed by the Special Judge, Delhi vide judgement dated 27th March 2002. The appellant has been sentenced to undergo rigorous imprisonment for one and a half years, and fine of Rs. 1,000/- for each offence and in default of payment to undergo simple imprisonment for three months on both counts separately. The sentences have been directed to run concurrently.

Challenging the conviction, the learned senior advocate for the appellant submits that there are major contradictions on material aspects in the testimonies of the complainant Nand Lal (PW-2) and the panch witness Hemant Kumar (PW-3). Nand Lal (PW-2)in his court testimony recorded on 9th July 1999 had denied to having paid any money to the appellant prior to lodging of the complaint, but in his complaint (Exhibit PW-2/A) dated 2nd August 1994, Nand Lal (PW-2) had alleged that he had fifteen days back paid Rs. 500/- to the appellant. Further, Nand Lal (PW-2) in his examination-in-

chief on hand-wash had claimed that it was taken and perhaps polythene bag was also washed, but in his cross- examination PW-2 had accepted that hand-wash of the appellant was not taken. Similarly, Hemant Kumar (PW-3) had contradicted the version in his examination that the pant wash of the accused was taken at the Anti-Corruption Branch, as in his cross- examination Hemant Kumar (PW-3) had accepted the suggestion that the hand-wash and pocket wash were not taken after the appellant was apprehended. Inspector Rohtash Singh (PW-5) who had conducted the raid has admitted that he had not taken the hand-wash or the pant wash of the appellant from which the polythene packet containing the bribe money was allegedly seized. Further, the testimonies of Nand Lal (PW-2) and Hemant Kumar (PW-3) reveal a major dichotomy on the amount that the appellant had allegedly demanded as bribe. In his cross- examination Nand Lal (PW-2) had denied the suggestion that the appellant had asked for Rs. 2,000/- to be paid separately by Nand Lal (PW-2) and Hemant Kumar (PW-3) as the two were partners, contrary to the version given by Hemant Kumar (PW-3) who had deposed that the appellant had told them in the gallery that each of them should pay Rs. 2,000/-. There is a contradiction in the testimony of Nand Lal (PW-2) and Hemant Kumar (PW-3) as to the place where the allegedly bribe money was asked and paid to the appellant. As per Nand Lal (PW-2) the bribe was asked and paid in the garment shop, whereas Hemant Kumar (PW-3) has denied that the payment took place inside the cloth shop. Drawing our attention to the version of Nand Lal (PW-2), it was submitted that Hemant Kumar (PW-3) was not an eyewitness or a panch witness to the demand and payment of alleged bribe money. In view of the irreconcilable versions of the two witnesses, the appellant is entitled to benefit of doubt. Further, there is no evidence or document to show that Nand Lal (PW-2) was the tenant in the shed for which the appellant had statedly asked for bribe money to provide the electricity meter. Anil Ahuja (PW-6), the owner of the shed has not supported the case of the prosecution and had contradicted the claim made by Nand Lal (PW-2) in his complaint (Exhibit PW-2/A).

3. On the question of demand and payment of bribe for performance of public duty or forbearance to perform such duty, we would read the testimonies of the complainant – Nand Lal (PW-2), panch witness – Hemant Kumar (PW-3), and the Inspector of Anti- Corruption Branch – Rohtash Singh (PW-5) in unison. Nand Lal (PW-2) has deposed having visited the DESU office and his meeting with Inspector Yadav for installation of electricity meter in the shed for a fan and a light. Nand Lal (PW-2) after

shifting his goods etc. to the shed had again visited the DESU Office and learnt that Inspector Yadav had been transferred. Nand Lal (PW-2) had met his successor-the appellant, who had asked him to move an application for providing a meter for the electricity connection. The appellant had also stated that electricity could be provided without meter for which Nand Lal (PW-2) was asked to pay bribe of Rs.2,000/-. Thereupon, Nand Lal (PW-2) had expressed his inability to pay Rs.2,000/- in lumpsum but he could pay the bribe amount in instalments of Rs.500/- each, which the appellant had agreed and accepted. Thereafter, Nand Lal (PW-2) had visited the Anti-Corruption Branch and lodged his complaint on 2nd August 1994 vide Exhibit PW-2/A that was signed by him at Point A. Both Hemant Kumar (PW-3) and Inspector Rohtash Singh (PW-5) have in seriatim confirmed the relevant ensuing events. Nand Lal (PW- 2), Hemant Kumar (PW-3) and Rohtash Singh (PW-5) have affirmed that Nand Lal (PW-2) had produced five currency notes of Rs.100/- each, the serial numbers of which were duly recorded and the notes were sprinkled with powder. The three had then along with other members of the raiding team proceeded to the DESU office but the appellant had asked Nand Lal (PW-2) to come on the next day, as the work would not be done on 2nd August 1994. On 3rd August 1994, Nand Lal (PW-2) had again visited the Anti-Corruption Branch office where Hemant Kumar (PW-3) and Rohtash Singh (PW-5) were present. The currency notes were again subjected to chemical treatment and the raiding party had proceeded to the DESU office. Nand Lal (PW-2) and Hemant Kumar (PW-3) had met the appellant, who had then asked Nand Lal (PW-2) to wait on the appellant's scooter parked outside the office. After some time, the appellant came out of the office. He started the scooter and they drove for about 50 yards with Nand Lal (PW-2) sitting on the pillion seat. Nand Lal (PW-2) in his deposition has stated that he had asked the appellant to stop the scooter as the third person – Hemant Kumar (PW-3) was also accompanying them.

4. Thereafter, there is divergence in the version given by Nand Lal (PW-2) on one side and the version given by Hemant Kumar (PW-3) and Rohtash Singh (PW-5). Nand Lal (PW-2) has testified that the appellant after stopping the scooter went inside a garment shop. He had then asked Nand Lal (PW-2) to come inside. Nand Lal (PW-2) proceeded inside. The appellant had then demanded money from Nand Lal (PW-2) – "*lao, paise do*". The appellant had procured one polythene bag and Nand Lal (PW-2) was asked to put the money in the polythene bag and thereafter put the polythene bag in the appellant's pocket. Nand Lal (PW-2) had suggested that

he would give money in the presence of the other person, i.e., Hemant Kumar (PW-3), which suggestion was not accepted by the appellant. Nand Lal (PW-2) is, however, categoric that he had as directed put the money in the pocket of the pant of the appellant. Thereafter, Nand Lal (PW-2) went outside and gave signal to the witness Hemant Kumar (PW-3) who started to move towards him. The appellant came out of the shop. Nand Lal (PW-2) also accepts that Hemant Kumar (PW-3) had given signal to the raiding team who reached the spot and had caught hold of the appellant. From the pant pocket of the appellant, a polythene bag containing the currency notes was seized. Thus, Nand Lal (PW-2) accepts that bribe was demanded and paid and that the tainted bribe money was recovered from the appellant by Rohtash Singh PW-5) in his presence and in the presence of Hemant Kumar (PW-3).

5. Hemant Kumar (PW-3) has on the other hand unfailingly affirmed that he had joined the raiding team as panch witness and that Nand Lal (PW-2) had recorded his statement/complaint vide Exhibit PW-2/A. Hemant Kumar (PW-3) has deposed as to the five currency notes of Rs. 100/- each given by the complainant to the Anti-Corruption Branch office on which phenolphthalein powder was coated. Instructions were given. On 2nd August 1994 at about 10:00 -10:30 a.m., the raiding team had visited the DESU office but the appellant had asked Nand Lal (PW-2) to come on the next day. On 3rd August 1994 at 9:30 a.m. Hemant Kumar (PW-3) had visited the Anti-Corruption Branch office. Nand Lal (PW-2) was present and the entire exercise of powdering the currency notes etc. was repeated. Hemant Kumar (PW-3) and Nand Lal (PW-2) along with the raiding team had reached the DESU office at about 10:00 a.m. The appellant took Nand Lal (PW-2) outside the DESU office and they drove away on the scooter. Hemant Kumar (PW-3) had followed them on foot. The scooter was driven to a distance of about 50 yards from the DESU office. Thereupon, the appellant and Nand Lal (PW-2) had proceeded near a cloth shop where Nand Lal (PW-2) had handed over the tainted money to the appellant after placing it in a polythene bag in his presence. The appellant had kept the polythene bag with the currency notes in the right-side pant pocket of the appellant. The raiding party arrived at the spot and recovered the notes from the right-side pocket of the pant of the appellant. The notes were tallied with the numbers already noted and the same were seized by Exhibit PW- 2/C. Thereupon, the appellant-accused was taken to the Anti- Corruption Branch.

6. The two testimonies of Nand Lal (PW-2) and Hemant Kumar (PW-2) mon visit by the raiding team to the DESU office on 2nd August 1994 when the appellant had asked Nand Lal (PW-2) to come on the next day; that on 3rd August 1994 Nand Lal (PW-2) and Hemant Kumar (PW-3) along with the raiding team had accordingly again visited the DESU office; that the appellant and Nand Lal (PW-2) had travelled on the scooter for a short distance; and that Hemant Kumar (PW-3) had followed them on foot, are affirmed by Inspector Rohtash Singh (PW-5) who has also identically deposed, *albeit* he was not the person who had initially interacted with the appellant at the DESU office.

7. On the succeeding events, Rohtash Singh (PW-5) in his testimony has affirmed the narration of facts as stated by Hemant Kumar(PW-3). Hemant Kumar (PW-3) gave a signal and accordingly members of the raiding team had reached the spot and apprehended the appellant. Rohtash Singh (PW-5) had then disclosed his identity to the appellant and had challenged him that the appellant had accepted the bribe money from Nand Lal (PW- 2). Rohtash Singh (PW-5) had offered for his search, but it was refused by the appellant. The appellant was searched and polythene bag containing five Rs.100/- currency notes was recovered from the right-side pant pocket of the appellant. The five notes were marked P-3 to P-7 and were seized vide seizure memo PW-2/C. The numbers on the currency notes were tallied with the pre-raid report and were found to be the same.

8. Even if we are to accept the version of Nand Lal (PW-2), the appellant had asked for the bribe money that was paid to the appellant and at best at that time Hemant Kumar (PW-3) was not physically present inside the shop and was standing outside the shop. Nand Lal (PW-2) in his examination-in-chief has stated that the appellant had demanded money from him saying – *"Lao paise do"*. Thereafter, Rs. 500/- were paid as bribe by Nand Lal (PW-2) to the appellant in a polythene bag which was put in the appellant's pant pocket as was directed by the appellant. The presence of Hemant Kumar (PW-3) in the immediate vicinity remains unchallenged. In either case, we do not think that this deviation and incongruity between the depositions by Nand Lal (PW-2) and Hemant Kumar (PW-3) should result in the acquittal of the appellant. These deviations between the testimonies of Nand Lal (PW-2) and Hemant Kumar (PW-3) does not mean that the demand and payment of bribe, the trap and seizure of the bribe paid is not proved. The testimony of Rohtash Singh (PW-5) bolsters our findings.

Rohtash Singh (PW-5) has deposed about the recovery of bribe money on lines similar to the version of Nand Lal (PW-2) and Hemant Kumar (PW-3). It appears that Nand Lal (PW-2) had either tried to help the appellant but was unable do so in view of the documentary evidence in the form of his written complaint – Exhibit PW-2/A signed by him at point A and other documents prepared at the spot with his signature, or because of the time gap had forgotten some facts. On the first aspect relating to the contemporaneous documents, we would refer to the cross- examination of Nand Lal (PW-2) by the Additional Public Prosecutor on 14th September 1999 which reads as under:

> "...I cannot say whether the numbers of the said GC notes were found to be same which were mentioned in the pre-raid report. It is wrong that I am not intentionally disclosing this fact. It is correct that seizure memo of GC notes were prepared in my presence which is Ex. PW 2/C which bears my signature at point A. It is correct that GC notes Ex. P3 to P7 are the same which were recovered from the possession of the accused and were seized vide memo Ex. PW 2/C. It is correct that said polythene bag was got washed in colourless solution of sodium carbonate and that solution had turned pink and that solution was transferred into two bottles and the bottles were properly sealed and labeled. Bottles are Ex. P1 and P2 which bears my signatures on each bottle at point A. Polythene bag wash Ex. P1 and P2 were taken into possession vide seizure memo Ex.PW 2/D which bears my signatures at point A. Polythene bag is Ex. P8 which bears my signature at point A. Polythene bag Ex. P8 was taken into possession vide memo Ex. PW 2/F which bears my signature at point A."

9. Turning to the question of washing the polythene bag, the hand- wash and the pant wash of the appellant, Rohtash Singh (PW-5) has stated that phenolphthalein powder was applied to the currency notes and after the appellant was detained the polythene packet was washed and the wash was transferred to the bottles marked P1 and P2 which were taken into possession vide Exhibit PW-2/D. The polythene bag was also seized vide Exhibit PW-2/E. Raid memo proceedings were marked as Exhibit PW-2/G and post-raid proceedings as Exhibit PW-2/K. The aforesaid exhibits, i.e. P1 and P2 and the papers prepared have been accepted and proved in evidence by Nand Lal (PW-2) and Hemant Kumar (PW- 3).

10. Regarding the hand-wash, Nand Lal (PW-2) could not recollect full facts and had stated that as far as he could remember, the appellant had given his hand-wash and the polythene bag was also washed. Nand Lal (PW-2) had identified his signature on the bottles containing the wash of the

polythene bag and also the signature on the papers prepared. Hemant Kumar (PW-3) had stated that the pant wash was not done. We would observe that *ex facie* the hand wash and the pant wash were not done as the coated money was put in the polythene bag. Polythene bag was washed and the wash kept in the bottles as has been deposed by Rohtash Singh (PW-5). Minor discrepancy and inability of Nand Lal (PW-2) and Hemant Kumar (PW-3) to remember the exact details of whether or not the hand wash or pant wash was done would not justify acquittal of the appellant.

11. The contradictions that have crept in the testimonies of Nand Lal (PW-2) and Hemant Kumar (PW-3) noticed above and on the question of the total amount demanded or whether Nand Lal (PW-2) had earlier paid Rs.500/- are immaterial and inconsequential as it is indisputable that the bribe was demanded and taken by the appellant on 3rd August 1994 at about 10:30 a.m. The variations as highlighted lose significance in view of the proven facts on the recovery of bribe money from the pant pocket of the appellant, on which depositions of Nand Lal (PW-2), Hemant Kumar (PW-3) and Rohtash Singh (PW-5) are identical and not at variance. The money recovered was the currency notes that were treated and noted in the pre-raid proceedings vide Exhibit PW-2/G. The aspect of demand and payment of the bribe has been examined and dealt with above. The contradictions as pointed out to us and noted are insignificant when juxtaposed with the vivid and eloquent narration of incriminating facts proved and established beyond doubt and debate. It would be sound to be cognitive of the time gap between the date of occurrence, 3rd August 1994, and the dates when the testimony of Nand Lal (PW-2) was recorded, 9th July 1999 and 14th September 1999, and that Hemant Kumar's (PW-3) testimony was recorded on 18th December 2000 and 30th January 2001. Given the time gap of five to six years, minor contradictions on some details are bound to occur and are natural. The witnesses are not required to recollect and narrate the entire version with photographic memory notwithstanding the hiatus and passage of time. Picayune variations do not in any way negate and contradict the main and core incriminatory evidence of the demand of bribe, reason why the bribe was demanded and the actual taking of the bribe that was paid, which are the ingredients of the offence under Sections 7 and 13 of the Act, that as noticed above and hereinafter, have been proved and established beyond reasonable doubt. Documents prepared contemporaneously noticed above affirm the primary and ocular evidence. We, therefore, find no good ground and reason to upset and set aside the findings recorded by the trial court that

have been upheld by the High Court. Relevant in this context would be to refer to the judgment of this Court in ***State of U.P.*** v. ***Dr. G.K. Ghosh*** wherein it was held that in a case involving an offence of demanding and accepting illegal gratification, depending on the circumstances of the case, it may be safe to accept the prosecution version on the basis of the oral evidence of the complainant and the official witnesses even if the trap witnesses turn hostile or are found not to be independent. When besides such evidence, there is circumstantial evidence which is consistent with the guilt of the accused and inconsistent with his innocence, there should be no difficulty in upholding the conviction.

12. On the question of reason for the demand and payment of the bribe, the complainant Nand Lal (PW-2) is categoric that he had taken industrial shed in DSIDC area, Welcome Colony, Seelam Pur, Delhi on hire from one Anil Ahuja. The shed did not have an electricity meter. Anil Ahuja, who had appeared as PW-6, had denied having given the said shed on rent and was declared hostile. The testimony of PW-6 is, however, highly doubtful and not trustworthy, for he had failed and avoided to answer the question from whom he had purchased the shed. The fact that the shed did not have an electricity connection as deposed to byNand Lal (PW-2) has not been challenged. Nand Lal (PW-2) in his cross-examination had specifically denied the suggestion that he has not taken the shed on hire/rent. Interestingly, in the cross-examination one of the suggestions put to Nand Lal (PW-2) was that he had given an application for electricity connection to the predecessor of the appellant and not to the appellant, thus, suggesting that Nand Lal (PW-2) wanted installation of an electricity meter for the shed. We would, therefore, reject the contention of the appellant that Nand Lal (PW-2) had falsely deposed that he had taken the industrial shed on hire which did not have an electricity connection. The deposition of Nand Lal (PW-2) that he wanted an electricity connection to be installed in the shed should be accepted.

13. On the said aspect, we would now refer to Section 20 of the Act which reads as under:

> "20. Presumption where public servant accepts gratification other than legal remuneration
>
> (1) Where, in any trial of an offence punishable under Section 7 or Section 11 or clause (a) or clause (b) or sub- section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless

> the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.
>
> (2) Where in any trial of an offence punishable under Section 12 or under clause (b) of Section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.
>
> (3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

The statutory presumption under Section 20 of the Act can be confuted by bringing on record some evidence, either direct or circumstantial, that the money was accepted other than for the motive or the reward under Section 7 of the Act. The standard required for rebutting the presumption is tested on the anvil of preponderance of probabilities which is a threshold of a lower degree than proof beyond all reasonable doubt.

14. In the case at hand, the condition precedent to drawing such a legal presumption that the accused has demanded and was paid the bribe money has been proved and established by the incriminating material on record. Thus, the presumption under Section 20 of the Act becomes applicable for the offence committed by the appellant under Section 7 of the Act. The appellant was found in possession of the bribe money and no reasonable explanation is forthcoming that may rebut the presumption. Further, the recovery of the money from the pocket of the appellant has also been proved without doubt. We, therefore, hold that money was demanded and accepted not as a legal remuneration but as a motive or reward to provide electricity connection to Nand Lal (PW-2) for the shed.

15. Pertinent in this regard would be the statement made by the appellant under Section 313 of the Code of Criminal Procedure, 1973 ('the Code', for short) wherein in response to most of the questions, the appellant had expressed his inability to answer or denied the evidence proved. The appellant had accepted his arrest but had debunked the case as false and the CFSL report (Exhibit PW-4/A) as biased and motivated. In response to the

last question, the appellant had alleged that Nand Lal (PW-2) and Hemant Kumar (PW-3) had not supported the prosecution case and that he was innocent as he had never demanded or accepted any money as bribe.

16. We would now turn our attention to the two technical objections taken by the appellant in respect of the sanction order and the validity of investigation. In the present case, Navin Chawla (PW-1) had issued and granted sanction for prosecution of the appellant. He had deposed that the appellant was working as an inspector in DESU and he was the competent officer to remove him. He had, after carefully examining the allegations contained in the material placed before him, granted the sanction for prosecution vide order Exhibit PW-1/A. Paragraphs 1 and 2 of the sanction order Exhibit PW-1/A read:

> "Whereas it is alleged that Sh. Vinod Kumar Garg while functioning as Inspector, DESU (now DVB) Office Seelam Pur, Delhi, a public servant in the discharge of this official duty demanded Rs. 2,000/- as illegal gratification from Sh. Nand Lal S/o Shri Megh Raj r/o H.N. 341/20, Mangal Sain Building, Bagh Kare Khan, Delhi-110007 in consideration for installing an electric meter at shop No. A-2 DSIDC Welcome Colony, Seelam Pur, Delhi, without proper formalities. Sh. Vinod Kumar Garg, Inspector, DESU (now DVB) office Seelam Pur, Delhi, demanded, accepted and obtained Rs. 500/- (second instalment) as illegal gratification from the complaint.
>
> xx xx xx
>
> Whereas I, Navin Chawla, Chairman, D.V.B., New Delhi being the authority competent to remove Sh. Vinod Kumar Garg, DVB Office Seelam Pur, Delhi from office/services after fully and carefully examining the material before me in regard to the said allegation and circumstances of the case consider the said Inspector, Vinod Kumar Garg, DVB Office Seelam Put, Delhi be prosecuted in the Court of Law for the said offence/offences."

17. Relevant portion of Navin Chawla's (PW-1) examination-in-chief and the entire cross-examination read as under:

> "After fully and carefully examining the allegation contained in the material placed before me and the circumstances of the case, I granted sanction for prosecution of Vinod Kumar Garg vide my order Ex. PW 1/A. This order bears my signature at point 'A'."
>
> **Cross-Examination**
>
> "I had received a request for grant of sanction from the Anti-Corruption Branch. I had received along with the report of the I.O. calendars (*sic* kalandra) of oral and documentary evidence. It is correct that in this case, I had not received copies of statements of witnesses recorded u/s. 161 P.C. (*sic* Cr.P.C) or the seizure memos

> regarding the seizure of the bribe money. I had not received any copy of the report of the C.F.S.L. I had also received a format of the sanction order. I did not verify from the records of DESU whether the complainant had applied for an electric connection. I did not verify whether the complaint was a tenant or allottee of D.S.I.D.C. shed. In fact, I had granted the sanction only on the basis of the report of the IO and calendars (*sic* kalandra) of oral and documentary evidence furnished by the Anti-Corruption Branch."

Navin Chawla (PW-1) was specifically cross-examined and questioned whether "he had received the copy of the statement of the witnesses recorded under Section 161 of the Code or the C.F.S.L report". It is obvious that he had not asked for and received these reports or the statements under Section 161 of the Code. Navin Chawla (PW-1) in his cross-examination was, however, clear and categoric that he had received the report of the Investigating Officer along with the *kalandra* of oral and documentary evidence. The witness it is apparent may not be familiar with the statements under Section 161 of the Code etc., but he had certainly examined and considered the relevant material in the form of oral and documentary evidence that were a part and parcel of the *kalandra*. We have to read the cross- examination of Navin Chawla (PW-1) in entirety and not in piecemeal.

18. The appellant has relied upon the judgments of this Court in ***Mohd. Iqbal Ahmed*** v. ***State of A.P.*** and ***State of Karnataka*** v. ***Ameerjan*** to challenge the sanction order. In ***Mohd. Iqbal Ahmed*** (supra) it was observed that a valid sanction is the one that is granted by the Sanctioning Authority after being satisfied that a case for sanction is made out constituting the offence. It is important to be mindful of the observations made by the Court as reproduced below:

> "3. […] what the Court has to see is whether or not the Sanctioning Authority at the time of giving sanction was aware of the facts constituting the offence and applied its mind for the same…"

Similarly, in ***Ameerjan*** (supra), it was observed:

> "10. […] Ordinarily, before passing an order of sanction, the entire records containing the materials collected against the accused should be placed before the sanctioning authority. In the event, the order of sanction does not indicate application of mind as (*sic* to) the materials placed before the said authority before the order of sanction was passed, the same may be produced before the court to show materials had in fact been produced."

Therefore, what the law requires is the application of mind by the Sanctioning Authority on the material placed before it to satisfy itself of *prima facie* case that would constitute the offence. On the said aspect, the later decision of this Court in ***State of Maharashtra*** v. ***Mahesh G. Jain*** has referred to several decisions to expound on the following principles of law governing the validity of sanction:

> "14.1. It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.
>
> 14.2. The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution.
>
> 14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.
>
> 14.4. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.
>
> 14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.
>
> 14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.
>
> 14.7. The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper technical approach to test its validity."

The contention of the appellant, therefore, fails and is rejected.

19. The last contention of the appellant is predicated on Section 17 of the Act and the fact that the investigation in the present case was not conducted by the police officer by the rank and status of the Deputy Superintendent of Police or equal, but by Inspector Rohtash Singh (PW-5) and Inspector Shobhan Singh (PW-7). The contention has to be rejected for the reason that while this lapse would be an irregularity and unless the irregularity has resulted in causing prejudice, the conviction will not be vitiated and bad in law. The appellant has not alleged or even argued that any prejudice was caused and suffered because the investigation was conducted by the police officer of the rank of Inspector, namely Rohtash Singh (PW-5) and Shobhan Singh (PW-7).

20. This Court in ***Ashok Tshering Bhutia*** v. ***State of Sikkim*** referring to the earlier precedents has observed that a defect or irregularity in investigation however serious, would have no direct bearing on the competence or procedure relating to cognizance or trial. Where the cognizance of the case has already been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless a miscarriage of justice has been caused thereby. Similar is the position with regard to the validity of the sanction. A mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in a failure of justice or has been occasioned thereby. Section 19(1) of the Act is matter of procedure and does not go to the root of the jurisdiction and once the cognizance has been taken by the court under the Code, it cannot be said that an invalid police report is the foundation of jurisdiction of the court to take cognizance and for that matter the trial.

21. For the foregoing reasons, we dismiss the present appeal and uphold the conviction of the appellant under Sections 7 and 13 of the Act and the sentences as imposed. The appellant would surrender within a period of four weeks from today to undergo the remaining sentence. On failure to surrender, coercive steps would be taken by the trial court. All pending applications are also disposed of.

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**2020 (I) ILR - CUT- 38**

**K.S. JHAVERI, C.J.**

ARBP NO. 53 OF 2016

**ARSS BUS TERMINAL PRIVATE LTD.** .....Petitioner

*.Vs.*

**ODISHA STATE ROAD TRANSPORT CORPORATION** .....Opp. Party.

**ARBITRATION AND CONCILIATION ACT, 1996 – Section 11(6-A) – Provisions under for Appointment of Arbitrator – Appointment of Arbitrator is sought for on the basis of an agreement containing the Arbitration clause – The agreement in question has been quashed in a PIL by the High Court – Plea that the petition for appointment is not maintainable as the agreement in question was declared null and void**

**and the arbitration clause also does not survive – The question arose as to whether in such a situation Arbitrator can be appointed? – Held, Yes – Reasons indicated.**

*"Having heard learned counsel for the parties and taking into consideration the aforesaid judgments relied upon by them, I am of the view that the arbitration clause cannot be overruled as the existence of the agreement survives. The main contention of the opposite party is that in view of the agreement declared null and void by this Court in the public interest litigation petition referred to supra, however, taking into consideration the clause 16.3 of the agreement, the contention raised by learned counsel for the petitioner is accepted in view the observations made by the Hon'ble Supreme Court in* ***Mayavati Trading Private Limited (supra).*** *In that view of the matter and in view of scrutiny of judgments more particularly the decision of the Hon'ble Supreme Court in* ***Mayavati Trading Private Limited (supra)*** *in respect of Section 11 (6-A) of the Act, while referring the matter to the arbitrator, the court is not required to be influenced. Therefore, the claim is referred to the arbitrators for settlement of the disputes/differences between the parties." (Paras 11 & 12)*

**Case Laws Relied on and Referred to** :-

1. (2019) 8 SCC 714 : Mayavati Trading Private Limited .Vs. Pradyuat Deb Burman.
2. AIR 1959 SC 1362 : Union of India .Vs. Kishorilal Gupta and Bros.
3. AIR 1974 SC 158 : Damodar Vally Corporation .Vs. K.K. Kar.
4. AIR 2010 SC 488 : (2009) 10 SCC 103 : Branch Manager, M/s. Magma Leasing & Finance Ltd. & Anr. .Vs. Potlury Madhavilata & Anr.
5. 2010, Delhi AIR 2014 SC 3723 : Swiss Timing Ltd. .Vs. Organizing Committee, Commonwealth Games.
6. AIR 2000 SC 1379 :(2000) 4 SCC 272 :Wellington Associates Ltd. Vs. Kirti Mehta.
7. 2018 STPL 9668 SC : (2018) SCC Online SC 1045 : United India Insurance Co. Ltd. & Anr. .V. Hyundai Engineering and Construction Co. Ltd. & Ors.,
8. 2019 (3) Arb. LR 51 (SC) : United India Insurance Co. Ltd. .V. Antique Art Exports Pvt. Ltd.
9. Civil Appeal No.3631 of 2019 : Gareware Wall Ropes Ltd. .V. Coastal Marine Constructions & Engineering Ltd.
10. (2017) 9 SCC 729 : Duro Felguera, S.A. .V. Gangavaram Port Limited.

For Petitioner : Mr. M. Panda, M/s. Aditya N. Das, N. Sarkar & E.A. Das.

For Opp. Parties : Mr. S. Pattnaik, Sr. Adv., M/s. R.K. Pattnaik, S.P. Das & S. Das

JUDGMENT Heard and Decided on 15.11.2019

***K.S. JHAVERI, C.J.***

By way of this arbitration proceeding under Section 11 of the Arbitration and Conciliation Act, 1996, the petitioner has prayed for a

direction to appoint an arbitrator to settle the dispute between the petitioner and the opposite party.

2. We have heard Mr. M. Panda, learned counsel for the petitioner and Mr. S.K. Pattnaik, learned Senior Counsel for the opposite party.

3. The fact of the case is that the petitioner has sought for a direction for appointment of arbitrator in view of Clause 16.3 of the agreement, entered into between the parties, which reads as under:

> *"16.3 ARBITRATION*
>
> *(a) Arbitrators*
>
> *In the event the dispute or difference or claim, as the case may be, is not resolved as evidence by the signing of the written terms of settlement by the Parties, within 30 (thirty) days of reference for amicable settlement and/or settlement with the assistance of Expert, as the case may be, the same shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one each to be appointed by the Grantor and the Concessionaire and the third to be appointed by the two arbitrators so appointed, who shall act as chairperson of the arbitral tribunal."*

4. The contention of learned counsel for the petitioner is that the Government of Odisha, in the Department of Transport, invited proposal on 14.12.2009 for development of Baramunda Bus Terminal along with commercial facilities at various locations in Odisha including Bhubaneswar on Private Partnership mode on BOT basis. In response to the said proposal, the petitioner-company submitted its bid of Rs.56,00,00,000/- (Rupees Fifty-six Crores) towards concession fee as premium to be payable to the opposite party. After completion of all formalities, an agreement was entered into between the parties to execute the work. However, the same was the subject matter of the public interest litigation i.e. W.P.(c) No.30961 of 2011, wherein the agreement was declared null and void by order dated 20.12.2012. However, in the meantime, the petitioner was already issued with letter of award dated 26th July, 2010 by the Department of Commerce and Transport and ultimately the litigation was ended, after the SLP was dismissed by the Hon'ble Supreme Court.

5. Learned counsel for the petitioner has mainly relied upon the decision of the Hon'ble Supreme Court rendered in the case of ***Mayavati Trading Private Limited vs. Pradyuat Deb Burman***, reported in *(2019) 8 SCC 714*, more particularly, Paras-10 and 11, whereof read as under:

> *"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) - see paras 48 & 59.*
>
> *11. We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above."*

5.1. Learned counsel for the petitioner has also relied upon Section 11(6-A) of the Arbitration and Conciliation Act, 1996 which was amended w.e.f. 23.10.2015 and prayed for appointment of arbitrator. For better appreciation, Section 11(6-A) is reproduced hereunder:

> *"**11. Appointment of arbitrators.—***
>
> *xx xx xx*
>
> *(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

6. Mr. S.K. Pattnaik, learned Senior Counsel for the opposite party has vehemently argued and stated that the petition is not maintainable in view of order dated 20.12.2012 passed by this Court in W.P.(C) No.30961 of 2011, wherein the opposite party-OSTRC was a party, and ultimately the agreement in question was declared null and void.

6.1. He further submitted that in view of the judgments of the Hon'ble Supreme Court the entire agreement under Annexure-1 is *void ab initio* as the authority signed in the agreement was not competent to sign the same inasmuch as the agreement is opposed to public policy within the meaning of Section 23 of the Contract Act. Therefore, the entire agreement is rendered nonest in the eye of law and the arbitration clause also does not survive. Therefore, the present arbitration petition under Section 11(6) of the Act is not maintainable inasmuch as the agreement being declared void ab initio by this Hon'ble Court in judgment dated 20.12.2012 passed in W.P.(C) No.30961 of 2011. Thus, the claim of the petitioner for arbitration, raised after three years, which was received on 15.03.2016 is barred by limitation.

7. It is submitted that Section 16 of the Act provides that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to existence and validity of the arbitration agreement and an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. This occasionally arises only when the parties refer to the dispute to arbitration or the Court will refer the dispute to arbitration under Section 11 of the Act.

7.1. But while referring the dispute to arbitration, it is the duty of the Court to see if there is a contract in existence. An agreement enforceable in law is a contract. If an agreement is void ab initio, the High Court should refuse to refer to the arbitrator.

7.2. In the present case, this Hon'ble Court by judgment dated 20.12.2012 under an Annexure-2 has declared the agreement as void ab initio on various grounds. That judgment has become final and binding on both the parties and on all concerned being a judgment in rem. No further exercise is required to be done by this Hon'ble Court to find out if the arbitration clause survives when the main agreement is ab initio void and there is no valid contract.

7.3. He also submitted that Section 11(6-A) of the Act also mandates that the High Court has to decide if there is an arbitration agreement in existence before exercising the power under sub-section (6) of Section 11 of the Act. He, however, submitted that the decisions relied upon by the petitioner have been distinguished by the Hon'ble Supreme Court in different judgments.

8. It is further submitted that in the present case in hand, a Division Bench of this Court has decided that the agreement dated 16.03.2011 (Annexure-1) is void ab initio on the following grounds:

> (a) Lack of competence to execute the deed in view of Article 299 of the Constitution of India.
>
> (b) The agreement was contrary to the public policy and thus void in view of Section 23 of the Contract Act.
>
> (c) The agreement was not properly stamped, nor registered thereby violated the provisions of the Indian Stamp Act, Transfer of Property Act and the Registration Act.

Therefore, the agreement is not a contract in the eye of law and thus, not enforceable in law. So, the arbitration clause does not survive and this application under Section 11(6) of the Act is liable to be rejected.

9. Mr. Pattnaik, learned Senior Counsel has further submitted that the law is well settled, if the main agreement is void ab initio, the arbitration clause does not survive. In support of the argument, he relied upon the following decisions:

(i) In the case of ***Union of India vs. Kishorilal Gupta and Bros***., reported in AIR 1959 SC 1362, the Hon'ble Supreme Court, in paras-9 and 10, has held as under:

> "9. We shall now notice some of the authoritative statements in the text-books and a few of the cases bearing on the question raised: In Chitty on Contract, 21st Edn., the scope of an arbitration clause is stated thus, at p. 322:
>
> " So that the law must be now taken to be that when an arbitration clause is unqualified such a clause will apply even if the dispute involve an assertion that circumstances had arisen whether before or after the contract had been partly performed which have the effect of discharging one or both parties from liability, e.g., repudiation by one party accepted by the other, or frustration."
>
> In " Russel on Arbitration ", 16th Edn., p. 63, the following test is laid down to ascertain whether an arbitration clause survives after the contract is deter- mined:
> "The test in such cases has been said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause. remains effective and can be enforced."
>
> The Judicial Committee in Hirji Mulji v. Cheong Yue Steamship Company (1) gives another test at p. 502:
>
> "That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction."
>
> A very interesting discussion on the scope of an arbitration clause in the context of a dispute arising on the question of repudiation of a contract is found in the decision of the House of Lords in Heyman v. Darwine Ltd .(2 ) There a contract was repudiated by one party and accepted as such by the other. The dispute arose in regard to damages under a number of heads covered by the contract. The arbitration clause provided that any dispute between the parties in respect of the agreement or any of the provisions contained therein or anything arising there out should be referred to arbitration. The House of Lords held that the dispute was one within the arbitration clause. In the speeches of the Law Lords a wider question is discussed and some of the relevant principles have been succinctly stated. Viscount Simon L.C. observed at p. 343 thus:
>
> " An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If

> the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.
>
> If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen " in respect of ", or " with regard to ", or " under " the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland) such an arbitration clause would also confer authority to assess damages for breach even though it does not confer upon the arbitral body express power to do so.
>
> I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has "come to an end", as, for example, by frustration. In such cases it is the performance of the contract that has come to an end."

The learned Law Lord commented on the view expressed by Lord Dunedin at p. 344 thus:

> "The reasoning of Lord Dunedin applies equally to both cases. It is, in my opinion, fallacious to say that, because the contract has " come to an end " before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made. In such case a binding contract was entered into, with a valid submission to arbitration contained in its arbitration clause, and, unless -the language of the arbitration clause is such as to exclude its application until performance has begun, there seems no reason why the arbitrator's jurisdiction should not cover the one case as much as the other."

Lord Macmillan made similar observations at p. 345:

> "If it appears that the dispute is as to whether, there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has, never been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new

contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary."

These observations throw considerable light on the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. The principle is obvious; if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. The learned Law Lord pin-points the principle underlying his conclusion at p. 347:

"I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Lord Wright, after explaining the scope of the word " repudiation " and the different meanings its bears, proceeded to state at p. 350:

"In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission; but only as far as concerns future performance. It remains alive for the awarding of damages, either for previous breaches, or for the breach which constitutes the repudiation. That is only a particular form of contract breaking and would generally, under an ordinary arbitration clause, involve a dispute under the contract like any other breach of contract."

This decision is not directly in point; but the principles laid down therein are of wider application than the actual decision involved. If an arbitration clause is couched in widest terms as in the present case, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is not because the arbitration clause survives, but because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. *The contract is still in existence for certain purposes. But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause,* for, if it is superseded, the arbitration clause falls with it. The argument, therefore, that the legal position is the same whether the dispute is in respect of repudiation or frustration or novation is not borne out by these decisions. An equally illuminating judgment of Das, J., as he then was, in Tolaram Nathmull v. Birla Jute Manufacturing Co. Ltd.(1) is strongly relied upon by the learned Counsel for the appellant. There the question was whether an arbitration clause which was expressed in wide terms would take in a dispute raised in that case. It was contended on one side that the contract was void

ab intio and on the other side that, even on the allegations in the plaint, the contract was not ab initio void. The learned Judge, on the facts of that case, held that no case had been made out for staying the suit and therefore dismissed the application filed by the defendant for stay of the suit. The learned Judge exhaustively considered the case-law oil the subject and deduced the principles and enumerated them at p. 187. The learned Judge was not called upon to decide the present question, namely, whether an arbitration clause survived in spite of substitution of the earlier contract containing the arbitration clause by a fresh one, and therefore we do not think that it is necessary to express our opinion on the principles culled out and enumerated in that decision.

10. The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void ; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

(ii) In the case of ***Damodar Vally Corporation vs. K.K. Kar***, reported in *AIR 1974 SC 158*, ***Kishorilal Gupta (supra)*** has been followed by the Hon'ble Supreme Court.

(iii) In the case of ***Branch Manager, M/s. Magma Leasing & Finance Ltd. & Anr. vs. Potlury Madhavilata & Anr.,*** reported in AIR 2010 SC 488 : (2009) 10 SCC 103, the Hon'ble Supreme Court has held as under:

"10. xx xx xx

This decision is not directly in point; but the principles laid down therein are of wider application than the actual decision involved. If an arbitration clause is couched in widest terms as in the present case, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is not because the arbitration clause survives, but because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain

purposes. But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it."

(iv) The Hon'ble Supreme Court in the case of ***Swiss Timing Ltd. vs. Organizing Committee, Commonwealth Games, 2010, Delhi***, reported in AIR 2014 SC 3723, in para-27, has held as under:

"27. I am of the opinion that whenever a plea is taken to avoid arbitration on the ground that the underlying contract is void, the Court is required to ascertain the true nature of the defence. Often, the terms "void" and "voidable" are confused and used loosely and interchangeably with each other. Therefore, the Court ought to examine the plea by keeping in mind the relevant statutory provisions in the Indian Contract Act, 1872, defining the terms "void" and "voidable". Section 2, the interpretation clause defines some of the relevant terms as follows:-

"2(g) An agreement not enforceable by law is said to be void;

2(h) An agreement enforceable by law is a contract;

2(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

2(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable." The aforesaid clauses clearly delineate and differentiate between term "void" and "voidable". Section 2(j) clearly provides as to when a voidable contract would reach the stage of being void. Undoubtedly, in cases, where the Court can come to a conclusion that the contract is void without receiving any evidence, it would be justified in declining reference to arbitration but such cases would be few and isolated. These would be cases where the Court can readily conclude that the contract is void upon a meaningful reading of the contract document itself. Some examples of where a contract may fall in this category would be :-

(a) Where a contract is entered into by a person, who has not attained the age of majority (Section 11);

(b) Where both the parties are under a mistake as to a matter of fact essential to the agreement (Section 19);

(c) Where the consideration or object of the contract is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or where the object of the contract is to indulge in any immoral activity or would be opposed to public policy. Glaring examples of this would be where a contract is entered into between the parties for running a prostitution racket, smuggling drugs, human trafficking and any other activities falling in that category.

(d) Similarly, Section 30 renders wagering contracts as void. The only exception to this is betting on horse racing. In the circumstances noted above, it may not be necessary for the Court to take any further evidence apart from reading the contract document itself. Therefore, whilst exercising jurisdiction under Section 11(6) of the Arbitration Act, the Court could decline to make a reference to arbitration as the contract would be patently void."

(v) Learned Senior Counsel for the opposite party relied upon para-16 of the judgment rendered in ***Wellington Associates Ltd. vs. Kirti Mehta***, reported in AIR 2000 SC 1379 : (2000) 4 SCC 272, which reads as under:

"16. The interpretation put on section 16 by the petitioner's counsel that only the arbitral tribunal can decide about the "existence" of the arbitration clause is not acceptable for other reasons also apart from the result flowing from the use of the word 'may' in section 16. The acceptance of the said contention will, as I shall presently show, create serious problems in practice. As Saville L.J. stated in a speech at Middle Temple Hall on July 8, 1996: "Question of the jurisdiction of the tribunal cannot be left (unless the parties agreed) to the tribunal itself, for that would be a classic case of pulling oneself up by one's own bootstraps". (A practical approach to Arbitration Law, Keren Tweeddale & Andrew Tweeddale, (1999) Blackstone Press Ltd.)(P.75). Let us take this very case. If indeed clause 5 does not amount to an 'arbitration agreement', it will, in my view, be anomalous to ask the arbitrator to decide the question whether clause 5 is at all an arbitration clause. It is well settled and has been repeatedly held that the source of the jurisdiction of the arbitrator is the arbitration clause. [see Waverly Jute Mills case (AIR 1963 SC 90) above referred to ) When that is the position, the arbitrator cannot, in all situations, be the sole authority to decide upon the "existence" of the arbitration clause. Supposing again, the contract between the parties which contained the arbitration clause remained at the stage of negotiation and there was no concluded contract at all. Then in such a case also, there is no point in appointing an arbitrator and asking him to decide the question as to the existence of the arbitration clause. But, I may point out that there can be some other situations where the question as to the "existence" of an arbitration clause can be decided by the arbitrator. Take a case where the matter has gone to the arbitrator without the intervention of an application under section 11. Obviously, if the question as to the existence of the arbitration clause is raised before the arbitral tribunal, it has power to decide the question. Again in a case where the initial existence of the arbitration clause is not in issue at the time of section 11 application but a point is raised before the arbitral tribunal that the said clause or the contract in which it is contained has ceased to be in force, then in such a case, the arbitrator can decide whether the arbitration clause has ceased to be in force. A question may be raised before the arbitrator that the whole contract including the arbitration clause is void. Now Section 16 of the new Act permits the arbitral tribunal to treat the arbitration clause as an independent clause and section 16 says that the arbitration clause does not perish even if the main contract is declared to be null and void. Keeping these latter and other similar situations apart, I am of the view that in cases where to start with - there is a dispute

raised at the stage of the application under section 11 tha t there is no arbitrationclause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by section 16."

(vi) In the case of ***United India Insurance Co. Ltd. & Anr. vs. Hyundai Engineering and Construction Co. Ltd. & Ors***., reported in 2018 STPL 9668 SC : (2018) SCC Online SC 1045, the Hon'ble Supreme Court, in para-11, has held as under:

"11. The other decision heavily relied upon by the High Court and also by the respondents in Duro Felguera (supra), will be of no avail. Firstly, because it is a two-Judge Bench decision and also because the Court was not called upon to consider the question which arises in the present case, in reference to clause 7 of the subject Insurance Policy. The exposition in this decision is a general observation about the effect of the amended provision and not specific to the issue under consideration. The issue under consideration has been directly dealt with by a three-Judge Bench of this Court in Oriental Insurance Company Limited (supra), following the exposition in Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Anr.4, which, again, is a three-Judge Bench decision having construed clause similar to the subject clause 7 of the Insurance Policy. In paragraphs 11 & 12 of Vulcan Insurance Co. Ltd. (supra), the Court answered the issue thus:

"11. Although the surveyors in their letter dated April 26, 1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1, the appellant at no point of time raised any such dispute. The appellant company in its letter dated July 5 and 29, 1963 repudiated the claim altogether. Under clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of clause 18. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by Respondent 1. In other words, the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.

12. As per clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited. The rejection of the claim may be for the reasons indicated in the first part of clause 13, such as,

false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company‟s liability. It may well be that after the liability of the company is established in such a suit, for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with clause 18. But the arbitration clause, restricted as it is by the use of the words 'if any difference arises as to the amount of any loss or damage', cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all." (emphasis supplied) Again in paragraph 22, after analysing the relevant judicial precedents, the Court concluded as follows:

"22. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in Scott v. Avery bars any action or suit if commenced for determination of a dispute covered by the arbitration clause. But if on the other hand a dispute cropped up at the very outset which cannot be referred to arbitration as being not covered by the clause, then Scott v. Avery clause is rendered inoperative and cannot be pleaded as a bar to the maintainability of the legal action or suit for determination of the dispute which was outside the arbitration clause." (Emphasis supplied)

(vii) In the case of ***United India Insurance Co. Ltd. vs. Antique Art Exports Pvt. Ltd.*** reported in 2019 (3) Arb. LR 51 (SC), the Hon'ble Supreme Court, in para-20, has held as under:

"20. The submission of the learned counsel for the respondent that after insertion of subsection (6A) to Section 11 of Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in **Duro Felguera S.A. Vs. Gangavaram Port Limited 2017(9) SCC 729.** The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of subsection (6A) introduced by Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted."

(vii) The Hon'ble Supreme Court, in the case of ***Gareware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd.*** [Civil Appeal No.3631 of 2019 disposed of on April 10, 2019], in paras-19, 22, 23 and 24, has held as under:

> "19. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that **SMS Tea Estates (supra)** has, in no manner, been touched by the amendment of Section 11(6A).
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> 22. The other judgment strongly relied upon by the learned counsel for the respondent is **Duro Felguera, S.A. v. Gangavaram Port Ltd.**, (2017) 9 SCC 729 ["**Duro Felguera**"], and in particular, paragraph 59 of the judgment of Kurian Joseph, J. Paragraph 59 reads as follows:
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> "59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."
>
> This judgment also makes it clear that the mischief that was sought to be remedied by the introduction of Section 11(6A) was contained in the judgments of SBP & Co. (supra) and Boghara Polyfab (supra). This judgment does not, in any manner, answer the precise issue that is before us.
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> 23. Indeed, in United India Insurance Co. Ltd. and Ors. v.
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> Hyundai Engineering and Construction Co. Ltd. and Ors., 2018 SCC OnLine SC 1045 ["United India Insurance Co."], a three-Judge Bench of this Court, while dealing with an arbitration clause that arose under an insurance policy, distinguished Duro Felguera (supra) as follows:
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> "12. The other decision heavily relied upon by the High Court and also by the respondents in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729], will be of no avail. Firstly, because it is a two- Judge Bench decision and also because the Court was not called upon to consider the question which arises in the present case, in reference to clause 7 of the subject Insurance Policy. The exposition in this decision is a general observation about the effect of the amended provision and not specific to the issue under consideration. The issue

under consideration has been directly dealt with by a three-Judge Bench of this Court in Oriental Insurance Company Limited [Oriental Insurance Company Ltd. v. Narbheram Power and Steel (P) Ltd., (2018) 6 SCC 534], following the exposition in Vulcan Insurance Co. Ltd. v. Maharaj Singh [Vulcan Insurance Co. Ltd. v. Maharaj Singh, (1976) 1 SCC 943], which, again, is a three-Judge Bench decision having construed clause similar to the subject clause 7 of the Insurance Policy. In paragraphs 11 & 12 of Vulcan Insurance Co. Ltd. (supra), the Court answered the issue thus:

"11. Although the surveyors in their letter dated April 26, 1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1, the appellant at no point of time raised any such dispute. The appellant company in its letter dated July 5 and 29, 1963 repudiated the claim altogether. Under clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of clause 18. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by Respondent 1. In other words, the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.

12. As per clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited. The rejection of the claim may be for the reasons indicated in the first part of clause 13, such as, false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company's liability. It may well be that after the liability of the company is established in such a suit, for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with clause 18. But the arbitration clause, restricted as it is by the use of the words 'if any difference arises as to the amount of any loss or damage', cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all."

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14. From the line of authorities, it is clear that the arbitration clause has to be interpreted strictly. The subject clause 7 which is in pari materia to clause 13 of the policy considered by a three-Judge Bench in Oriental Insurance Company Limited (supra), is a conditional expression of intent. Such an arbitration clause will get activated or kindled only if the dispute between the parties is limited to the quantum

to be paid under the policy. The liability should be unequivocally admitted by the insurer. That is the precondition and sine qua non for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the concerned policy. That has been expressly predicated in the opening part of clause 7 as well as the second paragraph of the same clause. In the opening part, it is stated that the "(liability being otherwise admitted)". This is reinforced and re-stated in the second paragraph in the following words:

"It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this Policy."

15. Thus understood, there can be no arbitration in cases where the insurance company disputes or does not accept the liability under or in respect of the policy.

16. The core issue is whether the communication sent on 21st April, 2011 falls in the excepted category of repudiation and denial of liability in toto or has the effect of acceptance of liability by the insurer under or in respect of the policy and limited to disputation of quantum. The High Court has made no effort to examine this aspect at all. It only reproduced clause 7 of the policy and in reference to the dictum in Duro Felguera (supra) held that no other enquiry can be made by the Court in that regard. This is misreading of the said decision and the amended provision and, in particular, mis-application of the three-Judge Bench decisions of this Court in Vulcan Insurance Co. Ltd. (supra) and in Oriental Insurance Company Ltd. (supra).

17. Reverting to the communication dated 21 st April, 2011, we have no hesitation in taking the view that the appellants completely denied their liability and repudiated the claim of the JV (respondent Nos. 1 & 2) for the reasons mentioned in the communication. The reasons are specific. No plea was raised by the respondents that the policy or the said clause 7 was void. The appellants repudiated the claim of the JV and denied their liability in toto under or in respect of the subject policy. It was not a plea to dispute the quantum to be paid under the policy, which alone could be referred to arbitration in terms of clause 7. Thus, the plea taken by the appellants is of denial of its liability to indemnify the loss as claimed by the JV, which falls in the excepted category, thereby making the arbitration clause ineffective and incapable of being enforced, if not non- existent. It is not actuated so as to make a reference to arbitration. In other words, the plea of the appellants is about falling in an excepted category and non-arbitrable matter within the meaning of the opening part of clause 7 and as re-stated in the second paragraph of the same clause.

18. In view of the above, it must be held that the dispute in question is non-arbitrable and respondent Nos. 1 & 2 ought to have resorted to the remedy of a suit. The plea of respondent Nos. 1 & 2 about the final repudiation expressed by the appellants vide communication dated 17th April, 2017 will be of no avail. However, whether that factum can be taken as the cause of action for institution of the suit is a

> matter which can be debated in those proceedings. We may not be understood to have expressed any opinion either way in that regard. (emphasis in original)
>
> 24. This judgment is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6A) deals with "existence", as opposed to Section 8, Section 16, and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in United India Insurance Co. (supra), as followed by us."

(vii) Learned Senior Counsel for the opposite party also relied upon the decision of the Hon'ble Supreme Court in the case of ***Duro Felguera, S.A. vs. Gangavaram Port Limited,*** *reported in (2017) 9 SCC 729* and referred to para-47 and 59, which read as under:

> "47. What is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "the 2015 Amendment") with particular reference to Section 11(6) and the newly added Section 11(6A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.
>
> xx xx xx
>
> 59. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected."

10. Having heard learned counsel for the parties and taking into consideration the aforesaid judgments relied upon by them, I am of the view that the arbitration clause cannot be overruled as the existence of the agreement survives.

The main contention of the opposite party is that in view of the agreement declared null and void by this Court in the public interest litigation

petition referred to supra, however, taking into consideration the clause 16.3 of the agreement, the contention raised by learned counsel for the petitioner is accepted in view the observations made by the Hon'ble Supreme Court in ***Mayavati Trading Private Limited (supra).***

11. In that view of the matter and in view of scrutiny of judgments more particularly the decision of the Hon'ble Supreme Court in ***Mayavati Trading Private Limited (supra)*** in respect of Section 11 (6-A) of the Act, while referring the matter to the arbitrator, the court is not required to be influenced. Therefore, the claim is referred to the arbitrators for settlement of the disputes/differences between the parties.

12. Shri M. Panda, learned counsel for the petitioner has suggested the name of Shri Justice Basudev Panigrahi, Former Judge of this Court to be appointed as the Arbitrator on behalf of the petitioner and Shri S.K. Pattnaik, learned Senior Counsel for the opposite party has suggested the name of Dr. Justice A.K. Rath, Former Judge of this Court to be the Arbitrator for the opposite party.

13. Accordingly, this Court appoints ***Shri Justice Basudev Panigrahi*** and ***Dr. Justice A.K. Rath***, Former Judges of this Court as the arbitrators for the parties. The said two Arbitrators shall nominate a third Arbitrator/Umpire and thereafter the arbitration proceedings may commence in terms of the Arbitration rules. The arbitration proceedings may take place either at the High Court Arbitration Centre or any other place at the choice of the Arbitrators/Umpire.

14. The fees of the learned Arbitrators shall be as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015. It shall be open to the parties to raise all such pleas as are available to them in law before the learned Arbitrators, who shall consider the same on its own merit and in accordance with law.

15. The ARBP is, accordingly, disposed of.This order be communicated to ***Shri Justice Basudev Panigrahi and Dr. Justice A.K. Rath***, Former Judges of this Court forthwith. Certified copy of this order be granted on proper application.

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**2020 (I) ILR - CUT- 56**

**K.S. JHAVERI, C.J & K.R. MOHAPATRA, J.**

W.P.(C) NO. 7099 OF 2012

**PARADIP PORT BUILDERS ASSOCIATION** ……..Petitioner

*.Vs.*

**CHAIRMAN, PARADIP PORT TRUST & ORS.** ……..Opp. Parties

**BUILDING AND OTHER CONSTRUCTION (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICES) ACT, 1996 – Section 2 – Provisions under – Writ petition – Challenge is made to the collection of 1% cess on construction – Plea that the petitioner will come within the ambit of the Factories Act, 1948, therefore, the provisions of Building and other Construction (Regulation of Employment and Conditions of Services) Act, 1996 is not applicable to it – Whether acceptable? – Held, No.**

*"Taking into consideration the very object of the Act of 1996, 1% cess is to be deducted for benefit of the workers. In our considered opinion, in view of the decision of the Hon'ble Supreme Court in the case of* ***Lanco Anpara Power Limited (supra)*** *is not applicable to the case at hand, as the petitioner is not carrying out any activity under the Factories Act. Hence, it will be covered by the impugned decision under Annexure-1, which is just and proper. No interference is called for. Accordingly, the writ petition stands dismissed being devoid of any merit."*

**Case Laws Relied on and Referred to** :-

1. (2016) 10 SCC 329 : Lanco Anpara Power Limited Vs. State of Uttar Pradesh and Ors.

For Petitioner : Mr. Amiya Kumar Mohanty-A
R.K. Behera, R.C. Pradhan, & P. Pattnaik

For Opp. Parties : M/s P.K. Nanda, K. Badhei & S. Mishra.

ORDER Heard and Disposed of on : 26.11.2019

***BY THE COURT***

Heard learned counsel for the parties.

2. By way of this writ petition, the petitioner assails the action of the opposite parties in imposing 1% Cess vide order dated 12.1.2011 (Annexure-1) under Building and other Construction (Regulation of Employment and Conditions of Services) Act, 1996.

3. The contention of the petitioner is that as per the minutes of the meeting dated 19.11.2011 under Annexure-1 decision as under is taken:

> "As regards the recovery of 1% Cess and making deposit with the Commissioner under Building and Other Construction workers Act, 1996, it was clarified that such provision is applicable with effect from 15.12.2008. In case in the Contract/Estimate, there is no such provision the amount to assessed will be 1st recovered from the bills of the Contractors and thereafter, these are to be reimbursed by Paradip Port Trust."

3.1 The said decision has been taken unilaterally without taking into consideration the recommendation made by the Chief Engineer, Paradip Port Trust to the Secretary of PPT vide its letter dated 17.02.2012 under Annexure-2, which is reproduced hereunder for ready reference.

> "**Sub: Deposit of 1% Cess under Building and other construction Workers Welfare Cess Act, 1996.**
>
> Ref: Letter No.AD/ir-22/2010/639 DATED 03.02.2012 OF Secretary, PPT.
>
> With reference to the letter under reference, this is to inform that after further perusal of the matter with specific reference to Section-2(d) of the Act (copy enclosed), it is apparent that payment of cess is not applicable to any construction work in an organization to which provision of Factories Act, 1948 apply. In our case, the Directorate of Factories and Boilers, Odisha, Bhubaneswar have communicated that Factories Act, 1948 will apply to Paradip Port Trust, since the Port owns and operates a water treatment plant (copy enclosed).
>
> In view of the above facts, it is requested to examine the matter and inform to the District Labour Officer, Jagatsinghpur that collection of cess is not applicable to various works undertaken by Paradip Port Trust."

In this regard, the petitioner has made a representation on 16th December, 2011, which was not considered.

4. Counsel for the opposite parties, while arguing the matter on last occasion, has contended that the present case is covered by decision of the Hon'ble Supreme Court in the case of ***Lanco Anpara Power Limited Vs. State of Uttar Pradesh and others***, reported in (2016) 10 SCC 329. However, in our considered opinion it is a statutory liability and the petitioner is bound to pay 1% cess pursuant to a beneficial legislation meant for the workers and for their benefit 1% cess is required to be collected. Moreover, as it appears the contractor's representatives had participated and agreed to the minutes under Annexure-1.

4.1 However, learned counsel of the petitioner placed reliance on paragraphs 12, 25, 32, 34, 37 and 38 of ***Lanco Anpara Power Limited*** (supra). For better appreciation of facts, those paragraphs of ***Lanco Anpara Power Limited (supra)*** are quoted below.

> "12. The second submission, which in fact flows from the first submission noted above, was that the approach of the High Court in dealing with the matter was contrary to law. In this behalf, it was pointed out that the High Court has rejected the case of the appellants herein on the ground that even if the appellants had obtained a licence under the Factories Act for registration to work a factory, the appellants were still not excluded from the provisions of the Welfare Cess Act as no manufacturing process or factory operation had started by the appellants and, therefore, the appellants did not answer the description of "factory" within the meaning of the Factories Act. As per the High Court, since the appellants had only undertaken the process of construction of premises which are to be ultimately used as factories, and since such power project has not started and there was no operation for which the licence was obtained under the Factories Act till the production commences, it could not be said that "factory" has come into existence and, therefore, the appellants were not entitled to take advantage of mere registration under the Factories Act.
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> xx xx xx
>
> 25. We have bestowed our due and serious consideration to the submissions made of both sides, which these submissions deserve. The central issue is the meaning that is to be assigned to the language of Section 2(1)(d) of the Act, particularly that part which is exclusionary in nature i.e. which excludes such building and construction work to which the provisions of the Factories Act apply. Before coming to the grip of this central issue, we deem it appropriate to refer to the objectives with which the Factories Act and the BOCW Act were enacted, as that would be the guiding path to answer the core issue delineated above.
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> xx xx xx
>
> 32. Section 2(k) of the Factories Act defines "manufacturing process" in the following manner:
>
> "2. (k) "manufacturing process" means any process for—
>
> (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
>
> (ii) pumping oil, water, sewage or any other substance, or
>
> (iii) generating, transforming or transmitting power, or
>
> (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding, or
>
> (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels, or
>
> (vi) preserving or storing any article in cold storage;"

xx xx xx

34. On the conjoint reading of the aforesaid provisions, it becomes clear that "factory" is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of "worker" under the Factories Act. On these two aspects, there is no cleavage and both parties are at ad idem. What follows is that these construction workers are not covered by the provisions of the Factories Act.

xx xx xx

37. We now advert to the core issue touching upon the construction of Section 2(1)(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(1)(d) of the BOCW Act dealing with the building or construction work is in three parts. In the first part, different activities are mentioned which are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not include "any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies". Thus, first part of the definition contains the nature of activity; second part contains the subject-matter in relation to which the activity is carried out and the third part excludes those building or other construction work to which the provisions of the Factories Act or the Mines Act apply.

xx xx xx

38. It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work" as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words "but does not include any building or other construction work to which the provisions of the Factories Act … apply" (emphasis supplied). The question is as to whether the provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply" only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with the approach adopted by this Court in Organo Chemical Industries v. Union of India [Organo Chemical Industries v. Union of India, (1979) 4 SCC 573: 1980 SCC (L&S) 92]. Two separate, but concurring, opinions were given by Justice V.R. Krishna Iyer and Justice A.P. Sen, and we reproduce here below some excerpts from both opinions:"

5. It is further contented by learned counsel for the petitioner that the petitioner will come within the ambit of the Factories Act, 1948, therefore, the provisions of Building and other Construction (Regulation of Employment and Conditions of Services) Act, 1996 is not applicable to it.

6. Learned counsel for the opposite parties placed reliance on their averments in paragraphs 5, 8 and 12 of its counter affidavit, which are reproduced hereunder for ready reference.

> "5. That the brief factual backdrop of the case from the point of view of the opposite parties is stated hereunder:
>
> Paradip Port is one of the Major Ports of India serving the Eastern and Central parts of the country. It is an autonomous body under the Major Port Trusts Act functioning under Ministry of Shipping. It is administered by a Board of Trustees set up by the Government of India.
>
> Every year the Port undertakes some construction work such as the new construction, alternation, repairs, maintenance or demolition, of or in relation to building, streets, roads etc. Those works are normally carried on by the Port Trust through contractors by floating tenders. The works so undertaken come within the meaning of "building or other construction work" as defined under Sec.2(d) of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996. So as per the Building and other Construction Workers Welfare Cess Act, 1996 read with S.O. No.2899 dtd. 26.09.1996, a cess @ 1% of the cost of construction incurred by the employer is to be levied and collected. On a combined reading of Building and other Construction Workers Welfare Cess Act, 1996 and Rules and the Resolution dtd. 15th December, 008 of Labour and Employment Department, Govt. of Odisha, it is clear that the contractors are also the employer within the meaning of the above Act and rules and payment of cess at the prescribed rate by the employer is mandatory. As per Sec.2(i)(iii) where the construction work is carried on by or through the contractor or by the employer of building workers supplied by a contractor, the contractor is also to be treated as the employer. As per the above Acts and Rules, cess is to be paid within 30 days from the completion of the construction project or within 30 days/date on which assessment of cess payable is finalized, whichever is earlier. In case the duration of the project or construction work exceeds one year, the cess shall be paid within 30 days of completion of one year from the date of commencement of work of every year. Resolution dtd.15.12.2008 of Govt. of Odisha, Labour and Employment Department, clearly speaks that:
>
> "All Govt. Department, Public Sector Undertakings and other Government Departmental agencies/Bodies carrying out any buildings or other construction works which are covered under Section (2(1)(d) of the Building and Other Construction Workers (RE&CS) Act, 1996 shall pay 1% of the amount of the cost approved as per the tender notification. This amount will be deducted from the bill at the time of making payment to the contractors and such amount shall be remitted

by way of account payee cheque in favour of the Odisha Building and Other Construction.

Workers Welfare Board within 30 days of making payment along with a forwarding letter addressed to the Secretary-cum-Chief Executive Officer, the Orissa Building and Other Construction workers Welfare Board, Office of the Labour Commissioner, Orissa, Bhubaneswar."

So it is the statutory obligation of the PPT to deduct or caused to be deducted, the cess payable at the notified rate from the bills of the contractor paid for such work. The resolution dtd.15th December, 2008 of Govt. of Odisha, Labour & Employment Department is annexed herewith as Annexure-A.

It is further submitted that non-payment of cess will invite interest, financial penalty and criminal actions as per the provisions laid down under the Building and Other Construction workers Welfare Cess Act and Rules. So the Port Trust authorities have acted as per the Acts, Rules and the Regulations issued by the Govt. of Odisha. Thus, the allegations of the petitioner-Association is baseless.

xx xx xx

8. That with regard to the averments made in paragraph-5 & 6 of the writ petition it is humbly submitted that as per Sec.2(d) of the Building & other Construction Workers (Regulation of Employment & Construction of Service) Act, 1996, building or other construction work does not include any building or other construction work to which the provisions of Factories Act, 1943 (63 of 1948) or the Mines Act, 1952 (35 of 1952) apply. But it cannot be stretched to the extent that Factories Act will be applicable to all Port operations and works, Statutory obligation on part of the PPT being the principal employer to deduct or caused to be deducted, the Cess payable at the notified rate from the bills of the contractors paid for such work.

xx xx xx

9. That with regard to the averments made in paragraph-7 of the writ petition it is humbly submitted that collection of cess is mandatory as per the above Acts, Rules and Resolution of Govt. of Odisha irrespective of the fact that any such clause for deduction has been incorporated in the Agreement of not. However, provisions for deduction of cess is being kept in the Agreement with the contractors and in case the provisions has not been incorporated, the method as indicated in the Minutes vide AD/IR-33/09/5201 dtd.02.12.2011 issued by Secretary, PPT will apply. The copy of the Minutes issued on dtd.02.12.2011 is enclosed herewith as Annexure-B."

7. Taking into consideration the very object of the Act of 1996, 1% cess is to be deducted for benefit of the workers. In our considered opinion, in view of the decision of the Hon'ble Supreme Court in the case of ***Lanco Anpara Power Limited (supra)*** is not applicable to the case at hand, as the petitioner is not carrying out any activity under the Factories Act. Hence, it will be covered by the impugned decision under Annexure-1, which is just and proper. No interference is called for.

8. Accordingly, the writ petition stands dismissed being devoid of any merit.

**2020 (I) ILR - CUT- 62**

**SANJU PANDA, J & S.K. SAHOO, J.**

W.P.(C) NO. 3468 OF 2003

**B. KRISHNA MURTY** …… Petitioner

*.Vs.*

**PRESIDING OFFICER, INDUSTRIAL TRIBUNAL & ANR.** ……Opp. Parties

**(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the award of Industrial Tribunal holding the petitioner not entitled to claim any relief – Petitioner was working as a contract labour under a contractor – After abolition of the contract labour, the Government of Odisha decided that petitioner along with others should be taken as regular workmen under the company and accordingly, there was an interview and about forty nine workers were appointed in the Canteen Department of the Company – The petitioner also continued to work on probation for six months which was extended for another three months and during absence of the petitioner, his services were terminated – Petitioner was working on probation and has worked for 265 continuous days – On account of the death of his mother after receipt of the telegram, he left for his village to perform obsequies ceremony after taking permission of the authorities – No allegation that he was habitually remaining absent during the period of probation or his work was unsatisfactory during such period – Held, it appears that clandestinely his service was terminated with malafide intention arbitrarily because of the petitioner's participation in trade union activities without following the principle of natural justice – Award set aside – Petitioner was put back in service with 50% back wages.**

**(B) PROBATION – Definition thereof-**

*"As per the definition of 'probationer' in the Certified Standing Orders of the company, it means a workman who is provisionally employed to fill up a permanent vacancy or post and who has not completed six months service therein. On expiry of the aforesaid probationary period of six months, the workman may be confirmed in writing. In case, however, the services of the workman is not found satisfactory, the probationary period of six months may be extended in writing for a further period of three months, whereafter the workman shall be deemed to be a permanent workman. Since after six months' probation period from 01.09.1995, there was an extension of probationary period for three months, as per the Certified Standing Orders, on successful completion of probationary period, on 01.06.1996 the petitioner would have been deemed to be a permanent workman in the company. It is no doubt true that the period of probation furnishes a valuable opportunity to the*

*master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or to dispense with his service. Period of probation may vary from post to post or master to master and it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer. A probationer is on test and if his services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services. The mere fact that in response to the challenge the employer states that the services were not satisfactory, would not ipso facto mean that the services of the probationer were terminated by way of punishment."*

**Case Laws Relied on and Referred to** :-

1. A.I.R. 2000 S.C. 1080 : V.P. Ahuja .Vs. State of Punjab.

For Petitioner : Mr. J.R. Dash, M. Dash & Mrs. K.L. Dash
For Opp. Party : Mr. S.K. Mishra, D.P. Nanda, P.K. Mohapatra & M.K. Pati, R. Kanungo

JUDGMENT Date of Hearing & Judgment: 04.12.2019

***S.K. SAHOO, J.***

In this writ petition the petitioner B. Krishna Murty has challenged the award dated 13.12.2002 passed by the Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.6 of 1998 in holding that the petitioner is not entitled to claim any relief whatsoever.

The Government of Orissa in their Labour and Employment Department vide memo no.12357(5) dated 05.11.1998 made the following reference under sub-section (5) of section 12 read with clause (d) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947 (hereafter 'I.D. Act') for adjudication:-

> "Whether the termination of service of Sri B.K. Murty, Empl. No.68295, Canteen Department by M/s. Larson & Tubro Ltd., Kansbahal Works, Kansbahal by giving 24 hours notice in its letter dated 25.05.1996 during his three months extension of probationary period, is legal and/or justified? If not, to what relief the workman is entitled to?"

It is the case of the petitioner that he was working in the Canteen Department of the opposite party no.2 Management as a contract labour under a contractor and after abolition of the contract labour, the Government of Odisha decided that the petitioner along with others should be taken as regular workmen under the company

and accordingly, there was an interview and about forty nine workers were appointed in the Canteen Department of the company. The petitioner also continued to work there till he was discharged from the service. His probation period for six months was extended for another three months and during absence of the petitioner, his services were terminated without any reason whatsoever. It is the further case of the petitioner that since he was an active member of the Union espousing the causes of the workmen with the Management of the company, to get rid of him, the Management of the company stealthily terminated his service without paying him compensation and one month's wages in lieu of the notice and that the conduct of the company amounts to unfair labour practice. It is his further case that since he has been victimized for his trade union activities in the company, therefore, he prayed for reinstatement in the service with full back wages.

It is the case of opposite party no.2 Management that the petitioner was kept under probation for a period of six months and his work was found not to be satisfactory for which his probation period was extended for another three months as per the Certified Standing Orders of the company and the terms of his contract of service with the company. However, the petitioner was not found suitable for his job and therefore, before completion of his extended period of three months of probation, he was discharged from his service. Since the petitioner was not a regular workman, he was not entitled to one month's notice or in lieu thereof one month's wage and compensation for his termination from service under the company.

The learned Tribunal framed the following issues:-

"(I) Whether the termination of service of 2nd party workman by the 1st party management by giving 24 hours notice in its letter dated 25.05.1996 during his 3 months extension of probationary period, is legal and/or justified.

(II) If not, to what relief the workman is entitled to?"

While adjudicating issue no.(I), the learned Tribunal has been pleased to observe that the first party Management has left no stone unturned in effecting service of the order of termination on the petitioner and it was sufficiently brought to the knowledge of the petitioner workman that his service was terminated and for that reason he agitated the matter before the conciliation authorities and ultimately a reference was made on the basis of failure of the conciliation. It is further held that the very purpose of placing a person on probation is to try him during the period of probation to assess his suitability for the job and the order of discharge is not the order of punishment and therefore, there is no question of giving an opportunity of hearing before termination of service. It is further held that the petitioner is not entitled to claim any relief under section 25-F and section 2(oo) of the I.D. Act as it does not amount to termination and it is not bad on the ground of non-compliance of section 25-F and since it is a case of termination simplicitor, the principle of natural justice is not required to be complied with as the petitioner was a probationer. It was further held that since the petitioner being a probationer is not entitled to leave of any type and his absence from the work from 23.05.1996 to 03.06.1996 was unauthorized, he cannot be paid any wages for such period because of the principles of 'no work no pay'. Accordingly, it was held that the petitioner is not entitled to any relief whatsoever.

Mr. J.R. Dash, learned counsel appearing for the petitioner contended that when the Management has failed to adduce any evidence to show that the performance of the petitioner during the period of probation was unsatisfactory and that the absence of the petitioner from 23.05.1996 to 03.06.1996 was deliberate and without any valid reason, the learned Tribunal should not have mechanically held that the petitioner being a probationer is not entitled to get any relief whatsoever. It is argued that the petitioner was under probation on the extension basis for a period of three months after completing the earlier probation period of six months. On 21.05.1996 he received a telegram from his brother staying at his native village indicating "mother expired" and accordingly he approached the Personal Executive -cum- Canteen in charge, showed the telegram to proceed to his native village and with the permission of the authority, he proceeded to the native village on 23.05.1996 and after returning from home when he came to report for his duty as usual, he was not allowed to enter into the factory premises. It is further contended that even though in the letter of termination which is dated 25.05.1996 marked as Ext.D, it is mentioned therein that the petitioner's contract of employment is terminated giving 24 hours' notice but the order of termination was sent by post only on 28.05.1996 and therefore, the malafideness of the Management is apparent and as such the order of termination is liable to be set aside. It is contended that deliberately the petitioner was terminated in his absence even though his leave was on a valid ground and it was duly intimated to the authority and necessary permission was taken for absence. In that respect, learned counsel for the petitioner brought to the notice of this Court the telegram which is marked as Ext.3. It is contended that since on account of the trade union activities of the petitioner, the Management was seeking for an opportunity to remove him, without following the principle of natural justice, the petitioner was terminated from his service and therefore, the impugned award passed by the learned Tribunal should be set aside and the order of reinstatement with full back wages should be passed.

The learned counsel for the opposite party no.2 Management on the other hand supported the impugned award and contended that the appointment offer dated 01.09.1995 clearly indicates that it was a six months' probation period which is to take effect from 01.09.1995 and during the period of probation, the contract of employment can be terminated by either party by giving 24 hours' notice in writing to the other without assigning any reason and that during the probationary period, the workman will not be entitled to any kind of leave. It is argued that after joining of the petitioner

on 01.09.1995, he was posted in the Canteen Department and on 23.05.1996 he was found absent without any application and on 25.05.1996 on account of his absence, the order of termination was displayed in the Notice Board and on 28.05.1996 the termination notice was sent to the petitioner by registered post with A.D. at his local address as well as permanent address. It is contended that in view of the limited scope of certiorari writ jurisdiction, when there is no illegality in the findings of the learned Tribunal or in the award, the writ petition should be dismissed. The learned counsel placed the Certified Standing Orders of the company and particularly the definition of the 'probationer'.

> As per the definition of 'probationer' in the Certified Standing Orders of the company, it means a workman who is provisionally employed to fill up a permanent vacancy or post and who has not completed six months service therein. On expiry of the aforesaid probationary period of six months, the workman may be confirmed in writing. In case, however, the services of the workman is not found satisfactory, the probationary period of six months may be extended in writing for a further period of three months, whereafter the workman shall be deemed to be a permanent workman. Since after six months' probation period from 01.09.1995, there was an extension of probationary period for three months, as per the Certified Standing Orders, on successful completion of probationary period, on 01.06.1996 the petitioner would have been deemed to be a permanent workman in the company.

Learned counsel for the Management emphatically contended that since no kind of leave is permissible during the probation period of service, the petitioner's absence from the service since 23.05.1996 is clearly unauthorized and therefore, the Management rightly terminated him from service on 25.06.1996. Though the learned counsel for the Management submitted that since during the first six months' probationary period, the service of the petitioner was found not to be satisfactory for which it was extended for a further period of three months but extension order which is dated 01.02.1996 does not indicate any such reason for extension. Therefore, it is difficult to accept that during the six months' probationary period, the service of the petitioner was not satisfactory.

It is no doubt true that in the appointment offer, it is mentioned that during the probationary period, the petitioner will not be entitled to any kind of leave but under the compelling circumstances, on account of his mother's death, he proceeded to his village after receipt of a telegram from his brother which has been marked as Ext.4 which indicates "mother expired". Therefore, it cannot be said that the absence of the petitioner from 23.05.1996 till the termination order was passed on 25.03.1996 was illegal or that he deliberately flouted the conditions of the appointment offer.

Ext.D is the termination order which is dated 25.03.1996 wherein it is mentioned that the employment is terminated by giving 24 hours notice but it was posted only on 28.05.1996 as reveals from the envelope which was utilized for postal service of such order on the petitioner which returned unserved. Therefore, it is apparent that after the expiry of 24 hours period as stipulated in Ext.D, the letter was posted which clearly reflects the malafide intention of the Management. Though it is contended by the learned counsel for the Management that on 25.05.1995 the termination order was displayed in the notice board of the company but no clinching material has been produced in that respect rather it is apparent that when the company authorities knew that on 01.06.1996 i.e., after the expiry of the extended period of probation of three months, the petitioner would be deemed to be a permanent workman in view of the definition of 'probationer' as per the Certified Standing Orders, they utilized the absence of the petitioner in terminating his services. There are materials on record to suggest that the petitioner was actively involved in trade union activities. The case of the petitioner that due to such involvement, his services has been terminated cannot be lightly brushed aside.

The petitioner was working on probation in the company from 01.09.1995 till 22.05.1996 and therefore, he has worked for 265 continuous days.

It is no doubt true that the period of probation furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or to dispense with his service. Period of probation may vary from post to post or master to master and it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer. A probationer is on test and if his services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services. The mere fact that in response to the challenge the employer states that the services were not satisfactory, would not ipso facto mean that the services of the probationer were terminated by way of punishment.

In case of **V.P. Ahuja -Vrs.- State of Punjab reported in A.I.R. 2000 S.C. 1080**, it is held that a probationer, like a temporary servant, is also

entitled to certain protection and his services cannot be terminated arbitrarily nor can those services be terminated in a positive manner without complying with the principles of natural justice.

In view of the foregoing discussions, we are of the view that absence of the petitioner from his service since 23.05.1996 cannot be said to be unauthorized but as it appears that on account of the death of his mother after receipt of the telegram, he left for his village to perform obsequies ceremony after taking permission of the authorities. There is no allegation against him that he was habitually remaining absent during the period of probation or his work was unsatisfactory during such period. It appears that clandestinely his service was terminated with malafide intention arbitrarily because of the petitioner's participation in trade union activities without following the principle of natural justice. Therefore, we are of the humble view that the impugned award is not sustainable in the eye of law and accordingly, the same is set aside. The petitioner shall be put back in service and in the facts and circumstances; he is entitled to 50% of his back wages. With the aforesaid observation, the writ petition is disposed of.

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**2020 (I) ILR - CUT- 68**

**SANJU PANDA, J & S.K. SAHOO, J.**

WRIT APPEAL NO. 307 OF 2019

**UCO BANK REPRESENTED BY ITS GENERAL MANAGER & ANR.** .....Appellants

*.Vs.*

**SK FAYAJUDDIN** .....Respondent

**LETTERS PATENT APPEAL – Power of Division Bench while entertaining a Letters Patent appeal against the judgment of a Single Judge – Held, as under.**

*In the case of **Smt. Asha Devi**, it is held that the power of a Division Bench hearing a Letters Patent appeal under Cl. 10 from the judgment of a Single Judge in first appeal is not limited only to a question of law under section 100 Civil Procedure Code but it has the same power which the Single Judge has as a first Appellate Court. The limitations on the power of the Court imposed by Ss. 100 and 101 Code of Civil Procedure cannot be made applicable to an Appellate Court hearing a Letters Patent Appeal for the simple reason that a Single Judge of the High Court is*

*not a Court subordinate to the High Court. This writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948. Letters Patent Appeal is an intra Court Appeal where under the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench.* ***(Ref:- (1996) 3 SCC 52, Baddula Lakshmaiah -Vrs.- Shri Anjaneya Swami Temple)****. The Division Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law. This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made."*

**Case Laws Relied on and Referred to** :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka & Ors -Vs.- Umadevi & Ors.
2. A.I.R. 1974 S.C. 2048 : Smt. Asha Devi -Vs.- Dukhi Sao.
3. 2015 –II- Labour Law Journal 1 : Amarkant Rai -Vs.- State of Bihar.
4. 2018 -IV- Labour Law Journal 331 : Narendra Kumar Tiwari -Vs.- State of Jharkhand.
5. 1996) 3 SCC 52 : Baddula Lakshmaiah -Vs.- Shri Anjaneya Swami Temple).
6. (2006) 13 SCC 449 : B. Venkatamuni -Vs.- C.J. Ayodhya Ram Singh.
7. (2005) 6 Supreme Court Cases 243 : Umabai -Vrs.- Nilkanth Dhondiba Chavan.
8. (2016) 9 Supreme Court Cases 538 : Commissioner of Income Tax -Vrs.- Karnataka Planters Coffee Curing Work Private Limited.
9. (2006) 5 Supreme Court cases 515 : National Board of Examination -Vrs.- G. Ananda Ramamurti.
10. A.I.R. 1993 Orissa 180: State of Orissa -Vrs.- Janamohan Das.

For Appellants **:** M/s. Subrat Mishra**,** S. Mohapatra **&** B.N. Swarnakar

For Respondent : Mr. Surendra Nath Panda

JUDGMENT Date of Argument: 06.12.2019 : Date of Judgment:18.12.2019

***S.K. SAHOO, J.***

Aggrieved by the impugned judgment and order dated 20.06.2019 passed by the learned Single Judge of this Court in W.P. (C) No. 13355 of 2015, the unsuccessful appellants therein have preferred the present writ appeal.

2. The appellants were the opposite parties and the respondent was the petitioner in W.P.(C) No.13355 of 2015 wherein a prayer was made by the respondent seeking for a direction to the opposite party-Bank to regularize his services forthwith taking into account his past service, for the purpose of

calculating retirement benefits at least from the year 2007 when the services of his juniors were regularized and further to grant him all consequential service benefits by quashing the order dated 17.07.2015 under Annexure-14 passed by the appellant no.2 i.e. Zonal Manager, UCO Bank, Zonal Office, Sambalpur, Odisha (opposite party no.2 in the writ petition).

This Court allowed the writ petition and quashed the order dated 17.07.2015 under Annexure-14 passed by the appellant no.2 and directed the appellants to regularize the services of the respondent in the post of driver in which he has been discharging his duty on being duly selected pursuant to the advertisement dated 17.02.1995 under Annexure-1 to the writ petition.

3. The case of the respondent is that he was engaged as a personal driver by the Zonal Manager, UCO Bank, Bhubaneswar w.e.f. 27.03.1989 to drive the car of the Bank provided to the Zonal Manager for his official use by the Bank. Along with the respondent, others were also appointed for similar nature of job under the Bank. Pursuant to the notification issued under Annexure-1 dated 17.02.1995, the Bank invited applications in the prescribed proforma from the personal drivers of Branch Managers/Divisional Managers and subordinate staff members possessing the requisite driving licence for the post of driver to work at Dhera Branch. In response to same, the respondent applied for the post and on being selected, he was engaged as driver. The Zonal Manager vide letter dated 20.03.1995 sought approval for appointment of the respondent as permanent driver in the vacancy of driver for the currency chest of Dhera Branch to drive the Bank's cash van which was not responded to by the authority of Head Office of the Bank. The Zonal Manager of the UCO Bank again sought permission vide letter dated 23.02.1996 for appointment of the respondent as driver indicating therein that in case the same is not possible, to authorise him to engage the respondent at least on daily wage basis. The competent authority of the Head Office of the Bank authorised the Zonal Manager, Bhubaneswar as per letter dated 01.07.1996, to engage the respondent as casual driver on daily wage basis to drive the cash van of Dhera Branch. Accordingly, the respondent was engaged as casual driver on daily wage basis by the Zonal Manager to drive the cash van w.e.f. 10.07.1996. Subsequently, the Bank came out with a circular dated 30.05.2002 to empanel the daily wagers for regularization in bank service. The Branch Manager, Dhera Branch submitted a statement mentioning the details of the respondent's engagement, wages paid etc. as per format to the controlling office. Some of the casual drivers approached the CGIT, Kolkata for regularization of their services by filing Reference Case

No.45 of 2003 and the Tribunal passed the award on 17.07.2006 as "No Dispute" since the matter was settled amicably between the parties. Accordingly, the Board of Directors of UCO Bank approved the absorption of thirty nine personal drivers in regular service of the bank as Peon-cum-Farash as a one-time measure. Even though the personal drivers were absorbed on regular basis as Peon-cum-Farash, the case of the respondent was not taken into consideration for which he submitted a representation on 08.12.2014. The services of the respondent were neither regularized against the clear cut vacancy of driver nor were he absorbed regularly at par with his counterparts as Peon-cum-Farash. As his services were not regularized, he approached this Court in W.P.(C) No.4147 of 2015 and this Court by order dated 10.03.2015 disposed of the said writ petition directing the appellants to consider the representation filed by the respondent. In compliance of the same, the appellant no.2 passed the order dated 17.07.2015 under Annexure-14 to the writ petition rejecting the representation of the respondent dated 08.12.2014 stating, inter alia, that the demand for regularization/absorption in Bank's services is devoid of any merit and accordingly, his request was declined.

4. It is the case of the appellants that since the absorption of thirty nine personal drivers in regular service of the Bank was approved by the Board of Directors of UCO Bank as a one-time measure on the basis of settlement arrived between the parties during the pendency of Reference Case No.45 of 2003 pending before the CGIT, Kolkata which was filed by some casual drivers and the respondent's service was not regularised against a clear cut vacancy of drivers and he was never absorbed regularly at par with his counterparts as Peon-cum-Farash, there is no illegality or irregularity in the order of the appellant no.2 in rejecting the representation of the respondent.

5. The learned Single Judge in the impugned judgment after carefully considering the contentions raised by the learned counsel for the parties as well as facts pleaded on their behalf held that in the order impugned, it is categorically admitted that the personal drivers who were attached to different Branch Managers/Divisional Managers and subordinate staff members of the Bank have been absorbed as Peon-cum-Farash pursuant to the award dated 17.07.2006 passed by the CGIT, Kolkata in Reference Case No.45 of 2003 and if the petitioner was not absorbed as driver for some reason or other, he could have been absorbed as Peon-cum-Farash in compliance of such award but the same was not done by the concerned authority even though the juniors to the respondent were absorbed on regular

basis in the Bank. It was further held that when a clear cut vacancy was available at Dhera Branch and the Bank issued an advertisement on 17.02.1995 under Annexure-1 fixing eligibility criteria mentioned therein, pursuant to which the respondent submitted his application and having been selected, he got appointed as driver and discharged his duty w.e.f. 16.07.1996, it cannot be said that the judgment passed by the Hon'ble Supreme Court in the case of **Secretary, State of Karnataka and others - Vrs.- Umadevi and others reported in (2006) 4 Supreme Court Cases 1** is not applicable. Since there was availability of regular post and the respondent was selected by following due procedure and has been discharging his duty, he cannot be denied regularization of service, taking into consideration the length of service he had rendered in the post itself and when there is still requirement for the Bank. When the services of some personal drivers have been regularised by absorbing them as Peon-cum-Farash in the bank service, pursuant to the award dated 17.07.2006 passed by the CGIT, Kolkata, there was no justifiable reason available with the Bank not to regularise the services of the respondent at par with his counterparts whose services have already been regularised. Accordingly, the order dated 17.07.2015 passed by the appellant no.2 under Annexure-14 was quashed.

6. Mr. Subrat Mishra, learned counsel appearing for the appellants contended that irregular appointments can be regularised and not illegal appointments as observed by the Hon'ble Supreme Court in the case of **Umadevi** (supra). The respondent's initial appointment was illegal due to advertisement in the notice board and as no due procedure was followed in view of the ban on appointment. The respondent was not qualified to be regularised as per UCO Bank circular dated 19.10.1989. It is contended that since the services of some personal drivers were regularised as peons on the basis of CGIT award and the respondent did not approach the Tribunal for similar relief, he cannot claim parity with those persons whose services were regularised. He placed reliance in the case of **Umadevi** (supra) and also on the decision of the Hon'ble Supreme Court in the case of **Smt. Asha Devi - Vrs.- Dukhi Sao reported in A.I.R. 1974 S.C. 2048** and contended that since the findings of the learned Single Judge are perverse and the same is contrary to the records, it should be set aside.

Mr. Surendra Nath Panda, learned counsel appearing for the respondent on the other hand supported the impugned judgment and contended that since the respondent was discharging his duties as a personal

driver of the Zonal Manager, UCO Bank, Bhubaneswar w.e.f. 27.03.1989 and pursuant to notification issued under Annexure-1 dated 17.02.1995, he applied for the post and on being selected, he was engaged as driver and discharging his duties and the competent authority of the Head Office of the Bank authorised the Zonal Manager, Bhubaneswar as per letter dated 01.07.1996, to engage the respondent as casual driver on daily wage basis to drive the cash van of Dhera Branch and accordingly, the Zonal Manager passed the order and the respondent has served the Bank for more than two decades and services of similarly situated persons have been regularised since long and the posts are lying vacant and the Bank is utilizing the services of the respondent since long, there is no illegality in the order of the learned Single Judge in directing the appellants to regularise the services of the respondent in the post of driver and also quashing the order dated 17.07.2015 passed by the appellant no.2 under Annexure-14. He relied upon the decisions of the Hon'ble Supreme Court in the case of **Amarkant Rai -Vrs.- State of Bihar reported in 2015 –II- Labour Law Journal 1** and **Narendra Kumar Tiwari -Vrs.- State of Jharkhand reported in 2018 -IV- Labour Law Journal 331**.

7. Let us first examine the power of a Division Bench while entertaining a Letters Patent appeal against the judgment of a Single Judge.

In the case of **Smt. Asha Devi** (supra), it is held that the power of a Division Bench hearing a Letters Patent appeal under Cl. 10 from the judgment of a Single Judge in first appeal is not limited only to a question of law under section 100 Civil Procedure Code but it has the same power which the Single Judge has as a first Appellate Court. The limitations on the power of the Court imposed by Ss. 100 and 101 Code of Civil Procedure cannot be made applicable to an Appellate Court hearing a Letters Patent Appeal for the simple reason that a Single Judge of the High Court is not a Court subordinate to the High Court.

This writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948. Letters Patent Appeal is an intra Court Appeal where under the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench. **(Ref:- (1996) 3 SCC 52, Baddula Lakshmaiah -Vrs.- Shri Anjaneya Swami Temple**). The Division

Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law. This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made.

In the case of **B. Venkatamuni -Vrs.- C.J. Ayodhya Ram Singh reported in (2006) 13 Supreme Court Cases 449**, it is held that in an intra-court appeal, the Division Bench undoubtedly may be entitled to reappraise both questions of fact and law, but entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the Single Judge. Even a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint. Similar view was taken in the case of **Umabai -Vrs.- Nilkanth Dhondiba Chavan reported in (2005) 6 Supreme Court Cases 243**. In the case of **Commissioner of Income Tax - Vrs.- Karnataka Planters Coffee Curing Work Private Limited reported in (2016) 9 Supreme Court Cases 538**, it is held that the jurisdiction of the Division Bench in a writ appeal is primarily one of adjudication of questions of law. Findings of fact recorded concurrently by the authorities under the Act and also in the first round of the writ proceedings by the learned Single Judge are not to be lightly disturbed.

A writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible on the question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, were the case come initially before it. The exercise of discretion by the Single Judge should manifestly be wrong which would then give scope of interference to the Division Bench.

8. Coming to the facts of the case, it is not in dispute that the respondent has rendered his service as personal driver of the Zonal Manager, UCO bank, Bhubaneswar w.e.f. 27.03.1989. It is also not dispute that a notification for filling up the post of Bank's driver at Dhera Branch was issued on 17.02.1995 in which applications were invited in the enclosed proforma from personal drivers of Branch Managers/Divisional Managers and subordinate staff members who possess the requisite driving licence. The age, qualification and other guidelines were given in the said notification and it was circulated to all Branches/Offices in the Orissa Zone of the Bank. The last date of receiving the applications was fixed to 04.03.1995. The respondent having satisfied the requirement of eligibility criteria mentioned in the notification, submitted his application for selection of driver and accordingly, after following the due procedure of selection, the respondent was selected for the post of driver. The Zonal Manager vide letter dated 20.03.1995 intimated the Head Office that they notified the vacancy by inviting applications from the eligible persons being working in the subordinate carder and since no other applications except that of the respondent was received and he fulfilled the eligibility criteria and was the senior most among the existing personal drivers, his name was recommended. The restrictions imposed as per circular dated 28.01.1991 was indicated in the aforesaid letter dated 20.03.1995 and a statement containing the biodata of the respondent was enclosed and request was made to sanction the appointment of the driver for Dhera Branch. Subsequently, another letter dated 23.02.1996 was issued by the Zonal Manager to the Head Office making reference to the earlier letter dated 20.03.1995 requesting to authorise to engage the respondent as driver on daily wage basis. The Head Office in its letter dated 01.07.1996 addressed to the Zonal Manager passed order for engaging the respondent as casual driver on daily wage basis to drive the cash van of Dhera Branch at the rates applicable to the empanelled casual workers and for payment of pro rata allowances payable to a driver and accordingly, the Zonal Manager issued letter dated 10.07.1996 engaging the respondent as casual driver on daily wage basis to drive the cash van of the Branch. It is not in dispute that since the date of his initial appointment, the respondent is discharging his duties on daily wage basis against the substantive vacant post of driver and in the meantime twenty three years have passed. It is also not dispute that services of some personal drivers have been regularised in the meantime those who are juniors to the respondent by absorbing them as Peon-cum-Farash in the Bank service. The contention of the learned counsel for the appellants that the respondent should have approached the Tribunal to

get the relief cannot be a ground to deny such relief to him particularly when there is availability of regular posts of driver and the petitioner was selected for the post in pursuance to the advertisement for such posts way back in 1995 and he is discharging his duties in the said post and there is any blemish record against him.

Though it is contended by the learned counsel for the appellants that the advertisement was illegal as it was issued in the notice board but there is no material in that respect rather the notification relating to filling up the post of Bank's driver at Dhera Branch seems to have communicated to all the Branches/Offices in the Orissa Zone. It is not the case of the appellants that there was no requirement for engaging a driver at the relevant point of time, on the other hand the Head Office being satisfied about such requirement authorised the Zonal Manager in its letter dated 01.07.1996 to engage the respondent as casual driver. Even though there was restriction imposed on regular appointment but since there was necessity for such appointment and after due notification and selection, the Head Office authorised the Zonal Manager for the appointment of the respondent as casual driver, it cannot be said that there is any illegality in the initial appointment as contended by the learned counsel for the appellants. Though the learned counsel for the appellants contended that due procedure was not followed in the appointment of the respondent but such type of submission is vague inasmuch as it is not clarified as to which specific procedure was not followed in the appointment more particularly when the notification issued by the authorities for filling up the post of driver not only indicated the age, qualification of the applicant but also other guidelines. It is also the case of the respondent that since he fulfilled all the eligibility criteria, taking into account his past experience as a personal driver of the Zonal Manager, he got selected and accordingly his name was recommended for appointment which was accepted by the Head Office.

In the case of **Umadevi** (supra), the Hon'ble Supreme Court passed the order that the claim acquired by a person in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude so as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. In our humble view, the learned Single Judge was justified in holding that the ratio laid down in the case of **Umadevi** (supra) is very much applicable to the present case as there was a clear cut vacancy at Dhera Branch for which an advertisement was issued on 17.02.1995 fixing

criteria mentioned therein, pursuant to which the respondent submitted his application and having been selected, he got appointed as driver and discharged his duty since July 1996 and therefore, he cannot be denied regularization of his service.

In the case of **Amarkant Rai** (supra), the Hon'ble Supreme Court held as follows:

> "15. Considering the facts and circumstances of the case that the Appellant has served the University for more than 29 years on the post of Night Guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the Appellant retrospectively w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar)."

In the case of **Narendra Kumar Tiwari** (supra), the Hon'ble Supreme Court held as follows:

> "11. Under the circumstances, we are of the view that the Regularisation Rules must be given a pragmatic interpretation and the Appellants, if they have completed 10 years of service on the date of promulgation of the Regularisation Rules, ought to be given the benefit of the service rendered by them. If they have completed 10 years of service they should be regularised unless there is some valid objection to their regularisation like misconduct etc.
>
> 12. The impugned judgment and order passed by the High Court is set aside in view of our conclusions. The State should take a decision within four months from today on regularization of the status of the Appellants."

9. The learned counsel for the appellants contended that the respondent has not made specific prayer in the writ petition for regularization of his services in the post of driver and therefore, it was not proper on the part of the learned Single Judge to grant him such relief. He placed reliance in the case of **National Board of Examination -Vrs.- G. Ananda Ramamurti reported in (2006) 5 Supreme Court cases 515** wherein it is held that the High Court was not justified in granting a relief not sought for by the respondents in the writ petition.

In the writ petition, the prayer of the respondent who was the petitioner in the said case is as follows:-

> "Under the above stated facts, the petitioner most respectfully prays that Your Lordship may graciously be pleased to issue a Rule of NISI calling upon the Opp. party Bank to regularise him in the Bank forthwith giving the benefit of past service for the purpose of retirement benefits, at least from 2007, i.e. the date of regularization of his juniors so that he can live retirement period peacefully by making use of the benefits at his dotage and quashing Order dtd.17.07.2015 (Annexure-14) and oblige.

And/or may pass such order/orders, as this Hon'ble Court may deem fit and proper.

And for this act of your kindness the petitioner as in duty bound ever pray."

The impugned order dated 17.07.2015 under Annexure-14 which was challenged in the said writ petition relates to consideration of the representation dated 08.12.2014 of the respondent, casual driver, Dhera Branch, Angul, Odisha towards his regularization in bank services. In the entire body of the writ petition, the respondent has indicated as to how he was initially engaged as personal driver by the Zonal Manager and how he applied for the post of driver as per the notification dated 17.02.1995 and how he got selected on account of fulfilling all the eligibility criteria and accordingly appointed on the daily wages basis by the Zonal Manager, Bhubaneswar on being authorised by the competent authority of the Head office of Bank, how he was discharging the duty of the driver since then and how the juniors were regularised ignoring his case. The respondent has specifically mentioned that he was continuing in the permanent vacancy and therefore, his services be regularised. In the prayer portion of the writ petition, since it is mentioned 'And/or may pass order/orders, as this Hon'ble Court may deem fit and proper', even though it is not specifically mentioned in the prayer portion to direct the appellants to regularise the services of the respondent in the post of driver but in view of the settled principle of law that a writ Court has ample power to modify reliefs to make that reliefs available which would meet the ends of justice (**Ref:- State of Orissa -Vrs.- Janamohan Das, A.I.R. 1993 Orissa 180**), the contentions raised by the learned counsel for the appellants is not acceptable.

10. In view of the foregoing discussions, we are of the humble view that the view taken by the learned Single Judge is reasonable and logical and there is no patent error on the face of the impugned judgment or any perversity therein and therefore, we are not inclined to interfere with the same. Accordingly, the writ appeal stands dismissed.

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**2020 (I) ILR - CUT- 78**

**S.K. MISHRA, J & DR. A.K. MISHRA, J.**

JCRLA NO. 102 OF 2004

**BANAMALI JANI** .....Appellant

*.Vs.*

**STATE OF ORISSA** .....Respondent

**CRIMINAL TRIAL – Offence under section 302 of the Indian Penal Code, 1860 – Conviction – Appeal – Appellant submits that the prosecution has failed to prove its case as no motive has been established – The question cropped up as to whether the absence of motive will hamper a safe conviction when the prosecution has established its case beyond all reasonable doubt from other circumstantial evidence? – Held, No.**

*"We take into consideration the reported case of* ***Mani Kumar Thapa V. State of Sikkim****; AIR 2002 Supreme Court 2920; whereas at paragraph-4 of the judgment, the Hon'ble Supreme Court has held that if the prosecution is able to establish beyond all reasonable doubt from other circumstantial evidence that it is the accused alone could have committed the murder, the absence of the motive will not hamper a safe conviction. In other words, the Hon'ble Supreme Court has stated that in all criminal cases, it is not necessary to prove the motive of commission of the crime. In the case of* ***Baituliah and another V. State of U.P.****; (1998) 1 Supreme Court Cases 509, the Hon'be Supreme Court has held that it is very well established by catena of cases of the Supreme Court that when the occurrence was spoken to by an eye witness and the same was supported by medical report, it will not be necessary to investigate the motive behind such commission of offence. In other words where a murderous assault has been established by clear ocular evidence, motive pales into insignificance as rightly found by the High Court. We are of the opinion that though in this case, the prosecution has not examined any witnesses to prove the motive, the material available on record should be reassessed to find out whether the conviction by the learned Addl. Sessions Judge is correct or not. Failure to prove the motive only will not make the prosecution case vulnerable." (Paras 8 & 9)*

**Case Laws Relied on and Referred to** :-

1. AIR 2002 SC 2920 : Mani Kumar Thapa Vs. State of Sikkim.
2. (1998) 1 SCC 509 : Baituliah and another Vs. State of U.P.

For Appellant : M/s.N.Patnaik, S.K.Dey, G.Nayak & N.Patnaik.

For Respondent : Addl. Gov. Adv.

JUDGMENT Date of Judgment : 25.7.2019

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

In this case the convict, Banamali Jani, assails his conviction under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the I.P.C. for brevity) and sentence of imprisonment for life passed by the learned Addl. Sessions Judge, Nabarangpur as per judgment dated 20.8.2004 in S.C. No.12/2001.

2. Bereft of all unnecessary details, the case of the prosecution is that in the morning of 19.3.2001 Punei, the wife of P.W.1 along with her cousin

Ashai were near a tank for fishing. The accused picked up quarrel with them and gave blows to both the ladies with the help of an exe. The informant-P.W.1 and others, who were working at a distant place, receiving information about the quarrel, rushed to the spot and found Punei lying dead and the accused was giving blows to Ashai. They asked the accused not go give blows, but the accused threatened them raising axe for which the witnesses receded. Then the accused fled away from the spot and it was found that both the ladies were dead. The matter was reported to the I.I.C., Nabarangpur Police Station, who registered Nabarangpur P.S. Case No.26/2001 for offence under Section 302 of the I.P.C. and took up investigation. In course of investigation, necessary steps like conducting post mortem examination, seizure of material objects, arrest of accused etc. were taken by the Investigating Officer, P.W.11. After completion of investigation, finding a prima facie case, he submitted charge sheet against the accused under Section 302 of the I.P.C.

3. The plea of the accused is of complete denial. Additionally, they have made a feeble attempt by giving suggestion that the accused was insane at that time, but no material has been placed before the court to show that the accused was insane at that time.

4. In order to prove its case, the prosecution has examined as many as eleven witnesses. P.W.1, Dambaru Bhotra, who happens to be the husband of Punei Bhotruni one of the deceased, is the informant of the case. P.W.1, P.W.3-Gopi Bhotra, P.W.4-Jagat Bhotra and P.W.6-Manu Pujari are the eye witnesses to the occurrence. P.W.8-Dr. Pravakar Das, P.W.10-Dr. Biswajit Mohanty, are the two doctors had conducted postmortem examination on the dead bodies of both the deceased. P.W.9-Dr.Govinda Biswas has examined the accused on police requisition. P.W.11-Suresh Kumar Panda, as stated earlier, is the I.O. of the case. The rest of the witnesses are formal witnesses. In addition to this, the prosecution has exhibited sixteen exhibits. Ext.1 is the F.I.R. and Ext.16 is the chemical examination report. Additionally, three material objects i.e. Tangia, one white colour blood stained saree and one green colour saree were led into evidence as material objects.

5. The defence, on the other hand, neither examined any witness nor proved any document.

6. The learned Additional Sessions Judge, Nabarangpur taking into consideration the narration of the witnesses P.Ws.1,3,4 and 6 corroborated by

medical evidence and production of the weapon of offence in the court came to the conclusion that the prosecution has brought home the case which alleges against the accused. Hence he proceeded to convict the appellant under Section 302 of the I.P.C. and sentenced him to undergo imprisonment for life.

7. Learned counsel for the appellant submits that the prosecution has failed to prove its case as no motive has been established by the prosecution in this case. Secondly, it is contended that the prosecution has led evidence to the effect that one Tankadhr Bhotra produced the weapon of offence, i.e. M.O.1 before the I.O., who seized the same. But the said Tankadhar Bhotra has not been examined as witness for the prosecution. It is also argued by the learned counsel for the appellant that one Ashadu Jani, who informed the eye witness to the occurrence, has not been examined by the prosecution. It may be noted that Ashadu Jani happened to be the uncle of the accused.

8. We take into consideration the reported case of ***Mani Kumar Thapa V. State of Sikkim***; AIR 2002 Supreme Court 2920; whereas at paragraph-4 of the judgment, the Hon'ble Supreme Court has held that if the prosecution is able to establish beyond all reasonable doubt from other circumstantial evidence that it is the accused alone could have committed the murder, the absence of the motive will not hamper a safe conviction. In other words, the Hon'ble Supreme Court has stated that in all criminal cases, it is not necessary to prove the motive of commission of the crime. In the case of ***Baituliah and another V. State of U.P.***; (1998) 1 Supreme Court Cases 509, the Hon'be Supreme Court has held that it is very well established by catena of cases of the Supreme Court that when the occurrence was spoken to by an eye witness and the same was supported by medical report, it will not be necessary to investigate the motive behind such commission of offence. In other words where a murderous assault has been established by clear ocular evidence, motive pales into insignificance as rightly found by the High Court.

9. We are of the opinion that though in this case, the prosecution has not examined any witnesses to prove the motive, the material available on record should be reassessed to find out whether the conviction by the learned Addl. Sessions Judge is correct or not. Failure to prove the motive only will not make the prosecution case vulnerable.

10. The second contention is that the man who produced the axe before the I.O., namely Tankadhar Bhotra has not been examined by the prosecution. We have given our anxious thought to the aspect of examination

of evidence of P.W.11. The I.O. says that he seized the weapon of offence, i.e. M.O.1 on production by Tankadhar Bhotra under seizure list, Ext.4. The defence has not cross examined the Investigating Officer on this score to test the veracity of the statement not even a suggestion etc. has been given to this witness to the effect that Tankadhar Bhotra had not produced the weapon of offence before him and that he seized the same. So if in the trial the seizure of the weapon of offence on production by Tankadhar Bhotra is not disputed for the first time the same cannot be raised in appeal. Moreover, no foundation has been laid to raise such a point to show that the prosecution case is vulnerable. So we are not inclined to interfere in the matter only because Tankadhar Bhotra has not been examined as a witness in this case.

11. Now, coming to the question of homicidal nature of the death, the learned counsel for the defence has not challenged the same. However, for the sake of appreciation of evidence, we have examined the evidence of two doctors who had conducted the post mortem examination. P.W.8, Dr. Pravakar Das, on 20.3.2001 had conducted post mortem examination on the dead body of the deceased Punei Bhotruni and he found that the head of the deceased was totally separated from the body except skin which was intact on the posterior side of the back of the neck of the deceased. He found the following injuries:-

> (i) Skin around the neck extending from suprasternal notch to above hyoid bone except mid-portion of the back of the neck from C-3 to C-6 vertibra level were severed with bloo clots and blood discharge. All the muscles front, back, right and left side of the neck were served multiple pieces. Thyroid and cricoid cartilags, hyoid bone, larynx, trachea oesophagus were severed into multiple pieces. Vessels common carotidartery external carotidartery, vertebral artry juglar veins were served into multiple pieces, vertibra from c-3 to c-6 were served with corresponding spinal cord were also severed into multiple pieces.
>
> (ii) Lacerated injury on left shoulder of sixe 4”X3”X1”.
>
> (iii) Lacerated injury on the posterior aspect of mid-fore-arm on left side of size 2” x 1” x 1” with fracture of left-ulnar bone projected outside the skin.

12. This witness further stated that all the above injuries were ante mortem in nature. The cause of death is due to loss of vital structure of the neck caused by heavy sharp cutting weapon. He stated that the time since death of post mortem examination is within 36 hours. Ext.5 is the post mortem examination report which corroborates the statement made by the said witness in court. He has further stated that on 16.4.2001 on police requisition and on production of weapon of offence, he has opined that the

injury nos.1 to 3 described in the Ext.5 would be caused by the said Tangia and, therefore, he has prepared a report which has been marked as Ext.6. He has further stated in cross-examination that injury nos.1 to 3 can also be possible by other sharp cutting weapon, but it is not possible by fall on the hard and rough surface.

13. P.W.10, Dr. Biswajit Mohanty, has stated on 20.3.2001 he had conducted post mortem examination on the dead body of Ashai Bhotra and found the following injuries:-

> (i) Around the next from supra-sternal notch to above hyoid bone except the back of the neck were cut into multiple pieces and all the muscles front right and left side of the neck were cut into multiple pieces. Thyroid larynx trachea up to supra-sternal notch were cut into multiple pieces. Common carotid artery external carotid artery, vertebral artery, jugular vessels were cut into multiple pieces. Vertibra from C-4 to C-6 along with corresponding spinal cord were cut into multiple pieces.
>
> (ii) Lacerated injury on right frontal region of 1" x 1" x 1" along with fracture of right frontal bone. One haematoma of size 2" x 1" on right frontal lobe. All the viseras are intact.

14. This witness has stated that all the injuries were ante mortem in nature. The time since death of the deceased is fixed at 36 hours from the post mortem examination. The cause of death was due to loss of vital structure of neck caused by heavy sharp cutting weapon. Ext.8 is the post mortem examination report. He has stated on oath that on 16.4.2001 he examined the weapon of offence, M.O.1, and opined that the injury nos.1 and 2 found on the dead body of the deceased could be caused by the said Tangia. Ext.9 is his report. In cross-examination, he has stated that the injury no.2 can be possible by fall on the hard and rough surface. Injury no.1 can also be caused by successive strokes with heavy sharp cutting weapon. He has stated that it can be possible by four successive blows. He has stated that the death of the deceased was homicidal in nature.

15. Thus, from the evidence of these two witnesses given in the court under oath have not been shaken by cross examination. There is no reason to come to the conclusion that the evidence given by these witnesses are not trust worthy and should he thrown away. Thus, it is established by clear, cogent and reliable evidence that the death of the deceased Punei Bhotruni and Ashai Bhotruni were caused by exe blows, i.e. M.O.I and their deaths are homicidal in nature.

16. Coming to the question of complexity of the appellant in commission of the crime, it is necessary to examine the evidence of eye witnesses. P.W.1 the informant, who happens to be the husband of Punei Bhotruni, has stated in the court under oath that about a year ago (from the date of his deposition), the occurrence took place around 8.A.M. near a chuan (a water reservoir) of Raju Babu in village Tenlengaguda. This witness himself, Manu Bhotra, Gopi Bhotra, Madhu Bhotra and some other were digging earth in the land of Raju. In the mean time, Ashadu Jani came there and told them that the accused who was his brother's son was quarreling with two ladies and that witness should separate them. Therefore, they went to the distance of about one k.m. and found there the accused assaulting Ashai Bhotruni by a Tangia. By then the accused had already killed his wife Punei Bhotruni and Punei Bhotruni was lying dead at that spot. Seeing this witness, the accused fled towards his village with the Tangia and Ashai Bhotruni died at the spot due to his assault. He has further stated that they went to the village of the accused to search him. He has been cross-examined by the State defence before the court of original jurisdiction he has stated that he has seen the accused assaulted both the deceased, but he cannot say the number of blows by Tangia by the accused. He has further stated that about 8 persons including him had gone to the earth work. He can name all eight persons. He has stated that when he reached at the spot, many persons were present there. A contradiction has been brought in his evidence that he has not stated before the I.O. that Ashai Bhotruni was his sister-in-law and that the accused was assaulting Ashai Bhotruni by means of Tangia. At paragraph-10, P.W.11 has also admitted that this witness has not stated that Ashai Bhotruni was his sister-in-law and the accused was assaulting Ashai by Tangia. P.W.3 is another eye witness, who has stated that when they reached at the spot they saw that the accused has already killed a female there and killed another female by means of a Tangia. They found both the ladies lying on the ground with bleeding injuries. They shouted and said the accused not to assault, but the accused chased them with that tangia and threatening to assault them for which they receded to a distance out of fear. In the cross In the cross-examination, the defence is brought out a contradiction to the effect that this witness has not stated to the I.O. that the accused killed the two ladies by means of tangia and when the accused chased them they retreated and that the accused escaped and that the lady killed earlier was Punei and the lady killed later was Ashai. Similar is the evidence of P.Ws.4 and 6. As far as P.W.4 is concerned one contradiction has been brought that he has not stated before the I.O. that he knew the accused from the childhood and that the

accused chased them with the Tangia and that Asadu Jani told them that the accused was assaulting the two ladies by Tangia. P.W.6 has also cross-examined and it is brought out from the mouth that he has stated before the I.O. that himself, Jagat, Domu and Gopi went there to see what happened; and that the lady was struggling after assault and they saw the assault from a distance of 10 cubits and that the accused escaped with 'dhala' and thereafter himself, Jagat and Gopi went to Police Station and Domburu and Domu guarded the dead body. In fact, the contradiction as far as P.W.6 is concerned though the suggestions have been made that he has not stated, the same has not been proved by confronting the statement recorded under Section 161 of Cr.P.C. to the I.O. So the contraction is not proved.

17. Having carefully gone through all these contradictions brought out by the State defence counsel, we are of the opinion that these are all contradictions, it can be termed as peripheral probative short fall without having any effect on the core evidence stated to by four eye witnesses. In fact nothing has been brought out in the cross-examination by defence in this case to disbelieve the evidence of P.Ws.1,3,4 and 6. Therefore, the narration is also supported by the evidence of Medical Officers P.Ws.9 and 10 both with respect to the injuries that they have found on the dead bodies of the deceased and the opinion they have rendered on examination of M.O.1. Moreover, M.O.1 was produced in Court and on chemical examination it was found to have stained with her blood.

18. The non-examination of Ashadu Jani, the person, who allegedly informed the eye witnesses about the quarrel between the accused and two ladies will not be fatal to the prosecution case as it is neither the case of the prosecution that he is an eye witness to the occurrence nor the substratum of the prosecution case depends on his evidence. Moreover, when by examination of four eye witnesses, the prosecution has brought home the charges levelled against him, the convict cannot take the plea that such non-examination of the witness, who is not expected to depose regarding the actual incident, will be fatal to the case of the prosecution. Moreover, the defence has not given any suggestion to any of the witnesses who have deposed as eye witnesses to the occurrence that Ashadu Jani has not informed about the incident to them. So, we are of the opinion that non-examination of the said Ashadu Jani will not make the case of the prosecution vulnerable.

19. Keeping in view the aforesaid evidence, which is clinching in nature, we are of the opinion that non-examination of Ashadu Jani is of no

consequence, as it is not the case of the prosecution that he is the witness to the main occurrence and the accused giving blows on the neck of both the deceased. Hence, we come to the conclusion that the learned Addl. Sessions Judge has perspicacious view of the evidence on record and has come to a correct conclusion by holding the accused guilty of the offence under Section 302 of the I.P.C. We, therefore, find no reason to interfere with the same. Hence the JCRLA is dismissed. L.C.R. be returned to the lower court immediately.

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**2020 (I) ILR - CUT- 86**

**S. K. MISHRA, J & DR. A. K. MISHRA, J.**

DSREF NO. 1 OF 2018 & JCRLA NO. 46 OF 2018

**STATE OF ODISHA** ……..Appellant

*.Vs.*

**DENGUN SABAR & ORS.** ……. Respondents

**JCRLA No. 46 of 2018**

**DENGUN SABAR & ORS.** ……Appellants

*.Vs.*

**STATE OF ODISHA** ……Respondent

Counsel for Appellants : Mr. Ratikanta Mohapatra, Amicus Curiae.
Counsel for Respondent : Mr. Janmejaya Katikia, Addl. Govt. Adv.
Counsel for Informant : M/s. Asit Kumar Choudhury, A. K. Mishra, A. K. Panda, K. C. Sarangi and N. K. Sahoo.

**(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 366 – Confirmation of death sentence – The gravamen of the charge that the accused persons in furtherance of common intention suspecting the practice of Witchcraft abducted, criminally intimidated and murdered three persons and caused disappearance of the evidence with the intention to screen the offenders – Duty of High court while dealing with the reference – Held, the duty of the High Court in dealing with reference U/s.366 of Cr.P.C. is not only to see whether the order passed by the Addl. Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted persons.** (Para 8)

**(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 366 – Confirmation of death sentence – Addl. Sessions Judge has committed an error in convicting the accused persons U/s.365 of the IPC without framing charge – Effect of – Held, the offence U/s.365 of the IPC provides the kidnapping or abducting with intent to cause that person to be secretly and wrongfully confined – This offence U/s. 365 of the IPC is not a minor offence to Section 302 of the IPC – The ingredients of this offence are not ingrained in the offence of murder – Offence of abducting is not a cognate offence to murder – What follows from the above reasoning is that a failure of justice has been occasioned due to such conviction U/s.365 of the IPC without charge – It is not a curable irregularity – As grave error has been committed in not framing charge and thereby failure of justice has been occasioned, we feel it just and proper for the interest of justice to direct further inquiry U/s.367 of Cr.P.C. – Matter remanded.** (Paras 10 to 12)

**Case Laws Relied on and Referred to** :-

1. AIR 2011 SC 3114 : Rafiq Ahmed @ Rafi Vs. State of U.P.
2. (2012) 9 SCC 650 : Bhimanna Vs. State of Karnataka.

JUDGMENT Date of Hearing: 11.09.2019 & Date of Judgment : 5.11.2019

***DR. A.K. MISHRA, J.***

Learned Addl. Sessions Judge, Gunupur vide judgment dated 11.04.2018/13.04.2018 in Criminal Trial No.07 of 2017 convicted nine appellants U/s. 302/201/365/342/506/34 of the I.P.C. and Section 4 of the Odisha Prevention of Witch Hunting Act, 2013 and passed the following sentence.

| **Offence** | **sentence** |
|---|---|
| U/s.302 of the IPC | All the convicts are sentenced to death for committing offence of murder punishable U/s.302 Of the IPC and to pay a fine of Rs.50,000/-each in default to undergo imprisonment for one more year. Each of the convicts be hanged by their neck till they are individually dead. |
| U/s.201 of the IPC | Each of the convicts shall undergo R.I. for three years and to pay fine of Rs.5000/- each i.d. to SI for three months. |
| U/s.365 of the IPC | Each of the convicts shall undergo R.I. for three months and to pay fine of Rs.5000/- each i.d to SI for three months. |
| U/s.342 of the IPC | Each of the convicts shall undergo SI for three months. |
| U/s.506 of the IPC | Each of the convicts shall undergo SI for two years. |
| Section 4 of the Odisha Prevention of Witch Hunting Act, 2013 | Each of the convicts shall undergo SI for one year and to pay fine of Rs.1000/- i.d. for one month. |

All the sentences were to run concurrently on modification/commutation/remission of sentences or pardon granted to the convicts.

Learned Addl. Sessions Judge also allowed compensation in the following manner:-

> "From out of Rs.61,000/- fine imposed on each of the convicts, Rs.41,000/- each shall be paid as compensation to the informant Melita Sabar and her two younger brothers combinedly for equal distribution among them, if the same is realised. Additionally, as they have become Orphans and lost three closest members of their family along with house and property, Victim Compensation Committee is requested to pay compensation to them for their loss in terms of 2016 Scheme applicable for loss of human life. A copy of the judgment be accordingly forwarded to the District Compensation Committee through the Secretary, District Legal Services Authority, Rayagada."

2. In DSREF No.1 of 2018, the record has been submitted to the court for confirmation U/s.366 of the Cr.P.C. All the convicts have preferred appeal from jail U/s.383 of the Cr.P.C. resulting JCRLA No.46 of 2018. Both the reference and appeal are heard together.

Mr. Janmejaya Katikia, learned Addl. Govt. Advocate argued the matter on behalf of State, Mr. Ashok Ku. Mishra, learned counsel for the informant and Mr. Ratikanta Mohapatra, learned State Defence Counsel appointed on behalf of the appellants through Legal Services Authority in jail criminal appeal advanced their respective submissions both orally and in written.

3. The gravamen of the charge that the accused persons in furtherance of common intention suspecting the practice of Witchcraft abducted, criminal intimidated and murdered three persons namely Asina Sabar, Ambaya Sabar and Ashamani Sabar on 9.9.2016 at 8 P.M. at village Kitum and caused disappearance of the evidence with intention to screen the offenders.

The informant Melita Sabar is the daughter of Asina and Ambaya and the younger sister of the deceased Ashamani Sabar. The incident was unfolded by the informant lodging the F.I.R. on 16.9.2016 at Puttasingh P.S. As per the informant, on 9.9.2016 at evening she had gone to the house of one Anita Sabar, a co-villager to deliver corn. After half an hour she returned and did not find the family members in the house. One Damanta Sabar informed that her parents and elder sister were confined in the cowshed of

Girijana Sabar. She rushed there. On her arrival, she was also tied against stump and found that all the accused persons including one Jamsu Sabar (child in Conflict with Law) were assaulting her parents and elder sister who were tied separately against stumps. They were accusing them as to why they practised sorcery as a result of which two of their co-villagers namely Jamjam and Biranti died. They also blamed them to have caused fever and sickness to Ajanta, Ghunguri and Bubuna by sorcery. The accused persons were trying to extract confession from them and for that they were threatening to kill them. The parents of the informant pleaded their ignorance. Accused Dasanta brought one injection syringe with pesticide and injected the same in the mouth, cheek and eyes of her sister Ashamani. They assaulted her parents and sister giving kicks and fist blows. They also gave blows by means of lathis. Her parents and elder sister became half-dead. The accused persons took her sister outside. After some time, her mother was taken up and thereafter her father. The accused persons also untied her and threatened to kill her brothers if the incident was disclosed before anyone including police.

Out of fear, she could not inform the matter before others. On 15.09.2016, she came to know that all the accused persons disinterred the dead bodies from their burial and cremated all the three cadavers. She mustered courage and lodged an F.I.R. on 16.09.2016. It was scribed by one Janathan Lima. F.I.R. was registered U/s.302/201/342/506/34 of the IPC and under Section 4 of the Odisha Prevention of Witch Hunting Act, 2013 (hereinafter called as 'OPWH Act') vide Puttasing P.S. Case No.17 dated 16.09.2016. The I.I.C., Puttasing P.S. took up investigation who is examined as P.W.11.

4. In course of investigation, the statement of the informant U/s.164 of Cr.P.C. was recorded on 19.09.2016. The spot was visited. On the leading to discovery by accused Dengun Sabar, one 'lathi' as weapon of offence was seized vide Ext.5. The Scientific Team collected some charred bones and ashes from the spot. It was packed, sealed and seized under Ext. 3 and 4. The said bones were sent for D.N.A. Examination. D.N.A. profile could not be conducted as the bones were burnt completely and required quantity of D.N.A. could not be extracted vide report of S.F.S.L. No.1523 dated 2.2.2017 (Ext.21).

Investigating Officer also examined witnesses U/s.161 Cr.P.C. The accused persons were arrested. After completion of investigation, charge-

sheet No.01 dated 12.01.2017 was submitted U/s.302/201/342/506/34 of the IPC read with Section 4 of OPWH Act against all the accused persons.

5. Learned SDJM, Gunupur took cognizance and committed the case to the court of learned Addl. Sessions Judge, Gunupur. On 7.7.2017, charge was framed U/s.302/201/342/506/34 of the IPC and under Section 4 of OPHW Act.

All the accused persons pleaded not guilty and faced trial. The prosecution examined 11 witnesses in all. Defence examined none. 24 exhibits were marked and 15 material objects were admitted to record.

6. P.W.1 is the informant. P.W. Nos.2 to 8 are co-villagers. P.W.9 is the maternal uncle of the informant. P.W.10 is a Constable. P.W.11 is the Investigating Officer. P.Ws.2 to 7 are declared hostile. P.W.8 does not support the prosecution taking the plea of alibi.

6-I. The plea of defence was denial simplicitor.

7. Learned Addl. Sessions Judge analysed the evidence on record and held the accused persons guilty and passed sentence as stated above. While holding the accused persons guilty for the offence U/s.302/201/365/342/506/34 of the IPC and under Section 4 of OPWH Act, learned Addl. Sessions Judge has specifically observed in the judgment at para-35 that the accused persons were not charged with offence for commission of abduction punishable U/s.365 of the IPC.

We carefully perused the written note of submissions filed by each of the learned counsel and the citations. Bestowing our keen attention, the materials on record are carefully scrutinised.

Learned Addl. Sessions Judge has convicted the accused persons U/s.365 of the IPC without charge. Learned Addl. Govt. Advocate has not subscribed his legal view on that.

8. The duty of the High Court in dealing with reference U/s.366 of Cr.P.C. is not only to see whether the order passed by the Addl. Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry if the Court consider it desirable in order to ascertain the guilt or the innocence of the convicted persons. Conviction can be made in respect of minor offence where the accused is charged with on major offence. The

major and minor offences must be cognate offences. Section 222 of the Cr.P.C. is in the nature of general provision which empowers the Court to convict the accused for a minor offence even though the charge has been framed for a major offence.

In the case of **Rafiq Ahmed @ Rafi vrs. State of U.P.** reported in AIR 2011 SC 3114, the Hon'ble Apex Court has clarified the meaning of cognate offence and observed as follows:-

> "**23.** Having stated the above, let us now examine what kind of offences may fall in the same category except to the extent of 'grave or less grave'. We have already noticed that a person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record.
>
> xxx xxx xxx xxx
>
> **25.** This expression has also been recognized and applied to the criminal jurisprudence as well not only in the Indian system but even in other parts of the world. Such offences indicate the similarity, common essential features between the offences and they primarily being based on differences of degree have been understood to be 'cognate offences'. Black's Law Dictionary (English Edition) defines the expression 'cognate offences' as follows.
>
> "Cognate offences. A lesser offence that is related to the greater offense because it shares several of the elements of the greater offense and is of the same class or category. For example, shoplifting is a cognate offence of larceny because both crimes require the element of taking property with the intent to deprive the rightful owner of that property."
>
> **"12.** xxx xxx xxx xxx
> There can be cases where it may not be possible at all to punish a person of a less grave offence if its ingredients are completely different and distinct from the grave offence. To deal with this aspect illustratively, one could say that a person who is charged with an offence under Section 326 may not be liable to be convicted for an offence under Section 406 IPC because their ingredients are entirely distinct, different and have to be established by the prosecution on its own strength. In other words, the accused has to be charged with a grave offence which would take within its ambit and scope the ingredients of a less grave offence. The evidence led by the prosecution for a grave offence, thus, would cover an offence of a less grave nature. But it is essential that the offence, for which the Court proposes to punish the accused, is established beyond reasonable doubt by the prosecution."

9. In the decision reported in (2012) 9 SCC 650 in the case of **Bhimanna vrs. State of Karnataka**, the Hon'ble Apex Court at para-14 to 16 has observed as follows:-

> **"14.** It is a matter of great regret that the trial court did not proceed with the case in the correct manner. If the trial Court was of the view that there was sufficient

evidence on record against Yenkappa (A-1) and Suganna (A-3), which would make them liable for conviction and punishment for offences, other than those under Sections 447 and 504/34 IPC, the court was certainly not helpless to alter/add the requisite charges, at any stage prior to the conclusion of the trial. Section 216 of the Code of Criminal Procedure, 1973 empowers the trial Court to alter/add charge(s), at any stage before the conclusion of the trial. However, law requires that, in case such alteration/addition of charges causes any prejudice, in any way to the accused, there must be a fresh trial on the said altered/new charges, and for this purpose, the prosecution may also be given an opportunity to recall witnesses as required under Section 217 Cr.P.C.

**15.** In Hasanbhai Valibhai Qureshi vrs. State of Gujarat, AIR 2004 SC 2078, this Court held : "Therefore, if during trial the Trial Court, on a consideration of broad probabilities of the case, based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate.

**16.** Such power empowering alteration/addition of charge(s), can also be exercised by the appellate court, in exercise of its powers under Sections 385(2) and 386 Cr.P.C."

10. Regards being had to the above law and in order to ensure fair trial, we are of the considered view that learned Addl. Sessions Judge has committed an error in convicting the accused persons U/s.365 of the IPC without framing charge in a Sessions Trial. Offence U/s.365 of the IPC provides the kidnapping or abducting with intent to cause that person to be secretly and wrongfully confined. This offence U/s. 365 of the IPC is not a minor offence to Section 302 of the IPC. The ingredients of this offence are not ingrained in the offence of murder. Offence of abducting is not a cognate offence to murder.

What follows from the above reasoning is that a failure of justice has been occasioned due to such conviction U/s.365 of the IPC without charge. It is not a curable irregularity. Learned lower Court should have resorted to Section 216 of Cr.P.C.

11. For the availability of material on record including the police report, learned Addl. Sessions Judge should have framed charge U/s.364 and 365 of the IPC. Our opinion is persuaded by the materials on record that dead body of three deceased persons could not be recovered and DNA profile from the charred bones could not be conducted.

12. We are consciously restrained to make any observation on the merit of the matter including the appreciation of evidence made in the impugned

judgment under reference. As grave error has been committed in not framing charges and thereby failure of justice has been occasioned, we feel it just and proper for the interest of justice to direct further inquiry U/s.367 of Cr.P.C.

13. We are constrained by the above analysis to set aside the conviction and sentence passed in the impugned judgment dated 11.4.2018/13.04.2018 by the learned Addl. Sessions Judge, Gunupur in Criminal Trial No.7 of 2017.

14. In the result, the matter is remanded to the trial Court with a direction to add charge for the offence U/s.364 and 365 of the IPC and to proceed keeping in view of the provision U/s.217 of Cr.P.C.

Learned Trial Court shall ensure the completion of trial within six months from the date of receipt of copy of this order. Accordingly, DSREF is answered and JCRLA is disposed of. LCRs. be sent back immediately.

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**2020 (I) ILR - CUT- 93**

**S. K. MISHRA, J & DR. A. K. MISHRA, J.**

WPCRL NO. 561 OF 2008

**CHAITANYA MADHI** .....Petitioner.

*Vs.*

**STATE OF ODISHA AND ORS.** .....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition seeking issuance of a writ of habeas corpus – Petitioner is the son of the missing person who was a Sarpanch – Since the missing person was not found, the petitioner claimed compensation alleging violation of the right to life by the State – The question arose as to Whether a writ of habeas corpus is maintainable in respect of a missing person? and whether compensation can be granted? – Held, No, as the illegal detention of missing person is not established.**

*"Illegal confinement is the precondition to issue writ of habeas corpus. Though a writ of right, it is not a writ of course. This extraordinary remedy is not available against a missing person who is not disable by minority. The missing person might have exercised his volition to stay away and such volition is not violation of Article 21 of the Constitution. When the writ of habeas corpus is not maintainable, the claim of compensation as advanced in course of argument for contravention of Article 21 of the Constitution of India does not arise in respect of a missing person."*

**Case Laws Relied on and Referred to** :-

1. 2017(I) OLR 1126 (D.B.) : Smt. Tulasi Naik Vs. State of Orissa and four Ors.
2. (1973) 2 SCC 674 : Kanu Sanyal Vs. District Magistrate Darjeeling & Ors.

For Petitioner : M/s. G. P. Mohanty, Sr. Adv., M. S. Mohanty & H. P. Mohanty.
For Opp. Parties : Mr. Janmejaya Katikia, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 04.11.2019 : Date of Judgment : 27.11.2019

***DR. A. K. MISHRA, J.***

This writ of habeas corpus was filed on 16.10.2008 seeking following relief:-

"Issue a Rule Nisi, calling upon the opposite party no.1 to 4 with further direction to produce Indra Madhi in person in the Hon'ble Court on an appointed date, taking the assistance of the opposite party no.5 who was instrumental to the disappearance of Indra Madhi in connivance with the police officials; and

May issue further direction to the opposite parties to submit their reports, why he is not forwarded to the Court for such a long time, to comply with the constitutional provision as specified under Article 22 of the Constitution."

2. Petitioner is the son of Indra Madhi. It is alleged that Indra was a member of Scheduled tribe and also elected Sarapanch of the Chimtapalli Grama Panchayat under Korukonda Panchayat Samiti in the District of Malkanagiri.

On 26.8.2008, one Akula Sarkar of M.V. 123 village was arrested. He was not forwarded to Court. Indra, being Sarpanch along with Sri Deba Kawasi, the Sarpanch of Nilakamberu G.P. and another Subas Padiami met the Collector, Malkangiri twice against illegal detention of Akula by police. On 12.9.2008, police took Indra to the office of Superintendent of Police, interrogated and made him free.

One Bikash Halder, opposite party no.5 was the ward member of Tumsapalli G.P. He used to keep watch over the movements of Indra.

On 16.9.2008, Indra Madhi and Reena Sodi attended Block meeting. Indra brought Reena in his motorcycle and left in her village. At about 5 P.M.

he was returning on the M.V.22 Canal Road. Six persons, in plain cloth, in three motorcycles intercepted Indra on his way and took away him to unknown destination. The mobile phone of Indra did not respond thereafter. His motorcycle was not found.

On 18.9.2008, petitioner lodged an F.I.R. at Orkel P.S. he also lodged another F.I.R. on 19.9.2008 at Malkangiri P.S. as I.I.C., Orkel P.S. instructed him that the spot was coming under Malkangiri P.S.

On 20.09.2008, petitioner along with others filed complaint before Collector, Malkangiri. The Collector sent a copy of complaint to S.P., Malkangiri (Opposite Party no.2). The S.P. assured them to take appropriate steps to trace out Indra Madhi within a week.

The petitioner thereafter approached both the police stations but they did not supply any information about his missing father. Instead, the Superintendent of Police threatened them and advised them not to proceed further. When Bikas Halder, Opposite Party no.5 was asked about Indra, he was enraged and threatened the villagers.

Petitioner specifically avers that this was the state of affairs in Malkangiri area and the police plea was that they were combating Naxals.

3. Notice sent to O.P. No.5 has been returned with postal endorsement "No such addressee". Petitioner has not furnished any other address vide order dtd.2.12.2008. On behalf of opposite party no.2, S.P., Malkangiri, D.S.P., Malkangiri has filed an affidavit on 7.10.2009. Opposite party no.3, I.I.C., Malkangiri filed affidavit on 22.6.2009 and lastly on 24.6.2019. Opposite party no.4, I.I.C., Orkel P.S. also filed affidavit on 10.8.2009.

3-A. The petitioner also filed additional affidavit to provide clue of his missing father on 2.3.2009. The photograph of Indra was given to I.I.C., Malkangiri. The Court continued to obtain status report in regular intervals about the progress and steps taken to search the missing Indra.

A decade old monitoring reveals that "enquiry is still continuing". It was stated and lastly it is stated in the affidavit by opposite party nos.2 and 3 that on 22.9.2008, the petitioner had reported at Malkangiri P.S. in writing regarding missing of his father Indra Madhi since 16.9.2008 and accordingly the fact was reflected in Malkangiri P.S. station diary entry No.366 dated 22.9.2008 and Man Missing Register Sl. No.11/2008. The petitioner has

mentioned in his report that, his missing father was last seen at village Tumsapalli since 16.09.2008 5.00 P.M.

That on the basis of the report of the petitioner regarding missing of his father, Indra Madhi, enquiry was taken up and during course of enquiry, it was ascertained that the missing Indra Madhi on 16.09.2008 had attended the meeting at Block Office, Korukonda. One Renna Sodhi, Sarpanch, Tumusapalli G.P. had also gone to Korukonda along with her brother to attend the meeting. The brother of Reena Sodhi went to Orkel to witness Biswakarma Puja, leaving her at Korukonda. At about 4.00 P.M., the meeting ended at Block Office. As Reena Sodhi was alone, Bikash Haldar asked her as to how she would return to her village. In reply, Reena Sodhi told him that she would return to village with Indra Madhi in his motor cycle. Thereafter Reena Sodhi and Indra Madhi came to village Tumsapalli in a motor cycle bearing Registration No.OR10-D-9547. After reaching at village Tumsapalli, Indra Madhi gossiped with the father of Reena Sodhi for about 15 minutes and at about 5.00 P.M., he left alone for his village Tentuliguda in his motor cycle. Indra Madhi was last seen by one Irma Madhi, S/o-Bhima Madhi of village Tumsapalli, while he was taking bath in a canal on 16.9.2008 at about 6.P.M. and according to his version Indra Madhi proceeded towards village Kichipalli along with four unknown persons in three motor cycles and Indra Madhi was one of the pillion riders.

The fact was circulated among the P.S. staff, message was sent to all police posts of Malkangiri District vide Radio Message No.1643 dtd.22.9.2008 for regular and periodical enquiries and circulation among all police personnel, published in the Malkangiri District Weekly Crime Intelligence Bulletin No.39, submitted drafts for CIG Publication to S.P., CID, CB, Odisha, Cuttack vide letter No.1660 dated 26.9.2008 & letter no.1745 dated 15.10.2008 along with the photograph of the missing person Indra Madhi to the Director, Prasar Bharati, Doordarshan Kendra, Bhubaneswar along with the photograph of the missing person for wide publicity vide letter no.2072 dated 16.12.2008. The fact was also exhibited on T.V. on 29.12.2008 at 4.25 P.M.

That on 17.01.2009 CID, CB, Odisha, Cuttack had requested Director, All India Radio, Cuttack for broadcasting vide letter No.682/CID dated 06.01.2009. The CID, CB, Cuttack published the fact in CIG No.01 dated 14.1.2009, the photograph of the missing person Indra Madhi in enlarged size was affixed at all conspicuous places seeking information regarding the missing person.

4. Learned Senior Advocate Mr. G. P. Mohanty, for the petitioner submits that as the missing Indra Madhi is not yet traced out by the state officials responsible to protect life and liberty of a person under Article 21 of the Constitution, State should pay compensation. He relies upon the decisions reported in

(i) **AIR 1986 SC 494, Bhim Singh, MLA Vrs. State of J. & K. and Others,**

(ii) **AIR 2000 S.C. 988, Chairman, Railway Board and Others Vrs. Mrs. Chandrima Das and Others**; and

(iii) **AIR 1993 SC 1960, Smt. Nilabati Behera @ Lalita Behera vrs. State of Orissa and Others**.

4-A. Learned Addl. Government Advocate Mr. J. Katikia repels the above contention stating that when no cognizable office is alleged and all effective and meaningful steps on the direction of the Hon'ble Court have been undertaken to trace out the missing person, the State would not be liable to pay any compensation because neither Indra Madhi was in illegal custody nor has any deficiency been shown by the State to search him out. He vehemently submits that this writ petition is not maintainable for a missing person.

5. What stems from rival contentions is:-

Whether a writ of habeas corpus is maintainable in respect of a missing person?

6. Indisputable facts unfolded in this writ proceeding may be stated thus:-

Indra Madhi was found missing since 16.09.2008 and on the information received from his son, police, opposite party nos.2 to 4, have taken all possible effective steps to trace him out. Even this court has monitored the same during pendency of this proceeding. The enquiry is not closed. Most importantly, Indra was not taken into custody by police. The petitioner does not hesitate to raise his suspicion that the police was combating 'Naxals' in that area.

6-A. Illegal detention of Indra Munda is not established.

6-B. In the decision of this court, reported in **2017(I) OLR 1126 (D.B.), Smt. Tulasi Naik Vrs. State of Orissa and four others**, it is held as follows:-

*"xxxx Further from the undisputed stand of the opposite parties one thing is clear that the present one is not a case of illegal detention. Had there been any illegal detention the authorities would not have issued paper publication twice in course of departmental proceeding in order to enable husband of the petitioner to participate in the same. Law is well settled that a writ of habeas corpus can only be issued in case illegal detention wrongful confinement not otherwise. In this context one can profitably refer to the Division Bench decision of the Madhya Pradesh high Court as rendered in* ***Sulochana Bai Vrs. State of Madhya Pradesh and others*** *reported*

*in* ***2008 (1) M.P.L.J. 339****. Considering all these things we are not inclined to interfere in the matter. Accordingly the writ petition is dismissed."*

7. The Hon'ble Apex Court in the case of **Kanu Sanyal Vrs. District Magistrate Darjeeling and others** reported in **(1973) 2 SCC 674** (Constitution Bench) have enunciated the principle concerning the nature and scope of a writ of habeas corpus as follows:-

*"17. The writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain". But the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of t he subject illegally detained."*

8. Illegal confinement is the precondition to issue writ of habeas corpus. Though a writ of right, it is not a writ of course. This extraordinary remedy is not available against a missing person who is not disable by minority. The missing person might have exercised his volition to stay away and such volition is not violation of Article 21 of the Constitution.

9. When the writ of habeas corpus is not maintainable, the claim of compensation as advanced in course of argument for contravention of Article 21 of the Constitution of India does not arise in respect of a missing person.

9-A. All the three decisions cited by learned counsel for the petitioner have reiterated a different ratio in different context.

In **Bhim Singh Case** (Supra) the petitioner was arrested and not produced before the Magistrate as mandated under Law and for the violation of Article 21 and 22(2) of the Constitution, compensation was awarded. The Court said:-

> *"3. Xxxxx. When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. Xxxx."*

9-B. In **Mrs. Chandramani Das** case (supra), the victim was compensated for being raped by railway employees in railway building.

9-C. In **Mrs. Nilabati Behera** case (supra), the son of petitioner was found dead in police custody and "the mode of redress which commanded appropriate was to make an order of monetary relief in favour of the petitioner for custodial death of her son by ordering payment of compensation by way of exemplary damages."

10. Now descending to the facts at hand, for the son petitioner, the missing of father is a disaster of epic proportion, but Law cannot grope in the dark.

11. Stepping to conclusion, we record that the writ petition is not maintainable. The WPCRL stands rejected.

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**2020 (I) ILR - CUT- 99**

**S.K. MISHRA, J & B.P. ROUTRAY, J.**

CRLMP NO. 985 OF 2018

**KAMALA BASINI MOHANTY** .....Petitioner

*.Vs.*

**STATE OF ODISHA** .....Opp. Party

**THE ORISSA SPECIAL COURTS ACT, 2006 – Section 7 – Jurisdiction of the Special Court – Petitioner was serving as District School Inspector and has been arraigned as an accused along with her husband – Offences U/s.13(2) & 13 (1)(e) of the P.C. Act – Allegation of joint possession of disproportionate assets to the extent of 99% of their income – Application filed under section 239 of CR.P.C to discharge her on the ground that, she was not holding the office of a high public office as provided under section 5 of the Act – Jurisdiction of the special court questioned – Held, section 7 prescribes that a Special Court shall have jurisdiction to try any person alleged to have committed the offence in respect of which declaration has been made under section 5, either as principal, conspirator or abettor and for all the other offences accused persons can be jointly tried therewith at one trial in accordance with the code of criminal procedure.**

For Petitioner : Mr. H.K.Mund.

For Opp. Party : Mr. S.Dash, Sr. Standing Counsel, (Vig. Dept.)

JUDGMENT Date of Hearing :13.11.2019 : Date of Judgment:18.12.2019

***B.P. ROUTRAY, J.***

The order dated 1.8.2018 passed by the learned Special Judge, Special Court, Cuttack in T.R.Case No.6 of 2013 rejecting the prayer of the petitioner for discharge has been assailed in the present petition.

2. The petitioner along with her husband are accused in the aforesaid case for alleged commission of offence under Sections 13(2) and 13(1) (e) of the Prevention of Corruption Act, 1988. The petitioner was the District Inspector of Schools while her husband was serving as Soil Conservation Officer, Dhenkanal. On the allegation of possessing assets disproportionate to their income to the extent of Rs.31, 14, 741.07p, chargesheet was filed before the court below against both the accused persons and the check period is from 1.1.1980 to 26.12.2001.

3. Before framing of charge, the petitioner prayed for her discharge under Section 239 of the Code of Criminal Procedure. She inter alia had taken a stand that the allegations levelled against her regarding commission of offence are not true and she being a Government servant started her service career in the year 1972 as an Assistant Teacher, but the Vigilance Department had wrongly accounted the income, expenditure and assets of both the husband and wife jointly to show disproportionate increase of assets

to the extent of 99% to their income and moreover, she being not an officer holding high public office should not be tried before the Special Court. The learned court below considering the prayer of the petitioner and to such averments made by her has rejected it by the impugned order under Annexure-5.

4. The petitioner challenges the rejection of her prayer for discharge before us inter alia on the grounds that she not being an officer holding high public office cannot be tried before the Special Court jointly with her husband and further the court below has erred in not considering the probative value of materials brought on record.

5. The main thrust of challenge of the petitioner is that, when the sanction order under Section 5 of the Special Courts Act has been granted in favour of her husband for his prosecution before the Special Court, she cannot be added with him to face trial jointly. The said submission of the petitioner does not appear correct in view of the provisions contained in Section 7 of the Special Courts Act. Section 7 prescribes that a Special Court shall have jurisdiction to try any person alleged to have committed the offence in respect of which a declaration has been made under Section 5, either as principal, conspirator or abettor and for all the other offences and accused persons as can be jointly tried therewith at one trial in accordance with the Code of Criminal Procedure. Therefore, it is clear that the Special Court has jurisdiction to try any person as the principal accused along with all other accused persons as can be jointly tried. Besides, when the admitted relationship of both the accused persons is husband and wife and they are living jointly having joint assets, it is impracticable at this stage to segregate the income and expenditure of each of the accused.

6. The law on discharge is no more res integra. What is argued on behalf of the petitioner that the court below has not considered the probative value of the materials brought on record while considering her prayer for discharge cannot be faulted with, for the reasons that, the Court at the stage of framing of charge is to consider the sufficiency of materials available on record to find out if a prima facie case has been made out or not and a roving inquiry at this stage is not permissible.

7. Accordingly, we do not find any infirmity in the order of the court below. The petition is dismissed.

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**2020 (I) ILR - CUT- 102**

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

SA NO. 342 OF 1989

**JAMBU BISOIANI @ JAMBHUBATI BISOI & ORS.** .....Appellants

*.Vs.*

**M/S. GENERAL TRADERS & ANR**. .....Respondents

**LIMITATION – Money suit filed in the year 1977 by an unregistered Partnership Firm – Suit was dismissed holding, inter alia, that the firm being an unregistered one the suit was a bar under Section 69 of the Partnership Act and as such was not maintainable. – First Appeal filed – An application under Order 1 Rule 10 to implead Harihar Patra, managing partner of the firm as the plaintiff which was ultimately allowed by High Court – Appeal allowed – Second appeal – Plea of limitation for filing of the suit raised – The question arose as to whether impleadment of Harihar Patra would relate back to the date of institution of the suit or date of order dated 26.06.1989 passed by this Court in Civil Revision No.273 of 1981 – Held, from the date of impletion as per the order passed in the Civil Revision.**

*"In the instant case, pursuant to the order dated 26.06.1989 passed in Civil Revision No.273 of 1981, Harihar Patra was impleaded as plaintiff no.2. The order does not reveal that newly impleaded plaintiff shall effect from the date of institution of the suit. Thus the limitation begins to run from the date of impleadment of plaintiff no.2 in the suit. Under Article 14 of the Limitation Act, the period of limitation is three years for the price of goods sold and delivered, where no fixed period of credit is agree upon and the date of the delivery of the goods. Thus the suit filed by the plaintiff has to be treated as instituted when the application for impleadment of Harihar Patra was allowed on 26.06.1989. By that time the suit stood barred by time. The substantial question of law is answered in affirmative."* *(Para 13)*

**Case Laws Relied on and Referred to** :-

1. AIR 2001 SC 1185 : Ramalingam Chettiar Vs. P.K. Pattabiraman & Anr.

For Appellants : Mr.Buddhiram Das, Adv.
For Respondents : None

JUDGMENT Date of Hearing: 24.01.2019: Date of Judgment: 06.02.2019

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

The legal heirs of the defendant are the appellants against the reversing judgment.

**2.** Plaintiff-respondent no.1 instituted the suit for realisation of 4841.08 ps. with pendente lite and future interest. Case of the plaintiff is that it is a registered firm. The firm deals in mohua flower, jaggery and other commodities. On 30.1.1963, the defendant opened one mutual and current account with the plaintiff-firm and used to take goods on credit and deposit money according to his convenience. The account was maintained by the plaintiff in due course of business. On 3.2.1968, defendant purchased mohua flower amounting to Rs.432.28 ps. He deposited an amount of Rs.474/- on 13.3.1968. Thereafter, he stopped payment. An amount of Rs.4131.03 ps. was outstanding against the defendant as on 30.3.1968. When all the persuasions made by the plaintiff to clear up the outstanding dues ended in a fiasco, he filed the suit.

**3.** Defendant filed a written statement pleading, inter alia, that the plaintiff-firm is not registered under the Indian Partnership Act. The suit is barred under Sec.69 of the Partnership Act. There was no outstanding due against him.

**4.** Stemming on the pleadings of the parties, learned trial court struck six issues. Parties led evidence, oral and documentary. On an anatomy of pleadings and evidence on record, learned trial court dismissed the suit holding, inter alia, that the firm was an unregistered one. Sec. 69 of the Partnership Act is a bar for institution of suit by an unregistered firm. The suit is not maintainable. Aggrieved by and dissatisfied with the judgment and decree of the learned trial court, the plaintiff filed an appeal before the learned District Judge, Berhampur, which was subsequently transferred to the court of the learned Addl. District Judge, Berhampur and re-numbered as M.A No.7/88 (M.A No.20/78 GDC). During pendency of the appeal, the plaintiff filed a petition under Order 1 Rule 10 CPC to implead Harihar Patra, managing partner of the firm as the plaintiff. The defendant objected to the petition. Learned appellate court rejected the petition for impleadment on 10.3.1981. Against the said order, plaintiff filed Civil Revision No.273 of 1981 before this Court. The petition was allowed on 26.06.1989, whereafter Harihar Patra was impleaded as plaintiff no.2 in his individual capacity on 26.06.1989. Learned appellate court came to hold that Harihar Patra, managing partner of plaintiff no.1-firm, was impleaded as plaintiff no.2 and as such, he is entitled to the relief. The finding with regard to genuineness of the claim of the plaintiff has not been assailed by the defendant by filing cross-objection. The order allowing impleadment has attained finality and as

such, binding on the defendant. The suit is not barred by limitation. Held so, it allowed the appeal. It is apt to state here that during pendency of the first appeal, the original defendant died; whereafter his legal heirs and successors have been substituted.

**5.** The second appeal was admitted on the following substantial question of law.

> "Whether inclusion of plaintiff no.2 in the year 1989 would make the claim barred by limitation."

**6.** Heard Mr. Buddhiram Das on behalf of Mr. N.C. Pati, learned counsel for the appellants. None appeared for the respondents.

**7.** Mr. Das, learned counsel for the appellants submitted that initially plaintiff-respondent no.1-firm instituted the suit for realisation of money. It was an unregistered firm. Sec.69(2) of the Indian Partnership Act is a bar to institute a suit by an unregistered firm. The application to implead Harihar Patra was allowed by this Court on 26.06.1989 in Civil Revision No.273 of 1981. The suit is barred by limitation. To buttress the submission, he placed reliance on the decision of the apex Court in the case of Ramalingam Chettiar v. P.K. Pattabiraman and another, AIR 2001 SC 1185.

**8.** Before adverting to the contentions raised by the learned counsel for the appellants, it is apt to refer to Sec.69(2) of the Indian Partnership Act.

> "69.(1) xxx xxx xxx
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

**9.** On a bare reading of sub-sec.(2) of Sec.69 of the Indian Paternship Act, it is manifest that unless a firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm, no suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party.

**10.** Admittedly plaintiff-respondent no.1 is an unregistered firm. Thus the suit is not maintainable. The application under Order 1 Rule 10 CPC for impleadment of Harihar Patra in the partnership firm was filed before the learned appellate court on 18.7.1980. The same having been rejected on 10.3.1981, he filed Civil Revision No.273 of 1981 before this Court. The

civil revision was allowed on 26.06.1989; whereafter Harihar Patra was impleaded as plaintiff no.2.

**11.** The question does arise as to whether impleadment of Harihar Patra would relate back to the date of institution of the suit or date of order dated 26.06.1989 passed by this Court in Civil Revision No.273 of 1981.

**12.** In Ramalingam Cheettiar, the State of Tamil Nadu was not impleaded as defendant in the suit. Thereafter, an application for impleadment of the State of Tamil Nadu was filed. Learned trial court allowed the same on 11.10.1979. The apex Court held that Section 21 of the Limitation Act provides that where after the institution of a suit, if a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. In view of Section 21 of the Limitation Act, so far as the State of Tamil Nadu was concerned, suit filed by respondent has to be treated as instituted when the application for impleadment of State of Tamil Nadu was allowed, i.e. on 11.10.1979 and by that time the suit stood barred by time. A contention was raised that even if the application for impleadment of State of Tamil Nadu was allowed on 11.6.1979, the said order has to be understood as if impleadment of State of Tamil Nadu was with effect from the date of filing the suit. The contention was repelled. The apex Court held that Sec.21 of the Limitation Act contemplates two situations - one under the substantive provision which provides that where after filing of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been brought on the day when he was added or substituted as a party in the suit. The second situation contemplated under the proviso to the substantive provision is where the court is satisfied that a new plaintiff or defendant was omitted to be added or substituted due to a mistake in good faith, the court may direct that the suit, as regards the newly added or substituted party, shall be deemed to have been instituted on any earlier date. Thus, under the proviso, if the court is satisfied, it can direct that the suit as regards newly added or substituted plaintiff or defendant shall be deemed to have been instituted on an earlier date. In such a case, the court after substituting or adding a party in the suit is required to pass a separate/further order that the suit as regards the newly added defendant or plaintiff shall be deemed to have been instituted with effect from the date the suit was laid. Merely adding or substituting a plaintiff or defendant by the court is not enough. In the absence of any order that the impleadment of newly added or substituted party shall

take effect from the date of institution of a suit, the period of limitation so far as the newly added or substituted shall run from the date of their impleadment in the suit. The Court looked into the records but do not find any order having passed under the proviso to Sec.21 of the Limitation Act that the impleadment of the State of Tamil Nadu would take effect from the date of institution of the suit. It was held that in the absence of such an order by the trial court, the suit filed by the respondent was barred by limitation as contemplated under Sec. 59 of the Act.

**13.** In the instant case, pursuant to the order dated 26.06.1989 passed in Civil Revision No.273 of 1981, Harihar Patra was impleaded as plaintiff no.2. The order does not reveal that newly impleaded plaintiff shall effect from the date of institution of the suit. Thus the limitation begins to run from the date of impleadment of plaintiff no.2 in the suit. Under Article 14 of the Limitation Act, the period of limitation is three years for the price of goods sold and delivered, where no fixed period of credit is agree upon and the date of the delivery of the goods. Thus the suit filed by the plaintiff has to be treated as instituted when the application for impleadment of Harihar Patra was allowed on 26.06.1989. By that time the suit stood barred by time. The substantial question of law is answered in affirmative.

**14.** Resultantly, the judgment of the learned appellate court is set aside. The suit is dismissed.

**15.** The appeal is allowed. There shall be no order as to costs.

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**2020 (I) ILR - CUT- 106**

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

CMP NO. 966 OF 2017

**JUGAL KISHOR BANKA** .....Petitioner

*.Vs.*

**GOPAL GOSALA, BARGARH** .....Opp. Party

**CODE OF CIVIL PROCEDURE, 1908 – Order VI Rule 17 – Petition seeking amendment of written statement-cum-counter claim – Rejected – Writ petition challenging the rejection order – Amendment filed after**

**eight years of the filing of the written statement-cum-counter claim – Whether can be considered? – Held, No – Reasons indicated.**

*"In Chander Kanta Bansal v. Rajinder Singh Anand, AIR 2008 SC 2234, the apex Court held that the proviso limits the power to allow amendment after the commencement of trial, but grants discretion to the court to allow amendment, if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment. Proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.The facts, which are sought to be raised by way of amendment of written statement-cum-counter claim, were within the knowledge of the defendant. The same reveals the absence of due diligence on the part of the defendant. The impugned order of the learned trial court does not suffer from jurisdictionional error, nor any error of law warranting interference of this Court under Article 227 of the Constitution."*

**Case Laws Relied on and Referred to** :-

1. AIR 2008 SC 2234 : Chander Kanta Bansal .Vs. Rajinder Singh Anand.

For Petitioner : Mr. Amit Prasad Bose
For Opp. Party : None

JUDGMENT Date of Hearing: 30.01.2019 : Date of Judgment: 06.02.2019

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

This petition challenges the order dated 2.8.2017 passed by the learned Civil Judge (Senior Division), Bargarh in C.S. No.175 of 2006 whereby and whereunder learned trial court rejected the application of the defendant under Order 6 Rule 17 CPC for amendment of the written statement-cum-counter claim.

**2.** Plaintiff-opposite party instituted C.S. No.175 of 2006 for declaration of title. Defendant-petitioner entered contest and filed a written statement-cum-counter claim denying the assertions made in the plaint. While the matter stood thus, the plaintiff filed an application to withdraw the suit on the ground that the matter has been settled between the parties. The defendant

objected to the said petition. By order dated 2.8.2017, learned trial court disposed of the suit as withdrawn. Thereafter, defendant filed an application under Order 6 Rule 17 CPC to amend the written statement-cum-counter claim. In the proposed amendment, defendant sought to incorporate the fact that he is the owner in possession of the suit property. After death of his father, he is in possession of the suit property along with his mother. Thereafter, he is in possession of the suit property. He used to pay rent to the Government. With this factual scenario, he sought to incorporate the prayer for declaration of title over the suit property and conformation of possession. The plaintiff filed an objection. Learned trial court came to hold that the proposed amendment is contrary to the plea taken in the written statement-cum-counter claim. The petition has been filed after eight years of filing the written statement-cum-counter claim. The same will change the nature and character of the suit. Held so, it rejected the petition.

**3.** Heard Mr. Amit Prasad Bose, learned counsel for the petitioner. None appeared for the opposite party in spite of valid service of notice.

**4.** Mr. Bose, learned counsel for the petitioner submitted that the proposed amendment is formal in nature and will not change the nature and character of the suit. Merely because the application for amendment of the written statement-cum-counter claim is filed after eight years, the same is not per se a ground to reject the same. The proposed amendment is imperative for effectual adjudication of the lis.

**5.** Before adverting to the contentions raised by the learned counsel for the petitioner, it is apt to refer the proviso to Order 6 Rule 17 CPC.

> "17. Amendment of Pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

**6.** In Chander Kanta Bansal v. Rajinder Singh Anand, AIR 2008 SC 2234, the apex Court held that the proviso limits the power to allow amendment after the commencement of trial, but grants discretion to the court to allow amendment, if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal

principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment. Proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

**7.** The facts, which are sought to be raised by way of amendment of written statement-cum-counter claim, were within the knowledge of the defendant. The same reveals the absence of due diligence on the part of the defendant.

**8.** The impugned order of the learned trial court does not suffer from jurisdictionional error, nor any error of law warranting interference of this Court under Article 227 of the Constitution.

**9.** Accordingly, the petition is dismissed. There shall be no order as to costs.

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**2020 (I) ILR - CUT- 109**

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

MACA NO.1214 OF 2015 & MACA NO.1386 OF 2015

**THE DIVISIONAL MANAGER,**
**M/S. ORIENTAL INSURANCE CO. LTD.** .....Appellant

*.Vs.*

**DILLIP KUMAR DALAI & ORS.** .....Respondents

For Appellant : Mr.Santanu Kumar Swain
For Respondents : Dr.Tahali Charan Mohanty, Sr.Adv.

**MACA No.1386 of 2015**

**PRASANNA PATTANAYAK & ANR.** .....Appellants

*.Vs.*

**DILLIP KUMAR DALAI & ANR.** .....Respondents

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**MOTOR ACCIDENT CLAIM – Death of a student – Claim of 'Filial consortium' – Right of – Held, Filial consortium is the right of the parents to get compensation in the case of an accidental death of a child.**

*"In Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram and others, 2018 (4) T.A.C.345 (S.C.), the apex Court went in depth into the matter and held that parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."*

*Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.*

*Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have cognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child."*

*(Para 8)*

**Case Laws Relied on and Referred to** :-

1. 2018 (4) T.A.C.345 (S.C.) : Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram and Ors.

JUDGMENT Date of Hearing:01.02.2019 : Date of Judgment:06.02.2019

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

Against a common award passed by the learned 2nd Additional District Judge-Cum-MACT, Cuttack in MAC Case No.508 of 2010, two appeals have been filed i.e., the insurer has filed MACA No.1214 of 2015, whereas the claimants have filed MACA No.1386 of 2015.

**2.** The claimants are the unfortunate parents of the deceased Jiban Pattanayak. The case of the claimants was that on 24.7.2010 at about 1.20 P.M. while Jiban was returning from his college in a motorcycle, near Rahama College Chhaka in Cuttack-Paradeep Road, a tanker bearing registration no.OR-05-U-8131 came in a rash and negligent manner from

Paradeep side and dashed him, as a result of which, he succumbed to the injuries at the spot. Thereafter the deceased was shifted to District Headquarters Hospital, Jagatsingpur for postmortem. He was eighteen years old at the time of accident. He was a student. He was a tutor and earning Rs.5,000/- per month. With this factual scenario, they filed an application under Section 166 of the Motor Vehicles Act, 1988 before the learned Tribunal.

**3.** Though notice was issued to the owner of the offending vehicle, but he had chosen not to contest the case and as such set ex parte. The insurer of the vehicle filed written statement denying its liability.

**4.** Stemming on the pleadings of the parties, learned Tribunal stuck four issues. To substantiate the case, the claimants had examined three witnesses. No evidence was adduced by the insurer. On an anatomy of the pleadings and evidence on record, learned Tribunal came to hold that the accident occurred due to rash and negligent driving of the driver of the offending tanker. The deceased was a student. His notional income was assessed at Rs.4,000/- per month. Learned Tribunal deducted 50% of the income towards his personal expenses, since he was a bachelor. Applying '18' multiplier and funeral expenses of Rs.10,000/-, it directed the insurer to pay an amount of Rs.4,42,000/- with interest at the rate of 6% per annum from the date of filing of the application.

**5.** Dr.Tahali Charan Mohanty, learned Senior Advocate for the claimants submitted that the deceased was a bright student. The parents lost their son. No award has been made under Filial Consortium. The award may be enhanced.

**6.** Mr.Santanu Kumar Swain, learned counsel for the insurer submitted that the award is exorbitant. There is no document that the deceased was earning Rs.4,000/- per month. The same was assessed on surmises and conjectures. Since it is a contributory negligence, the insurer is exonerated from its liability.

**7.** The submission of the learned counsel for the insurer is difficult to fathom. The plea of contributory negligence was not raised before the learned Tribunal. No evidence was adduced. With regard to income, learned Tribunal is justified in assessing the notional income at Rs.4,000/- per month. Since the deceased was a bachelor, learned Tribunal deducted 50% and applied 18 multiplier.

**8.** In Magma General Insurance Co. Ltd. v. Nanu Ram alias Chuhru Ram and others, 2018 (4) T.A.C.345 (S.C.), the apex Court went in depth into the matter and held that parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have cognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

**9.** The ratio laid down in the case of Magma General Insurance Co. Ltd., proprio vigore applies to the facts of this case.

**10.** If Rs.80,000/- is added towards Filial Consortium, the award comes to Rs.5,22,000/-(Five lakhs twenty two thousand). The enhanced award amount of Rs.80,000/-(Eighty thousand) with interest as awarded by the learned Tribunal shall be deposited before the learned Tribunal within a period of six months from today, whereafter the same shall be disbursed to the claimants by the learned Tribunal in terms of its order.

**11.** Both the appeals are disposed of in terms of the aforesaid judgment.

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**2020 (I) ILR - CUT- 113**

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

W.P.(C) NO. 9514 OF 2013

**GANESHWAR HANSDA** ……Petitioner

*.Vs.*

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

**SERVICE LAW – Disengagement – Petitioner working as Gram Panchayat Technical Assistant (GPTA) – On the basis of preliminary inquiry report he was disengaged – No opportunity given – Effect of – Held, this Court is of the considered view that the order of disengagement having been passed in gross violation of principles of natural justice, cannot sustain in the eye of law and is liable to be quashed – The opposite parties are directed to allow the petitioner to work, as before, by engaging him as GPTA.**

*"In view of the aforesaid law laid down by the apex Court and applying to the same to the present context, if the opposite parties have relied upon the documents dated 18.01.2013 and the preliminary inquiry report conducted by the Addl. Project Director, DRDA and also the joint verification report dated 12.02.2013, the same could have been confronted with the petitioner by providing him an opportunity of hearing and calling upon him to show cause. But such documents have been relied upon by the opposite parties while passing the order impugned dated 16.04.2013 and no reference has been made to those documents while show cause for disengagement was called for from the petitioner. Therefore, the petitioner had no occasion to explain such documents which have been relied upon in the order of disengagement dated 16.04.2013 passed by the authority concerned and more particularly when the notice of show cause was issued the petitioner had already been found guilty on the charges of misappropriation of public money, negligence in duty and misconduct. Once the authorities have prejudged the matter finding the petitioner guilty, calling upon him to show cause, pursuant to show cause notice, was an empty formality. Therefore, the consequential order dated 16.04.2013 passed by the authority on the basis of preliminary inquiry report dated 18.01.2013 and proceeding dated 12.02.2013 finding him guilty of misappropriation of government money, gross negligence in government duty and gross misconduct and unsatisfactory performance, is contrary to the notice of show cause issued on the charges of misappropriation of public money, negligence in duty and misconduct, where the authority had already prejudged the matter finding him guilty of the said charges."* *(Para 18)*

**Case Laws Relied on and Referred to** :-

1. (1997) 1 SCC 299 : Narayan Dattatraya Ramteerthakhr .Vs. State of Maharastra.
2. (2013) 4 SCC : Nirmala J. Jhala .Vs. State of Gujarat.

3. (OJC No.6319 of 1999 : Janardan Mohanty .Vs. Union of India.
4. 2019 (I) OLR 728 : Subash Chandra Sahu .Vs. Union of India.
5. AIR 1965 SC 1767 : Bhagawan .Vs. Ramchand.
6. AIR 1975 SC 1331 : Sukdev Singh .Vs. Bhagatram.
7. (1978) 1 SCC 24 : Maneka Gandhi .Vs. Union of India.
8. (1976) 2 All ER 865 : Fairmount Investment Ltd. Vs. Secretary of State of Environemnt.
9. AIR 1981 SC 81 : Swadeshi Cotton Mills .Vs. Union of India.
10. AIR 1995 SC 1130 : State of U.P. .Vs. Vijay Kumar Tripathy.
11. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited .Vs. Government of Andhra Pradesh.

For Petitioner : M/s. S.K. Das & K. Das
For Opp.Parties : Mr. B. Senapati, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Date of Judgment : 20.06.2019

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

The petitioner, who was working as Gram Panchayat Technical Assistant (GPTA), has filed this application seeking to quash the office order dated 16.04.2013, which was passed by order of the Collector-cum-DPC, Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), Sundargarh, communicated by the Project Director, District Rural Development Authority (DRDA), Sundargarh in disengaging him from the post.

2. The factual matrix of the case, in hand, is that the petitioner having been duly selected was engaged as contractual GPTA under the MGNREGS in the district of Sundargarh vide office order dated 02.05.2006 of the Project Director, DRDA. The engagement being contractual for a period of one year, an agreement was executed annually as per the guidelines and as such, after the joining of the petitioner as GPTA, in each year, agreement was executed. The last agreement was executed on 01.04.2010 in Annexure-2, pursuant to which he continued. For the year 2010-11, some project work under Integrated Action Plan (IAP) were finalized to be executed in Nuagaon as per the approved project list communicated by the Project Director, DRDA vide letter dated 17.02.2011 to the Block Development Officer. Pursuant to such communication of the Project Director, DRDA, the BDO, Nuagaon on 23.02.2011 passed order directing the petitioner to prepare the plan and estimate of the project for technical sanction and administrative approval by the competent authority in respect of the

work/project indicated therein. Out of the same, serial no.1 relates to improvement of road from "Chitapedi to Jamtola" for Rs.20 lakhs. The plan and estimate was countersigned by the Assistant Engineer of the Block and the same was submitted to the DRDA by the BDO, Nuagaon. In the review meeting of the DRDA, Sundargarh held in presence of the BDO and Asst. Engineer, it was decided to go ahead with the work without waiting for technical sanction order/administrative approval, and the same was executed departmentally. According to such decision, the improvement of road from "Chitapedi to Jamtola" near about 2.744 kms has been done and rest part of the road is yet to be completed. The ongoing work was inspected by the higher authority from time to time and was measured and check-measured by the Asst. Engineer being countersigned by the BDO and Chairperson of the Block showing satisfaction about the execution of the work. Accordingly, running bills were also submitted. But, on the basis of the allegation of the local MLA and Chairperson of the Block with regard to irregularity committed in executing the work, the Collector, Sundargarh vide letter dated 06.02.2013 found the petitioner guilty and called upon him to show cause for disengagement from contractual service, without any inquiry and without any opportunity of hearing. In response to the same, the petitioner submitted his reply on 22.02.2013, but without considering the same in proper perspective, the order impugned dated 16.04.2013 was passed disengaging the petitioner from contractual service of GPTA under MGNREGS w.e.f. 16.04.2013 afternoon, as he has violated the terms and conditions of the agreement (Points No.3, 11 and 13) executed with the DPC. Hence, this application.

3. Mr. S.K. Das, learned counsel for the petitioner argued with vehemence and contended that the order impugned in Annexure-7 dated 16.04.2013, having been passed without conducting any inquiry and without giving opportunity of hearing, cannot sustain and is liable to be quashed. It is further contended that when show cause notice was issued, vide Annexure-5 dated 06.02.2013, the opposite parties have already found the petitioner guilty of misappropriation of public money, negligence in duty and misconduct. Having found guilty, calling upon the show cause in compliance of principles of natural justice is an empty formality. Therefore, the consequential order passed on 16.04.2013 disengaging the petitioner from service cannot sustain in the eye of law. It is further contended that while passing the final order on 16.04.2013, reasons for issuance of show cause notice was not there, rather the petitioner has been disengaged on the

allegation of gross negligence in government duty, gross misconduct and unsatisfactory performance. Thereby, the order in question cannot sustain in the eye of law and is liable to be quashed.

4. Mr. B. Senapati, learned Addl. Government Advocate contended that admittedly the petitioner was appointed as GPTA on contractual basis and as such OCS (CCA) Rules are not applicable to him and more particularly the petitioner's service is regulated as per the terms and conditions of the agreement executed between the petitioner as well as Project Director, DRDA in Annexure-2 dated 01.04.2010. Since the petitioner violated the conditions of agreement in clauses-3, 11 and 13, action has been taken against him for disengagement. Therefore, there is no need of compliance of principles of natural justice as the petitioner is bound by condition stipulated in the agreement. Thereby, the order so passed by the authorities is wholly and fully justified. It is further contended that pursuant to report dated 12.02.2013 of the joint verification conducted for the work "Improvement of Road from Chitapedi to Jamtoli" in Chitapedi Gram Panchayat of Nuagaon Block under IAP, misappropriation of Rs.15,35,747/- was found out, therefore the authorities are justified in disengaging the petitioner from service by passing the order impugned. It is also contended that the Addl. Project Director (Technical) DRDA was authorized to conduct inquiry into the allegations and as per the preliminary inquiry report dated 18.01.2013, show cause was called for on 06.02.2013 and on that basis action has been taken which is in consonance with the terms of the agreement. Thereby, the same may not be interfered with at this stage.

5. This Court heard Mr. S.K. Das, learned counsel for the petitioner and Mr. B. Senapati, learned Addl. Government Advocate appearing for the State opposite parties, and perused the record. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. Admittedly, the petitioner was engaged as GPTA on contractual basis. He was assigned with the work "Improvement of Road from Chitapedi to Jamtoli in Chitapedi Gram Panchayat of Nuagaon Block under IAP" to be executed departmentally against the sanctioned amount of Rs.20 lakhs. Without obtaining any technical sanction and administrative approval from the competent authority, he completed the work upto 2.744 kms and rest part of the work yet to be completed. For the work already undertaken, running bills were submitted, as the work was commenced on 23.02.2011. But, on

the basis of the allegations made by local MLA and Chairperson of the Block for the work in question, the petitioner was found guilty of committing misappropriation of public money, negligence in duty and misconduct, and thereby was called upon to show cause within seven days from the date of issuance of such notice. On receipt of such notice, the petitioner filed written explanation denying the allegations made against him and also reiterated the facts that due to issuance of work order by the BDO, Nuagaon for execution of the project departmentally, the actual execution was started. Therefore, it is the responsibility of the BDO to ensure that all required formalities are completed and kept on record before issue of such work order. Thereby, the allegation of execution of work by the petitioner, without obtaining technical sanction and administrative approval, cannot be attributable to the petitioner. As such, the construction work has not been completed, a part of work has been done and the same was inspected jointly by the Junior Engineer, Assistant Engineer and Block Development Officer and the measurement was taken including the dips and pits to be filled up. The site was duly physically verified by the Asst. Engineer and BDO. The petitioner had admitted that he has prepared estimate of the road more than 4.00 kms. Since the project was ongoing one, whatever work has already been done, the same was measured by him and checked by the Asst. Engineer. So far as quality of work is concerned, nothing has been detected by the Asst. Engineer at the time of check measurement of the site, rather the Asst. Engineer after recording the check measurement submitted the running bills for payment. Even though such explanation was submitted, the same was not considered in proper perspective and office order dated 16.04.2013 was passed, basing upon the preliminary inquiry report of the Addl. Project Director, DRDA, Sundargarh dated 18.01.2013, holding that in view of highly inflated measurement there was misappropriation of public money for an amount of Rs.15,35,747/-, and, as such, the petitioner was found guilty of gross negligence in government duty, gross misconduct and unsatisfactory performance. Thereby, he was disengaged from contractual engagement of GPTA under MGNREGS w.e.f. 16.04.2013 for violation of terms and conditions of agreement (Points no.3, 11 and 13) executed between the petitioner and DPC. Clauses-3, 10, 11 and 13, of the agreement which has been annexed as Annexure-2 to the writ petition, read as under:-

> *"03. That, the second party shall employ, himself/herself efficiently and diligently and to the best of his/her ability.*
>
> *xxx xxx xxx*

*10. That, breach of any of the terms or conditions of this agreement by the second party shall be treated as misconduct.*

*11. That, the second party has agreed to serve in the manner as required and perform the duties as assigned by the First Party and he/she has agreed to be disengaged without any notice on the ground of misconduct even during the operation of this agreement.*

*xxx xxx xxx*

*13. That, the second party can be terminated without notice if he found unsuitable or unsatisfactory performance."*

7. On perusal of aforesaid conditions, it appears that the petitioner owes an obligation to employ himself diligently to the best of his ability and breach of any of the terms and conditions of the agreement by him would be treated as misconduct and he could be terminated without notice if he found unsuitable or unsatisfactory performance. None of the conditions of the agreement is being satisfied and nothing has been placed on record to justify the same, save and except the notice of show cause issued on 06.02.2013 on the allegation of misappropriation of public money, negligence in duty and misconduct. But while the order impugned for disengagement was issued it has been mentioned that gross negligence in government duty, gross misconduct and unsatisfactory performance. Therefore, the reasons for issuance of show cause notice were different than that of the order passed by the authority on 16.04.2013. Meaning thereby, when the notice of show cause was issued, the opposite parties had already found the petitioner guilty of misappropriation of public money, negligence in duty and misconduct. Therefore, calling for reply to show cause notice was only an empty formality because the authorities had already prejudged the matter while issuing the notice of show cause. Much reliance has been placed on the preliminary inquiry report of the Addl. Project Director, DRDA dated 18.01.2013 basing upon which the show cause notice was issued on 06.02.2013. The said preliminary inquiry report dated 18.01.2013 has never been served on the petitioner. As such, on the basis of such preliminary inquiry report, the opposite parties had concluded the inquiry finding him guilty of gross negligence in government duty, gross misconduct and unsatisfactory performance. The status of preliminary inquiry report has been considered by the apex Court in various judgments.

8. For just and proper adjudication of the case, reliance has been placed on the case of ***Narayan Dattatraya Ramteerthakhr v. State of Maharastra***, (1997) 1 SCC 299 wherein the apex Court held as follows:-

> *"……..The preliminary enquiry has nothing to do with the enquiry conducted after the issue of the charge-sheet. The former action would be to find whether disciplinary enquiry should be initiated against the delinquent. After full-fledged enquiry was held, the preliminary enquiry had lost its importance."*

9. In the case of ***Nirmala J. Jhala v. State of Gujarat***, (2013) 4 SCC 301, in which reference has also been made to the case of ***Narayan Dattatraya Ramteerthakhar*** (supra), in paragraphs 23 and 25 the apex Court held as follows:-

> ***"23.*** *In view of the above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.*
>
> ***xx xx xx***
>
> ***25.*** *The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry."*

Similar view has also been taken by this Court in ***Janardan Mohanty v. Union of India***, (OJC No.6319 of 1999, disposed of on 17.01.2019 and in ***Subash Chandra Sahu v. Union of India***, 2019 (I) OLR 728.

10. In course of hearing, Mr. B. Senapati, learned Addl. Government Advocate laid emphasis on the proceedings of joint verification report dated 12.02.2013 and contended that because of such report, action has been taken against the petitioner. Though office order dated 16.04.2013 has relied upon the said inquiry report, nothing has been placed on record to indicate that such a report has ever been served on the petitioner calling upon him to give reply. Learned Addl. Government Advocate further contended that the petitioner being not a government employee, the provisions of OCA (CCS) Rules may not have any application to the petitioner. But in absence of rules applicable to the employee, at least the provisions of natural justice has to be complied with.

11. In ***Bhagawan v. Ramchand,*** AIR 1965 SC 1767, the apex Court held that the rule of law demand that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

12. In ***Sukdev Singh v. Bhagatram,*** AIR 1975 SC 1331, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice.

13. The soul of natural justice is 'fair play in action'. In ***Maneka Gandhi v. Union of India,*** (1978) 1 SCC 24, the Hon'ble Justice P.N. Bhagwati, J, as his lordship then was, has countered natural justice with 'fair play in action'.

In ***HK (An Infant) in re,*** (1967) 1 All ER 226 (DC), Lord Parker, CJ, preferred to describe natural justice as 'a duty to act fairly'.

In ***Fairmount Investment Ltd. v. Secretary of State of Environemnt,*** (1976) 2 All ER 865 (HL), Lord Russel of Kilowen described the natural justice as 'a fair crack of the whip'.

In ***R. V. Secretary of State for Home Affairs,*** (1977) 3 All ER 452 (DC & CA), Geoffery Lane, LJ, in defining the natural justice used the phrase 'common fairness'.

14. In ***Swadeshi Cotton Mills v. Union of India,*** AIR 1981 SC 81, the apex Court considered the meaning of 'natural justice' to the following effect:-

> *"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth", "Natural Justice" by Paul Jackson, 2nd Ed., Page 1. In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in the conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as " that part of natural law which relates to the administration of justice."*

15. In ***Swadeshi Cotton Mills*** *(supra),* the apex Court held as follows:

> *"Principles of natural justice are principles ingrained into the conscience of men. Justice being based substantially on natural ideals and human values, the administration of justice here is freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Principles/rules of natural justice are not embodied principles/rules. Being means to an end and not an end in them, it is not possible to make an exhaustive catalogue of such rules (Principles).*

16. In ***State of U.P. V. Vijay Kumar Tripathy,*** AIR 1995 SC 1130, the apex Court further held that it is important to note that the normal rule that whenever it is necessary to ensure against the failure of justice, the

principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principle of natural justice, but in that event the validity of that rule may fall for consideration.

17. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh,*** (2008) 16 SCC 276, the apex Court held that over the years by a process of judicial interpretation two rules have been evolved as representing the fundamental principles of natural justice in judicial process including therein quasi-judicial and administrative process, namely, an adjudicator should be disinterested and unbiased *(nemo judex in causa sua*) and that the parties must be given adequate notice and opportunity to be heard (*audi alteram partem).* They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men.

18. In view of the aforesaid law laid down by the apex Court and applying to the same to the present context, if the opposite parties have relied upon the documents dated 18.01.2013 and the preliminary inquiry report conducted by the Addl. Project Director, DRDA and also the joint verification report dated 12.02.2013, the same could have been confronted with the petitioner by providing him an opportunity of hearing and calling upon him to show cause. But such documents have been relied upon by the opposite parties while passing the order impugned dated 16.04.2013 and no reference has been made to those documents while show cause for disengagement was called for from the petitioner. Therefore, the petitioner had no occasion to explain such documents which have been relied upon in the order of disengagement dated 16.04.2013 passed by the authority concerned and more particularly when the notice of show cause was issued the petitioner had already been found guilty on the charges of misappropriation of public money, negligence in duty and misconduct. Once the authorities have prejudged the matter finding the petitioner guilty, calling upon him to show cause, pursuant to show cause notice, was an empty formality. Therefore, the consequential order dated 16.04.2013 passed by the authority on the basis of preliminary inquiry report dated 18.01.2013 and proceeding dated 12.02.2013 finding him guilty of misappropriation of government money, gross negligence in government duty and gross misconduct and unsatisfactory performance, is contrary to the notice of

show cause issued on the charges of misappropriation of public money, negligence in duty and misconduct, where the authority had already prejudged the matter finding him guilty of the said charges.

19. In the above view of the matter, this Court is of the considered view that the order of disengagement passed on 16.04.2013 in Annexure-7:Annexure-E/4, having been passed in gross violation of principles of natural justice, cannot sustain in the eye of law and is liable to be quashed. Accordingly, the same is hereby quashed. The opposite parties are directed to allow the petitioner to work, as before, by engaging him as GPTA.

20. The writ petition is thus allowed. However, there shall be no order as to cost.

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**2020 (I) ILR - CUT- 122**

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

W.P.(C) NO. 16928 OF 2006

**SUDRA PRATAP KARUAN & ORS.** .....Petitioners

*.Vs*

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

**(A) WORDS AND PHRASES – 'Preference' – Meaning of.**

*"Preference" means prior right; the superiority of one person or thing over another."*

*"Preference" means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another.*

*"Preference" is the expression of a motive or desire on the part of the directors of a Corporation to favour some creditors over others; to put them, as the word implies, a head in the race of assets.*

*The common definition of "preference as found in law dictionaries, is the paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claims, to the exclusion of the rest. (Para 7)*

**(B) WORDS AND PHRASES – The word 'then' – Meaning of – Use of word 'then' in preference clause provided in the guidelines for**

**recruitment of GRS which says the candidates of the same Grama Panchayat area will be given preference – Writ petition by more meritorious candidates challenging the selection of candidates on the basis of preferential clause – Effect of – Held, if these interpretations are attached to the preference clause (f) of the advertisement then it has to be given effect of sequence – If that sequence is followed and candidates belonging to concerned Kurmel Gram Panchayat area are available, then question of consideration of candidates from other Gram Panchayat area does not arise, even if they are more meritorious than the candidates belonging to same Panchayat Samiti area, otherwise the meaning of preference will be redundant.** (Para 16)

**Case Laws Relied on and Referred to** :-

1. AIR 2003 SC 3961:(2003) 9 SCC 34 : The Secretary, Andhra Pradesh Public Service Commission .Vs. Y.V.V.R.Srinivasulu.
2. AIR 1984 SC 200 : Sher Singh .Vs. Union of India.
3. AIR 1993 SC 477 : Indra Sawhney .Vs. Union of India.
4. (2006) 6 SCC 474 : State of U.P. .Vs. Om Prakash.
5. AIR 2008 Cal. 88 : Core Ceramics Ltd.Vs. Union of India.
6. AIR 1952 Pepsu 161 : Jangir Singh .Vs. State.
7. AIR 1986 SC 1043 : Om Prakash Shukla .Vs. Akhilesh Kumar Shukla.
8. AIR 1995 SC 1088 : Madan Lal .Vs. State of Jammu and Kashmir.
9. (2011) 1 SCC 150 : Vijendra Kumar Verma .Vs. Public Service Commission, Uttarakhand and Ors.
10. (2007) 11 SCC 522 : Marripati Nagaraja .Vs. Government of A.P.
11. 2017 (II) OLR 274 : Sevati Patra (supra); Pradeep Kumar Jena .Vs. State of Odisha.
12. 2018 (Supp-II) OLR 946 : Pravati Nayak .Vs. State of Odisha.
13. W.P.(C) No. 14047 of 2012 (Keshari Sahoo .Vs. State of Odisha).

For Petitioners : Mr. B.B. Mohanty.
For Opp. Parties : Mr. S. Mishra, Addl. Govt. Adv.
M/s. B.K. Dash, S.R. Dash,R.Dash, R. Sethy and D. Mahajan.
M/s. R.C. Pattanaik-2 and R.K. Pradhan

JUDGMENT Date of Hearing: 25.06.2019 : Date of Judgment : 02.07.2019

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

The petitioners, by means of this writ application, seek to quash the provisional select list of Multi Purpose Assistants (Gram Rozgar Sevak) prepared vide Annexure-4 dated 27.11.2006, and to issue direction to the opposite parties to prepare a fresh select list strictly on the basis of the merit as per the rules and instructions in vogue by considering the candidatures of

the petitioners along with others for appointment as G.R.S. in pursuance of the Advertisement dated 11.09.2006 in Annexure-1 within a stipulated time.

2. The factual matrix of the case, in hand, is that the petitioners, who are the permanent residents of different villages under Narla Panchayat Samiti (Block) of Kalahandi District, having qualification of 10+2 in different streams, applied for the post of Multi Purpose Assistants (Gram Rozgar Sevak) (in short "MPA(GRS)") pursuant to advertisement dated 11.09.2006 in Annexure-1 issued by the opposite party no.2-Collector & CEO, DRDA, Kalahandi. By the said advertisement, applications were invited in plain papers subscribing the name of the post with detail bio-data from the eligible candidates, along with attested copies of all the relevant certificates and mark sheets, for contractual engagement of candidates/Firm in the Gram Panchayats and Panchayat Samities of Kalahandi district. The petitioners are concerned with serial no.6, Narla Panchayat Samiti (Block) in respect of Baddharpur, Gadebandha, Karmegaon, Kurmel, Mandel, Raksi, Shantpur, Bhanpur, Takarla, Ulikupa Gram Panchayts. More specifically, their case is confined to Kurmel G.P. of Narla Block. The petitioners, having satisfied all the requirements, applied for the post of MPA(GRS). On scrutiny being made by the selection committee, a provisional select was prepared on 27.11.2006. Since the petitioners have not come out successful, they have filed this application.

2. Mr. B.B. Mohanty, learned counsel for the petitioners at the outset assails the select list by alleging that it suffers from the vices of arbitrariness and non-application of mind and hits by mandates of Articles 14, 15 and 16 of the Constitution of India. It is contended that in the selection process, the opposite parties have discriminated the candidates on the ground of place of birth in a particular revenue village/G.P. in contravention of the provision of Constitution. Besides, so far as the advertisement and the scheme of selection, as decided by the competent authority, are concerned the same never intended to fix such criteria or classification so as to eliminate meritorious candidates among all candidates in the fray, only on the ground of place of residence. The select list was prepared by misinterpreting and more so by giving improper interpretation to the word "preference" and the criteria of preference fixed in the advertisement itself. It is further contended that the opposite parties have selected the candidates only on the basis of the residence of particular Gram Panchayat area even though the candidates securing more marks are very much available in the neighbouring Gram

Panchayats under the very same Panchayat Samiti (Block), therefore, seeks for quashing of the same. To substantiate his contention he has relied upon the judgment of the apex Court in ***The Secretary, Andhra Pradesh Public Service Commission v. Y.V.V.R.Srinivasulu,*** AIR 2003 SC 3961:(2003) 9 SCC 34.

3. Mr. S. Mishra, learned Addl. Government Advocate contended that the provisional select list was prepared by following due procedure of selection and it is contended that the petitioners belong to Bhanpur Gram Panchayat area and they have applied for the post of MPA(GRS) in other Gram Panchayat, namely, Kurmel Gram Panchayat as the GRS was not vacant in Bhanpur Gram Panchayat, but the selection has been made as per the advertisement giving preference to the candidates of the concerned Gram Panchayat area, since eligible candidates are found in Kurmel Gram Panchayat area, and there is no chance to select the candidates outside the Gram Panchayat. It is further contended that even if the petitioners have secured more marks, they have not been considered for selection of MPA(GRS), as they are not coming under the concerned Gram Panchayat area, where the MPA(GRS) posts are lying vacant. As the selection has been done in consonance with the advertisement itself, by giving preference to the candidates of the very same area, namely, Kurmel Gram Panchayat, the same cannot be said to be illegal or irregular so as to cause interference of this Court in this proceeding.

4. Mr. S.R. Dash, learned counsel appearing for opposite party no.3 stated that the selection of MPA(GRS) has been made as per the guidelines prepared by the Commissioner-cum-Secretary to Govt. in Panchayati Raj Department, Orissa, Bhubaneswar vide his letter dated 25.08.2006. The selection has been done in consonance with the Government guidelines read with conditions stipulated in the advertisement dated 11.09.2006 published in Odia daily “Sambad” and as such, when the candidates belonging to concerned Gram Panchayat area are available, the question of considering the candidates from outside the Gram Panhayat area does not arise, as the advertisement itself gives a preferential treatment to the candidates of the respective Gram Panchayat. The advertisement itself specifically mentions that the preference can be given to the candidates belonging to concerned Gram Panchayat area, then to concerned Panchayat Samit area, and then to Kalahandi District area. If the suitable candidates are available in the concerned Gram Panchayat area, the question of considering the candidates

from other Gram Panchayat area does not arise. In that view of the matter, the present select list prepared by the opposite parties in Annexure-4 is in consonance with the guidelines issued by the Government read with conditions stipulated in the advertisement itself. Thereby, no illegality or irregularity has been committed by the authority by preparing such select list so as to warrant interference of this Court.

5. This Court heard Mr. B.B. Mohanty, learned counsel for the petitioners; Mr. S. Mishra, learned Addl. Government Advocate; and Mr. S.R. Dash, learned counsel for opposite party no.3; and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. Admittedly, the opposite party no.2-Collector-cum-Chief Executive Officer, DRDA, Kalahandi issued an advertisement in Annexure-1 dated 11.09.2006 inviting applications in plain paper subscribing the name of the post with detail bio-data from the eligible candidates, along with attested copy of all relevant certificates and mark sheets, for contractual engagement in the Gram Panchayats and Panchayat Samities of Kalahandi District for the post of Multi Purpose Assistants (Gram Rojgar Sevak). The present disputes relates to Narla Panchayat Samiti mentioned at serial no. 6, more particularly Kurmel Gram Panchayat, of the said advertisement. The relevant part of the advertisement, which is required for the purpose of deciding this case, is quoted below:

***"Multi Purpose Assistants (Gram Rojgar Sevak)a) Probable assignment:***

| ***Sl. No.*** | ***Name of the Block*** | ***Name of the G.P.*** |
|---|---|---|
| *XX* | *XX* | *XX* |
| *6.* | *Narla* | *Baddharpur, Gadebandha, Karmegaon, Kurmel, Mandel, Raksi, Shantpur, Bhanpur, Takarla, Ulikupa* |

*b) Age : Above 21 years and below 35 years as on 1.9.06.*

*c) Qualification : 10+2 pass, Preference will be given to commerce stream having computer proficiency of "O" level with use of Oriya language in Computer.*

*d) Selection :Selection will be made strictly on the basis of marks obtained in the 10+2 examination.*

*e) Remuneration : Consolidated remuneration of Rs.2,000/- (RupeesTwo thousand) only per month.*

> *f) Preference :It will be given to the candidates belonging to concerned Gram Panchayat area then to concerned Panchayat Samiti area then to Kalahandi District area."*

As per the condition stipulated in the advertisement, if a candidate has requisite qualification as per Clause (c) then he will be considered for selection strictly on the basis of the mark obtained in the 10+2 examination, but preference will be given to the candidates belonging to the concerned Gram Panchayat area, then to concerned Panchayat Samiti area, and then to Kalahandi district area. Meaning thereby, if a candidate belonging to concerned Gram Panchayat area is available, he/she will be first taken into consideration. If a candidate belong to concerned Gram Panchayat area is not available, then a candidate belonging to concerned Panchayat Samiti area will be considered, and if a candidates belonging to concerned Panchayat Samiti is not available, then a candidate from Kalahandi district area will be considered.

7. The above being the condition set out in the advertisement, the sole question is now to be considered what is the meaning of 'preference'.

> *"Preference" means prior right; the superiority of one person or thing over another."*
>
> *"Preference" means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another.*
>
> *"Preference" is the expression of a motive or desire on the part of the directors of a Corporation to favour some creditors over others; to put them, as the word implies, a head in the race of assets.*
>
> *The common definition of "preference as found in law dictionaries, is the paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claims, to the exclusion of the rest.*

8. In ***Sher Singh v. Union of India***, AIR 1984 SC 200, the apex Court held that preference would mean that other things generally appearing to be qualitatively and quantitatively equal though not with mathematical accuracy, statutory provisions will tilt the balance in favour of the undertakings.

9. In ***Indra Sawhney v. Union of India,*** AIR 1993 SC 477, the apex Court held that the expression 'preference' means an equitable apportionment of the vacancies reserved (for backward classes) among them.

10. In ***Secy., A.P. Public Service Commission,*** mentioned supra, the apex Court held that the word 'preference' is capable of different shades of

meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged. A rule of 'preference' meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. The 'preference' envisaged has to be given only when the claims of all candidates who are eligible, are taken for consideration and when any one or more of them found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-à-vis others in the matter of actual selection.

11. In ***State of U.P. v. Om Prakash***, (2006) 6 SCC 474, the apex Court held that the use of word 'preference' would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor in favour of candidates vis-à-vis others in the merit prepared by the commission. It does not mean on bloc preference irrespective of inter se merit and suitability.

12. Keeping in view the law laid down by the apex Court and the advertisement issued by the opposite parties referring to clause (f) if the preference is given to the candidates belonging to concerned Gram Panchayat area, the opposite parties no.4 to 7, having belonged to concerned Gram Panchayat area and the petitioners belonging to beyond the Gram Panchayat area, then in that case the opposite parties no.4 to 7 have a preference over the petitioners, and as such, the selection has been done on the basis of clause (f) of the advertisement itself. The preference clause itself also indicates that preference will be given first to the candidates belonging to concerned Gram Panchayat area, then to concerned Panchayat Samiti area, and then to Kalahandi district area. That means, it has got a sequential benefits to be available to such candidates.

13. The word "then" has the following meaning:-

> *The word "then" means, when used as a word of reasoning, "in that event", or "in that case", or "therefore". It also means "at that time" or "immediately afterwards".*
>
> *The word "then" as an adverb means at that time, referring to a time specified, either past or future. It has no power in itself to fix a time.*

14. In ***Core Ceramics Ltd. v. Union of India***, AIR 2008 Cal. 88, while interpreting Sec. 13(2) of Securitization and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2000, the Calcutta High Court held that the use of the word 'then' in Section 13(2) of the Act makes the fulfillment of precondition of issuance of notice by secured creditors as mandatory.

15. While considering Sec. 235(2) of Criminal Procedure Code, 1973, in ***Jangir Singh v. State,*** AIR 1952 Pepsu 161, the Court held that the word 'then' stands for what is subsequently to follow in point of sequence.

16. If these interpretations are attached to the preference clause (f) of the advertisement then it has to be given effect of sequence. If that sequence is followed and candidates belonging to concerned Kurmel Gram Panchayat area are available, then question of consideration of candidates from other Gram Panchayat area does not arise, even if they are more meritorious than the candidates belonging to same Panchayat Samiti area, otherwise the meaning of preference will be redundant.

17. In the case at hand, the petitioners with eyes wide open participated in the process of selection knowing fully well that they do not belong to the concerned Gram Panchayat area and having done so, when they did not come out successful, approached this Court by means of this writ application contending that they are more meritorious than the candidates of the concerned Kurmel Gram Panchayat area, and as such they should have been taken into consideration for giving engagement as MPA(GRS). This contention is absolutely fallacious, reasons being, the petitioners, having participated in the process of selection and not come out successful, are precluded from challenge the select list subsequently by way of filing the present application, in view of the law laid down by the apex Court in ***Om Prakash Shukla v. Akhilesh Kumar Shukla***, AIR 1986 SC 1043, wherein the apex Court held as follows:

> *"when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

18. Taking into account the aforesaid judgment, the apex Court in ***Madan Lal v. State of Jammu and Kashmir***, AIR 1995 SC 1088 held as follows:

> *"……..If a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection*

*Committee was not properly constituted. In the case of* ***Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.****, AIR 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

19. In ***Vijendra Kumar Verma v.Public Service Commission, Uttarakhand and others***, (2011) 1 SCC 150, the apex Court in paragraph-27 ruled as follows:

*"In Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100 in para 18, it was held that:*

*"18…….. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."*

20. In ***Marripati Nagaraja v. Government of A.P.***, (2007) 11 SCC 522, the apex Court observed as follows:-

*"The other contention of Mr. Rao that the candidates had given only seven days' time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."*

Similar view has also been taken by this Court in ***Sevati Patra*** (supra); ***Pradeep Kumar Jena v. State of Odisha***, 2017 (II) OLR 274; ***Pravati Nayak v. State of Odisha***, 2018 (Supp-II) OLR 946; and also judgment dated 02.04.2019 rendered in W.P.(C) No. 14047 of 2012 (***Keshari Sahoo v. State of Odisha***).

21. In view of the factual and legal matrix discussed above, this Court is of the considered view that the select list prepared by the opposite parties in Annexure-4 dated 27.11.2006 is in consonance with the guidelines issued by

the Government and also in terms of the advertisement issued on 11.09.2006 vide Annexure-1. As such, no illegality or irregularity has been committed by the authority in preparing the same. Therefore, this Court finds no merit in this writ application, which is accordingly dismissed. No order as to costs.

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**2020 (I) ILR - CUT- 131**

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

W.P.(C) NO. 29460 OF 2011
AND
W.P.(C) NO. 30837 OF 2011

**GANESH CHANDRA BEHERA & ANR.** .....Petitioners

*.Vs .*

**BERHAMPUR UNIVERSITY & ORS.** .....Opp. Parties

**(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – When a particular prayer is not made – Whether court can grant such a relief by "Moulding of relief" – Held, Yes – In view of the law laid down by the apex Court, so far as "moulding of relief" is concerned, this Court is of the considered view that even if there is no such specific prayer made in the writ application, this Court can grant such relief, as has been advanced before this Court in course of hearing of the matter, at the final stage by "moulding the relief".**

(Para 17)

**(B) SERVICE LAW – Promotion – On being promoted to the vacant posts by following DPC, the petitioners have worked in the higher post and discharged higher responsibility – Subsequently reverted – Whether the benefits already received can be recovered? – Held, No.**

*"Therefore, applying the above mentioned law laid down by the apex Court and also of this Court to the present context, this Court is of the considered view that as the petitioners have worked in the higher post and discharged higher responsibility attached to the said post, being appointed against the vacant posts by following DPC, subsequently reverted, but by following review DPC again promoted to the post of Senior Assistant, therefore, the benefits which they have already received that cannot be curtailed or reduced in any manner. Consequentially, their scale of pay should be fixed accordingly and the direction given, vide order dated*

*20.12.2011 in Annexure-7, for reducing their salary to the basic minimum scale of pay, cannot sustain in the eye of law and the same is hereby quashed to that extent."* *(Para 19)*

**W.P.(C) No. 30837 of 2011**
**RAJAT KUMAR PATTANAIK & ORS.** .....Petitioners
*.Vs.*
**BERHAMPUR UNIVERSITY & ORS.** ..... Opp. Parties

**Case Laws Relied on and Referred to** :-

1. AIR 1975 SC 1709 : Pasupuleti Venkateswarlu .Vs. The Motor & General Traders.
2. AIR 1992 SC 700 : Ramesh Kumar .Vs. Kesho Ram,
3. (2010) 3 SCC 470 : Sheshambal (dead) through LRs .Vs. Chelur Corporation Chelur Building.
4. (2018) 17 SCC 203 : Samir Narain Bhojwani .Vs. Aurora Properties and Investments,
5. 2015 (II) OLR 214 : Premalata Panda .Vs.State of Odisha.
6. AIR 1988 SC 1621 : (1988) 3 SCC 449 State of Rjastan .Vs. M/s. Hindustan Sugar Mills Ltd.

For Petitioners : Mr. J. Pattnaik, Sr. Adv.
M/s. H.M.Dhal, B. Mohanty, T.K. Pattnaik, A. Pattnaik, B.S. Rayaguru and R.P. Roy.

For Opp. Parties : M/s. B.S. Mishra (2) and A.R. Mishra, [O.Ps. No. 1 and 2]
Ms. Pami Rath, [For intervenors]

JUDGMENT Date of Hearing: 14.11.2019 : Date of Judgment : 19.11.2019

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

Of the two writ petitions, as mentioned above, W.P.(C) No. 29460 of 2011, in which petitioners are two in number, has been filed for the following relief:-

> *"It is therefore, prayed that your Lordships be graciously pleased to admit the writ application, issue rule NISI in the nature of writ of mandamus or any other writ(s) as deem fit and proper calling upon the Opp.Parties to show cause as to why the letter no. No.9940(3)Admn-II (NT) date : 31.10.2011 of Berhampur University to hold the review DPC and all actions pursuant thereto including the orders under Annexures-6, 7 and 7(A) front dating the promotion of the petitioners and reducing their scale of pay at Sr. Assistant Level shall not be quashed and why said Opp. Parties shall not be prevented from holding any DPC to review the promotion of the petitioners given in the year 1998 and if the DPC is held as per the dates fixed and if the position of the petitioners at Sr. Assistant are revised then their seniority in the said promotional post be counted from 22.12.1998 be protected and*

*alternatively why the petitioners promotion to the post Sr. Assistant w.e.f. 22.12.1998 and their scale of pay against the said post including all benefits shall not be protected, if at all any such DPC is held for re-fixation of seniority of any employees.*

*In the event of the Opp.Parties fail to show-cause or show insufficient cause said rule be made absolute."*

And W.P.(C) No. 30837 of 2011, in which petitioners are six in number, has been preferred seeking following relief-:

*"It is therefore, prayed that your Lordships be graciously pleased to admit the writ application, issue rule NISI in the nature of writ of mandamus or any other writ(s) as deem fit and proper calling upon the Opp.Parties to show cause as to why the letter no. No.9940(3)Admn-II (NT) date : 31.10.2011 of Berhampur University vide annexure-6 to hold the review DPC and all actions pursuant thereto shall not be quashed and why said Opp.Parties shall not be prevented from implementing the decision if taken on 11.11.11 and 12.11.11 affecting the seniority and pay of the petitioners in the post of Sr. Asst. and alternatively why the petitioners promotion to the post Sr. Assistant w.e.f. 22.12.1998 and 7.12.2000 of the petitioner no.3 and their scale of pay against the said post including all benefits shall not be protected, if at all any such DPC is held for re-fixation of seniority of any employees.*

*In the event of the Opp.Parties fail to show-cause or show insufficient cause said rule be made absolute."*

In both the writ petitions, relief sought by the petitioners being similar to each other, they were heard together and are disposed of by this common judgment.

2. The factual matrix of the case, in hand, is that the petitioners were appointed as Junior Assistants in Berhampur University and were continuing as such. Due to a resolution passed by the syndicate, the posts of nine employees of the University, those who were senior to the petitioners and continuing as Junior Assistant, were upgraded to Senior Assistant subject to approval from the Chancellor and the Government. But such approval having been refused, the Chancellor passed order reverting back those upgraded Senior Assistants to the post of Junior Assistant. In the meantime, due to vacancies created on retirement of employees, the petitioners were promoted to the post of Senior Assistant. The employees, who were reverted back to the post of Junior Assistant, challenged their reversion before this Court by filing W.P.(C) Nos. 12854, 11368, 12562, 12564 and 12566 of 2007. This Court disposed of those writ petitions, vide common order dated 04.08.2011, upholding the order of reversion and directed that they would be placed and

adjusted in the gradation list where they were placed earlier on the date of up-gradation. It was further directed that if any consequential benefits accrued to them from the date of up-gradation to the date of reversion, the same would be conferred on them in accordance with the rules governing the field and they would also be entitled to higher salary without any recovery during the material period. In compliance of the said order, the University conducted review DPC and the employees, who were reverted to the post of Junior Assistants, along with the petitioners, their cases were considered and all of them were promoted to the post of Senior Assistant. Therefore, the petitioners have claimed in these writ applications that their scale of pay should be protected, as they have worked in the promotional post during relevant period and discharged their duties in the higher post of Senior Assistant.

3. Mr. J. Pattnaik, learned Senior counsel appearing along with Mr. B.S. Rayaguru, learned counsel for the petitioner contended that though several questions have been raised in these writ applications, he confined the prayer only to the extent that the benefits of promotion which had been granted to the petitioners from 1998 till 2008, by following DPC, and financial benefits and other benefits, which have been received by the petitioners, should not be curtailed, rather the same should be protected as these petitioners have already got promotion by way of a review DPC held by the University in compliance of order passed by this Court on 04.08.2011 in W.P.(C) Nos. 12854, 11368, 12562, 12564 and 12566 of 2007. It is further contended that the petitioners have claimed in these writ applications that the scale of pay against the post of Senior Assistant w.e.f. 22.12.1998 including all the benefits may be protected so that no prejudice will be caused to them, and that even if such a prayer has not been made in express manner, this Court can in exercise of power under Article 226 of the Constitution of India mould the relief taking into consideration the factual matrix of the case, in hand.

4. Mr. B.S. Mishra, learned counsel appearing for the University per contra contended that the petitioners have already been promoted to the post Senior Assistant, and as such, they are continuing in such post by following DPC. So far as claim for protecting their salary and other financial benefits from 1998 to 2008 is concerned, for that purpose the petitioners can file representation before the authority so that the same can be considered and decided in accordance with law. It is further contended that the petitioners have not made specific prayer in the present writ applications in regard to the same, and thereby, the relief sought subsequently cannot be granted to the petitioners.

5. Ms. Pami Rath, learned counsel appearing for the private opposite parties contended that they are senior in the cadre of Junior Assistant. Pursuant to resolution passed by the syndicate, their posts were upgraded to Senior Assistant, of course subject to approval of the Chancellor and the Government. As both the Chancellor and Government refused to approve such up-gradation, as a consequence thereof they faced reversion, which was challenged before this Court and vide order dated 04.08.2011 though the reversion was upheld but protection to their salary was given. Pursuant to review DPC, these private opposite parties have already got promotion and continuing in the promotional post of Senior Assistant and receiving the benefits in compliance of order passed by this Court on 04.08.2011.

6. This Court heard Mr. J. Pattnaik, learned Senior Counsel appearing along with Mr.B.S. Rayaguru, learned counsel for the petitioners in both the writ applications; Mr. B.S. Mishra, learned counsel appearing for opposite parties no. 1 and 2- Berhampur University; and Ms. Pami Rath, learned counsel appearing for private opposite parties; and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. Having a cursory glance on the materials available on record, it is revealed that on 24.05.1994, syndicate of the University decided and resolved to upgrade certain posts of Junior Assistant to Senior Assistant and in pursuance of such resolution of the syndicate, 9 Junior Assistants were upgraded to the post of Senior Assistants and those Juniors Assistants were senior most in the cadre. Similarly, on 05.05.1995, syndicate of the University decided to upgrade some posts of Junior Assistant to that of Senior Assistant and in pursuance of such resolution of the syndicate, other 9 Junior Assistants were also upgraded as Senior Assistants on 03.02.1997 and such Junior Assistants were senior most Junior Assistants, but below the aforesaid nine Junior Assistants those who were upgraded earlier by syndicate resolution dated 24.05.1994. Such up-gradation of the above Junior Assistants to the post of Senior Assistant was subject to approval by the Chancellor as well as the Government. But the Chancellor and the Government refused to accord approval to such up-gradation and directed to restore back such upgraded Junior Assistant to the position which they were holding before their up-gradation, and to recover excess amount which were paid to them in the meantime. But fact remains, there was no consideration of

other Junior Assistants vis-à-vis the up-graded Junior Assistants while upgrading them to the post of Senior Assistant and they were upgraded only basing on their seniority without holding DPC, as required under the Orissa Universities Recruitment & Promotion of the Non-teaching Employees Rules, 1962 (hereinafter referred to as "The Recruitment Rules"). Since the Government as well as the Chancellor refused to accord approval, orders were passed on 06.09.2007 restoring back such upgraded Senior Assistants to their previous position as was before up-gradation.

8. In between 1994 to 1997, some ministerial employees were retired, for which certain posts of the Senior Assistants fell vacant. Against such retirement vacancies, some Junior Assistants, including the petitioners, were promoted to the post of Senior Assistant. The aforesaid order dated 06.09.2007 restoring those upgraded Senior Assistants to their previous posts was challenged before this Court in W.P.(C) Nos. 12854, 11368, 12562, 12564 and 12566 of 2007. The said cases, in which the petitioners were arrayed as opposite parties, were disposed by this Court, vide order dated 04.08.2011, the relevant part of which reads as under:-

> *"xx xx xx*
>
> *After hearing learned counsel for the parties, we are of the opinion that there is no infirmity in the order reverting the petitioners to the posts where they were working on the pre-upgraded stage. But the case of the petitioners is that now they have been placed at the bottom of the gradation list. According to them, the order of the Chancellor has not been followed in the spirit, in which it was passed. We are also of the view that even if we do not interfere with the order of reversion, the petitioners cannot be placed at the bottom of the gradation list. They shall be placed and adjusted in the gradation list where they were placed earlier on the date of up-gradation. If there is any consequential benefit accrued to the petitioners in the meantime, i.e. from the date of up-gradation of the posts in question till the date of reversion, the same shall be conferred on them in accordance with the Rules governing the field. Accordingly, we so direct.*
>
> *So far as recovery from the salary of the petitioners is concerned, we are of the view that as the petitioners have worked in the higher posts and discharged the higher responsibilities attached to the said posts, they are entitled to get the higher responsibilities attached to the said posts, they are entitled to get the higher salary even if they have been subsequently reverted for the reasons that the State Government was not able to take the financial burden. This cannot be the reason for recovery of the differential amount received by the petitioners.*
>
> *xx xx xx"*

A bare reading of the above mentioned order would indicate that this Court did not find any infirmity in the order reverting back the petitioners to

the post where they were working at the pre-upgraded stage and accordingly did not interfere with the order of reversion but held that they cannot be placed at the bottom of the gradation list and they can be placed and posted where they were placed earlier on the date of up-gradation. It was further held that if any consequential benefits accrued to them in the meantime i.e. from the date of up-gradation till the date of reversion, the same should be conferred on them in accordance with the rules governing the field. It was also fortified that so far as recovery from their salary is concerned, since they had worked in the higher posts and discharged higher responsibilities attached to the said posts, they were entitled to get the higher salary even if they had been subsequently reverted for the reasons that the State Government was not able to take the financial burden. This cannot be a reason for recovery of the differential amount received by the petitioners. Therefore, the order so passed on 04.08.2011 clearly protects the interest of the private opposite parties no. 6 to 23 those who were upgraded to the post of Senior Assistant and reverted back pursuant to non-approval by the Chancellor as well as the Government. But so far as the petitioners are concerned, though they were made as opposite parties in those cases, no direction was issued by this Court with regard to protection of their service benefits. The order dated 04.08.2011 were received by the University on 23.08.2011. Since this Court granted three months time for compliance, which was to expire on 23.11.2011, finding no other way out, the Berhampur University proceeded with the matter for implementation of the judgment in its letter and spirit.

9. It is of relevance to note, promotion to the post of Senior Assistant of the University are governed under the Recruitment Rules and under the said rules, the posts of Senior Assistant are to be filled up by way of promotion from the posts of Junior Assistant. As such, there is no provision for direct recruitment to the post of Senior Assistant. Under Rule-13 of the Recruitment Rules, it has been provided that the post of Senior Assistant is to be filled up by way of promotion. Under Rule-15 of the Recruitment Rules, the eligibility criteria for promotion to the post of Senior Assistant have been provided. Under Rule-14 of the Recruitment Rules, constitution of Departmental Promotion Committee for promotion to different posts, including Senior Assistant, has been prescribed. Under Rule-15(3), it has been specifically provided that the seniority of Senior Assistants shall be according to the ranking assigned to them in the select list drawn up by the Departmental Promotion Committee. Apart from this, under Rule-11 of the Recruitment

Rules it has also been provided that the seniority of each candidate in the respective cadre shall be determined on the basis of his position in the select list. The relevant provisions contained under Rule-2(b), 2(c), 3(a), 11, 13(1), 14(1), 14(2), 15(1), 15(3) are extracted below:

*" Definition 2(b) 'Cadre' means the strength of service or a part of service sanction separate unit;*

*2(c) "Prescribed" means by the Rules of Standing orders;*

*Ministerial Employees 3. Ministerial establishment under University shall include-*

*(a) Junior and Senior Assistants, Section Officers Level-II and Level-I and Office Superintendents;*

*Seniority 11. The Seniority of each candidates in the respective cadre shall be determined on the basis of his position in the select list.*

*Promotional Post 13.1 The following posts shall be filled up by way of promotion:-*

*(a) S.O. Level-1-1/ Office Superintendent.*
*(b) S.O. Level-II*
*(c) Senior Assistant*
*(d) Superintendent, Issue Section*
*(e) Head Typist*
*(f) Senior Typist*
*(g) Personal Assistant.*
*(h) Senior Stenographer*
*(i) Electricians Grade-I and Grade-II*
*(j) Driver (Heavy Vehicles)*
*(k) Diarists and Dispatchers*
*(l) Pasting Clerk*
*(m) Treasure Sarkar*
*(n) Wiremen*
*(o) Such other posts as may be determine by the Vice Chancellor from time to time.*

*Departmental Promotion Committee 14.(1) There shall be Departmental Promotion Committees which shall consider all cases of promotion to all ministerial and other posts and it shall make sustainable recommendations to the Vice-Chancellor for his consideration.*

*(2) The Departmental Promotion committee for promotion to the Senior Assistants/Senior Typists shall consists of the following members:-*

*1) Registrar - Chairman*
*2) Comptroller of Finance - Member*
*3) Senior most Deputy Registrar - Member*

*Promotion to the post of Senior Assistant*

*15.1 No Junior Assistant shall be considered for promotion to the post of Senior Assistant unless he has put in at least five years of continuance service as a Junior Assistant.*

*15.3 The seniority of Senior Assistants shall be according to the ranking assigned to them in the select list drawn up by the Departmental Promotion Committee."*

10. In view of the statutory provisions governing the field, in order to implement the order dated 04.08.2011 passed by this Court, the University had to constitute a DPC and consider the cases of all the employees, who were parties to the said cases, in order to place and adjust them in the gradation list where they were placed earlier on the date of up-gradation, and also grant them consequential benefits accrued on them in accordance with rules governing the field. Needless to say, the aforementioned Recruitment Rules have been framed under the Orissa University First Statute, 1990 in consultation with the Chancellor as well as the State Government and on being approved by them came into force with effect from 18.05.1992, when it was published in the official gazette. The said Recruitment Rules, being statutory, are applicable to all the Universities to whom the Orissa University Act, 1989 applies. Therefore, the University has to implement the orders of the Court in consonance with the aforementioned Rules. As a consequence thereof, on 20.09.2011, the Chancellor had also directed the University to implement the direction of the Court. Accordingly, the DPC was constituted and date of meeting of DPC was scheduled to be held on 11.11.2011 and 12.11.2011. Accordingly, notices were issued to the members of the DPC to be present in the meeting, by letter dated 31.10.2011 of the convenor of the DPC, who is in-charge of non-teaching establishment of the University. But when the DPC was started on 11.11.2011, an affidavit was received by the University from the petitioners, that this Court passed an interim order on 09.11.2011 in misc. case no. 17115 of 2011 arising out of W.P.(C) No. 29460 of 2011 wherein direction had been given that the University may hold the DPC, but shall not act upon the result of the DPC till 15.01.2012. Therefore, the DPC was held on the scheduled dates, i.e., on 11.11.2011 and 12.11.2011, but the result was not published, as directed by this Court. But the said interim order of this Court, having been vacated on 24.11.2011, the private opposite parties, who were upgraded to the post of Senior Assistant but were subsequently brought back to their previous position as Junior Assistant, were in the meantime promoted to the post of Senior Assistant on

regular basis in the year 2010. Therefore, all such employees, including the petitioners, are continuing as Senior Assistant by following review DPC held by the University. Since by order dated 04.08.2011 the benefits accrued in favour of upgraded Senior Assistants, who had been reverted back, had been protected, no order was passed, so far as petitioners are concerned. Therefore, the petitioners have approached this Court in the present applications contending that they should also be granted equal protection, as because they had been discharging duties in higher post from 1998 till 2008 by getting promotion against regular vacant posts from Junior Assistant to Senior Assistant following DPC and consequent upon the review DPC they are also discharging the same duty, for which their salary should not be reduced to the basic minimum scale of pay with effect from the date they have been promoted by following review DPC. Although nothing has been placed on record to indicate that any direction was given by the Berhampur University to recover the amount for the period from 1998 to 2008 from the petitioners, but in view of the order dated 20.12.2011 in Annexure-7 shifting the date of promotion, salary of the petitioners may be reduced to the basic minimum scale of pay, and that itself clearly indicates that the petitioners, who have already received benefits as Senior Assistant from 1998 to 2008, on being given promotion by following due procedure through DPC, will suffer irreparable loss in the event consequential order is passed for recovering the amount from them.

11. At this juncture, a contention was raised by Mr. B.S. Mishra, learned counsel appearing for the University that no such prayer having been made in these writ applications, such relief cannot be granted by this Court. But, Mr. J. Pattnaik, learned Senior Counsel appearing for the petitioners contended that even if such a prayer is not made in the writ applications, this Court can mould the prayer in the fitness of things taking into consideration the factually aspect of the matter.

12. "Moulding of relief" principle was recognized by the Supreme Court in ***Pasupuleti Venkateswarlu*** *v.* ***The Motor & General Traders,*** AIR 1975 SC 1709. It was observed therein that though the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding, the principle that procedure is the handmaid and not the mistress of the judicial process is also to be noted. Justice **VR Krishna Iyer** observed:

> *"If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of*

> *the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decrotal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.*

13. In ***Ramesh Kumar*** *v.* ***Kesho Ram****,* AIR 1992 SC 700, the Supreme Court again following this principle, i.e. "moulding of relief", observed as follows:

> *"6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief."*

14. In ***Sheshambal (dead) through LRs*** *v.* ***Chelur Corporation Chelur Building****,* (2010) 3 SCC 470, the apex Court laid down the conditions in which the relief can be moulded:

> *"(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;*
>
> *(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and*
>
> *(iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."*

15. In ***Samir Narain Bhojwani*** *v.* ***Aurora Properties and Investments,*** (2018) 17 SCC 203 the apex Court observed that principle of moulding of relief could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage.

16. In ***Premalata Panda v. State of Odisha,*** 2015 (II) OLR 214, relying upon ***State of Rajasthan*** *v.* ***M/s. Hindustan Sugar Mills Ltd.,*** AIR 1988 SC

1621 : (1988) 3 SCC 449 where the apex Court held that the High Court which was exercising high prerogative jurisdiction under Article 226 could have moulded the relief in a just and fair manner as required by the demands of the situation, this Court, in exercise of such power under Article 226 of the Constitution of India even though no specific prayer was made in the writ petition, taking into consideration the facts and circumstances of the case, was inclined to mould the relief and passed order/direction as deemed fit and proper as prayed for by the learned counsel for the petitioner in the writ petition.

17. In view of the law laid down by the apex Court, so far as "moulding of relief" is concerned, this Court is of the considered view that even if there is no such specific prayer made in the writ application, this Court can grant such relief, as has been advanced before this Court in course of hearing of the matter, at the final stage by "moulding the relief".

18. Reliance has been placed by learned Senior Counsel appearing for the petitioners on the judgment rendered in ***A.K. Patra***, mentioned supra, in paragraphs 11, 12 and 13 whereof this Court has observed as follows:-

> *"11. The judgment of the apex Court in **Chandi Prasad UniyaL v. State of Uttarkhand** AIR 2012 SC 2951 in which the judgment in **Sahib Ram v. State of Haryana** (1995) Supp.(I) SCC 18= 1995 AIR SCW 1780) was taken into consideration, since there was an apparent difference of views expressed on the one hand by the apex Court in **Shyam Babu Verma v. Unon of India (1994(2) SCC 521** and **Sahib Ram v. State of Haryana**, 1995 Supp(1) SCC 18 and in other hand in **Chandi Prasad Uniyal (supra)**, the matter was referred to a larger bench of three judges, but the apex court while disposing of the reference, the three- Judges Bench in **State of Punjab v. Rafiq Masih**, (2014) 8 SCC 883 has recorded the following observation:*
>
> *"6. In our considered view, the observations made by the Court not to recover the excess amount paid to the appellant therein were in exercise of its extraordinary powers under Article 142 of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice.*
>
> *xx xx xx*
>
> *13. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment.*
>
> *14. In that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we send back the matters to the Division Bench for their appropriate disposal."*

*12. Consequence thereof, the apex Court in* ***State of Punjab v. Rafiq Masih (supra)*** *has made their endeavour to lay down the parameters of fact situations wherein the employees who are beneficiaries of the wrongful monetary gains at the hands of the employer, may not be compelled to refund the same and the apex Court held that the instant benefit cannot extend to an employee merely on account of the fact that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee. In paragraphs 7 to 10, the apex Court held as follows :*

*"7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by6 the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this court exempted employees from such recover, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this court.*

*8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.*

*9. The doctrine of equality is a dynamic and evolving concept having may dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39,39-A,43*

*and 46 contained in Part IV of the Constitution of India, dealing with the "decretive principles of State Policy". These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice----social, economic and political, be inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.*

*10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental actions. An action of the state, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, that the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India."*

*Finally in paragraph 18, the apex Court has held as follows :*

*"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*

*(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).*

*(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*

*(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*

*(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*

*(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

*13. Applying the law laid down in* ***State of Punjab v. Rafiq Masih( supra)*** *to the present facts to since the case of the petitioner falls within the parameters of*

*Clause (i) to Clause (iv) as delineated above, the principles laid down by the apex Court in* ***Chandi Prasad Uniyal (supra)*** *and of this Court in* ***Ras Bihari Mandal v. N.T.P.C. Ltd.*** *2014 (Supp.II) OLR 951 have no application. This Court is of the considered view that the direction given for re-fixation of pay and refund of salary after lapse of 10 years period, cannot sustain in the eye of law."*

19. Therefore, applying the above mentioned law laid down by the apex Court and also of this Court to the present context, this Court is of the considered view that as the petitioners have worked in the higher post and discharged higher responsibility attached to the said post, being appointed against the vacant posts by following DPC, subsequently reverted, but by following review DPC again promoted to the post of Senior Assistant, therefore, the benefits which they have already received that cannot be curtailed or reduced in any manner. Consequentially, their scale of pay should be fixed accordingly and the direction given, vide order dated 20.12.2011 in Annexure-7, for reducing their salary to the basic minimum scale of pay, cannot sustain in the eye of law and the same is hereby quashed to that extent.

20. Both the writ applications are thus allowed. No order to costs.

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**2020 (I) ILR - CUT-145**

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

W.P.(C) NO. 1225 OF 2007

**SUMANTA KUMAR SAHOO** .....Petitioner

*.Vs.*

**RESERVE BANK OF INDIA & ORS**. .....Opp. Parties

**RECRUITMENT – Pursuant to resolution passed by the RBI to fill up the post of pharmacist, the name of the petitioner and others were sponsored by the Employment Exchange – They were advised to furnish particulars pertaining to their candidature before the Bank which they submitted along with application – After due scrutiny, they were issued with call letters to attend the interview – The petitioner appeared before the selection board along with all the documents for the viva voice test as no written examination was provided – Not selected – Writ petition challenging the select list on the ground that no written examination was conducted – Whether such a plea can be accepted? – Held, No.**

*"In summing up the principles laid down by the apex Court, as well as this Court, as mentioned above, since the petitioner appeared for interview before the selection board, without any protest and, when he found that he would not succeed in the examination, he filed this writ petition challenging the said examination, this Court cannot grant any relief to such petitioner, reason being if a candidate takes a calculated chance and appears at the interview then only because the result of the interview is not palatable to him he cannot turn around and subsequently contend that the process of interview was unfair or selection committee was not properly constituted. In view of such position, applying the above principle to the present context, this Court is of the considered view that the petitioner participated in the process of selection by appearing at the interview without any protest and took a calculated chance and having not come out successful, cannot turn around and say that the selection process was bad not being conducted written test and interview and, thereby, at his behest, the present writ petition is not maintainable in the eye of law."* *(Para 14)*

**Case Laws Relied on and Referred to** :-

1. (O.J.C. No. 14518 of 1999 : Usha Rani Agarwal Vs. State of Orissa
2. (2011) 1 SCC 150 : Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand and Ors.
3. (1994) 1 SCC 126 : State of Bihar Vs. The Secretariat Assistant Successful Examinees' Union.
4. (1997) 6 SCC 584 : AIR 1997 SC 3091 : Syndicate Bank Vs. Shankar Paul.
5. (2002) 4 SCC 726 : AIR 2002 SC 1885 : Vinodan Vs. University of Calicut.
6. (2006) 6 SCC 474 : AIR 2006 SC 3080 : State of U.P. Vs. Om Prakash,
7. AIR 1980 SC 2141 : 1980 (3) SCC 418 : J.P. Kulsrestha (Dr) Vs. Chancellor, Allahabad University
8. 1996 (6) SCC 322 : Harjinder Singh Sodhi Vs. State of Punjab.
9. 2000 (7) SCC 719 : Kiran Gupta Vs. State of U.P.

For Petitioners : M/s. P.K. Rath, R.C. Jena, P.K. Satpathy, R.N. Parija, & A.K. Rout.
For Opp. Parties : M/s. K. Patnaik, R. Samal, and S. Patnaik, Advocates Mr. Biswajit Nayak.

JUDGMENT Date of Judgment & Decided on: 20.11.2019

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

The petitioner has filed this application challenging the communication dated 17.01.2007 in Annexure-1 issued by the Asst. General Manager (Admn.), Reserve Bank of India (RBI) intimating him about non inclusion of his name in the select list drawn up for the post of Pharmacist.

2. The factual matrix of the case, in hand, is that the petitioner, who belonged to back ward classes, after completion of Diploma in Pharmacy in

the year 2001, registered his name in the Employment Exchange as well as Orissa State Pharmacy Council, Bhubaneswar. Pursuant to resolution passed by the RBI to fill up the post of pharmacist, the name of the petitioner and others were sponsored by the Employment Exchange, Bhubaneswar and they were advised to furnish particulars pertaining to their candidature before the Bank by 07.11.2006. Pursuant to letter dated 17.10.2006 in Annexure-7, the petitioner submitted his application before the Bank on 03.11.2006 and after due scrutiny, he was issued with a call letter on 05.11.2006 to attend the interview on 05.12.2006. The petitioner appeared before the selection board on 05.12.2006, along with all the documents in support of his qualification, experience etc., for the viva voice test as no written examination was provided for the candidates. But when the select list was published, his name did not find place in the same. Therefore, he has filed this application for inclusion of his name in the select list.

3. Mr. P.K. Rath, learned counsel for the petitioner contended that without conducting a written examination, the authority could not have done the viva voce test and prepared the select list. As such, the petitioner, being a meritorious candidate, his name should have been included in the merit list taking into consideration the written examination and viva-voce test both.

4. Mr. K. Pattnaik, learned counsel for opposite parties no. 2 and 3 contended that the petitioner had participated in the process of selection with eyes wide open and knowing fully well, that there was no written test for pharmacy, appeared before the selection board for interview and having not come out successful, cannot challenge the same subsequently saying that selection was not done proper by not holding the written test, and cannot also claim inclusion of his name in the merit list, as prayed in the writ petition. It is further contended that the petitioner, along with others, had appeared before the selection board for the viva voce test conducted by opposite parties no. 1 to 3, and he having not come out successful, his name does not find place in the select list prepared by the authority. It is further contended that the petitioner has only impleaded one of the successful candidates as opposite party no.4 and the other successful candidate has not been made party. Therefore, the writ petition suffers from non-joinder of proper party and should be dismissed. To substantiate his contention he has relied upon the judgments of this Court as well as apex Court in ***Smt. Usha Rani Agarwal v. State of Orissa*** (O.J.C. No. 14518 of 1999 disposed of on 19.04.2018), and of the apex Court in ***Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others,*** (2011) 1 SCC 150.

5. This Court heard Mr. P.K. Rath, learned counsel for the petitioner; and Mr. K. Pattnaik, learned counsel for opposite parties no. 2 to 3; and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. Before delving into the core issue involved in this writ petition, it is worth-the-name to mentioned that the RBI is a body corporate constituted under Section 3 of the Reserve Bank of India Act, 1934 (hereinafter referred to the "Act, 1934") and has been constituted to regulate the issue of bank and currency notes and keeping of reserves for securing money stability in the country and generally to operate the currency and credit system of the country to its advantage. The bank is the sole note issuing authority and the bank notes issued by the opposite party no.1 is legal tender under Section 22 and 39 of the Act, 1934. The opposite party no.1 regulates and controls the money supply in the country. The bank performs very vital sovereign functions. It manages the public debt of the nation. Apart from the above, the bank is the banker to Central Government as well as the State Government. The bank is also lender of last resort for the commercial banks and it is also their banker. Further, it performs very vital functions under Banking Regulation Act, 1949, Foreign Exchange Management Act, 2000 etc. and also other important functions under various other statutes. In order to carry out its functions effectively, the bank employs different classes of employees such as Class I (Officers), Class II (Personal Assistants), presently abolished, Class-III (Clerk/Typists) and Class-IV (Subordinate Staff). The Bank has framed well-defined policy and guidelines for the purpose of recruitment to different classes of employees. The cadre of pharmacists falls in the Class-III employees of the Bank and accordingly, for recruitment of Class-III employees, the bank has also framed its guidelines known as "Master Circular on Recruitment, Reservation in Recruitment/Promotion, compassionate appointment etc. for recruitment of Class III Staff". In order to recruit fresh employees, the Bank issues advertisement for recruitment from time to time but where the number of employees sought to be appointed is 5 or less, necessary requisition is made through the local employment exchange.

7. On 15.09.2006, the opposite party no.1 made a requisition through the District Employment Exchange, Bhubaneswar, Special Employment Exchange, Bhubaneswar and Rajya Sainik Board, Bhubaneswar, thereby,

inviting applications from aspiring candidates for recruitment to the two vacancies of Pharmacist in Reserve Bank of India, Bhubaneswar. In the said requisition, details of eligibility criteria and norms and other requirements were prescribed, namely, that the candidate should have passed matriculation or equivalent examination with Diploma in Pharmacy from a recognized Board or University in the State of Orissa. On receipt of the applications and on scrutiny of the eligibility conditions and other requirements prescribed for, a list of 45 candidates was finalized to be called for interview so that selection can be made from amongst the candidates as finalized. The candidates were advised to appear for the interview on the date fixed along with documents in support of the requisite qualifications. The petitioner was one of the candidates for the post of Pharmacist and based on his qualifications and other requirement, his name was included as one in the list of eligible candidates amongst 45 candidates. Accordingly, the petitioner was advised to appear in the interview to be conducted by the Bank. Pursuant to the guidelines regarding recruitment to Class-III employees of the Bank, an interview board comprising a Chairman and requisite number of members was constituted to assess the merit of the candidates appearing for recruitment for the post of Pharmacist in the Bank and also to prepare a select list of candidates on the basis of evaluation of their merit before the Board. Consequentially, the interview for the post was held on the dates and the venue mentioned in the letter issued to the candidates and out of 45 candidates called for to appear for the interview, only 44 candidates appeared. Basing on the performance before the interview board and the marks obtained by the candidates, a select was prepared. The petitioner, though succeeded in the interview, but depending upon his performance before the interview board, the mark given to him by each of the members of the interview board and the average arrived at on the basis of the same, his name was placed below in the list prepared in the order of merit and as such, he could not be selected for getting appointment. From out of the names which found place at the top of the list, since there were only two vacancies, two candidates were issued with appointment letter, for which one of the selected candidates has been impleaded as opposite party no.4 but the other has not been made party to the present case. As the petitioner was not selected, he was duly communicated, vide letter dated 17.01.2007.

8. Challenging such selection, the petitioner filed a representation before the authority praying that the selection made by the RBI, Bhubaneswar

should be properly reviewed, particularly when the selection committee has not given any reason for non-selection of candidate.

9. After selection process is completed, a merit list also known as select list has to be prepared. The select list to be prepared on the basis of the procedure laid down in the rules governing the field. Publication of a select list presupposes completion of selection process. While the selection process itself is not complete, the applicants cannot claim any legal right to be appointed. Therefore, it is essential to prepare select lilt as per criteria fixed by the authority.

In ***State of A.P. v. D. Dastagiri***, (2003) 5 SCC 373 : AIR 2003 SC 2475, the apex Court held that even if the selection process is complete and only the select list remains to be published but a policy decision is taken by the Government to cancel the recruitment process, the selected candidates do not get any vested right to appointment.

In ***State of Bihar v. The Secretariat Assistant Successful Examinees' Union***, (1994) 1 SCC 126, the apex Court held that it is now well settled by a series of decisions of the Supreme Court that the empanelment of the candidate in the select list confers no right on t he candidates to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it create a vested right to be appointed unless the service rules provide to the contrary.

Similar view has also been taken in ***Syndicate Bank v. Shankar Paul***, (1997) 6 SCC 584 : AIR 1997 SC 3091, ***Vinodan v. University of Calicut***, (2002) 4 SCC 726 : AIR 2002 SC 1885, ***State of U.P. v. Om Prakash***, (2006) 6 SCC 474 : AIR 2006 SC 3080

Therefore, the candidates have right to be considered but will have no vested right for selection.

10. In ***J.P. Kulsrestha (Dr) v. Chancellor, Allahabad University***, AIR 1980 SC 2141 : 1980 (3) SCC 418, the selection to the post of University Teacher by interview, the apex Court held that valid. The apex Court further clarified that any administrative or quasi-judicial body clothed with powers and left unfettered by procedures is free to devise its own pragmatic, flexible and functionally viable processes of transacting business subject, of course to the basics of natural justice, fair-play in action, reasonableness in collecting

decisional materials, avoidance of arbitrariness and extraneous considerations and otherwise keeping within the leading strings of the law. Therefore, finds no flaw in the methodology of interviews.

In ***Harjinder Singh Sodhi v. State of Punjab***, 1996 (6) SCC 322, the apex Court held that in the instant case no written examination conducted for consideration of the claims of the parties. Accordingly, the Public Service Commission and the Government have applied the principle of keeping 50% marks for the record and 50% for the interview. Under those circumstances, there is no illegality in the procedure adopted for selection.

In ***Kiran Gupta v. State of U.P.,*** 2000 (7) SCC 719, the apex Court held that selection based on interview is valid.

11. As such, the claim of the petitioner, that he should be selected, has no legs to stand. It is made clear that the petitioner submitted his application knowing very well that he had only to face interview. As such, no written examination had been prescribed and with eyes wide open, the petitioner participated in the interview and having not come out successful, he could not turn around and challenge the same by way of filing this application. As such, at his behest, the writ petition is not maintainable.

12. In the case of ***Smt. Usha Rani Agarwal*** (supra), on which reliance has been placed, this court has taken note of the judgment of the apex Court, as mentioned in paragraph-17, which reads as follows:

> *" In **Om Prakash Sukla v. Akhilesh Kumar Sukla,** AIR 1986 SC 1043, the apex Court has been pleased to hold that when the petitioner therein appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.*
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> *In **Madan Lal and others v. State of Jammu and Kashmir and others,** AIR 1995 SC 1088, the apex Court held that if a candidate takes a calculated chance and appears at the interview, then only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted."*

13. Similarly, in ***Vijendra Kumar Verma*** (supra) in paragraphs, 25 to 28, the apex Court held as follows:

> ***25.** In this connection, we may refer to the decision of the Supreme Court in G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection*

*process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus: (SCC p. 591)*

*"15. … He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee."*

***26.** In P.S. Gopinathan v. State of Kerala [(2008) 7 SCC 70 : (2008) 2 SCC (L&S) 225] this Court relying on the above principle held thus: (SCC p. 84, para 44)*

*"44. … Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] …."*

***27.** In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] in SCC at para 18 it was held that: (SCC p. 107)*

*"18. … It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."*

***28.** Besides, in K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345] in SCC paras 72 and 74 it was held that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel.*

14. In summing up the principles laid down by the apex Court, as well as this Court, as mentioned above, since the petitioner appeared for interview before the selection board, without any protest and, when he found that he would not succeed in the examination, he filed this writ petition challenging the said examination, this Court cannot grant any relief to such petitioner, reason being if a candidate takes a calculated chance and appears at the interview then only because the result of the interview is not palatable to him he cannot turn around and subsequently contend that the process of interview was unfair or selection committee was not properly constituted. In view of

such position, applying the above principle to the present context, this Court is of the considered view that the petitioner participated in the process of selection by appearing at the interview without any protest and took a calculated chance and having not come out successful, cannot turn around and say that the selection process was bad not being conducted written test and interview and, thereby, at his behest, the present writ petition is not maintainable in the eye of law.

15. As it reveals, out of two selected candidates those who have been appointed, the petitioner has only arrayed one of them as opposite party no.4, excluding the other selected candidate. Therefore, the writ petition suffers from non-joinder of proper party and is thus liable to be dismissed on that ground also.

16. In the conspectus of facts and law, as discussed hereinbefore, this Court is of the considered view that the relief sought by the petitioner is not admissible to him. Therefore, this Court does not find any merit in this writ petition, which is hereby dismissed. There shall be no order as to cost.

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**2020 (I) ILR - CUT- 153**

**D.DASH, J.**

CRLREV NO. 349 OF 2011

**DILLIP KUMAR SWAIN** .....Petitioner

*.Vs.*

**SMT. ANURADHA DAS** .....Opp. Party

**THE NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 118, 138 & 139 – Dishonour of cheque – Presumption in favour of the holder of the cheque – In the present case, complainant had executed a power of attorney in favour Jayant kumar Mohanty(one of the accused) to develop and sale her property & in return Jayant Kumar issued cheque in her favour but the same was dishonoured – Such cheque was returned & a new cheque was delivered to complainant having the signature of another accused(petitioner) named as Dillip Kumar Swain who have no direct relation with the complainant and the subsequent cheque also dishonoured due to insufficient funds – Complaint filed against both the accused – In the trial, accused Jayant kumar(Power of attorney) acquitted but petitioner convicted – Order of the trial court**

**challenged – Petitioner(accused Dillip Kumar swain) pleaded that he had no legal liability towards the complainant though he admitted the issuance of cheque – The legality of the trial court order while convicting the petitioner questioned – Held, the complainant in the present case is holder in due course, section 118 of the N.I Act provides that until the contrary is proved in so far as the consideration of the establishment of the negotiable instrument is concerned, presumption stands that every negotiable instrument was made or drawn for consideration, and that such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration – The complainant not being the direct holder of the cheque, the presumption as the transferee is available in his favour.**

For Petitioner : Mr.J.Panda
For Opp. Parties : M/s.S.K.Pati, N.Naik & S.K.Mishra

JUDGMENT Date of Hearing : 22.08.2019 : Date of Judgment : 19.09.2019

***D. DASH, J.***

The petitioner, by filing this revision, has assailed the judgment dated 9.3.2011 passed by the learned Ad hoc Sessions Judge, Fast Track Court No.II, Bhubaneswar in Criminal Appeal No.3/69 of 2009.

By the said said judgment, the appeal filed by the petitioner (accused) questioning the judgment of conviction and order of sentence dated 17.8.2009 passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No.1545 of 2006 (Trial No.215/2009) has been dismissed. The petitioner (accused) has been convicted under section 138 of the Negotiable Instrument Act (in short, 'the N.I.Act') and sentenced to undergo simple imprisonment for a period of one year and pay compensation of Rs.7,00,000/- (rupees seven lakhs only) for onward payment to the opposite party (complainant) in terms of section 357 (3) of the Code of Criminal Procedure.

**2.** Facts of the case of the complainant is that accused Jayanta Kumar Mohanty came and represented before the complainant to have been engaged in real estate business. Then after discussion, he entered into an agreement with the complainant for development of her land. She then executed a deed of power of attorney appointing said accused Jayanta Kumar Mohanty for development and sale of the land. It is stated that in order to discharge the liability, accused Jayanta Kumar Mohanty issued a cheque worth Rs.6,00,000/- in favour of the complainant. That cheque being presented by

the complainant in the Bank for collection of the amount in her account, bounced back and stood dishonoured. This fact being communicated by the complainant to accused Jayanta Kumar Mohanty, he requested to return the cheque. Accepting his request, that cheque was returned to him. Accused Jayanta Kumar Mohanty then gave another cheque being no.635283 dated 22.12.2005 drawn on State Bank of India worth Rs.6,30,000/- Said cheque had been issued by this accused Dillip Kumar Swain (petitioner of this revision) under his signature. The complainant then deposited the said cheque in the Bank for obtaining the money covered. Surprisingly, in the account of accused Dillip Kumar Swain, the funds available was insufficient to meet the demand covered under the cheque. So, there was no collection of money and the cheque was returned as dishonoured. The complainant then sent notice to Jayanta Kumar Mohanty and this accused Dillip Kumar Swain by registered post with AD intimating them the fact that the cheque issued by accused Dillip Kumar Swain has been dishonoured and demanding payment of said amount. No response being received from any quarter, the complaint has been lodged alleging commission of offence under section 138 of the N.I. Act by both accused persons, i.e, Jayanta Kumar Mohanty and this accused Dillip Kumar Swain.

The plea of the accused persons is that of complete denial and false implication.

**3.** From the side of the complainant, three witnesses have been examined. This accused Dillip Kumar Swain has examined himself as D.W.1. The complainant when has proved the cheque in question and other connected documents as regards its dishonour, the copy of the demand notice as well as the postal receipt etc; from the side of this accused Dillip Kumar Swain, his evidence affidavit and the signature thereon have been unnecessarily marked as Ext.A and Ext.A/1 respectively even though the same is part of evidence.

**4.** The trial court, upon analysis of evidence, has acquitted Jayanta Kumar Mohanty. However, this accused Dillip Kumar Swain has been held guilty of commission of offence under section 138 of the N.I. Act and accordingly, he has been sentenced and directed to pay compensation as aforestated.

**5.** Learned counsel for the petitioner (accused-Dillip Kumar Swain) attacked the finding of guilt of the accused Dillip Kumar Swain, raising

contentions that the evidence on record being wholly insufficient to establish that said cheque (Ext.1) had been issued by this accused Dillip Kumar Swain in favour of the complainant for discharge of any of his debt or liability subsisting as on that date towards the complainant, the courts below have seriously erred both on fact and law in holding the case of the complainant to have been proved in ultimately concluding that this accused Dillip Kumar Swain has thereby committed the offence under section 138 of the N.I. Act. He next submitted that the result returned by the courts below being perverse, this revisional court should interfere with the same so as to prevent miscarriage of justice.

Learned counsel for the petitioner cited the following decisions in support of his contentions.

> "(i) Kundan Lal Rallaram –V- Custodian, Evacuce Property; AIR 1961 SC 1316;
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> (ii) K.J. Bhat –V- D.G.Hegde; 2008 (39) OCR (SC) 578;
>
> (iii) Rangappa –V- Mohan; 2010 AIR SCW 2946;
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> (iv) Kumar Exports –V- Sharma Carpets; (2009) 2 SCC 513;
>
> (v) John K. Abraham –V- Simon C. Abraham and another; (2014) 2 SCC 236; and
>
> (vi) R.M. Marykutty –V- R. C. Kottaram and another; (2013) 1 SCC 327"

**6.** Learned counsel for the opposite party (complainant) submitted all in favour of the judgments of the courts below holding the accused Dillip Kumar Swain as guilty for commission of offence under section 138 of the N.I. Act for the dishonour of hte cheque issued by him in favour of the complainant for discharge of the debt and liability. It is his submission that in terms of the provision of section 138 of the N.I. Act, it is not always necessary that a person issuing the cheque must owe the debt and liability towards the complainant standing for being discharged at the time of issuance of cheque.

**7.** Provision of section 138 of the N.I. Act says that where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the Bank unpaid, for the reasons stated therein, an offence is committed by the person who has drawn that cheque.

The provision is very clear that such issuance of cheque need not be necessarily for the discharge, in whole or in part of the debt or other liability of the drawer of the cheque standing for payment to the holder of the cheque. So, a person issuing such cheque for discharge, in whole or in part of any debt or liability of another, also falls within the ambit of commission of offence under section 138 of the N.I. Act in the event said cheque stands dishonoured and finally, the demand thereunder is not met.

Adverting to the complaint's case in hand, it is seen that being the owner of the land, she had entered into an agreement with Jayanta Kumar Mohanty (since acquitted), who was the Managing Director of Bayasha Properties Private Limited having been engaged in real estate business. He had taken a power of attorney from the complainant to sell her land after development at the agreed consideration. He has issued a cheque of Rs.6,00,000/- and that was towards full and final settlement of the consideration value for the sale of the total land and then he had sold the land by virtue of such power of attorney. This cheque, first of all, stood dishonoured in view of the closure of the account. So Jayanta Kumar Mohanty requested the complainant to return the said cheque and on receiving it, in turn, gave the cheque drawn by this accused Dillip Kumar Swain under his signaute in his bank account which is the subject matter of the proceeding.

**8.** Receipt of this cheque (Ext.1) in question, in course of the very transaction by the complainant being handed over by Jayanta Kumar Mohanty is established through Ext.2.

Accused Dillip Kumar Swain has expressed total ignorance about the transaction and he has denied to have ever issued any cheque in favour of the complainant. The cheque (Ext.1) seems to have been issued in favour of the complainant for the amount, as has been written therein. As per his evidence, he was not a total foreigner to the real estate business of said Bayasha Properties Private Limited but had been engaged for measurement and preparation of sketch map of the lands. He has stated that Jayanta Kumar Mohanty demanded a blank cheque from him for purchase of land and although, he was not willing to hand over any blank cheque, being convinced that he will fill up the entire cheque after settlement of the land value with the land owner, which he was intending to purchase, he had so given. It is his next statement that said cheque is found to have been later on misutilized.

That part of the evidence, being very interesting, is quoted herein below:

> "3. That during the course of my engagement, Jayanta Kumar Mohanty being one of the employee of M/s.Bayasa Properties Private Limited, developed a relationship with me and thereby he induced me to purchase of land in Daruthenga mouza for consideration amount of Rs.2,00,000/- and accordingly, I agreed with his proposal; and
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> 4. That in the year 2005, Jayanta Kumar Mohanty demanded a blank cheque from me for the purchase of the said land and although I was not willing to handover any blank cheque, but he convinced me that he will fill up the entire cheque after settlement of land value with the land owner which I was intending to purchase."

So, this accused Dillip Kumar Swain is not saying to have not given any cheque to the complainant by drawing it on his account for being paid to the complainant. The explanation given by this accused Dillip Kumar Swain, as already stated, is per se not acceptable. The complainant thus, in the present case, is a holder of the cheque in due course. Provision of section 118 of the N.I. Act says that until the contrary is proved in so far as the consideration of the establishment of the negotiable instrument is concerned, presumption stands that every negotiable instrument was made or drawn for consideration and that such instrument when has been accepted, endorsed, negotiated or transferred was accepted, endorsed, negotiated or transferred for consideration. Here, the complainant not being the direct holder of the cheque, the presumption as the transferee is available in his favour.

Next coming to the provisions of section 139 of the N.I. Act as to the presumption in favour of the holder, it reads that the holder of cheque of the nature, referring to section 138 of the N.I. Act has so received it for the discharge, in whole or in part of any debt or other liability. This stands in favour of the case of the complainant as, this presumption does not stand confined to the discharge in whole or in part of any debt or other liability of the person, who has issued the cheque towards the ultimate holder of the cheque.

So, in the present case, the submission of the learned counsel for the accused that the complainant having not proved the cheque to have been issued by the accused in her favour towards discharge either whole or in part of any debt or liability against her, the complaint against the accused is misconceived, is of no significance to say that the provision of section 138 of

the N.I. Act, in the present case, does not get attracted in so far as accused Dillip is concerned.

Having carefully read the cited decisions as noted at paragraph-5, the principles of law as settled therein, in my considered view, in the facts and circumstances of the case in hand; not come to the aid of this accused-Dillip.

The accused having admitted to have given the blank cheque signed by him to that Jayanta Kumar Mohanty, and then having failed to offer any acceptable explanation through his conduct some time after the issuance of cheques or thereafter having come to know about the cheque being so used by Jayanta through the notice, in my considered view, under the proven facts and circumstances, is squarely liable for commission of the offence under section 138 of the N.I. Act.

Next coming to the order of sentence and award of compensation, taking into account the fact that the cheque in question had not been directly issued by this accused Dillip to the complainant for discharge of his debt or other liability towards the complainant, while being inclined to set aside the order of sentence of simple imprisonment for a period of one year, as has been directed by the courts below, to be undergone by this accused Dillip Kumar Swain; the order for payment of compensation of Rs.7,00,000/- (rupees seven lakhs only) by this accused to the complainant is confirmed with further direction that if the same is not paid by this accused Dillip Kumar Swain within a period of three months hence, he would undergo simple imprisonment for a period of six months.

The amount lying in deposit in connection, in connection with this case, with the Registry of this Court together with the accrued interest and that lying in deposit with Registrar, Civil Courts, Khurda at Bhubaneswar together with the accrued interest be adjusted towards the compensation as awarded. The said amount be released in favour of the complainant after observance of all the required formalities and this accused Dillip Kumar Swain is directed to cooperate with the same as and when so required.

The accused Dillip Kumar Swain would pay the remaining part of the compensation to the complainant within a period of three months, hence failing which the default stipulation as aforesaid would have its play. The CRLREV is disposed of accordingly.The LCR be sent back immediately.

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**2020 (I) ILR - CUT- 160**

**D.DASH, J.**

CRIMINAL APPEAL NO. 160 OF 1993

**BHAGANESWAR SAHU** ……..Appellant.

*Vs*

**STATE OF ORISSA** ……..Respondent

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 374 – Criminal Appeal – Offence U/s.7 of the Essential Commodities Act r/w clause 4 of the Kerosene (Fixation of ceiling prices) Order – Conviction of the accused – Trial of the summon case – Explanation to the accused about the substances of the accusation – Non mentioning of any clauses of the order – Whether vitiate the proceeding? – Held, Yes. – Reasons explained.**

For the Appellant : M/s. B.K.Sahu, P.K.Sahu, G.N.Sahoo, A.Jena, Mr. Soumya Sekhar Parida,(Amicus Curie).

For the Respondent : Mr. Sk. Zafarulla, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment : 26 .09.2019

***D.DASH, J.***

The appellant by filing this appeal has assailed the judgment of conviction and order of sentence dated 06.05.1993 passed by the learned Special Judge, Cuttack in 2(C) CC No. 41 of 1990.

By the said judgment, the appellant (accused) has been convicted for committed offence under section 7 of the Essential Commodities Act for contravention of Clause 4 of the Kerosene (Fixation of Ceiling Prices) Order and for violation of conditions of Clauses 5 to 8 of the Kerosene Licence granted to the petitioner and it has been ordered that for the same, he would undergo simple imprisonment for a period of six months and pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for a period of one month.

2. The prosecution case in short is that the Marketing Inspector, Civil Supply Corporation (P.W.1) with others staff visited the business premises of the accused on 25.07.1989. During visit they found that the accused was not maintaining the accounts uptodate. It was also noticed that although,

obligated under Orissa Declaration of Stocks and Price of Essential Commodities Order the prevailing price of essential commodity has not been maintained in the Declaration Board. It is said that from 22.02.2011989 onwards the Board was not maintained. The stock register was not uptodate with the last entry dated 24.07.1989, and cash book produced was not also uptodate. They seized 4300 litres of kerosene as was available. On scrutiny of the documents and verification of the available stock at hand, P.W.1 found shortage of 216 litres of kerosene. On verification of the records it was found that the accused was not submitting the returns every fortnight to the Licensing Authority.

With all these allegations, the prosecution report was submitted against the accused and his brother, namely, Khageswar Sahu. They faced the trial. This accused admitted to be the wholesale dealer of kerosene. He however, denied the allegations made against him and his liability on those counts.

3. From the side of the prosecution five witnesses were examined and all the seized documents have been proved.

The defence has examined one witness and proved the issue register (Ext.A), statement of accused (Ext.B) and some cash memos.

The trial court on scrutiny of evidence and examination of the documents admitted in the evidence from the side of the prosecution has found the accused guilty of having deficit of 260 litres of kerosene in the stock and thus finding the contravention of the Control Order and the license conditions, this accused has been convicted for commission of offence under section 7 of the Essential Commodities Act. Accordingly, he has been sentenced as aforestated. The other accused namely Khageswar who happens to be the brother of this accused has been acquitted holding that he has nothing to do in the matter of wholesale business of kerosene by this accused.

4. Learned Amicus Curie submits that here the prosecution has held to be bad in law and the trial stands vitiated for the reason that the accused has been taken to surprise being not explained with the substance of the accusations with reference to the contravention of the particular clauses of the Control Order promulgated under section 3 of the Essential Commodities Act, for which he was proceeded in the trial. He thus submits that the finding of conviction and order of sentence cannot be sustained. In this connection,

he has relied upon the decision rendered by Hon'ble Justice R.N. Misra (as His Lordship then was) in case of *Tarinisen Maharana (Criminal Revision No. 136 of 1979) and Narayan Das (in Criminal Revision No. 143 of 1979) vs. The State reported in 1980 C.L.R. 227.*

5. Learned Addl. Standing Counsel submits that when such factum of contravention of the Control Order promulgated under section 3 of the Essential Commodities Act have been well indicated in the prosecution report, the trial court while trying the case under the summons procedure having not explained the accusations with specific reference to the violation of the Control Orders stands insignificant and it is of no such fatal consequence in the outcome of the trial.

6. Going to address the rival contention, I have carefully gone through the record of the trial court. It appears that on 11.03.1991 the trial court has explained the substance of the accusations. For proper appreciation, that order need be reproduced and it runs as under:-

> "Both the accused persons are present. Perused the relevant papers placed before me. The particulars of offence stated in the P.R. is explained to the accused persons. They plead not guilty and claim to be tried. Issue summons to the witnesses, fixing 26.04.1991 for evidence. Accused persons are as before."

It appears from the above order that except just mentioning that the substance of accusations are explained, it has not further been mentioned that either those are with reference to the facts of the case or as regards violation of particular Control Order; nor there has been any indication as to for what reason such violations are alleged. It has not been reflected in the order that while explaining the substance of accusations, the trial court has given any hint as to which of the clauses of the Control Order made under section 3 of the Essential Commodities Act has been violated.

In the circumstances as aforesaid, in my considered view the accused have been seriously prejudiced in the trial and finding of guilt under section 7 of the Essential Commodities Act against the accused cannot be sustained. Having said so, in view of lapse of more than three decares, by now since the date of detection, this Court refrains from directing for retrial.

7. In the wake of aforesaid, the judgment of conviction and order of sentence dated 06.05.1993 passed by the learned Special Judge, Cuttack

which have been impugned in this appeal are set aside. Accordingly, the appeal is allowed.

The bail bonds furnished by the appellant (accused) shall stand discharged. The LCR be sent back forthwith.

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**2020 (I) ILR - CUT- 163**

**BISWANATH RATH, J.**

W.P.(C ) NO. 12363 OF 2010

**RABINARAYAN SAHU** .....Petitioner

*.Vs.*

**COLLECTOR & DISTRICT MAGISTRATE, GANJAM & ANR.** .....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Quashing of the proceeding under essential commodities Act r/w Orissa kerosene control order, 1993 – Unauthorised transport of kerosene – Search & seizure – Seizure made by Sub-inspector of police – Repeal of Order, 1993 & introduction of Orissa Public Distribution System (Control) Order, 2008 – As per amended order, officer not below the rank of Inspector is authorised to do the search & seizure – In view of such amendment the seizure made by the S.I of police/competency questioned – Held, since the proceeding is based on a search and seizure by an incompetent person, the proceeding stands vitiated.**

**Case Laws Relied on and Referred to** :-

1. 2010 (1) OLR 201 : Rajendra Prasad Gupta Vs. Collector and District Magistrate Balasore and others W.P.(C ) No.12796 of 2009 disposed of on 24.12.2009.

For Petitioner : M/s. Deepali Mohapatra & Shri S. Parida
For Opp. Parties : Shri S.N. Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing:12.07.2019: Date of Judgment: 18.07.2019

***BISWANATH RATH,J.***

This writ petition involves a request for quashing of a proceeding vide EMC No.24 of 2010, a proceeding under the Essential Commodities Act read with Orissa Kerosene Control Order, 1993.

***2.*** Short background involving the case is that on the night of 24/25.2.2010, the raiding party under the leadership of S.I, Aska when were on duty, the driver namely Naba Mohanty driving truck bearing Regd. No.OR-07-T-4077 belonging to the petitioner was coming from K.S Nagar side moving towards Aska, the raiding party detained the vehicle involved on the premises of transportation of kerosene oil unauthorisedly. The S.I., Aska after seizure of the truck took the truck with the driver to the police station, arrested the driver as a consequence of such search and seizure submitted an FIR vide Annexure-1. Seizure list was prepared vide Annexure-2. On the basis of F.I.R, a case was registered involving the petitioner and his driver under Section 7 of the Essential Commodities Act for violation of provision at Section 3 of the Essential Commodities Act and also the provisions of the Orissa Kerosene Control Order for initiation of proceeding under the provisions mentioned therein.

***3.*** Challenging the initiation of such proceeding, filing the writ petition, Miss Mohapatra, learned counsel for the petitioner contended that for the involvement of a search and seizure by incompetent persons and the search and seizure remaining contrary to the provisions contained in Orissa Kerosene Control Order, the search and seizure both remain bad. Miss Mohapatra also contended that the proceeding initiated also becomes bad for the reason of a proceeding undertaken through repealing provision involving Kerosene Control Order which has been repealed on introduction of Orissa Public Distribution System (Control) Order, 2008. While seeking quashing of the proceeding vide EMC No.24 of 2010. Miss Mohapatra, learned counsel for the petitioner also attempted to satisfy this Court on the merit involving the matter. In support of her such contention Miss Mohapatra also relied on a decision of this Court in the case of ***Rajendra Prasad Gupta Vs. Collector and District Magistrate Balasore and others*** in *W.P.(C) No.12796 of 2009* disposed of on 24.12.2009 and reported in *2010 (1) OLR 201*.

***4.*** In his opposition, Shri S.N. Mishra, learned Addl. Govt. Advocate while opposing the contentions raised by the petitioner with regard to merit involving the case, referring to the Kerosene Control Order 1993 particularly the notification dated 7.7.1994 contended that for the prescription therein, at the minimum, search and seizure should have been undertaken by a police officer not below the rank of Inspector. He, therefore, not disputed the contentions being raised by Miss. Mohapatra that the search and seizure become bad for the undertaking of such exercise by Sub-Inspector.

***5.*** Considering the rival contentions of the parties and the pleading as well as the documents available herein, more particularly, the FIR vide Annexure-1, this Court finds the F.I.R involving the initiation of the Essential Commodities proceeding while the FIR though filed by Sub-Inspector, Aska P.S but there also remains no dispute that search and seizure are made by the S.I., Aska. It is at this stage, looking to the prescription made in Notification dated 7.7.1994, being repealed and further revived through the Orissa P.D.S Control Order, 2008, this Court finds the notification prescribes action under Orissa P.D.S Control Order, 2008 should be undertaken by a Police Officer not below the rank of Inspector. The F.I.R at Annexure-1 and the seizure list at Annexure-2 since made by a Sub-Inspector, this Court finds Miss Mohapatra, learned counsel for the petitioner is justified in making a claim that both the Search and Seizure are made by person unauthorized to do so.

***6.*** In the circumstance, this Court finds since the Essential Commodity proceeding vide EMC No.24 of 2010 is based on a search and seizure by an incompetent person, the proceeding vide EMC No.24 of 2010 stands vitiated.

***7.*** It is here taking into consideration the decision of this Court vide 2010 (1) OLR 201 going through the judgment indicated herein this Court finds the point involved here is also a point of consideration in the cited decision and the decision taken therein has direct application to the case at hand.

***8***. In the result, this Court while declaring the process involving search and seizure becomes bad as a consequence declares Notice involving EMC No. 24 of 2010 becomes bad and accordingly declares the same invalid.

***9***. In the result, the writ petition succeeds. No cost.

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**2020 (I) ILR - CUT- 166**

**BISWANATH RATH, J.**

W.P.(C) NO.1519 OF 2009

**SATYA RANJAN PATTANAIK** .....Petitioner

*.Vs.*

**M.D, O.F.D.C LTD., BHUBANESWAR & ORS.** .....Opp. Parties

**SERVICE LAW – Medical Attendance Rules – Claim of medical reimbursement – As per clause-8(3) of the Office Memorandum dated 21.01.1987, medical reimbursement should have been preferred within three months of expiry of treatment as certified by concerned medical officer – Delay in submission of the claim – Circumstances show that the Petitioner was not responsible for the delay – Claim allowed – Cost of Rs. 20,000/- imposed.**

*"This Court, therefore, while observing that rejection of the claim of the petitioner vide Annexure-6 and the subsequent communication vide Annexure-8 on rejection of the review of the order at Annexure-6 being sought for by the petitioner ought to be interfered set aside both the orders vide Annexures-6 and 8 respectively. This court while further observing that such attitude amounts to inhumane attitude by an employer to an employee, for defaulting reimbursement of the money spent by an employee for long sixteen years, this Court while quashing the order at Annexures-6 and 8 issues mandamus to the opposite party no.1-Managing Director, OFDC Ltd., Bhubaneswar to calculate the entitlements of the petitioner through the claim bill after adjusting a sum of Rs.3,000/- paid by way of advance and pay the balance entitlements along with interest @7% per annum all through. In addition to above for finding there is serious negligence by an employer in the matter of medical reimbursement and looking to the harassment to the poor employee fighting all these years in the matter of medical claim reimbursement and this Court also imposes a cost of Rs.20,000/- (Rupees Twenty thousand) on the opposite party no.1. The cost along with the entitlements of the petitioner as directed hereinabove shall be paid to the petitioner in one block within a period of six weeks from the date of communication of this Court's judgment along with copy of 12 the writ petition by the petitioner."* *(Para 10)*

**Case Laws Relied on and Referred to** :-

1. 113 (2004) DLT 91 : Milap Singh Vs. Union of India (Uoi) & Anr.
2. 2004 (III) AD, Delhi 569 : Pritivi Nath Chopra Vs. Union of India & Anr.
3. W.P.(C) No.694 of 2015 : Sivakanta Jha Vs Union of India & Ors, decided on 13.4.2018 deciding

For Petitioner : Mr. Biraja Prasad Das, Mr. S.K.Kanungo & Mr. J.S.Mohapatra

For Opp. Party : Mr.S.K.Patnaik, Mr. U.C. Mohanty, Mr. P.K.Pattanaik, Mr. D. Pattanaik and Mr. S.Pattnaik.

JUDGMENT Date of Hearing and Judgment : 27.11.2019

***BISWANATH RATH, J.***

This writ petition involving quashment of orders at Annexures-6 and 8 respectively and thereby issuing a mandamus directing opposite party no.1-the Managing Director, Orissa Forest Development Corporation Ltd., Bhubaneswar ('OFDC' in short) to reimburse petitioner's medical expenses as submitted vide Annexure-4 series after adjustment of advance medical allowance.

**2.** Heard Mr. Biraja Prasad Das and associates, learned counsel for the petitioner and Mr.S.K.Patnaik, learned Senior Counsel for the opposite party no.1 along with his associates. None appears for opposite party nos.2 and 3.

**3.** Short background involving the case is that petitioner started his career as a L.D. Assistant under the OFDC on 31.8.1990 and was posted in the Office of Divisional Manager, Cuttack Plantation Division (O.P.D.C. Ltd.). Subsequently he was transferred to Bhubaneswar Plantation Division in the year 1997. While continuing in the Bhubaneswar Plantation Division, he was transferred to Head Office in April, 1999. In January, 2001, he was transferred to Jeypore (CKL) Division, Jeypore and worked there for six years. On 11.01.2007, while continuing as such, for treatment of his mother Smt. Sarojini Pattanaik, being a dependant availed a sum of Rs.3,000/- as medical advance after due sanction by the opposite party no.1 on 26.9.2000 vide Annexure-1. For the Doctor's finding his mother suffering from 'Complete Cardiac Block' and there required Implantation of Pacemaker with his mother being advised vide Annexure-2, petitioner's mother underwent surgery and a pacemaker was implanted in the premier Government Hospital of the State, i.e. SCB Medical College and Hospital, Cuttack with a total cost of Rs.51,605/-. While matter stood thus, petitioner was transferred to Jeypore during his mother's illness. It is stated that petitioner getting disturbed for his transfer taking place and for non-grant of Essentiality Certificate within time frame he could not submit bills for reimbursement and ultimately on 30.10.2003, he received the Essentiality Certificate. Thereafter, petitioner submitted his medical bills along with Essentiality Certificate on 4.11.2003 before the opposite parties for reimbursement of expenses incurred on account of his mother's treatment vide Annexure-4 series. It is averred after

submission of all necessary documents, opposite party no.2-General Manager, OFDC Ltd., Balangir Commercial Zone, Balangir on 25.11.2003 forwarded petitioner's claim to the head office for sanction at their end. Receiving all documents from opposite party no.2, opposite party no.1 did not release the amount for long time. Finding no option, petitioner was constrained to send a representation for drawing attention of opposite party no.1 which was followed by several representations. It is after lapse of five and half years, opposite party no.1 vide his office order No.535 rejected the petitioner's case for reimbursement on the ground that the claim is barred by time and thereby also directed the petitioner to make the refund of the advance of Rs.3,000/- he had received immediately with further threatening that failure of refund of such money, it shall be recovered from his salary vide Annexure-6. Petitioner on receipt of the rejection order dated 23.12.2008 on the same day itself filed the review application for reconsideration of the rejection by the opposite party no.1. However, opposite party no.1 without taking into consideration the reason of delay in submitting such claim rejected the review application at the instance of the petitioner on 22.01.2009 vide Annexure-8.

**4.** Mr. Das, learned counsel appearing for the petitioner taking into account the background detailed herein submitted that admittedly the Essentiality Certificate was granted by the doctor on 30.10.2003 and the delay in grant of Essentiality Certificate was also bona fide particularly for want of so many formalities. Further, as the petitioner was posted away from the place the authority deciding on Essentiality Certificate, for there being ultimate grant of such certificate, it is thus contended that there is mechanical rejection of the claim of the petitioner and for the material establishing treatment with surgery of the patient, the mother of the petitioner and there is grant of Essentiality Certificate establishing such treatment being undertaken, there was no reason to reject such claim.

Mr. Das, learned counsel for the petitioner further contended that rejection of the claim of the petitioner contravenes provision in the Orissa Service Medical Attendance Rules. Further a stand is also taken involving Annexure-6 drawing the attention of the Court to the provision of Orissa Service Medical Attendance Rules requiring to the drawing/controlling officer to cancel such claim and the officer cancelled the claim of the petitioner is claimed to be not a drawing/controlling officer. On the premises that there are genuine bills that too provided by a premier Government

Hospital of the State, Mr.Das, learned counsel for the petitioner submitted that claims of this nature should not have been rejected on technical ground. Petitioner thus while claiming that there is serious victimization of the petitioner, for rejection of a genuine claim not only that the State Authority also failed to discharge its duty and obligation to its employee or his dependants. Learned counsel for the petitioner accordingly makes a claim for allowing the writ petition and issuing suitable direction.

**5.** Learned counsel for the petitioner while justifying such claim has also taken support of four judgments, which are as under:

1) ***The Secretary to the Govt. of Haryana & Others Vrs Vidya Sagar***, Judgment dated 16th July, 2016, passed in Civil Appeal No.4384, Supreme Court of India.

2) ***Surjit Singh Vrs State of Punjab & Others***, Judgment dated 31st January, 1996, Supreme Court of India.

*3)* ***Manoj Jain Vrs State of Haryana & Others,*** Judgment dated 3rd December, 2018, passed in CWP No.13494/2016, Punjab & Haryana High Court.

4) ***Milap Singh Vrs Union of India & Another***, Judgment dated 13th July, 2004, Delhi High Court.

**6.** In his opposition Mr. S.K. Pattnaik, learned Senior Counsel appearing for the contesting opposite party no.1 referring to the documents at Annexure-E submitted that for the Clause-8(3) therein, medical reimbursement should have been made under Clause-8(3) of the Office Memorandum dated 21.01.1987, Annexure-A therein claim on medical reimbursement should have been preferred within three months of expiry of duration of treatment as certified by concerned medical officer. Further also referring to the documents at Annexure-B a further application at the instance of the petitioner to draw further advance of a sum of Rs.5,000/- for his mother going to undertake surgery of 'Femonel Hernia' being advised by Assistant Professor (Surgery), S.C.B. Medical College and Hospital, Cuttack and the disclosure through Annexure-B/1 contended that for petitioner's mother not undertaking surgery of 'Femonel Hernia', Mr. Pattnaik, learned Senior Counsel contended that there has been attempt for false claim by the petitioner. Referring to other documents available therein in the counter on behalf of opposite parties, Mr. Pattnaik, learned Senior Counsel again submitted that for the failure of the petitioner's making claim within the desired period and for the petitioner even unable to make the claim for a long period, the authority was compelled to reject the medical claim made by the petitioner and thereby issuing separate orders had rightly directed for

recovery of advance so paid to the petitioner to be refunded back or to be recovered from his salary.

**7.** Taking this Court to the objection through paragraph nos.4, 5, 7, 8 and 9 of the counter affidavit, Mr. Pattnaik, learned Senior Counsel contended that the delay in making the claim is not justified and thus claimed for rejection of the writ petition having no merit.

**8.** Considering the rival contentions of the parties, this Court finds there is no dispute that for the provision at Clause-8.3, the Office Memorandum clearly discloses the medical reimbursement should be preferred within three months of the expiry of duration of the treatment as certified by the concerned medical officer. It is looking to the Essentiality Certificate being granted only on 30.10.2003, there is no doubt that the certificate required for such reimbursement was ultimately granted by the competent authority only on 30.10.2003. From Annexure-4 series at Page-17 onwards, it clearly appears that the mother of the petitioner had undergone the treatment for CHB:PPI from 01.01.2001 to 13.02.2001 as a patient of SCB Medical College and Hospital, Cuttack. It is here looking to the documents at Annexure-2 it clearly appears that it contained a certificate of Professor and H.O.D., Cardiology, SCB Medical College and Hospital, Cuttack through the Department of Cardiology at Column-'Ka' running Page-13 where it clearly appears that there is a recommendation by non-else than the Professor and H.O.D. involving Complete Heart Block and at 'Kha' therein there is suggestion for Permanent Pacemaker Implantation. It also appears based on this report only, the competent authority had released a sum of Rs.3,000/- as advance for undertaking the surgery involving his mother. Looking to the further documents appearing through Annexure-B to the counter affidavit, this Court finds there is again submission of one more application for grant of further advance by the petitioner taking support of another advisory of the Professor (Surgery) of SCB Medical College and Hospital, Cuttack recommending therein surgery involving 'Femonel Hernia' is clearly available at page-41. Both the documents are being granted by competent doctors of SCB Medical College and Hospital, Cuttack. Petitioner cannot be held responsible for his claiming for 2nd advance as he was simply to follow the directions of the competent doctors. Looking to the documents at Annexure-4 series running through Pages-17, 18 and 19, this Court finds there is no dispute in the grant of Essentiality Certificate clearly indicating petitioner's mother undergoing CHB:PPI surgery in the SCB Medical

College and Hospital, Cuttack. The Essentiality Certificate also contained the signatures of all concerned as required under law. For delay in grant of Essentiality Certificate by competent authority the petitioner cannot be held responsible. Further being an employee it also appears that the employer had no attempt for expediting grant of Essentiality Certificate. Through the reading of the whole objection and taking into consideration the contention raised by Mr.S.K. Patnaik, learned Senior Counsel appearing for the contesting opposite parties, this Court nowhere finds either any denial to petitioner's mother undertaking such surgery in the SCB Medical College and Hospital, Cuttack nor there is any dispute to the authenticity of the initial claim of the petitioner vide Annexure-2 and further in the grant of the Essentiality Certificate by the competent person though at a belated stage. This Court therefore observes for the admitted undertaking of the surgery involving the mother of the petitioner Complete Heart Block through Permanent Pacemaker Implantation (CHB:PPI), in such view of the matter, petitioner again requesting that there is requirement of treatment of surgery of his mother on 'Femonel Hernia' since based on the recommendation of a Professor of Surgery of SCB Medical College being granted by competent authority could not have stood on the way of release of medical claims. So, only question remains to be considered here if the petitioner should be deprived of reimbursement of the claim, for there being delay in submission of Essentiality Certificate being contrary to the provision at Clause 8.3 of the Office Memorandum. It is here taking into consideration some of the decisions, more particularly the decisions through 1996 SCC (2) 336, then the decision in the case of ***Milap Singh Vs. Union of India (Uoi) and another,*** reported in 113 (2004) DLT 91, decision of the Hon'ble Supreme Court through judgment dated 16th July, 2009 involving Civil Appeal No.4384 of 2009. A decision of Punjab and Haryana High Court dated 03.12.2018, CWP No.13494/2016. The decision of Hon'ble Apex Court in the case of ***Pritivi Nath Chopra Vrs. Union of India & another,*** reported in 2004 (III) AD, Delhi 569, this Court observe that law of the land is to find out whether there is support to the undertaking of surgery of the dependant by the claimant concerned or not. This Court here observes that petitioner makes claim on the basis of genuine documents. Thus, there is no question of blocking the claim on technical ground. Looking to the background involving the claim involving the case at hand and for the grant of Essentiality Certificate by a competent authority clearly proving undertaking of such treatment that too claim since based on genuine documents, further for the framing of rule to provide s uch facilities to the employees as well as their dependants, this

Court observes such claims should not have been denied on mere technicality of being submitted after long delay again when no fault of the petitioner. There is no case even that the Essentiality Certificate is an un-genuine one. This Court observes delay in submission of the claim cannot be attributed to the claimant and as such the petitioner is deserved to get the relief as claimed in the writ application.

**9.** This Court here also takes into account the latest judgment of the Hon'ble Apex Court in the matter of reimbursement of medical bills in the case of ***Sivakanta Jha Vrs Union of India and others***, decided on 13.4.2018 deciding W.P.(C) No.694 of 2015. Looking to the direction of the Hon'ble Supreme Court particularly in paragraph-15 thereunder, this Court also directs the Chief Secretary of the State of Odisha to constitute a Secretary Level High Power Committee in the concerned Ministry, which shall not only keep the track of such claims and meet every month for quick disposal of such cases after taking into account all aspects.

**10.** This Court, therefore, while observing that rejection of the claim of the petitioner vide Annexure-6 and the subsequent communication vide Annexure-8 on rejection of the review of the order at Annexure-6 being sought for by the petitioner ought to be interfered set aside both the orders vide Annexures-6 and 8 respectively. This court while further observing that such attitude amounts to inhumane attitude by an employer to an employee, for defaulting reimbursement of the money spent by an employee for long sixteen years, this Court while quashing the order at Annexures-6 and 8 issues mandamus to the opposite party no.1-Managing Director, OFDC Ltd., Bhubaneswar to calculate the entitlements of the petitioner through the claim bill after adjusting a sum of Rs.3,000/- paid by way of advance and pay the balance entitlements along with interest @7% per annum all through. In addition to above for finding there is serious negligence by an employer in the matter of medical reimbursement and looking to the harassment to the poor employee fighting all these years in the matter of medical claim reimbursement and this Court also imposes a cost of Rs.20,000/- (Rupees Twenty thousand) on the opposite party no.1. The cost along with the entitlements of the petitioner as directed hereinabove shall be paid to the petitioner in one block within a period of six weeks from the date of communication of this Court's judgment along with copy of the writ petition by the petitioner. Writ petition succeeds with award of cost of Rs.20,000/-. Writ Petition is accordingly allowed.

Free copy of this judgment be handed over to learned AGA for communicating the same to the Chief Secretary, Government of Odisha, Bhubaneswar for compliance of the direction herein.

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**2020 (I) ILR - CUT- 173**

**BISWANATH RATH, J.**

O.J.C. NO. 7235 OF 1998

**GAJA NAGA & ORS.** …….Petitioners

*.Vs.*

**JOINT COMMISSIONER OF CONSOLIDATION, SAMBALPUR & ORS.** …….Opp. Parties

**ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 4 (4) – Partition Suit – Preliminary decree passed by the civil court – Final decree pending – Neither appeal nor revision from the preliminary decree pending – Meanwhile consolidation proceeding initiated – Question raised as to, whether the preliminary decree shall be abetted in view of section 4 (4) of the Act? – Held, the suit having been adjudicated and on the admission of both sides no appeal or revision is pending, the provision of sub-section (4) of section 4 of the OCH & PFL Act has no application.**

**Case Laws Relied on and Referred to** :-

1. AIR 2013 SC 1010 : (2012) 12 SCC 642 : Paras Nath Rai & Ors. .Vs. State of Bihar & Ors.

For petitioners : M/s.S.K.Padhi, Mrs.D.Mohapatra, B.K.Sahoo & S.Parida
For O.Ps.1 to 3 : Mr. S.N.Mishra, Addl. Govt. Adv.
For O.P.4 : M/s.P.K.Routray, P.R.Sutar & M.R.Dash

JUDGMENT Date of Hearing & Judgment : 27.11.2019

***BISWANATH RATH, J.***

This writ application involves a challenge to the order at Annexure-3 passed by the Joint Commissioner of Consolidation, Sambalpur involving C.R. Case No.314/88.

**2.** Assailing the impugned order, Sri Panigrahi, learned counsel for the petitioners raised a preliminary objection to the impugned order on the premises that once a preliminary decree is there involving a partition suit pending for final decree, in the event of commencement of consolidation proceeding in the locality, such preliminary decree shall stand abated. It is in this context, a further question is also raised as to whether in presence of a preliminary decree already observing the agricultural land to be partitioned by the Consolidation Authority and the Civil Court Commissioner partition the house site, it is still open to the Consolidation Authority to declare such preliminary decree bad and proceed with the consolidation proceeding to decide the title and interest of the party involved therein ? Taking this Court to the development taking place through the suit ending with rejection of an application under Order 9 Rule 13 of C.P.C. to set aside the ex parte order landing in finality of preliminary decree, Sri Panigrahi, learned counsel for the petitioners contended that for the civil suit attaining finality pending in final decree consolidation process undertaken in the locality cannot abate such preliminary decree.

**3.** Sri Routray, learned counsel for the contesting O.P.4, on the other hand, taking this Court to the observations of the Consolidation Authority holding that such decree being contrary to the Full Bench decision of this Court reported in 1980 C.L.T. 337 and for the observation of the revisional authority contended that there is no dispute that the decree, if any, shall stand abated on coming into force of the consolidation operation in the locality.

**4.** Sri S.N.Mishra, learned Additional Government Advocate appearing for O.Ps.1 to 3 also supported the stand taken by the learned counsel for O.P.4.

**5.** Considering the rival contentions of the parties and looking to the questions involved, as indicated herein above, this Court finds, Sub-Section (4) of Section 4 of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 reads as follows :-

> "4. Effect of notification-Upon the publication of the notification issued under Sub-Section (1) of Section 3 in the Official Gazette. The consequences as hereinafter set forth, shall, subject to the provisions of this Act, ensure in the consolidation area till the publication of notification under Section 41 or Sub-Section (1) of Section 5, as the case may be –
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> xxx xxx xxx

> (4) Every suit and proceedings for declaration of any right or interest in any land situate within the consolidation area in regard to which proceedings could be or ought to be started under this Act, which is pending before any Civil Court, whether of the first instance or appeal reference or revision shall, on an order being passed in that behalf by the Court before which such suit or proceeding is pending stand abated;"

For the provision at Sub-Section (4) of Section 4 of the OHC & PFL Act, it is made clear that every suit and proceeding for declaration of right or interest in any land situate within the consolidation area pending before any civil court, appeal reference or revision on an order being passed in that behalf by the court before which such suit or proceeding pending stands abated.

**6.** Considering the background involved herein and the pleadings of the parties, this Court finds, the civil suit initiated among the parties having come to an end, there is already preliminary decree. Not only that there was no suit pending before the trial court on the other hand the preliminary decree was pending for final decree in the executing court. Therefore, looking to the language and the purport of Section 4(4) of the OCH & PFL Act making thereby any suit pending for adjudication shall stand abated. For the suit being already adjudicated and on the admission of both sides that no appeal involving such judgment and decree is pending nor revising therefrom, this Court finds, the provision of Sub-Section (4) of Section 4 of the OCH & PFL Act has no application to the case at hand. The revisional authority has miss-read and miss-applied the same in passing the impugned judgment. This Court here takes into consideration the decision of the Hon'ble apex Court in ***Paras Nath Rai & others vrs. State of Bihar & others*** reported in AIR 2013 SC 1010/(2012) 12 SCC 642, paragraph-38 reads as follows :-

> "38. The Full Bench was dealing with an appeal directed against the final decree for partition. The question before the Full Bench was whether under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Administration of Land Act, 1972 (for short 'the 1972 Act') a final decree stood abated. The Full Bench referred to the notification issued under Section 3(1) of the 1972 Act, scanned the language employed in sub-section (4) of Section 4 and came to hold that a final decree proceeding cannot be characterized as a suit or a proceeding for right, title or interest in respect of any land. It has been opined there that Section 4(4) does not include an appeal arising out of a final decree as the same would not declare any right, title or interest of the parties but deal with certain matters pertaining to what has already been declared. Pendency of an appeal against the final decree cannot take away the finality of the preliminary decree which has already declared the rights, title and interest of the parties. We may repeat for clarity that in the said case, the preliminary decree passed in the suit had become final as it was not challenged by way of an appeal. Thus, the factual matrix was quite different."

**7.** Taking into reliance the full Bench decision taken reliance by the counsel for O.P.4 and also referred by the Joint Commissioner, vide 1980 CLT 337, on search this Court finds, the decision so reflected is a decision involving a criminal case and has no application to the case at hand. Even the only full Bench decision available therein has no application to the case at hand.

**8.** For the observation of this Court herein above and the decision of the Hon'ble apex Court, this Court finds, the impugned order at Annexure-3 is not sustainable. As such, this Court interfering with the impugned order at Annexure-3 sets aside the same in restoring the orders of the original authority as well as the appellate authority.

**9.** The writ petition succeeds. No cost.

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**2020 (I) ILR - CUT- 176**

**S. K. SAHOO, J.**

CRLA NO. 101 OF 2012

**DR. BALARAM BAG** .....Appellant

*.Vs.*

**STATE OF ODISHA (Vig.)** .....Respondent

**(A) THE INDIAN EVIDENCE ACT,1872 – Section 114(g) – Provisions under – Offence under sections 13(2) r/w 13 (1)(d) of P.C. Act and under sections 477-A,34 of IPC – Pecuniary advantage by abusing official position – Order placed for GCI sheets beyond the requirement and without quotation – Allegation of interpolation in the official entries – Neither the relevant entries/ record been produced before the court nor the competent person been examined to prove the entries – Effect of – Held, in view of the provision contained in section 114(g) of the Indian Evidence Act, which has the effect that if evidence which could have been produced, has not been produced, the presumption would be that it would have gone against the party who withholds it – It would be reasonable to draw such inference in this case – Since the relevant entries on which the prosecution heavily banks upon have not been marked as exhibits and proved by competent persons in accordance with law, it would be difficult to place any reliance on such entries and more particularly use it against the accused/appellant.** (Para 8)

**(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 313 – Statement of the accused – Incriminating circumstances against the accused – No opportunity to the accused to explain the incriminating circumstances against him – Effect of – Held, if a material piece of evidence is not put to the accused when he is examined under section 313 of Cr.P.C, the prosecution is disentitled from placing reliance on such evidence.**

(Para 8)

**(C) THE INDIAN EVIDENCE ACT, 1872 – Section 35 – Provisions under – Admissibility of documents – Principles – Held, as under.**

Section 35 of the Evidence Act requires the following conditions to be fulfilled before a document can be admissible under this section:-

(i) the document must be in the nature of an entry in any public or other official book, register or record;

(ii) it must state a fact in issue or a relevant fact;

(iii) the entry must be made by a public servant in the discharge of his official duties or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept. (Para 8)

For Appellant : Mr. Hemanta Kumar Mund
For Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vig.)

CRLA No. 125 Of 2012
**GUDLA UMA MAHESWAR RAO** .....Appellant

*.Vs.*

**STATE OF ODISHA (Vig.)** .....Respondent

For Appellant : Mr. G.K. Mishra
For Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vig.)

**Case Laws Relied on and Referred to** :-

1. A.I.R. 1970 S.C. 326 : Ram Prasad Sharma .Vs. The State of Bihar.
2. A.I.R. 1983 S.C. 684 : State of Bihar .Vs. Radha Krishna Singh.
3. A.I.R. 2010 S.C. 2933 : Madan Mohan Singh .Vs. Rajni Kant.
4. (2003) 12 SCC 528 : Kuldip Singh .Vs. State.
5. A.I.R. 2017 S.C. 3772 : Rajiv Kumar .Vs. State of U.P.
6. (2010) 7 SCC 759 : Dharnidhar and Ors. .Vs. State of U.P.

JUDGMENT Date of Hearing: 28.08.2019 : Date of Judgment: 11.09.2019

***S. K. SAHOO, J.***

The appellants Dr. Balaram Bag (CRLA No. 101 of 2012) and Gudla Uma Maheswar Rao (CRLA No. 125 of 2012) along with one Bhajaram

Swain faced trial in the Court of learned Special Judge (Vigilance), Jeypore in G.R. Case No.20 of 1993(V)/ T.R. No. 77 of 2007 for offences punishable under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and section 477-A read with section 34 of the Indian Penal Code on the accusation that the appellant Dr. Balaram Bag being a public servant employed as Block Development Officer (hereafter 'B.D.O.'), Nandahandi Block in connivance with the other two co-accused persons, by corrupt or illegal means or by otherwise abusing his position as public servant, obtained pecuniary advantage to the extent of Rs.4,72,878.67 paisa from 21.11.1991 to 01.06.1992 and also with further accusation that the appellant Dr. Balaram Bag in connivance with the co-accused persons in furtherance of their common intention being an officer (B.D.O.) under Government of Odisha willfully and with intent to defraud, altered certain papers and manipulated the official documents by accepting higher rate of tenders showing undue official favour to the co-accused persons.

The learned trial Court vide impugned judgment and order dated 10.02.2012 though acquitted the co-accused Bhajaram Swain of all the charges but found the appellants guilty of the offences charged and sentenced each of them to undergo rigorous imprisonment for three years and to pay a fine of Rs.50,000/- each, in default, to undergo further rigorous imprisonment for six months for the offence under section 13(2) read with section 13(1)(d) of the 1988 Act and to undergo rigorous imprisonment for three years and to pay a fine of Rs.50,000/- each, in default, to undergo further rigorous imprisonment for six months for the offence under section 477-A read with section 34 of the Indian Penal Code and both the substantive sentences of imprisonment were directed to run concurrently.

2. The factual matrix of the prosecution case, in short, as per the first information report dated 03.09.1993 lodged by Sri Debadutta Pattnaik (P.W.18), Inspector of Police, Vigilance, Nawarangpur before the Superintendent of Police, Vigilance, Berhampur Division, Berhampur, is that the appellant Balaram Bag, OAS was posted as B.D.O., Nandahandi from 20.09.1991 to 24.07.1992. During his incumbency as B.D.O., he purchased 12,657.70 Kgs. of purlins/rafters @ Rs.23.50 paisa per kg. in bill Nos.326, 327, 328 and 329 all dated 12.05.1992, bill nos.332 and 333 both dated 20.05.1992 and bill no.106 dated 24.03.1992 from M/s. Maa Bhagabati Engineering Works, Jhaliguda, an unregistered firm without calling for

quotation against the E.P.M. rate of Rs.12.99 paisa per kg. during that period. The cost of 12,675.70 kg. of purlins/rafters at the approved rate of Rs.12.99 paisa per kg. including the transportation cost of Rs.405/- from Jhaliguda to Nandahandi comes to Rs.1,64,828.52 paisa but appellant Balaram Bag paid Rs.2,97,456.00 paisa thus making excess payment of Rs.1,32,627.48 paisa to the firm abusing his official position as B.D.O. by showing undue official favour to the firm.

It is further alleged in the F.I.R. that appellant Balaram Bag purchased 651 nos. of Asbestos cement sheets (hereafter 'AC sheet') and 210 pairs of ridges worth of Rs.2,31,192/- against bill no.636 dated 22.11.1991, bill no.639 dated 22.11.1991 and bill no.648 dated 27.11.1991 of M/s. Hyderabad Industries, Visakhapatnam without calling for quotations. Though he purchased the AC sheets in the consumer price directly from the company, he endorsed the copy of purchase order to M/s. Parbati Traders, Jeypore in Memo No.2133 dated 26.11.1991 which enabled the firm M/s. Parbati Traders, Jeypore to derive pecuniary advantage of Rs.25,231.05 paisa by way of commission. He stated to have abused his official position as B.D.O. in showing undue official favour to the firm in obtaining pecuniary advantage of Rs.25,231.05 paisa.

It is further alleged in the F.I.R. that the appellant Balaram Bag had shown purchase 2000 nos. of GCI sheets of 10' x 24 gauge in bill no.32 dated 01.06.1992 for Rs.7,65,440/- from M/s. Sai Laxmi Enterprises, Jeypore without calling for quotation against the requirement of only 21 nos. of GCI sheets. During physical verification of the GCI sheets, it was found that the GCI sheets were of 10' x 28 gauge quality and not of 10' x 24 gauge quality as shown to have been received by the appellant Balaram Bag. The weight of each sheet came to 8.556 kg against 14.54 kg. The total weight of 2000 nos. of GCI sheets of 10' x 24 gauge should have been 29,080 kgs. whereas the total weight 10' x 28 gauge came to only 17,112 kgs. which was lesser by 11,968 kg. The proportionate cost of 11968 kg. of GCI sheets as per the rate accepted by the appellant Balaram Bag came to Rs.3,15,020.14 paisa which has been paid in excess to the firm. The appellant Balaram Bag thus stated to have abused his official position in showing undue official favour to the firm in obtaining pecuniary advantage of Rs.3,15,020.14 paisa which was an equivalent loss to the Government.

It is further alleged in the F.I.R. that the appellant Balaram Bag being a public servant committed criminal misconduct in abusing his official

position by showing undue official favour to the firms i.e. M/s. Maa Bhagabati Engineering Works, Jhaliguda in obtaining pecuniary advantage of Rs.1,32,627.48 paisa in purchase of 12,657.70 kgs. of purlins/rafters; to M/s. Parbati Traders, Jeypore in obtaining pecuniary advantage of Rs.25,231.05 paisa in purchase of 651 nos. of AC sheets and to M/s. Sai Laxmi Enterprisers, Jeypore in obtaining pecuniary advantage of Rs.3,15,020.14 paisa in purchase of 2000 nos. of GCI Sheets.

3. On the basis of such F.I.R., Berhampur Vigilance P.S. Case No.20 of 1993 was registered under section 13(2) read with section 13(1)(d)(ii) of the 1988 Act and section 477-A of the Indian Penal Code against the appellant Balaram Bag. P.W.18 was directed by the Superintendent of Police, Vigilance to take up investigation of the case and accordingly, P.W.18 carried out investigation from 03.09.1993 till 06.11.1993 whereafter he handed over the charge of investigation to P.W.20 Ramahari Mohapatra.

During course of investigation, it came to light that the appellant Gudla Uma Maheswar Rao, Proprietor of M/s. Sai Laxmi Enterprises and co-accused Bhajaram Swain, Proprietor of M/s. Maa Bhagabati Engineering Works, were the beneficiaries of the illegal acts committed by the appellant Balaram Bag and accordingly charge-sheet was submitted against the appellants along with co-accused Bhajaram Swain under section 13(2) read with section 13(1)(d)(ii) of the 1988 Act and sections 477-A/34 of the Indian Penal Code.

4. The defence plea of the appellants was one of complete denial. The appellant Balaram Bag took a specific plea that he had acted in good faith on the basis of previous quotation and that the joint verification conducted at the instance of the Vigilance Department is completely erroneous. The other appellant Gudla Uma Maheswar Rao and the co-accused Bhajaram Swain took the plea that they had supplied the materials on the basis of orders placed with their firms and that they have no role to play in the alleged occurrence.

5. In order to prove its case, the prosecution examined twenty witnesses.

P.W.1 S. Vaskar Rao is the proprietor of Jeypore Small Scale Industries engaged in the manufacture of purlins/ rafters, anglers, chairs, tables, almirahs etc. He stated that the appellant Balaram Bag did not call for any quotation from his firm in the year 1992 and that he had supplied some

materials to Orissa Cooperative Marketing Federation, Nabarangpur. He did not state anything relating to the occurrence except that the price of articles varies from time to time.

P.W.2 Anjangi Bhupati was working as R.I. at Khatiguda under Baziguda Circle and he stated in the year 1993, the Vigilance Inspector enquired from him regarding existence of the registered firms, namely, M/s. Maa Bhagabati Engineering Works, Nilima Engineering Works and Sanjibani Engineering Works at Khatiguda and that after verification, he had informed the Vigilance Inspector that no such registered firms existed in that Circle.

P.W.3 Simanchal Mishra is a witness to the seizure of documents from Nandahandi Block Office under seizure list Exts. 1 and 2.

P.W.4 V. Iswar Rao is the proprietor of Natraj Hardware Stores at Jeypore. He stated that there are different varieties of GCI sheets from 20 gauge to 28 gauge and in the year 1991, the price of 22 to 24 gauge GCI sheets per Kg. was Rs.23.30 paise, 26 gauge was Rs.27.50 paise per kg. and 28 gauge was Rs.28.50 paise per kg. and further stated that the approximate weight of 10 feet GCI sheet of 24 gauge would be around 15 to 16 Kgs. and in case of 26 gauge the approximate weight would be 12 Kgs. and in case of 28 gauge, it would be about 8 to 9 Kgs.

P.W.5 G. Ganga Rao is a hardware shop owner of Jeypore dealing with AC and GCI sheets who did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.6 P. Ripumardhan Choudhury is a witness to the seizure of some papers from Jeypore Small Scale Industry vide seizure list Ext.4.

P.W.7 P. Mohan Rao is a hardware store owner at Nabarangpur who used to supply goods on placement of orders by different Government agencies. He stated that he never supplied any GCI sheets or cement or any other hardware to Nandahandi Block office.

P.W.8 Subudhi Mohanty stated that his wife and son were having a welding shop at Khatiguda and that purlins and rafters are prepared in their work shop only after receipt of orders from the Government agency. He further stated that one Nilima Engineering Works and Bhagabati Engineering

Works were functioning for some time at Khatiguda but those were closed since last seven years and that those firms were not registered.

P.W.9 Ramakrushna Panigrahi stated that one Swain had opened Bhagabati Engineering Works at Khatiguda which was closed since last eight to nine years back.

P.W.10 Brundaban Panigrahi was examined in-chief in part but since his evidence could not be completed, the learned trial Court has not placed any reliance on such evidence.

P.W.11 Narasingh Rath was working as cashier of Nandahandi Block during October 1993 to August 1996. He stated that prior to his joining, the appellant Balaram Bag was the B.D.O. of that block. He further stated that the B.D.O. has no power to divert the amount of one head to another head and by the time of his joining in the Block, some building materials were already purchased and stacked in the Block office. He further stated after verifying the cash book that there was no fund available under the 'development head' of account for purchase of building materials during the period from 20.09.1991 to 24.07.1992. He further stated that from the cash book, he came to know that the appellant Balaram Bag had purchased the building materials by diverting funds from other heads.

P.W.12 Labanya Sabar was the Additional C.T.O., Koraput Circle-I, Jeypore in the year 1994 and he stated that after verifying the official records, he informed the Vigilance Inspector that there was no Nilima Engineering Works or Sanjibani Engineering Works at Jhaliguda under Ward-B area of Nabarangpur.

P.W.13 A. Sitaram Naidu is a witness to the seizure of the file No.XII-2/91 marked Ext.5 containing correspondence on quotation of development materials which was seized under seizure list marked Ext.1.

P.W.14 Harihar Sadangi was the Senior Clerk, Nandahandi Block who stated about the seizure of joint verification report of Nandahandi Block vide seizure list Ext.1. He also stated about the seizure of the stock register of development materials vide seizure list Ext.6, seizure of posting order etc. of appellant Balaram Bag vide seizure list Ext.7, quotation file vide seizure list Ext.2. He further stated that without calling for any quotation, the appellant Balaram Bag gave orders to M/s. Maa Bhagabati Engineering

Works, Jhaliguda to supply purlins and rafters for houses under IAY scheme and the appellant did not mention the comparative chart in the note sheets.

P.W.15 Bishnu Prasad Patra is a seizure witness, who stated about the seizure of the xerox copy of credit bill and circular order of Jeypore Small Scale Industry under seizure list marked Ext.4.

P.W.16 G. Chandrasekhar is a partner of Srinivas Stores, Jeypore who stated that he had submitted quotation to Nandahandi Block for supply of GCI sheets.

P.W.17 Panchanan Kar proved the stock register of Nandahandi Block for the period 1991-92 marked as Ext.8. P.W.18 Debadutta Pattnaik is the informant in the case who also investigated the case and handed over the charge to P.W.20 on 06.11.1993.

P.W.19 Sushil Kumar Mishra was the Junior Engineer, Mechanical who participated in the inquiry conducted by Vigilance Department at Nandahandi Block and took measurement of GCI sheets, rafters, purlins and AC sheets available in the Store and further stated about the preparation of the joint verification report vide Ext.10.

P.W.20 Ramahari Mohapatra was the Investigating Officer who after taking over charge of investigation from P.W.18 on 06.11.1993 submitted charge sheet against the appellants and the co-accused Bhajaram Swain.

The prosecution exhibited thirty one documents. Exts.1, 2, 4, 6, 7, 11, 17, 19, 20 and 26 are the seizure lists, Ext.3 is the quotation, Ext.5 is the file containing correspondence and note sheet, Ext.8 is the stock register of Nandahandi Block, Ext.9 is the F.I.R., Ext.10 is the joint verification report, Exts.12 and 18 are the zimanama, Ext.13 is the bill of Maa Bhagavathi Engineering works, Ext.14 is the money receipt, Ext.15 is the bill of M/s. Sai Laxmi Enterprises, Ext.16 is the stock register, Ext.21 is the xerox copy of consumer price list of AC sheets, Ext.22 is the credit bill, Ext.23 is the xerox copy of circular order, Ext.24 is the posting order, Ext.25 is the joining report, Ext.27 is the extract of special audit report, Ext.28 is the file of Nandahandi Block, Ext.29 is the sanction order, Ext.30 is the rate chart and Ext.31 is the quotation/correspondence file.

The defence exhibited four documents. Exts.A and B are the carbon copies of challans, Ext.C is the office copy of the letter and Ext.D is a letter of P.I.O., Nandahandi.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that even though the sanction order issued in respect of the appellant Balaram Bag was issued by the Officer on Special Duty to the Chief Secretary -cum- Ex-Officio Joint Secretary to the Government but the sanction was actually granted by the State Government. It was further held that non-production of confidential enquiry report is of no consequence as the F.I.R. and other connected police papers and documents were taken into account and that the appellant was aware about the specific allegations leveled against him. It was further held that non-production of the quotation correspondence file marked as Ext.28 before the Sanctioning Authority during pre-sanction discussion cannot be a ground to invalidate the sanction order. It was further held that the shortfall in quality of GCI sheets in the sanction order can be treated as inadvertent or accidental and similarly non-mentioning of the name of M/s. Hyderabad Industries in the sanction order cannot be treated as fatal to the prosecution case and that the defects in the sanction order has not led to miscarriage of justice. While dealing with the specific charges, the learned trial Court held that the appellant Balaram Bag placed orders for purchase of rafters/purlins with M/s. Maa Bhagabati Engineering Works within one year of the accepted tender and therefore, merely because a quotation was not called for, it would not ipso facto lead to a conclusion that some foul play was involved in the purchase in question. It was further held that by placing orders with M/s. Maa Bhagabati Engineering Works, the appellant Balaram Bag cannot be said to have committed any illegality so as to invite criminal liability upon himself and that there is no evidence to show any sort of involvement of co-accused Bhajaram Swain, Proprietor of M/s. Maa Bhagabati Engineering Works or that he obtained any undue pecuniary benefit out of the transaction. It was further held that merely because quotations were not called for, it cannot be a ground to impute foul play in the transaction in question and that the act of the appellant Balaram Bag as B.D.O. can at best be treated as a procedural irregularity which may make him liable for administrative action under the service laws governing him but a definite criminal liability cannot be saddled on him on such score. It was further held that not a scrap of paper has been produced by the prosecution to show that an amount of Rs.25,231.05 paisa was actually paid to M/s. Parbati Traders and as such the allegation regarding payment of

commission to the local firm appears to be more speculative in nature than based on facts. The learned trial Court considered the allegation of misconduct in the purchase of GCI sheets on the ground of (i) without calling for quotations, (ii) without the corresponding requirement, and (iii) of lesser quality than that shown in the official records and held that the purchase in question being made within one year of the earlier quotation, no illegality can be said to have been committed by the accused in not calling for a fresh quotation. The learned trial Court considering the allegation purchase of GCI sheets without the corresponding requirement, held that there was no requirement of GCI sheets except to the extent of 21 sheets and the so-called requirement of 2000 sheets was falsely projected in the file by interpolating/adding/manipulating the note sheet of the concerned file subsequently, apparently to justify the purchase of the same and that the appellant Balaram Bag has played the main role by granting approval and also having interpolated his own endorsement in the note sheet must, therefore, be held to have abused his official position to falsely project the requirement of GCI sheets evidently to make an unlawful gain and his action led to unnecessary expenditure of substantial amount of government money i.e. Rs.7,65,440/- at the relevant time. The learned trial Court further held that the actual requirement was 21 nos. of 22 gauge GCI sheets only whereas the sheets shown to have been purchased were 24 gauge quality and on actual verification, it was found to be 28 gauge quality but the price was paid for 24 gauge and that the supplier also played its part by falsely submitting bill (Ext.15) for 24 gauge sheets even though it had actually supplied 28 gauge sheets, as a result of which the government had to make an excess payment of Rs.3,15,020.14 paisa to the firm. The learned trial Court further held that the appellant Balaram Bag being a public servant abused his official position to falsely project the requirement of GCI sheets in the official file (Ext.31) and in the process, he caused payment to be made of a substantial amount of government money i.e. Rs.7,65,440/- unnecessarily to the firm M/s. Sai Laxmi Enterprises of which the appellant Gudla Uma Maheswar Rao was the Proprietor and that the appellant Balaram Bag in connivance with appellant Gudla Uma Maheswar Rao, with intent to defraud, caused alteration/manipulation of official papers and records to obtain pecuniary advantage of Rs.3,15,020.14 paisa to the said firm who in furtherance of their common intention submitted a false bill (Ext.15) showing supply of 24 gauge GCI sheets while actually supplying 28 gauge GCI sheets. In the ultimate conclusion, the learned trial Court held the co-accused Bhajaram Sethy not

guilty of any offences charged, however found the appellants guilty of the offences charged and passed sentences accordingly.

7. Mr. Hemanta Kumar Mund, learned counsel appearing for the appellant Balaram Bag contended that so far as the accusation against the appellant for placing orders for excess GCI sheets than requirement is concerned, the prosecution relies heavily on the entries made in the file (Ext.31). The F.I.R. in this case was registered on 03.09.1993 and Ext.31 was shown to have been seized on 17.09.1993 but it was not submitted to the Court at the time of filing of the charge sheet. P.W.10 Brundaban Panigrahi who was the Senior Clerk of Nandahandi Block and dealing with this file deposed in the learned trial Court on 26.09.2002 and when he deposed regarding this file, the learned Special Public Prosecutor filed a petition to defer the further examination-in-chief of this witness on the ground that the file was not available in the Court and P.W.10 was required to prove the file and accordingly, the learned trial Court deferred further examination of P.W.10. In spite of such deferment, the file was neither produced in Court to be proved by P.W.10 nor was the evidence of P.W.10 completed. Even Ext.31 was not available in the trial Court on 06.12.2011 when the I.O. (P.W.18) who seized the file adduced his evidence in the Court for which the file was could not be proved through P.W.18 though other documents seized under the same seizure list (Ext.11) were proved by him. Ext.31 was proved only when the subsequent I.O. (P.W.20) who took over charge of the investigation from P.W.18 was examined. According to Mr. Mund, the manner in which Ext.31 was brought on record for the first time when P.W.20 tendered his evidence has caused serious prejudice to the appellant and therefore, the learned trial Court committed gross error in placing reliance on the entries made on such file and in holding the appellant guilty on the basis of such evidence. It was further argued that the interpolations/entries alleged to have been made in Ext.31 have not been proved in accordance with law. The persons who made the entries in Ext.31, i.e. the Stipendiary Engineer and the Junior Engineer have not been examined to prove the entries and the alleged interpolations have also neither been proved nor marked separately. Therefore, it is not admissible under section 35 of the Evidence Act. He placed reliance in the cases of **Ram Prasad Sharma -Vrs.- The State of Bihar reported in A.I.R. 1970 S.C. 326**, **State of Bihar -Vrs.- Radha Krishna Singh reported in A.I.R. 1983 S.C. 684** and **Madan Mohan Singh -Vrs.- Rajni Kant reported in A.I.R. 2010 S.C. 2933**. It was further argued that the incriminating circumstances appearing in

the file (Ext.31) as enumerated by the learned trial Court have not been put to the appellant in his accused statement recorded under section 313 of Cr.P.C. and therefore, it cannot be utilized against the appellant. He placed reliance in the case of **Kuldip Singh -Vrs.- State reported in (2003) 12 Supreme Court Cases 528**. It was argued that though in Ext.31, it is mentioned that 21 sheets more were required for construction of IAY houses but the appellant as B.D.O. was dealing with various schemes apart from construction of Anganwadi Centers in different Gram Panchayats and therefore, the possibility of acquiring those extra GCI sheets for being utilized in any other schemes cannot be ruled out. The prosecution has not adduced any evidence to prove that the notings made in the file regarding requirement of more GCI sheets was wrong. It was argued that so far as the size of the GCI sheets is concerned, the joint verification report vide Ext.10 was prepared at a time when the Vigilance Department had taken up preliminary enquiry and only ten nos. of GCI sheets were selected randomly out of 2000 sheets for determining the quality of the materials supplied and on the basis of such random sampling, no criminal liability can be fastened on the appellant. He argued that there is no evidence that the GCI sheets verified by the technical committee were procured by the appellant inasmuch as after the GCI sheets were procured on 01.06.1992, the appellant handed over the charge of his post as far back as on 24.07.1992 and the so-called joint verification was conducted at the behest of the Vigilance Department only on 24.02.1993 and by that time the appellant was succeeded by three other incumbents in the office and the charge of the Store had also changed hands for several times in the meantime. It was argued that the learned trial Judge has acted erroneously in ignoring the shortcomings in the prosecution case and in placing reliance on the joint verification report (Ext.10). It was argued that the articles which were allegedly verified by the Vigilance Department were not proved to be the very articles ordered and received by the appellant. It was argued that it was not practically possible on the part of the appellant Balaram Bag as B.D.O. to physically verify the quality of the GCI sheets supplied and receive in the Store and in that regard, he has to rely on his subordinates who were the persons in-charge of the Store. Placing the evidence of P.W.19, it was argued that he has admitted that the joint verification report (Ext.10) was not prepared in his presence and he was unable to speak as to who had prepared the said report vide Ext.10 and therefore, it can be said that he had just signed on a pre-prepared report by the I.O. having no knowledge about the contents of it. The GCI sheets found in the Store at the time of search and verification

were not seized and after a lapse of more than six months of the joint verification, the I.O. seized 1432 nos. of GCI sheets on 17.09.1993 and therefore, it is very risky to accept such evidence to convict a public servant. Neither the appellant nor the Officer in-charge of the Store namely B.B. Panigrahi who had received the GCI sheets was informed about such joint verification nor were they present at the time of verification. In such circumstances, the report of the joint verification prepared in the absence of the appellant and without affording any reasonable opportunity to him to explain his position cannot be utilized against him. The F.I.R. was lodged on 03.09.1993 on the basis of joint verification conducted by P.W.18 along with P.W.19 and others but the joint verification report was seized only on 20.09.1994 on production by the Head Clerk of the Block. It was argued that the bill vide Ext.15 and the money receipt marked as Ext.15/1 were proved by the I.O. (P.W.18) who is not competent to prove the same and therefore, even though in question no.34 of the accused statement, the appellant admitted that from the bill marked Ext.15, it is revealed that M/s. Sai Laxmi Enterprises supplied 2000 nos. of 10' x 24 gauge GCI sheets and raised bill amount of Rs.7,65,440/- out of which a sum of Rs.3,65,440/- was paid by way of a cheque but such admission without proving the document in accordance with law is not sufficient to fasten liability on the appellant. While concluding his argument, Mr. Mund emphasized that the findings of the learned trial Court are based on mere conjectures than admissible evidence on record and therefore, the impugned judgment suffers from serious infirmities and it is a fit case where benefit of doubt should be extended in favour of the appellant Balaram Bag.

Mr. G.K. Mishra, learned counsel appearing for appellant Gudla Uma Maheswar Rao adopted the argument advanced by Mr. Mund.

Mr. Sanjay Kumar Das, learned Standing Counsel appearing for the Vigilance Department on the other hand emphatically contended that the learned trial Court has assessed the oral as well as documentary evidence in its proper perspective and while not accepting the prosecution case in part and also acquitting the co-accused Bhajaram Swain of all the charges, the Court rightly found the appellants guilty on the basis of the available materials on record. He placed the relevant notings in Ext.31 and argued that the alternations/interpolations are apparent and no satisfactory explanation has been offered by the appellant Balaram Bag in that respect. Relying on the evidence of P.W.11, the cashier of Nandahandi Block, it was argued that

even though no fund was available under the 'development head' account for purchase of building materials during the period from 20.09.1991 to 24.07.1992 but the appellant having no power to divert the amount from one head to another head, purchased the building materials by diverting funds from other heads which shows his interestedness to clear up the bill at an earliest even though the purchased GCI sheets were much more than the requirement. He contended that there is no perversity in the impugned judgment and as such the criminal appeals filed by the appellants should be dismissed. He placed reliance in the case of **Rajiv Kumar -Vrs.- State of U.P. reported in A.I.R. 2017 S.C. 3772**.

8. Adverting to the contentions raised by the learned counsel for the respective sides and on perusal of the impugned judgment, it appears that the appellants have been convicted on the ground that the purchase of 2000 GCI sheets were without the corresponding requirements and those were of lesser quality than what was shown in the official records.

The trump card of the prosecution case hinges on the acceptability or otherwise of the quotation/correspondence file marked as Ext.31. In the said file, as per entry dated 23.04.1992, it is mentioned that 21 GCI sheets were required to meet the demand of construction of IAY and necessary order to be passed to purchase the GCI sheets. By the side of the said entry dated 23.04.1992, it appears that the Stipendiary Engineer and Junior Engineer have made certain entries on the very day. The Stipendiary Engineer has noted that to complete the IAY, Anganwadi Centers, repairing of school buildings and works under SC/ST benefit scheme, the B.D.O. may place order for 200 numbers of GCI sheets for the two Gram Panchayats if funds are available so that the work can be completed in time. Similarly, the Junior Engineer has given his note that for construction of IAY, Anganwadi Centers, school buildings and other structural works, 1779 of GCI sheets may be required for eight numbers of Gram Panchayats. Basing on these two notes, it is mentioned by the B.D.O. that indent be placed for 2000 GCI sheets so that works to be taken up during that year very smoothly and can be completed. It is the prosecution case that the notings given by the Stipendiary Engineer and Junior Engineer as well as by the B.D.O. (appellant Balaram Bag) are interpolated.

The Stipendiary Engineer and Junior Engineer who allegedly made the so-called interpolated entries have not been examined to prove the entries nor any other competent persons who were acquainted with the handwritings

and signatures of the two engineers proved the entries. Similarly, the entry relating to placement of indent for 2000 GCI sheets have not been proved to be that of the appellant. On perusal of the relevant entries dated 23.04.1992, it appears to have been made by at least four persons in different inks but nobody has been examined from the prosecution side during trial to say as to who made those entries. If the prosecution wanted to utilize those entries dated 23.04.1992 against the appellant Balaram Bag, first of all it should have been proved in a proper manner in accordance with law and secondly, the appellant should have been asked specific questions in the accused statement relating to such entries. Mere marking of the quotation/correspondence file as Ext.31 is not sufficient.

Section 35 of the Evidence Act requires the following conditions to be fulfilled before a document can be admissible under this section:-

> (i) the document must be in the nature of an entry in any public or other official book, register or record;
>
> (ii) it must state a fact in issue or a relevant fact;
>
> (iii) the entry must be made by a public servant in the discharge of his official duties or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept.

In the case of **Radha Krishna Singh** (supra), it was held that admissibility of a document is one thing and its probative value is quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil.

In the case of **Ram Prasad Sharma** (supra), the Hon'ble Supreme Court rejected the *hath chitha* marked as Ext.D as a public document on the following grounds:-

> "13.....No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. In the result, we must hold that Ext.D, the hath chitha, was rightly held by the High Court to be inadmissible."

In the case of **Madan Mohan Singh** (supra), while dealing with an entry made in a public document, it was held as follows:-

> "14. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in

> the facts and circumstances of a particular case.....In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases."

The prosecution examined P.W.10, the Senior Clerk of Nandahandi Block who stated to have given notes in Ext.31 in due discharge of his official duty. Most peculiarly Ext.31 was not available at the time of examination of P.W.10 and the learned Special Public Prosecutor filed a petition for deferring the further examination of P.W.10 due to non-availability of such file and accordingly, the further examination was deferred. The evidence of P.W.10 remained incomplete and for the best reason known to the prosecution, P.W.10 was not recalled by the prosecution to prove the entries in Ext.31 and therefore, the learned trial Court has not placed any reliance on the evidence of P.W.10.

The quotation/correspondence file bearing no. Xii/2/92 has been marked as Ext.31 through the I.O. (P.W.20) but the relevant entries in the file have not been exhibited and proved in accordance with law. Had the Stipendiary Engineer and Junior Engineer been examined to prove the entries, they would have thrown light as to why they made those entries and when and whether anybody asked them to make such entries. P.W.10 would also have thrown light as to whether the entries made by the Stipendiary Engineer and Junior Engineer were on the same day i.e. 23.04.1992 or those were interpolated subsequently and made ante-dated. In my humble view, the failure of the prosecution to examine the two engineers to prove the entries and also to leave the evidence of P.W.10 incomplete suggest that their evidence would have gone against the prosecution for which they were not produced. In this connection, I would also like to advert to the provisions contained in section 114(g) of the Indian Evidence Act, which are to the effect that if evidence which could have been produced, is not produced, the presumption would be that it would have gone against the party which withholds it. It would be reasonable to draw such inference in this case. Since the relevant entries on which the prosecution heavily banks upon have not been marked as exhibits and proved by competent persons in accordance with law, it would be difficult to place any reliance on such entries and more particularly use it against the appellant Balaram Bag.

On verification of the accused statement of the appellant Balaram Bag, though question nos.28 to 33 relate to Ext.31 but no question has been asked relating to the alleged interpolated entries dated 23.04.1992. The argument advanced by the learned Standing Counsel for the Vigilance Department that the alternations/interpolations are apparent and no satisfactory explanation has been offered by the appellant Balaram Bag in that respect, is totally fallacious inasmuch as when no question has been put to the appellant in that respect in the accused statement, where he would have given his satisfactory explanation? The learned trial Court has put some questions relating to the evidence of P.W.10 in question nos.10 and 11 even though the examination in-chief of the said witness was not completed and the defence has not been given any opportunity of cross-examination. Law is well settled that when the attention of the accused is not drawn specifically to the incriminating circumstance during his examination under section 313 of Cr.P.C., such circumstance cannot be used against him. Examination of an accused is not a mere formality. It has practical utility for the criminal Courts in affording opportunity to the accused to explain the incriminating circumstances and to explain his stand in defence. Sub-section (4) of section 313 of the Code indicates that answers given by the accused, during his examination under section 313, may be considered by the Court. The words "may be taken into consideration" in such enquiry or trial as appearing in sub-section (4) indicates that the legislature laid down the guideline for the Court to give due weight to such answers. In the case of **Dharnidhar and Ors. -Vrs.- State of U.P. reported in (2010) 7 Supreme Court Cases 759**, it is held that the legislative intent behind section 313 of Cr.P.C. appears to have twin objects. Firstly, to provide an opportunity to the accused to explain the circumstances appearing against him. Secondly, for the Court to have an opportunity to examine the accused and to elicit an explanation from him, which may be free from the fear of being trapped for an embarrassing admission or statement. The proper methodology to be adopted by the Court while recording the statement of the accused under section 313 of the Cr.P.C. is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. In other words, it provides an opportunity to an accused to state before the Court as to what is the truth and what is his defence, in accordance with law. It was for the accused to avail of that opportunity and if he fails to do so then it is for the Court to examine the case of the prosecution on its evidence with reference to the statement made by the accused under

section 313 of the Cr.P.C. In the case of **Kuldip Singh** (supra), it is held if a material piece of evidence is not put to the accused when he is examined under section 313 of Cr.P.C., the prosecution is disentitled from placing reliance on such evidence.

In view of the ratio laid down in the aforesaid cases, the learned trial Court should not have utilised entries dated 23.04.1992 in Ext.31 against the appellant Balaram Bag as no questions have been put to him in the accused statement relating to such entries. Moreover, it cannot be lost sight of the fact that Ext.31 was brought on record and tendered in the evidence for the first time when the I.O. (P.W.20) who took over charge of the investigation from P.W.18 was examined. The manner in which such an important document has been withheld by the prosecution for a substantial period is likely to cause serious prejudice to the appellant as the appellant lost the opportunity to go through the same from the beginning and prepare for his defence accordingly. The prosecution should come before the Court with clean hands and it cannot be allowed to play a game of hide and seek in a criminal trial either with the Court or with the accused just to secure an order of conviction.

It is no doubt true that at one place in the entry dated 23.04.1992, it is mentioned that 21 GCI sheets were required to meet the demand of construction of IAY and necessary order to be passed to purchase the GCI sheets but all the same there are two other entries on 23.04.1992 which are stated to be of the Stipendiary Engineer and Junior Engineer and they have mentioned about the requirement of 200 and 1779 numbers of GCI sheets respectively for different works in the Gram Panchayats. The prosecution has not adduced any evidence that the notings made in the file (Ext.31) regarding requirement of more numbers of GCI sheets were wrong. There should not be any confusion that the noting in respect of 21 GCI sheets was for a particular purpose i.e. construction of IAY but the requirement of 200 and 1779 numbers of GCI sheets were for completion of IAY, Anganwadi Centers, repairing of school buildings and works under SC/ST benefit scheme and other structural works in different Gram Panchayats. Therefore, when it is not proved that except 21 numbers of GCI sheets, there was no other requirement for any other purpose whatsoever and it is also not proved that entries relating to requirement of 200 and 1779 numbers of GCI sheets are interpolated, no fault can be found with the appellant Balaram Bag in placing indent and procuring 2000 GCI sheets.

9. Now, coming to the accusation that the procured 2000 GCI sheets were of lesser quality than what was shown in the official records, it is the prosecution case that although the order was placed for 2000 GCI sheets of size 10' x 24 gauge and the bill of M/s. Sai Laxmi Enterprises dated 01.06.1992 vide Ext.15 reflects purchase of such sheets but at the time of joint verification by the Vigilance Department, it was found that the appellant Gudla Uma Maheswar Rao, Proprietor of M/s. Sai Laxmi Enterprises had supplied GCI sheets of 28 guage which were of lesser quality and in the process, there has been an excess payment of Rs.3,15,020.14 paisa to him.

In order to prove this accusation, the prosecution relies on the evidence of P.W.19 who was the Junior Engineer at the relevant point of time and checked the Store of Nandahandi Block on 24.02 1993 and measured the thickness of GCI sheets by using Vernier Caliper and found it to be of 28 gauge. He has also signed the joint verification report (Ext.10). He stated that all the articles were kept in the Store in a stacked manner at different places but those were not sealed. He admits that as per the report Ext.10, the articles were in the custody of D. Satyanarayan after having passed through several other store keepers prior to him. He stated that there were about 2000 GCI sheets but they measured only ten sheets at random and that the weight of the GCI sheets was not calculated by actual weighment but on the basis of engineering specifications by taking into account the dimensions. He further stated that he cannot say who wrote the report marked as Ext.10 and he was not present at the time of preparation of report.

It cannot be lost sight of fact that the GCI sheets were procured on 01.06.1992 and the appellant Balaram Bag handed over the charge to his successor on 24.07.1992 and the joint verification was made on 24.02.1993. There is no material on record that when 2000 GCI sheets were received in the Store on 01.06.1992, there were no other GCI sheets in it. In absence of such evidence, when on the date of joint verification, GCI sheets were lying in the Store at different places in a stacked manner and only ten numbers of GCI sheets were measured at random, it cannot be said with certainty that all those ten GCI sheets were from the 2000 GCI sheets procured by the appellant Balaram Bag and not from any other available GCI sheets in the Store. No measurement chart has been proved in the case. The joint verification was not made either in presence of the appellant Balaram Bag or in presence of the person who was in-charge of the Store when it was procured. As appears, the charge of the Store had changed to several hands.

The joint verification report was also not supplied to the appellant Balaram Bag seeking for his response on the less thickness of GCI sheets found during verification. In view of the powers and functions of the Block Development Officer as enumerated under Rule 13 of the Odisha Panchayat Samiti (Administration of Affairs) Rules, 1987 (hereafter '1987 Rules'), the appellant Balaram Bag as B.D.O. in his hectic schedule of works was supposed to rely on his subordinates including the Store Keeper and it was not expected of him to remain personally present near the Store gate to receive the GCI sheets, measure each and every GCI sheet and then allow its entry to the Store. The entire responsibility of receipt of 28 gauge qualities of GCI sheets instead of 24 gauge qualities, if any, cannot be fixed on the appellant. Therefore, it cannot be said with certainty that what was received in the Store on 01.06.1992 were not of 24 gauge size but of 28 gauge size.

10. The learned Standing Counsel for the Vigilance Department heavily relied on the answer given by the appellant Balaram Bag to the question no.34. The question and answer is extracted herein below:

> "**Q.34.** From the bill marked Ext.15, it is revealed that M/s. Sai Laxmi Enterprises Firm supplied 2000 nos. of 24 gauge x 10' long GCI sheets @ Rs.382.72 paisa and raised total bill amount of Rs.7,65,440/- out of which a sum of Rs.3,65,440/- was paid by way of cheque dated 21.07.1992 as per report marked Ext.15/1. What have you to say?
>
> **Ans.**: It is true."

Ext.15 is the bill dated 01.06.1992 of M/s. Sai Laxmi Enterprises and Ext.15/1 is the money receipt of M/s. Sai Laxmi Enterprises dated 21.07.1992 showing receipt of Treasury Cheque No.16403 dated 21.07.1992 of Rs.3,65,440/- towards GCI sheets supply. These two documents were proved by the I.O. (P.W.18) who stated to have seized those documents on 17.09.1993 as per seizure list Ext.11. P.W.18 admits that in Ext.15, there is no signature of the B.D.O. below the stock entry certificate. A competent person who has prepared both the documents or acquainted with the handwriting and signature of such person should have proved the documents. Before utilizing a particular document against the accused, it is to be proved in accordance with law and specific question on such document is required to be put to the accused in the statement recorded under section 313 of Cr.P.C. It is a settled principle of law that the statement made by the accused under section 313 of the Cr.P.C. can be used by the Court to the extent that it is in line with the case of the prosecution. The same cannot be the sole basis for

convicting an accused. Moreover, it is not the prosecution case that the rate of 24 gauge GCI sheets as mentioned in the bill Ext.15 was excessive rather it is the case of the prosecution that though payment was made for 24 gauge GCI sheets but what was received in the Store was 28 gauge GCI sheets.

11. Relying on the evidence of P.W.11, it was argued by the learned Standing Counsel for the Vigilance Department that no fund was available under the 'development head' account for purchase of building materials during the period from 20.09.1991 to 24.07.1992 when the appellant Balaram Bag was working as B.D.O. of Nandahandi Block but the appellant having no power to divert the amount from one head to another head, purchased the building materials by diverting funds from other heads which shows his interestedness to clear up the bill at an earliest. P.W.11 states in cross-examination that he had not verified any circular of the Government to ascertain the powers of the B.D.O. in due discharge of his official duty. The I.O. (P.W.20) has stated that he has not ascertained the specific provisions of Rule 13 and 14 of 1987 Rules and he has also not gone through the provisions of O.G.F.R., P.W.D. Code and Panchayat Samiti Accounting Procedure Rules. Therefore, the vague statement of P.W.11 is not sufficient to hold that the appellant as B.D.O. had no power to divert the amount from one head to another head in case of requirement.

The learned Standing Counsel for the Vigilance Department placed reliance in the case of **Rajiv Kumar** (supra), wherein the Hon'ble Supreme Court taking into account the facts of that case came to hold that strong 'cuttings' and 'overwritings' made in order to make original words or figures illegible which itself show dishonest intention behind cuttings and overwritings. Manner of cuttings in itself shows that those are not on account of any clerical mistake or inadvertent error but they are deliberate attempt made with ulterior motive to cause benefit to appellants and clearly they have been made so substantially that matter beneath them may not be read by naked eyes even after efforts. In the case in hand, however, there are no such cuttings and overwritings in Ext.31 in the entries dated 23.04.1992 nor are the entries illegible. The only feature is that the entries stated to have been made by the Stipendiary Engineer and Junior Engineer are by the side of the main noting dated 23.04.1992. Therefore, the observation made in the case of **Rajiv Kumar** (supra) is no way helpful to the learned Standing Counsel.

12. In view of the foregoing discussions, when the relevant entries dated 23.04.1992 made in Ext.31 have not been proved in accordance with law, material witnesses have been withheld by the prosecution, relevant questions on the incriminating circumstances have not been put to the appellants in their statements recorded under section 313 of Cr.P.C. giving an opportunity to explain and there is no clinching material that the purchase of 2000 GCI sheets were made without the corresponding requirements and it is also not proved by adducing satisfactory evidence that the purchased GCI sheets were of lesser qualities than what was shown in the official records and when the findings of the learned trial Court against the appellants for the offences under which they have been convicted are based on mere conjectures than admissible evidence on record, I am of the humble view that it is a fit case where benefit of doubt should be extended in favour of the appellants.

13. In the result, both the criminal appeals are allowed. The impugned judgment and order of conviction of the appellants under section 13(2) read with section 13(1)(d) of the 1988 Act and section 477-A read with section 34 of the Indian Penal Code and the sentence passed thereunder is hereby set aside. The appellants in both the appeals are acquitted of all the charges. The appellants are on bail by virtue of the order of this Court. They are discharged from liability of their bail bonds. The personal bonds and the surety bonds stand cancelled. Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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**2020 (I) ILR - CUT- 197**

**S. K. SAHOO, J.**

CRLA NO. 489 OF 2014

**HERASHA MAJHI @ HIRESA MAJHI & ANR.** .....Appellants

*Vs*

**STATE OF ODISHA** .....Respondent

**(A) CRIMINAL TRIAL – Appreciation of evidence – Independent witness turned hostile – Value of official witness – Whether conviction can be based solely on the testimony of the official witness? – Held,Yes. –**

**Principle explained – Condition precedent is that the evidence of such witness must be reliable, trustworthy and must inspire confidence – There is absolute no command of law that the testimony of the police officials should always be treated with suspicion – Of course while scrutinising the evidence, if the court finds the evidence of the police officials as unreliable and untrustworthy, the court may disbelieve them but it should not so solely on the presumption that a witness from the department of police should viewed with distrust – This is based on the principle that quality of the evidence weigh over the quantity – The rule of prudence requires more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them – Absence of any corroboration from the independent witness does not in any way affect the creditworthiness of the prosecution case.** (Para 9)

**(B) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 100(4) & (5) read with section 165(4) – Search and Seizure – Preparation of seizure list – Whether all prosecution/seizure witnesses required to be signed on the seizure list? – Held, seizure list is not required to be signed by all the witnesses present at the time of search and seizure and the evidence of a witness to the search and seizure which is otherwise reliable and trustworthy and his presence at the relevant time cannot be brushed aside merely because he is not a signatory to the seizure list – In other words, even if the officer making search fails to obtain the signature of a person who is a witness to the seizure in the seizure list, it may amount to irregularity and the effect of the same would depend upon the facts and circumstances of each case.** (Para 10)

**(C) THE INDIAN EVIDENCE ACT, 1872 – Section 6 – Res gestae – Whether a confessional statement or a statement can be regarded as res-gestae? – Held, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter – But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.** (Para 11)

**(D) ORISSA POLICE RULES – Rule 119 – Maintenance of police Malkhana Register – Non production of the same before the Court – No reason assigned for such non production – Safe custody of the seized articles questioned – Held, it can be said that the prosecution has**

**failed to adduce cogent evidence that the seized articles and the sample packets were in safe custody before its production in the court.** (Para 12)

**(E) NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 55 – Charge of seized articles – Personal brass seal – Handing over to an independent witness – Necessity of such formality – Discussed – Held, handing over the brass seal to an independent, reliable and respectable person and asking him to produce it before the court at the time of production of the seized articles in court for verification are not the empty formalities or rituals but is a necessity to eliminate the chance of tampering with the seized articles while in police custody.** (Para 12)

**(F) NARCOTIC DRUGS PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 57 – Report of Seizure and Arrest – Non compliance of the mandatory provision – Effect of – Held, if there is no compliance of the provision under section 57 of the NDPS Act or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have bearing on the appreciation of evidence regarding arrest or seizure as well as on the merit of the case.** (Para 13)

**Case Laws Relied on and Referred to** :-

1. (2018) 70 OCR 340 : Ramakrushna Sahu .Vs. State of Orissa.
2. A.I.R. 2001 S.C. 1002 : Gurbax Singh .Vs. State of Haryana.
3. (1994) 7 OCR (SC) 283 : State of Punjab .Vs. Balbir Singh.
4. (2016) 64 OCR 40 : Prasanta Kumar Behera .Vs. State of Orissa.
5. (2018) 71 OCR 413 : Ghadua Muduli .Vs. State of Orissa
6. A.I.R. 1954 S.C. 15 : Zwinglee Ariel .Vs. State of M.P.
7. A.I.R. 1964 Orissa 144 : Paramahansa Jadab .Vs. The State.
8. (2015) 61 OCR (SC) 532 : Makhan Singh .Vs. State of Haryana.
9. (1996) 6 SCC 241 : Gentela Vijayavardhan Rao .Vs.State of Andhra Pradesh.
10. (2015) 61 OCR (SC) 1001 : Indra Dalal .Vs. State of Haryana.
11. 2019 (2) Crimes 13 (P & H) : State of Haryana .Vs. Padam @ Parmod.

For Appellants: Mr. Satyabrata Pradhan

For State: Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 22.10.2019

***S. K. SAHOO, J.***

The appellants Herasha Majhi @ Hiresa Majhi and Jejanga Majhi faced trial in the Court of learned Sessions Judge -cum- Special Judge,

Rayagada in C.T. Case No. 08 of 2011 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 06.02.2011 at about 5.00 a.m. in front of Kenduguda outpost under Padmapur police station in the district of Rayagada, they were found in possession of contraband ganja weighing 10 kgs. 640 grams and 13 kgs. 860 grams in two bags for selling purpose at Berhampur.

The learned trial Court vide impugned judgment and order dated 05.08.2014 found the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh only) each, in default, to undergo further rigorous imprisonment for a period of one year each.

2. The prosecution case, as per the first information report lodged by Alekha Chandra Dalei (P.W.2), S.I. of Police, Kenduguda outpost, in short, is that on 05.02.2011 at about 9.00 p.m. some of the police officials of Kenduguda police outpost and CRPF personnel were performing blocking and area domination duty in front of Kenduguda outpost road. At about 5.00 a.m. on 06.02.2011, they found two persons coming from Sardhapur side in a Hero Honda Splendor motorcycle bearing registration no.OR-07-F-3000. The informant and his team stopped the motorcycle and found the pillion rider was carrying a jerry bag and another jerry bag was loaded on the carrier of the motorcycle and acute smell of ganja was coming from both the jerry bags. The informant suspected that the jerry bags might be containing ganja. On being confronted by the informant, the rider of the motorcycle identified himself as Herasha Majhi (appellant no.1) and the pillion rider identified himself as Jejanga Majhi (appellant no.2). Both the appellants confessed that they were transporting ganja for sale at Berhampur. After giving his identity, the informant offered the appellants with the option of being searched by a Gazetted Officer or in presence of an Executive Magistrate. The appellants opted in writing that they wanted to be searched in presence of an Executive Magistrate. The informant sent intimation about the detention of the appellants with jerry bags to his official superior over phone and also sent requisition of the Sub-Collector, Gunupur for deputation of an Executive Magistrate to remain present at the spot during search and seizure and the appellants were detained. Khirabdhi Behera (P.W.12), Tahasildar, Padmapur arrived at the spot on 06.02.2011 at about 01.00 p.m. as per the order of A.D.M., Rayagada and after giving his personal search before the appellants

as well as taking the personal search of other witnesses, in their presence, the appellants were searched and the contraband ganja found in the two bags were weighed by weighman Jitendra Mohapatra (P.W.7) and net quantity of ganja found in one bag was 10 kgs. 640 grams and in the other bag, it was 13 kgs. 860 grams and accordingly, a weighment chart was prepared. From each of the bag, sample ganja of 50 gms. in duplicate was collected in two packets after homogenous mixture separately. The sample packets collected from the jerry bag containing 10 kgs. 640 grams were marked as A-1 and A-2 and the sample packets collected from the jerry bag containing 13 kgs. 860 grams were marked as B-1 and B-2 respectively. The sample packets so collected were sealed with wax and personal seal impression of the informant was put on it and similarly the bulk quantity of ganja found in the jerry bags after collection of samples were also sealed and a seizure list was prepared in presence of the witnesses, P.W.12 and the weighman. The informant seized the weighing machine in presence of the witnesses as per seizure list and left it in the zima of the weighman (P.W.7). The brass seal which was used for sealing and packing of the ganja packets was also left in the zima of P.W.7 under proper zimanama. The informant found prima facie case under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants for illegal possession and transportation of commercial quantity of ganja in a motorcycle and accordingly, prepared the written report and sent the report to the Inspector in charge of Padmapur police station for registration of the case through a constable.

3. The Inspector in-charge of Padmapur police station namely, Smt. Jyotsnna Kaunri (P.W.13) on receipt of the written report through constable, registered Padmapur P.S. Case No. 08 of 2011 against the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and took up investigation.

During course of investigation, the I.O. examined the constable who carried the written report, visited the spot, examined the informant, took charge of the seized articles and prepared the spot map (Ext.14). She examined the appellants and arrested them and returned to the police station with the appellants and the seized articles and kept the seized articles in the P.S. Malkhana after making necessary entry in the Malkhana register. On 07.02.2011 the appellants were forwarded to Court and the seized bulk ganja packets and sample packets were also produced in Court and prayer was made by the I.O. for sending the seized sample packets for chemical analysis and also to keep the seized bulk ganja packets in Court Malkhana. The learned Special Judge, Rayagada directed for production of the sample

packets before the learned S.D.J.M., Rayagada for sending it to R.F.S.L., Berhampur and accordingly, the I.O. produced the sample packets before the learned S.D.J.M., Rayagada who forwarded the same for chemical analysis through constable along with specimen seal impression marked as Ext.C in a sheet of paper. A separate petition was filed to receive the bulk ganja packets marked as Exts.A and B in the Court Malkhana along with the sample packets marked as Exts.A-2 and B-2. The prayer was allowed. A query was made while forwarding the sample packets for chemical analysis as to whether the brass seal impression on the inner cover of exhibits A-1 and B-1 tallies with that of specimen seal impression of Ext.C. The I.O. also seized the station diary of Kenduguda outpost and the message for deputation of Executive Magistrate to A.D.M., Rayagada under seizure list Ext.11/1. The station diary entry book and Malkhana register of Padmapur police station were seized under seizure list Ext.12 and those were left in the zima of S.I. of police Krushna Chandra Rout executing zimanama Ext.21. On 07.02.2011 the I.O. made a full report of all the particulars of arrest and seizure to the Superintendent of Police, Rayagada and on 07.03.2011 she seized the full report as per seizure list Ext.10. On 25.03.2011 the I.O. received the chemical examination report (Ext.23) which indicated that the exhibits marked as A-1 and B-1 were found to contain fruiting and flowering tops of cannabis plants (ganja) and the seal impression of exhibits A-1 and B-1 were found tallied with the specimen seal impression of Ext.C. On 22.06.2011 on completion of investigation, charge sheet under section 20(b)(ii)(C) of the N.D.P.S. Act was submitted against the appellants.

4. The learned trial Court framed charge under section 20(b)(ii)(C) of the N.D.P.S. Act on 01.11.2011 and the appellants refuted the charge and pleaded not guilty and claimed to be tried.

5. The defence plea of the appellants was one of denial.

6. In order to prove its case, the prosecution examined thirteen witnesses.

P.W.1 Lingaraj Palka was the constable attached to Kenduguda outpost who accompanied the informant (P.W.2) for patrolling duty. He stated about carrying of ganja in two gunny bags by the appellants in a motorcycle and search and seizure of ganja from the possession of the appellants in presence of the Executive Magistrate.

P.W.2 Alekh Chandra Dalai, S.I. of Police of Kenduguda outpost is the informant in the case who detected the appellants carrying ganja in two bags on a motorcycle, seized it after complying the required procedure in presence of the witnesses.

P.W.3 Pradeep Kumar Rath was the A.S.I of Police attached to Kenduguda outpost who accompanied P.W.2 for patrolling duty. He also stated about the search and seizure of ganja from the possession of the appellants.

P.W.4 Surendra Sabar was the police constable attached to District Police Office, Rayagada who is a witness to the seizure of detailed report regarding seizure of ganja as per seizure list Ext.10 on being produced by the steno to S.P., Rayagada.

P.W.5 Rabinarayan Acharya, P.W.6 Debendra Panda and P.W.7 Jitendra Mohapatra who are the independent witnesses did not support the prosecution case and they were declared hostile by the prosecution and cross-examined.

P.W.8 Simanchala Sahu was the constable attached to Padmapur Police Station who stated about the seizure of one command certificate and one RFSL receipt under seizure list Ext.9.

P.W.9 A. Kamaraju Patra was the Havildar and P.W.10 Ratnakar Bhanja was the Sepoy of CRPF Camp at Kenduguda respectively who accompanied P.W.2 for patrolling duty and they stated about search and seizure of ganja from the possession of the appellants in presence of the Executive Magistrate.

P.W.11 Rabi Pradhan was a constable attached to the Padmapur Police Station who is a witness to the seizure of detailed report regarding seizure of ganja as per seizure list Ext.10 on being produced by the steno to S.P., Rayagada and one Malkhana register vide Ext.12.

P.W.12 Khirabdhi Behera was the Tahasildar, Padmapur, who on receipt of a message from A.D.M., Rayagada proceeded to the spot and he stated about the search and seizure of contraband ganja in two bags from the possession of the appellants, collection of sample packets from the bags,

sealing of the bags and sample packets and preparation of the seizure lists in which he put his signatures.

P.W.13 Smt. Jyotsnna Kaunri was the Inspector in charge of Padmapur police station, who registered the case on receipt of the written report from P.W.2. She is also the investigating officer.

The prosecution exhibited twenty seven documents. Ext.1 is the option of appellant no.1 Hiresa Majhi, Ext.2 is the option of appellant no.2 Jejanga Majhi, Ext.3 is the message sent to S.D.M. for deputation of an Executive Magistrate, Exts.4, 5, 9, 10, 11/1, 12 and 13 are the seizure lists, Exts.6, 20 and 21 are the zimanama, Ext.7 is the certificate of the Executive Magistrate, Ext.8 is the F.I.R., Ext.14 is the spot map, Ext.15 is an application by the I.O. to Court for sending exhibits to R.F.S.L., Berhampur for chemical examination and opinion, Ext.16 is another application by the I.O. to Court to keep the mal items in the Court Malkhana, Ext.17 is the forwarding report of exhibits to R.F.S.L., Ext.18 is the command certificate, Ext.19 is the acknowledgement receipt, Ext.22 is the detailed report, Ext.23 is the chemical examination report, Ext.24 is the statement of R.N. Acharya (P.W.5), Ext.25 is the statement of Debendra Panda (P.W.6) and Ext.26 is the statement of Jitendra Mahapatra (P.W.7) recorded by the I.O. during investigation and Ext.27 is the extract of station diary entries nos.124, 125 dated 06.02.2011 and 142 dated 07.02.2011.

The prosecution also proved six material objects. M.O.I is the sample packet, M.O.II is the seized ganja, M.O.III is the sample packet of ganja (A-2), M.O.IV is the sample packet of ganja (B-2) and M.Os.V and VI are the gunny bags containing seized ganja.

No witness was examined on behalf of the defence.

7. The learned trial Court after analysing the evidence on record came to hold that the evidence of P.Ws. 1, 2, 3, 8 and 9 that the appellants were carrying ganja in two jerry bags have not been discredited and there was nothing to disbelieve them merely because they were official witnesses. The confession of the appellants before the Executive Magistrate (P.W.12) was accepted and it was held by the learned trial Court that the conscious possession of the bags M.Os.V and VI can safely be attributed to the appellants. It was further held that non-compliance of the provision under

section 42(2) of the N.D.P.S. Act has no bearing on the merits of the case as there was no occasion for P.W.2 or his party coming to know about the arrival of the appellants or transportation of contraband ganja. The learned trial Court further held that there is no material on record that there was any tampering of the seal or displacement of the seized articles while keeping the same in the police station Malkhana and there is no missing link in the chain of circumstances from the point of seizure till the arrival of the seized articles in Court. It was further held that the presence of ganja leaves would not rule out the presence of flowering and fruiting tops and that there was substantial compliance of section 57 of the N.D.P.S. Act which is not mandatory. It was further held that the prosecution has successfully proved that the appellants were transporting 24.5 kgs. of ganja and they have failed to rebut the legal presumption arising under section 54 of the N.D.P.S. Act and accordingly the appellants were found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

8. Mr. Satyabrata Pradhan, learned counsel appearing for the appellants strenuously argued that the independent witnesses to the search and seizure of contraband ganja have not supported the prosecution case for which they have been declared hostile and since the version of the official witnesses are doubtful, the learned trial Court was not justified in convicting the appellants. He further argued that there are discrepancies regarding date and time of search and seizure as per the statements of the prosecution witnesses. The ownership of the motorcycle in which the appellants were stated to be carrying contraband ganja has not been established by the prosecution and therefore, it is doubtful as to how the motorcycle in question came into the possession of the appellants. Challenging the safe custody of the contraband ganja after its seizure till its production in Court, it was argued that when neither the Malkhana register nor its extract has been produced in the trial Court and the brass seal of the informant with which the contraband ganja and the sample packets were sealed was not produced in Court at the time of production of the seized articles for verification, it is a serious lacuna in the prosecution case. It was further argued that the compliance of section 57 of the N.D.P.S. Act has not been satisfactorily proved by the prosecution which has a bearing on the appreciation of the evidence. Placing reliance in the cases of **Ramakrushna Sahu -Vrs.- State of Orissa reported in (2018) 70 Orissa Criminal Reports 340**, **Gurbax Singh -Vrs.- State of Haryana reported in A.I.R. 2001 S.C. 1002**, **State of Punjab -Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283**, **Prasanta Kumar Behera -Vrs.- State of Orissa reported in (2016) 64 Orissa Criminal**

**Reports 40**, **Ghadua Muduli -Vrs.- State of Orissa reported in (2018) 71 Orissa Criminal Reports 413**, **Zwinglee Ariel -Vrs.- State of M.P. reported in A.I.R. 1954 S.C. 15**, **Paramahansa Jadab -Vrs.- The State reported in A.I.R. 1964 Orissa 144** and **Makhan Singh -Vrs.- State of Haryana reported in (2015) 61 Orissa Criminal Reports (SC) 532** while canvassing different points, it was argued that benefit of doubt should be extended in favour of the appellants.

Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate on the other hand supported the impugned judgment and contended that even though the independent witnesses have not supported the prosecution case relating to the search and seizure of contraband ganja from the possession of the appellants but since all the official witnesses have consistently stated in that respect which has not been shaken in the cross-examination and their version is clear, cogent and trustworthy and they have no axe to grind against the appellants to falsely entangle them in a case of this nature, the learned trial Court rightly accepted such evidence and found the appellants guilty of the offence charged. He argued that immediately after the detention, the appellants disclosed before P.W.2 that they were taking the gunny bags containing ganja for sale at Berhampur and they also confessed before P.W.12 and their conduct is admissible as res gestae under section 6 of the Evidence Act and in view of section 26 of the Evidence Act, the confessional statements made by the appellants before P.W.12 is admissible and merely because the prosecution has not adduced any evidence relating to the ownership of the motorcycle in question and how such motorcycle came into the possession of the appellants, it would not ipso facto be a ground to discard the transportation of contraband ganja in that motorcycle. It was further argued that after the contraband ganja was seized and sealed, it was properly stored in the P.S. Malkhana before its production in Court and as per the order of the Court, it was also produced before the chemical examiner in sealed condition and the defence has not challenged the factum of safe custody of the contraband ganja after its seizure by cross-examining the relevant witness (P.W.13) and therefore, the hypothetical argument that there was possibility of tampering with the seized contraband ganja cannot be accepted. He argued that there is substantial compliance of the provision under section 57 of the N.D.P.S. Act and placing reliance on the Division Bench decision of Punjab and Haryana High Court in the case of **State of Haryana -Vrs.- Padam @ Parmod reported in 2019 (2) Crimes 13 (P & H)**, it was argued that since

there is no infirmity in the impugned judgment, the appeal should be dismissed.

9. It is true that the independent witnesses like P.Ws.5, 6 and 7 have not supported the prosecution case for which they have been declared hostile by the prosecution and allowed to be cross-examined by the learned Special Public Prosecutor under section 154 of the Indian Evidence Act, 1872. Merely because the independent witnesses have turned hostile, the evidence of the police witnesses cannot be disbelieved. Conviction can be based solely on the testimony of official witnesses; condition precedent is that the evidence of such witnesses must be reliable, trustworthy and must inspire confidence. There is absolute no command of law that the testimony of the police officials should always be treated with suspicion. Of course while scrutinising the evidence, if the Court finds the evidence of the police officials as unreliable and untrustworthy, the Court may disbelieve them but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is based on the principle that quality of the evidence weighs over the quantity of evidence. The rule of prudence requires a more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them. Absence of any corroboration from the independent witnesses does not in any way affect the creditworthiness of the prosecution case. Non-supporting of the prosecution case by independent witnesses in N.D.P.S. Act cases is a usual feature but the same cannot be a ground to discard the entire prosecution case. If the evidence of the official witnesses which is otherwise clear, cogent, trustworthy and above reproach is discarded in such cases just because the independent witnesses did not support the prosecution case, I am afraid that it would be an impossible task for the prosecution to succeed in a single case in establishing the guilt of the accused. Therefore, the Court has got an onerous duty to appreciate the relevant evidence of the official witnesses and determine whether the evidence of such witnesses is believable after taking due care and caution in evaluating their evidence. In case of **Prasanta Kumar Behera** (supra), it is held as follows:-

> "However it is the settled principle of law that even though the independent witnesses in such type of cases for one reason or the other do not support the prosecution case, that cannot be a ground to discard the prosecution case in toto. On the other hand if the statements of the official witnesses relating to search and seizure are found to be cogent, reliable and trustworthy, the same can be acted upon

> to adjudicate the guilt of the accused. The Court will have to appreciate the relevant evidence and determine whether the evidence of the Police Officer/Excise Officer is believable after taking due care and caution in evaluating their evidence."

10. Now it is to be seen how far the evidence of the official witnesses are reliable and trustworthy. P.W.2, the informant has stated that while he along with the other police officials were performing patrolling duty near Kenduguda outpost, they found two persons coming in a motorcycle carrying two gunny bags containing something. They detained those two persons and since ganja smell was emanating from the gunny bags, on being confronted by P.W.2, those two persons not only disclosed their identity as appellants but also told that they were carrying the gunny bags containing ganja for sale at Berhampur. The Hero Honda Splendor motorcycle which the appellants were riding was having registration no.OR-07-E-3000. P.W.2 communicated regarding detention of contraband goods to the Inspector in-charge of Padmapur police station, S.D.P.O. and Superintendent of Police. When the appellants were asked by P.W.2 as to whether they wanted to be searched by the police officials or by an Executive Magistrate, the appellants exercised their option in writing to be searched by an Executive Magistrate. Letters of option have been proved by P.W.2 as Exts.1 and 2. P.W.2 sent intimation to Sub-Collector, Gunupur for deputation of an Executive Magistrate to the spot to remain present during search and seizure. The copy of the message has been marked as Ext.3.

The evidence of P.W.2 on the above aspect gets support from the evidence of other official witnesses like P.W.1, P.W.3, P.W.9 and P.W.10.

The learned counsel for the appellants contended that P.W.3 admitted that he had not signed on the seizure lists or any other documents in token of his presence at the spot at the relevant time of search and seizure. P.W.9 has also stated that no document relating to the fact that he was on duty at the spot on the relevant date of seizure was seized from him by the S.I. of police. P.W.10 has stated that he has not signed in any seizure lists and no document in token of the fact that he was on duty on the relevant date of seizure was seized from him by the police. It is contended by the learned counsel for the appellants that since there is no documentary evidence to support that P.Ws.3, 9 and 10 were present at the spot at the time of detention of the motor cycle or at the time of search and seizure, their evidence should be taken out of consideration as there was every chance of including those official witnesses as the witnesses to the search and seizure at a belated stage.

Sub-sections (4) and (5) of section 100 of Cr.P.C. read with section 165(4) of Cr.P.C. nowhere indicate that all the persons witnessing a search are required to sign on the seizure list. Even they shall not be required to attend the Court as witnesses to the search unless specifically summoned by it as per provision under section 100(5) of Cr.P.C. Signing of the seizure list is not a part of witnessing the search. The officer making search shall as far as practicable call upon two or more independent and respectable persons of the locality to remain present at the time of search and seizure and sign the search/seizure list. Where there are number of persons present, the officer concerned may in his discretion make two or more of them as witnesses to the search and seizure and obtain their signatures on the relevant documents. Therefore, a seizure list is not required to be signed by all the witnesses present at the time of search and seizure and the evidence of a witness to the search and seizure which is otherwise reliable and trustworthy and his presence at the relevant time cannot be brushed aside merely because he is not a signatory to the seizure list. In other words, even if the officer making search fails to obtain the signature of a person who is a witness to the seizure in the seizure list, it may amount to an irregularity and the effect of the same would depend upon the facts and circumstances of each case.

Even if for the sake of argument, the evidence of P.Ws.3, 9 and 10 are taken out of consideration on the ground that there is no documentary evidence to show their presence at the spot at the relevant time, there remains two official witnesses like P.Ws. 1 and 2 who have deposed regarding the detention of the appellants while coming on the motorcycle carrying two gunny bags and option being given by the appellants to be searched by an Executive Magistrate. The investigating officer (P.W.13) seized the station diary of Kenduguda outpost, message for deputation of Executive Magistrate to A.D.M., Gunupur, Message of A.D.M., Rayagada for deputation of Executive Magistrate and command certificate for deputation of staff for Naka duty of Kenduguda outpost on production by S.I. of police Alekha Chandra Dalai as per the seizure list Ext.11/1. The command certificate of the constable (P.W.1) has also been seized under seizure list Ext.9. Though it has been elicited in the cross-examination of P.W.2 that there is no document to show that he was directed to remain present for the blocking which was going on at the spot, nothing further has been elicited to discard the evidence of the police officials that they were performing patrolling duty near the outpost and that they detained the appellants while carrying two gunny bags in a motorcycle from which smell of ganja was emanating and that as per the

option given by the appellants, request was made by P.W.2 to the A.D.M., Gunupur for deputation of an Executive Magistrate to remain present at the time of search and seizure.

Regarding discrepancies of the date and time of search and seizure in the evidence of the prosecution witnesses as contended by the learned counsel for the appellants, it is highlighted that P.W.2 gave prevaricating statements. However, on a careful scrutiny of the evidence of P.W.2, it appears that though he along with other police officials were performing patrolling duty near the outpost on 05.02.2011 but the detection was made on 06.02.2011 at 5.00 a.m. whereafter intimations were sent to different authorities and ultimately the seizure was effected after the arrival of the Executive Magistrate at 2.00 p.m. P.W.1 has also stated that the Executive Magistrate arrived at the spot at about 1.00 p.m. P.W.12, the Executive Magistrate stated that he reached at the spot at about 1.00 p.m. whereafter the formalities of search and seizure were conducted. P.W.3 has stated that the patrolling duty started at 9.00 p.m. on 05.02.2011 and the appellants were detained while coming on the motor cycle at 5.00 a.m. on 06.02.2011 and the Executive Magistrate arrived at the spot at 1.00 p.m. P.W.9 and P.W.10 have stated that they were performing patrolling duty on 05.02.2011 night and the appellants were detained with their motorcycle on 06.02.2011 at about 5.00 a.m. and the Executive Magistrate arrived at the spot at about 1.00 p.m. on 06.02.2011. Thus there are no discrepancies in the evidence of the official witnesses relating to the date and time of the search and seizure rather it indicates that the patrolling duty was being performed by P.W.2 and his team during the night on 05.02.2011 near Kunduguda outpost and the appellants with their motorcycle were detained on 06.02.2011 at about 5.00 a.m. and then intimations were sent to different authorities and when P.W.12 arrived at the spot on 06.02.2011 at about 1.00 p.m., in his presence the search and seizure took place. In the seizure list (Ext.4), the timing of seizure is reflected as 06.02.2011 at 2.00 p.m. P.W.13, the Inspector in-charge of Padampur police station has stated that Kenduguda outpost was under her control and its staff used to act as per her direction but NAKA duty and area domination duty were not performed as per her direction but it was as per the direction of the S.I. of police of Kenduguda outpost. Therefore, the contention of the learned counsel for the appellants regarding discrepancies of the date and time of search and seizure has no merit and liable to be rejected.

11. The next aspect which is to be dealt is the confessional statement of the appellants before P.W.2 and P.W.12. The learned trial Court has placed reliance on the confession of the appellants before P.W.12.

P.W.2 has stated that after the detention, the appellants disclosed before him that they were taking the gunny bags containing ganja for sale at Berhampur and when P.W.12 came to the spot at 2.00 p.m. and two local witnesses namely Debendra Panda and Rabinarayan Acharya also came there, on being asked by P.W.12, the appellants confessed before him that they were taking gunny bags containing ganja for sale.

It is not disputed that the evidence of P.W.2 relating to confession of the appellants gets corroboration not only from the evidence of P.W.1 and P.W.9 but also from the evidence of P.W.12. There is no cross-examination on such aspects and even no suggestion has been given to any of these witnesses that the appellants have made no confession either before P.W.2 or P.W.12.

The learned counsel for the appellants placing reliance on the decision of the Hon'ble Supreme Court in the case of **Zwinglee Ariel (supra)** and of this Court in the case of **Paramhansa Jadab (supra)** contended that such confessional statements are inadmissible.

Under section 25 of the Evidence Act, no confession made by an accused to a police officer can be admitted in evidence against him. Section 26 states that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Therefore, section 26 is an exception by which a confessional statement made in the immediate presence of the Magistrate is made provable and becomes admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement.

In case of **Indra Dalal -Vrs.- State of Haryana reported in (2015) 61 Orissa Criminal Reports (SC) 1001**, the Hon'ble Supreme Court while discussing section 26 of the Evidence Act held as follows:-

> "16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made

> by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.
>
> 17. The word '*confession*' has no where been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is other than a police officer, shall also become inadmissible."

In case of **Zwinglee Ariel (supra)**, it is held that if the confessional statement is not recorded by the Magistrate in the manner prescribed by section 164 of Cr.P.C., the same will not be admissible in evidence under section 26 of the Evidence Act even if such confession is made in the immediate presence of the Magistrate. In case of **Paramhansa Jadab (supra),** it is held that "police custody" for purpose of section 26 does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance. As soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in "custody" within the meaning of section 26 of the Evidence Act. Even indirect control over the movements of suspects by the police would amount to 'police custody' within the meaning of section 26. The learned counsel for the State placed reliance in the case of **Padam @ Parmod (supra)** in which a Division Bench of Punjab and Haryana High Court held that the expression 'Magistrate' in section 26 of the Evidence Act includes 'Executive Magistrate' and not only the 'Judicial Magistrate'.

Even though P.W.2 has stated that after their detention, the appellants confessed before him that they were taking the gunny bags containing ganja for sale at Berhampur but in view of section 25 of the Evidence Act, it is not admissible. P.W.12 stated that when he arrived at the spot at about 1.00 p.m.,

he found the appellants were present near a motorcycle and two gunny bags were kept on the motorcycle and the police persons were present surrounding them. He disclosed his identity and on being asked, the appellants disclosed their names and told that they were taking ganja for sale. P.W.12 has not reduced the confessional statement into writing. Except giving his identity, P.W.12 has not followed any of the requirements as laid down under section 164 of Cr.P.C. for recording of confession by the Magistrate. Even if it is not a confession made before a Magistrate which was reduced into writing but since it is sought to be utilized against the maker thereof, prudence requires that not only the Magistrate must disclose his identity before the maker but also explain to the person concerned that he is not bound to make a confession and if he does so, it may be used against him. There must be also material that the Magistrate has reason to believe that confessional statement is being made voluntarily. If these minimum requirements are not adhered to and the confessional statement made before the Magistrate which is not reduced to writing, is used against the maker thereof, it is likely to cause serious prejudice to him. In the present case, the appellants were detained in police custody since 5.00 a.m. and P.W.12 arrived at the spot at about 1.00 p.m. which is almost eight hours after their detention. In such a scenario when they were surrounded by police, it is very difficult to accept that the confession, if any, was made in a free mind. There was every possibility of influence of the police to the appellants by way of threat, inducement or promise. Therefore, it would not be proper to place reliance on the so-called confessional statements made by the appellants before P.W.12. Moreover, it is a joint confessional statement and it is not known which appellant spoke what words and what sequence. Another interesting feature is that in the first information report, it is mentioned that when the Executive Magistrate interrogated, the appellants disclosed that they were carrying ganja in their motorcycle after procuring the same at the cost of Rs.500/- per bag with a view to sale in higher price. Thus, there are discrepancies relating to the exact nature of disclosure made by the appellants before P.W.12. The appellants specifically denied in their statements recorded under section 313 of Cr.P.C. to have made any such confession. In view of the foregoing discussions, I am of the humble view that the learned trial Court was not justified in placing reliance on the confessional statements of the appellants.

Even otherwise, the confessional statements made by the appellants before P.W.12 cannot be utilized as *res gestae* under section 6 of the Evidence Act as it is not a spontaneous statement but was given after eight

hours of police detention. To form particular statement as part of the same transaction as required under section 6 of Evidence Act, it must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after the occurrence. In the case of **Gentela Vijayavardhan Rao -Vrs.- State of Andhra Pradesh reported in (1996) 6 Supreme Court Cases 241**, while discussing section 6 of the Evidence Act, the Hon'ble Supreme Court held that the principle or law embodied in section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*.

Thus the contention of the learned counsel for the State that conduct of the appellants is admissible as res gestae, is not acceptable.

12. Let me now analyse the evidence on record relating to the search and seizure of contraband ganja from the possession of the appellants.

P.W.2 has stated that P.W.7 was called with weighing machine and P.W.12 took personal search of all the staff present and did not recover anything from any person. The first gunny bag was weighed and it was found to be 10 Kgs. 710 grams and the second gunny bag was found to be 13 Kgs. 800 grams. After measurement, the contents of gunny bags were mixed together and sample of 50 grams each was collected from each gunny bag. He further stated that the sample packets were properly sealed and the personal seal of P.W.2 was put on the sample packets. The bulk quantity of ganja contained in the two packets were also sealed with the personal seal of P.W.2 and then the signatures of P.W.12 and other persons present at the spot were obtained on the paper slips which were affixed to the sample packets.

P.W.12 has not stated anything relating to taking of personal search of anyone in the chief examination. However, the learned defence counsel without being conscious of the oft-quoted principle that a counsel cross-examining a witness should first know what not to ask than what to ask, has elicited in the cross-examination of P.W.12 that prior to the search of the appellants, their personal search was taken and nothing was recovered from their possession and then the personal search of three police personnel were also taken and nothing was recovered. P.W.12 without stating what quantity of ganja was found from each of the bag has stated that opening the gunny bags, ganja was found and on weighment, the ganja along with the gunny bags came to 24 Kgs. 655 grams and the net weight of ganja was 24 Kgs. 500 grams. He further stated that P.W.2 collected two sample packets from each gunny bag each containing 50 grams and sealed the same by using wax and brass seal and marked the sample packets as A-1, A-2, B-1 and B-2. He further stated that P.W.2 also sealed the gunny bags containing bulk ganja by using wax and brass seal and thereafter seized the jerry bags containing bulk ganja as well as sample packets under seizure list Ext.4 and signed the seizure list. He further stated that P.W.2 seized the weighing machine and obtained the signatures of the witnesses, appellants and his own signature on the paper slips and kept one paper slip in each sample packets and on the gunny bags containing ganja. P.W.12 gave certificate to the fact that two packets of seized ganja marked as A and B were weighed, packed, sealed and labeled in his presence as per seizure list so also the sample packets vide A-1, A-2, B-1 and B-2 were prepared. P.W.2 left the seized weighing machine and his personal brass seal under the zima of P.W.7 by executing a zimanama. Thus the evidence of P.W.2 gets corroboration from the evidence of P.W.12.

P.W.7 has not supported the prosecution case. No weighment chart was proved during trial. P.W.2 should not have mixed the contents of the two gunny bags together before collecting the sample. Samples should have been collected from the individual gunny bag separately and it should have also been separately marked. What was the content of one bag cannot be known once it is mixed with the content of the other bag and thereafter sample is taken. The statement of P.W.2 regarding collection of sample appears to be a little confusing. Though on the one hand, he states that the contents of gunny bags were mixed together whereas on the other hand, he states that sample of 50 grams each was collected from each gunny bag. It seems that the contents of each gunny bag were homogeneously mixed but separately and then the samples were collected in duplicate from each gunny bag separately. P.W.12

has stated two sample packets were collected from each gunny bag and it was marked as A-1 and A-2 so far as the first bag is concerned and B-1 and B-2 so far as the second bag is concerned.

It appears that A-1 and B-1 were sent for chemical examination whereas A-2 and B-2 were kept in Court Malkhana along with the bulk quantity of ganja. The exhibits marked as A-1 and B-1 on chemical examination were found to contain fruiting and flowering tops of cannabis plant (ganja).

P.W.2 has stated that his personal brass seal was left in the zima of P.W.7 by executing zimanama (Ext.6). P.W.12 has also stated that P.W.2 left the seized weighing machine and his personal brass seal under the zima of weighman (P.W.7) on execution of a zimanama. P.W.3 has stated that P.W.2 left the brass seal under the zima of P.W.7 on execution of a zimanama. The zimanama (Ext.6) clearly indicates that the brass seal along with weighing machine were handed over in the zima of P.W.7. Even though P.W.7 has not supported this aspect for which he was declared hostile but since three official witnesses have stated in that respect and nothing has been brought out in the cross-examination to disbelieve such aspect, I find no constraint in accepting the prosecution case that the personal brass seal of P.W.2 was handed over to P.W.7 after the bulk ganja packets and sample packets were sealed.

Now coming to the safe custody of the contraband ganja after its seizure, P.W.2 has stated that when the Inspector in charge (P.W.13) came to the spot, he handed over the seized articles, the appellants and all the papers to her. P.W.13 has stated that after she took charge of the seizure list and the seized items from P.W.2, she resealed the seized bulk ganja and sample packets of ganja and after she returned to the police station at 10.00 p.m. on 06.02.2011 along with the appellants and the seized articles, she kept the seized articles at P.S. Malkhana vide Malkhana Register Entry No.1 of 2011 and on 07.02.2011, the appellants were sent to the learned Special Judge, Rayagada along with the seized bulk ganja and sample packets. P.W.13 has further stated that there was a Malkhana at Padmapur police station and S.I. of police K.Ch. Rout was the in-charge of P.S. Malkhana but she has not cited K.Ch. Rout as a witness in the charge sheet. She admits that she had not sent the Malkhana register of the police station or even the extract of it to the Court. Suggestion has been given that she has not deposited the seized bulk

ganja and sample packets at P.S. Malkhana on 06.02.2011. She admits that she has left Column No.4 blank in respect of P.S. property registration number in the final form. The extract of the station diary entry nos.124, 125 dated 06.02.2011 and 142 dated 07.02.2011 of Padmapur police station has been marked as Ext.27. S.D. Entry No.124 reveals that P.W.13 resealed the seized articles after taking charge. S.D. Entry No.125 reveals that P.W.13 took the Malkhana key from S.I. of police K.Ch. Rout and she kept the sealed jerry bags containing bulk quantity of ganja and sample packets in the Malkhana and it was entered in the Malkhana register bearing no.1/2011. S.D. Entry No.142 reveals that after the lock of the Malkhana was opened in presence of constable, the mal items marked as A, A-1, A-2, B, B-1 and B-2 were found intact and it was brought out of the Malkhana. There is virtually no cross-examination on the station diary entries.

Learned counsel for the appellants placing reliance in the case of **Ramakrushna Sahu** (supra) contended that since the Malkhana register or its extract has not been produced in Court, the safe custody of the seized articles after its seizure and before its production in Court is doubtful. In the said case, it has been held as follows:-

> "Rule 119 of the Orissa Police Rules which deals with malkhana register states, inter alia, that all the articles of which police take charge, shall be entered in detail, with a description of identifying marks on each article, in a register to be kept in P.M. form No. 18 in duplicate, and a receipt shall be obtained whenever any article or property of which the police take charge is made over to the owner or sent to the Court or disposed of in any other way and these receipt shall be numbered serially and filed, and the number of receipts shall be entered in column No. 7. Therefore, it is clear that whenever any article is seized and kept in police malkhana, details thereof should be entered in the malkhana register and while taking it out, the entry should also be made in such register. This would indicate the safe custody of the articles seized during investigation of a case before its production in Court.
>
> When the malkhana registers of Jarada police station as well as Baidyanathpur police station have not been proved in the case and the officers in charge of malkhana of the respective police stations have not been examined, it is difficult to believe that the seized articles along with the sample packets were in safe custody before its production in Court for being sent for chemical analysis."

In the case in hand, the Malkhana register of Padmapur police station or its extract has neither been seized during investigation nor produced during trial. The person in charge of P.S. Malkhana namely K.Ch. Rout has neither been cited as a charge sheet witness nor examined in Court. Except P.W.13, no other witness has stated about keeping the seized articles in the P.S.

Malkhana. Except the extract of station diary entry, there is no other document to show that the seized articles were kept in the P.S. Malkhana. The detailed report (Ext.22) which was submitted on 07.02.2011 by P.W.13 to the Superintendent of Police, Rayagada nowhere indicates that the seized articles were kept in Malkhana before those were sent to Court with the forwarding of the appellants. Neither in Ext.15 nor in Ext.16, it was mentioned that the bulk ganja packets and sample packets were kept in Malkhana. No reason has been assigned by P.W.13 as to why the vital document like Malkhana register or its extract has been withheld from the Court. Thus, it can be said that the prosecution has failed to adduce cogent evidence that the seized bulk ganja packets and the sample packets were in safe custody before its production in Court.

The personal brass seal of P.W.2 was handed over to P.W.7 under zimanama (Ext.6) but the order sheet of the Court indicates that the said seal was not produced in Court either at the time of production of the seized contraband ganja and the sample packets at the first instance or at the time of trial. Handing over the brass seal to an independent, reliable and respectable person and asking him to produce it before the Court at the time of production of the seized articles in Court for verification are not the empty formalities or rituals but is a necessity to eliminate the chance of tampering with the seized articles while in police custody.

P.W.2 has stated that the signatures of P.W.12 and other persons present at the spot were obtained on the paper slip which was affixed on the sample packet A-1 which was collected from one bag. He has also stated that the other sample packet was collected from the second bag and the signatures of P.W.12 and others were taken on the paper slip which was affixed on such sample packet. P.W.12 however stated that paper slip containing the signatures of the witnesses, appellants, P.W.2 and his own signature was kept in each sample packet and also in the gunny bags containing ganja. During examination of P.W.12, one sample packet marked A-2 was opened in Court in presence of the witnesses and it was found that no paper slip containing the signature of any person was inside the alleged sample packet. No such paper slip was found in exhibits A-1 and B-1 sent for chemical analysis. Therefore, the so-called paper slips containing the signatures of the witnesses was neither there on the sample packets nor found inside it which is a suspicious feature. Though Ext.C which contained specimen seal impression in a sheet

of paper was sent along with sample packets Ext.A-1 and Ext.B-1 for chemical examination but none has stated Ext.C was prepared from the personal brass seal of P.W.2 which was handed over to P.W.7. This missing link weakens the prosecution case and tilts the balance in favour of the appellants.

13. Coming to the non-compliance of section 57 of the N.D.P.S. Act, it was argued by the learned counsel for the appellants that there is no receipt or acknowledgement of the detailed report Ext.22 in the office of the Superintendent of Police, Rayagada. P.W.13, the I.O. admits that there is no receipt or acknowledgement in token of the fact that the detailed report was received by the office of Superintendent of Police, Rayagada. Though P.W.4, P.W.11 as well as P.W.13 have stated that the detailed report was seized from the steno of Superintendent of Police namely Sisir Kumar Swain under seizure list Ext.10 but P.W.13 has stated that he has not examined steno Sisir Kumar Swain and he has also not cited him as a witness in a charge sheet. In case of **Gurbax Singh** (supra), it is held that it is true that the provision under section 57 of the N.D.P.S. Act is directory and violation of such provision would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore the provision and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In case of **Balbir Singh** (supra), it is held that if there is non-compliance of the provision under section 57 of the N.D.P.S. Act or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. In the case of **Ghadua Muduli** (supra), it is held that when the original report has not been produced and no competent witness from the S.P. office has been examined and no corresponding documents from the office of S.P. has been proved relating to receipt of the full report under section 57 of the N.D.P.S. Act, it is very difficult to accept that there is substantial compliance of such provision.

Therefore, in absence of any documentary evidence like receipt or acknowledgement of the detailed report in the S.P.'s office and non-examination of the steno namely Sisir Kumar Swain from whom such report was seized, it cannot be said that the prosecution has proved the substantial compliance of the provision under section 57 of the N.D.P.S. Act.

14. It is contended by the learned counsel for the appellants that since the ownership of the motorcycle in question has not been established by the prosecution and it is doubtful as to where from the motorcycle came into the possession of the appellants, benefit of doubt should be given to the appellants. Reliance was placed in the case of **Makhan Singh** (supra) wherein the Hon'ble Supreme Court analysing the facts came to hold that the Courts below erred in attributing to the appellants the onus to prove that wherefrom *fitter-rehra* (a vehicle) had come, especially when ownership/possession of *fitter-rehra* has not been proved by the prosecution.

There cannot be any settled principle that wherever the prosecution has failed to establish the ownership of a vehicle in which the accused was carrying contraband articles and how the vehicle came into his possession, benefit of doubt should be extended in his favour. An accused may commit theft of a vehicle and thereafter changing its colour and tampering with its registration number, engine and chassis number may use it for committing the offence in the event of which it would be difficult for the prosecution to establish the ownership of the vehicle. Therefore, possession of the vehicle with the accused at the time of commission of crime is an important aspect which is to be carefully considered by the Court.

15. Law is well settled that the prosecution has to prove that the articles which were produced before the Court were the very articles which were seized and the entire path has to be proved by adducing reliable, cogent, unimpeachable and trustworthy evidence. Since the punishment is stringent in nature, any deviation from it would create suspicion which would result in giving benefit of doubt to the accused.

In view of the foregoing discussions, when the confessional statements of the appellants before P.W.2 and P.W.12 cannot be acted upon, the safe custody of the seized articles before its production in Court is doubtful, the P.S. Malkhana register or its extract has not been produced during trial in support of keeping the seized articles in safe custody, the personal brass seal of P.W.2 with which the seized articles were sealed was not produced in Court at the time of production of the seized articles and even during trial and there is no satisfactory compliance of the provision of section 57 of the N.D.P.S. Act, it cannot be said that the prosecution has successfully established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants beyond all reasonable doubt.

Therefore, the impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is not sustainable in the eye of law.

Accordingly, the Criminal Appeal is allowed. The appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellants who are in jail custody shall be set at liberty forthwith if their detention is not required in any other case.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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**2020 (I) ILR - CUT- 221**

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

MA NO. 85 OF 1995

**RAJKUMARI @ KHEDI DEI** …….Appellant

*.Vs.*

**RAGHUNATH BHOI & ORS.** …….Respondents

**WORKMEN'S COMPENSATION ACT, 1923 – Section 30 – Appeal by the wife of the deceased workman – The respondent No.2 had given his motorcycle for repairing to respondent No.1, who was a motorcycle mechanic – The deceased-Rathi Bhoi, was working as a helper under him – After repairing of the motorcycle, when the deceased took it for a trial, met with an accident and the deceased succumbed to the injuries – Award saddling the liability to pay the compensation on respondent No.1, the employer (Mechanic) – Plea of the appellant that the owner of the motor cycle should be saddened with the liability – Whether can be accepted? – Held, No.**

*"Having heard learned counsel for the parties, it is apparent that the deceased was a workman within the meaning of Section 2(n) of the Act and respondent No.1 was the employer. The broad interpretation of the term 'employer' as interpreted in the case law (supra) does not embrace the respondent No.2 within its fold. The respondent No.2 had never employed the deceased either permanently*

*or temporary basis, nor the deceased was ever under the control of the respondent No.2 even temporarily nor the respondent No.1 had ever lent on hire the services of the deceased to the respondent No.2 at any point of time. Thus, the respondent No.2 can never be treated as an employer qua the deceased. As such, he is not liable to pay the compensation."*

**Case Laws Relied on and Referred to** :-

1. Ors,(2006) 11 SCC 692 : Zila Sahakari Kendrya Bank Maryadit .Vs. Shahjadi Begum & Ors.

For Appellant : M/s. A. Mohanty & L.M. Nanda (B. Sahoo)
For Respondents : M/s. P. Ray, S. Ray & A.A. Khan (Smt. Rimjhim Pati) (R.3)

ORDER Heard & Disposed of on: 12.09.2019

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

Heard Mr. B. Sahoo (for A.Mohanty), learned counsel for the appellant and Smt. Rimjhim Pati (for P.Ray), learned counsel appearing for the respondent No.3-Insurance Company. None appears for the respondent Nos. 1 and 2 in spite of valid service of notice.

In this appeal under Section 30 of the Workmen's Compensation's Act, 1923 (for short, 'the Act'), the appellant (widow of the workman) assails the judgment and award dated 12.12.1994 passed by learned Assistant Labour Commissioner & Commissioner for Workmen's Compensation, Rourkela (for short, 'the Commissioner') in W.C. Case No. 4 of 1991 awarding a compensation of Rs.88,548/- and saddling the liability to pay the compensation on respondent No.1-the employer.

Although no substantial question of law has been framed in this appeal, Mr. Sahoo (for A.Mohanty), learned counsel for the appellant submits that the substantial question of law involved in this case is._

> *"Whether liability to pay the compensation can be fastened on the owner of the motorcycle-respondent No.2 treating him to be the employer by giving a broader interpretation to the definition of 'employer' under Section 2(e) of the Act?."*

It is submissioned that since the motorcycle was validly insured with the respondent No.3 on the date of accident, the compensation amount should have been indemnified by respondent No.3-Insurance Company. It is his case that the respondent No.2 had given his motorcycle for repairing to respondent No.1, who was a motorcycle mechanic. The deceased-Rathi

Bhoi, was working as a helper under him. After repairing of the said motorcycle, when the deceased took it for a trial, it met with an accident and the deceased succumbed to the injuries.

Mr. Sahoo (for A. Mohanty), learned counsel for the claimant-appellant submits that since the deceased had taken the vehicle on trial, it is presumed that his services were hired by the owner of the motor Cycle-respondent No.2 temporarily for that purpose only. Thus, respondent No.2 comes within the broad interpretation of 'employer' under Section 2(e) of the Act and the respondent No.2 for that limited purpose should be considered as the employer of the deceased for the time being .

In support of his case, he relied upon in the case of ***Zila Sahakari Kendrya Bank Maryadit –v- Shahjadi Begum and others***, reported in (2006) 11 SCC 692, wherein it is held as under:

> *"5. The short question which arises for consideration is as to whether the defendant Nos. 2 and 4 and consequently the State should be directed to reimburse Appellant so far as the amount of compensation payable to Respondent No.1 is concerned.*
>
> *The Act was enacted to provide for payment by certain classes of employers to their workmen of compensation for injury by accident. The term 'Employer' has been defined in Section 2(e) of the Act in the following terms:*
>
> *"employer" includes anybody of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent of let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;*
>
> *However, the term 'employee' has not been defined in the Act. The definition of employer, therefore, embraces within its fold not only a person who employs another either permanently or on temporary basis but also those who were in control of the workman temporarily lent or let on hire to them by the person with whom the workman has entered into a contract of service. It is, therefore, a broad definition."* (emphasis supplied)

He, therefore submits that the case at hand is squarely covered under the broad definition of 'employer' in view of ratio of the aforesaid case law and the respondent No.2 is an 'employer' at least for the limited purpose of achieving the object of the benevolent statute, i.e., the Act. Thus, the respondent No.2 being an employer, should be held liable to pay the compensation awarded. The motorcycle in question was, at the time of

accident, validly insured with respondent No.3-Insurance Company. Thus, the respondent No.3 is liable to indemnify the insured, namely, respondent No.2 and prays for a direction to the respondent No.3 to discharge the liability of respondent No.2 and pay the compensation awarded.

Smt. Pati (for P.Ray), learned counsel for the respondent No.3-Insurance Company, on the other hand, vehemently refuted the submissions of Mr.Sahoo (for A.Mohanty) and contended that the respondent No.2 hired the services of respondent No.1-the mechanic, for repairing of his motorcycle and not the deceased. The deceased was admittedly working under respondent No.1 and by no stretch of imagination it can be assumed that the deceased was an employee under respondent No.2. As such, learned Commissioner has rightly saddled the liability on the respondent No.1 to pay the compensation.

Having heard learned counsel for the parties, it is apparent that the deceased was a workman within the meaning of Section 2(n) of the Act and respondent No.1 was the employer. The broad interpretation of the term 'employer' as interpreted in the case law (supra) does not embrace the respondent No.2 within its fold. The respondent No.2 had never employed the deceased either permanently or temporary basis, nor the deceased was ever under the control of the respondent No.2 even temporarily nor the respondent No.1 had ever lent on hire the services of the deceased to the respondent No.2 at any point of time. Thus, the respondent No.2 can never be treated as an employer *qua* the deceased. As such, he is not liable to pay the compensation.

In that view of the matter, the appeal merits no consideration and the substantial question of law is answered against the appellant. It is however, open to the claimant-appellant to approach the competent forum by filing appropriate application for realization of the compensation amount. The appeal is disposed of accordingly. L.C.R. be sent back immediately.

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