THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

Containing Judgments of the High Court of Orissa and some important decisions of the Supreme Court of India.

Mode of Citation
2021 (I) I L R - CUT.

JANUARY - 2021

Pages : 1 to 240

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice DR. S. MURALIDHAR, *B.A. (Hons.), LL.B.*

PUISNE JUDGES

The Hon'ble Justice KUMARI SANJU PANDA, *B.A., LL.B.*

The Hon'ble Shri Justice S.K. MISHRA, *M.Com., LL.B.*

The Hon'ble Shri Justice C.R. DASH, *LL.M.*

The Hon'ble Shri Justice BISWAJIT MOHANTY, *M.A., LL.B.*

The Hon'ble Shri Justice Dr. B.R. SARANGI, *B.Com.(Hons.), LL.M., Ph.D.*

The Hon'ble Shri Justice DEBABRATA DASH, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice SATRUGHANA PUJAHARI, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice BISWANATH RATH, *B.A., LL.B.*

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

The Hon'ble Shri Justice PRAMATH PATNAIK, *M.A., LL.B.*

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

The Hon'ble Shri Justice BIBHU PRASAD ROUTRAY, *LL.B.*

The Hon'ble Shri Justice SANJEEB KUMAR PANIGRAHI, *LL.M.*

The Hon'ble Miss Justice SAVITRI RATHO, *B.A., (Hons.), LL.B.*

ADVOCATE GENERAL

Shri ASHOK KUMAR PARIJA, *B.Com., LL.B.*

REGISTRARS

Shri MALAYA RANJAN DASH, *Registrar General*
Shri RAJENDRA KUMAR TOSH, *Registrar (Administration)*
Shri LALIT KUMAR DASH, *Registrar (Judicial)*

NOMINAL INDEX

ACTS

Acts & No.	
1950- 46	The Army Act, 1950
1908 - 5	Code of Civil Procedure, 1908
1973- 02	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
1952- 19	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
1972-14	Orissa Forest Act, 1972
1988- 49	Prevention of Corruption Act, 1988

STATUTE

Orissa University First Statute, 1990

SUBJECT INDEX

PAGE

THE ARMY ACT, 1950 – Section 104 read with Sections 475 & 167(2) of the Code of Criminal Procedure, 1973 – Offence relating to marriage and demand of dowry (Civil offence) committed by the Army officer (Major) – Accused arrested & produced before the learned SDJM – Application filed to hand over the accused to military custody – Application allowed by the learned SDJM – Such order challenged before the revisional Court (Session Court) – Revisional Court set aside the order of the SDJM and directed to produce the accused before the Court below (SDJM Court) – Order of Session court challenged – Held, the custody of Army Officer cannot be examined at this stage pending investigation and the stage to exercise the option for custody has not reached yet awaiting submission of police report U/s.173(2) of the Cr.P.C. – Hence the order of the Session Court does not require any interference.

Adm Commandant -V- State of Odisha & Ors.

2021 (I) ILR-Cut…… 234

CIVIL PROCEDURE CODE, 1908 – Civil suit – Examination of witness – Whether a party, who is set ex-parte and has not filed written statement, can be examined as a witness? – Held, an ex-parte can lead evidence subject to certain riders, which can be broadly stated as follows:-(I) the witness cannot propound a new case or the case of its own (II) the witness must not have entered witness box in the said suit previously to lead evidence and has been cross-examined (III) permitting a party to the suit to be examined on behalf of another, is always at the discretion of the court.

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction – Scope of interference in disciplinary enquiry and punishment matters of Govt. employees – Principles – Discussed.

Chairman, Odisha Gramya Bank -V- Rama Chandra Behera.
2021 (I) ILR-Cut…… 89

Articles 226 and 227 – Writ petitions in the nature of PIL – Issues involved regarding the charging of tuition fees by private unaided schools in the State of Odisha in the wake of COVID-19 pandemic from March, 2020 – Scope of judicial review – Legal position – Discussed.(T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481 followed.)

Mohammed Mustaq Ansari -V- State of Odisha & Anr.
2021 (I) ILR-Cut…… 01

Articles 226 and 227 – Writ petitions in the nature of PIL – Challenge is made to the decision of HPCL for establishment of retail outlet – Advertisement for establishment of retail outlet was issued on 25.11.2018 – LOI was issued on 16.10.2019 and thereafter on 21.11.2019 the HPCL issued a letter to the Collector to issue NOC – NOC in favour of the HPCL was issued on 19.03.2020 – PIL petitioners got information on 20.12.2019, but they kept silent over the matter – When HPCL went ahead with construction work writ petition was filed on 19.05.2020, and to cover up the lacunae in the said writ petition, another set of people filed another writ petition on 03.08.2020 – Prior to filing of writ petition a suit was filed and is pending – Having failed to get any interim relief in the said suit, the present writ petitions have been filed in the garb of public interest litigation, particularly when the civil suit is pending – Held, in the above background, at best it can be construed that the petitioners are fence sitters and they have approached this Court, after selection process was over, on a frivolous and flimsy ground relying upon a guideline, which has been revised

in the meantime – As such, without knowing the present status in proper prospective, the petitioners have approached this Court in a camouflage manner to cause prejudice to the selected candidate – Writ petitions dismissed – Cost imposed.

Arun Kumar Acharya -V- National Highway Authority of India & Ors.

2021 (I) ILR-Cut…… 12

Articles 226 and 227 – Writ petitions in the nature of PIL – Challenge is made to the decision of HPCL for establishment of retail outlet – PIL – Scope of interference and duty of the court while entertaining a PIL – Held, in view of the law laid down by the apex Court, in our considered opinion, on Public Interest Litigation (PIL), redressal of public injury, enforcement of public duty, protection of social rights and vindication of public interest must be the parameters for entertaining a PIL – The Court has a bounden duty to see whether any legal injury is caused to a person or a cluster of persons or an indeterminate class of persons by way of infringement of any constitutional or other legal rights while delving into a PIL – The existence of any public interest as well as bona fide are the other vital areas to come under the Court's scrutiny – In absence of any legal injury or public interest or bona fide, a PIL is liable to be dismissed at the threshold – It is to be borne in mind that ultimately it is the rule of law that is to be vindicated – As such, there is a need for restrain on the part of the public interest litigants when they move Courts – The Courts should also be cautious and selective in accepting PIL as well – Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation' – If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well – There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe – It cannot also be invoked by a person or a body of persons to further his or their personal

causes or satisfy his or their personal grudge and enmity – Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction – A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have *locus standi* and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration.

Arun Kumar Acharya -V- National Highway Authority of India & Ors.

2021 (I) ILR-Cut…… 12

Articles 226 and 227 – Writ petition in the nature of PIL – Petitioners are villagers – Incident of death of loving couple – Circumstances show the incident was an outcome of 'honour killing' – Allegation of improper investigation by police – Plea by petitioners to handover the investigation to any other agency – Matter was examined in details with reference to the investigation conducted by the police – Held, in view of the provisions of law, as discussed above, it clearly reveals that further investigation can be permissible in respect of an offence by different investigating agency, as prima facie this Court is of the considered view that the investigation in the instant case has been undertaken in a negligent and perfunctory manner and, as such, it requires further investigation by a different investigating agency other than the local police authority – Ordered accordingly.

Bibhuranjan Dalai & Ors. -V- State of Odisha & Ors

2021 (I) ILR-Cut…… 74

Articles 226 and 227 – Writ petition – Challenge is made to the award passed by the Labour court – Plea that there is no scope to make judicial review in a certiorari proceeding – Jurisdiction

Allegation of voluntary relinquishment by the petitioner – No document/evidence to that effect – Rather frequent notices of acquisition falsify the stand of voluntary relinquishment – Neither any claim with regard to raising of compensation nor with regard to restoration of possession since two decades – During the period of initial notice petitioner had claimed Rs.3000/- per decimal – Prayer of the petitioner considered – Held, the petitioner is entitled to receive Rs.3000/- per decimal together with all statutory benefits including solatium and interest as available at that point of time.

Sureswari Devi -V- State of Odisha & Ors.

2021 (I) ILR-Cut…… 158

Article 311 – Service Law – Disciplinary proceeding – Framing of charge on the basis of preliminary inquiry by an authority not approved by the Disciplinary Authority – Effect of – Held, illegal.

Satish Kumar Ishwardas Gajbhiye @ Satish Kumar Gajbhiye -V- Union of India & Ors.

2021 (I) ILR-Cut…… 104

Article 311 – Service Law – Who is the Disciplinary Authority in respect of All India Service Officers working under the State Governments – The AIS (D & A) Rules 1969 read with DoPT memorandums designate the concerned head of department as the Disciplinary Authority, however this power has been conferred upon the State Governments – Effect of – Held, delegation of disciplinary powers to the State Governments is not only contravenes this carefully crafted scheme but also weakens the steel frame of the All India Services.

SERVICE LAW – Preliminary inquiry – Conducted unilaterally without calling upon the petitioner to remain present and no opportunity granted – Effect of – Held, wholly unreasonable, arbitrary and unjust – This is palpably a disturbing trend and contrary to the notion of good governance – The principles of Commodum ex injuria sua nemo habere debet (No party can take undue advantage of his own wrong) – Applies.

Satish Kumar Ishwardas Gajbhiye @ Satish Kumar Gajbhiye -V- Union of India & Ors.

2021 (I) ILR-Cut…… 104

WORDS AND PHRASES – "Per incuriam" – Meaning and definition thereof – Held, A judgment can be per incuriam if any provision of a statute, rule or regulation, was not brought to the notice of the court – Moreover, a decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench – Since the learned Single Judge in the decision impugned in three writ appeals has neither noted the complete definition of "appropriate government" in Section 2(a) (i) what includes "a mine" making Central Government as the appropriate government, nor noticed the above referred to binding decision of the Division Bench, upholding validity of very same notification dated 17.3.1993, the impugned decision for these reasons shall be per incuriam.

M/s. Orissa Mining Corporation Ltd. -V- Union of India, Ministry of Labour.

2021 (I) ILR-Cut…… 52

—— o ——

2021 (I) ILR - CUT- 1

DR. S. MURALIDHAR, C.J & DR. B. R. SARANGI, J.

W. P. (C) NOS. 11299, 11514 & 32259 OF 2020

MOHAMMED MUSTAQ ANSARI .....Petitioner

.V.

STATE OF ODISHA & ANR. .....Opp. Parties

In W.P.(C) No.11514 of 2020

ODISHA ABHIBHABAK MAHASANGHA .....Petitioner

.V.

UNION OF INDIA & ORS. .....Opp. Parties

In W.P.(C) No.32259 of 2020

SAI INTERNATIONAL SCHOOL PARENTS FORUM .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petitions in the nature of PIL – Issues involved regarding the charging of tuition fees by private unaided schools in the State of Odisha in the wake of COVID-19 pandemic from March, 2020 – Scope of judicial review – Legal position – Discussed.(T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481 followed.) (Paras 22 to 28)

Case Laws Relied on and Referred to :-

1. (2005) 6 SCC 537 : PA Inamdar Vs. State of Maharashtra.
2. (2003) 6 SCC 697 : Islamic Academy of Education Vs. State of Karnataka.
3. (2004) 5 SCC 583 : Modern School Vs. Union of India.
4. (2002) 8 SCC 481 : T.M.A. Pai Foundation Vs. State of Karnataka.

For Petitioner : In W.P.(C) No.11299 of 2020
Mr. Mohammed Mustaq Ansari (in person)
In W.P.(C) No.11514 of 2020 Mr. V. Narasingh.
In W.P.(C) No.32259 of 2020 Mr.Goutam Mukherjee, Sr.Adv.
& Mr. B.B. Mohanty.

For Opp. Parties :Mr. Ashok Kumar Parija, Adv. General,
Mr. M.S. Sahoo, Addl. Govt. Adv.
Mr. P.K. Parhi, Asst. Solicitor General
Mr. Tarananda Pattanayak, (CBSE)
Mr. Budhadeb Routray, Sr. Adv. (for Confederation of Public Schools)

Mr. Asok Mohanty, Sr. Adv.
Mr. Patitapaban Panda, Mr. Dayananda Mohapatra,
Mr. Sameer Kumar Das, Mr. B.D. Das, Mr.Alok Ku.Mohapatra,
Mr. N.K. Sahu, (For respective Intervenors)

JUDGMENT Date of Judgment : 07.01. 2021

DR. S. MURALIDHAR, C.J.

1. The central issue in the present batch of writ petitions concerns the charging of fees by private unaided schools in the State of Odisha in the wake of COVID-19 pandemic from March, 2020 onwards.

The petitions

2. The lead petition in the present batch is Writ Petition (Civil) PIL No.11299 of 2020 filed by Mr. Mohammed Mustaq Ansari, who appears in person. The prayer in this petition *inter alia* is for directions to the Government of Odisha to issue necessary orders directing both the private unaided and aided schools not to collect tuition fees for the lockdown period till actual commencement of classes in physical mode; not to increase in fees in the academic session 2020-21; "not to put extra financial burden on the parents or creating any new head of the fees for the academic session 2020-21" and for a direction to strictly enforce the provisions of law against the Managing Committee of those institutions who fail to strictly comply with the directions of the Government. The further prayer of the Petitioner is for a direction to the Government of Odisha to provide funds to all the private schools, who are unable to bear the basic liability of payment of salaries to their staffs both the teaching and the non-teaching staff to meet the situation arising out of the COVID-19 pandemic. In this lead petition, notice was issued by this Court on 24th April, 2020.

3. One of the connected petitions is Writ Petition (Civil) No.11514 of 2020 filed by the Odisha Abhibhabak Mahasangha. The Opposite Parties in this writ petition include the Department of School and Mass Education (DSME), the Central Board of Secondary Education (CBSE), Stuarts School, Cuttack (Opposite Party No.3), the Confederation of Odisha Public Schools (Opposite Party No.7), the Association of Odisha ICSE Schools, the S.K. International School and DAV Public School.

4. The prayer in Writ Petition (Civil) No.11514 of 2020 which projects the point of view of the students seeking a direction to the Opposite Parties to issue circular/order to the private/public school across the State of Odisha to waive off the school fees /tuition fees/development fees/re-admission fees etc. for two quarters from March-June and July-September, 2020 and for a

direction to the schools not to enhance the fees or any other ancillary charges for the academic year 2020-21.

5. The 3rd petition i.e. W.P.(C) No.32259 of 2020 has been filed by Sai International School Parents Forum. It projects the point of view of the parents of the students. The prayers here are again broad and sweeping. They seek a direction to the Opposite Parties to roll back the enhancement of fees for the academic session 2020-21. A direction is sought to the Sai International School to reconsider the matter by adopting the fees structure prevailing in the previous academic year 2019-20 and grant waiver of some portion thereof during the period of the COVID-19 pandemic. A direction is sought to the State to take steps for meticulous compliance of the terms and conditions of the Resolution dated 23rd September, 1996 of the Department of School and Mass Education (S & ME) on the basis of No Objection Certificate (NOC) which was issued in favour of the private unaided schools including Sai International School, Bhubaneswar. In the batch of petitions, some interveners have entered by filing their intervention applications.

6. It may be mentioned at the outset that the pleadings in the lead matter i.e. Writ Petition (Civil) (PIL) No.11299 of 2020 including the counter affidavit and other affidavits filed therein have been relied upon by the parties in all the matters.

Orders of this Court

7. As noted earlier after the initial order passed in the lead petition on 24th April 2020, an interim order was passed by this Court on 26th May, 2020 to the effect that during the pendency of the matter "the students of any private school shall not be deprived of participation in the e-classes and shall be provided with password and ID". A detailed order was thereafter passed on 1st September, 2020 as under:

> "Heard Mr. Mohammed Mustaq Ansari, learned Advocate, who appears in person in W.P.(C) No.11299 of 2020, Mr. Ranjan Kumar Rout, learned counsel for the petitioner in W.P.(C) No.11263 of 2020, Mr. V. Narasingh, learned counsel for the petitioner in W.P.(C) No.11514 of 2020 and Mr. Ashok Kumar Parija, learned Advocate General for the State-opposite parties, Mr. B. Routray, learned Senior Advocate for the opposite party-Confederation of Odisha Public Schools and Sri Asok Mohanty, learned Senior Advocate for the opposite party-Odisha Private Schools Teachers Association, by Video Conferencing mode.

Mr. Ashok Kumar Parija, learned Advocate General was on the earlier date requested to assist this Court in the matter and explore the possibility of the amicable resolution of the dispute by way of mediation between the parties whether the private educational institutions can be persuaded to grant waiver of a portion of fees due to the ongoing pandemic COVID-19 to the W.P.(C) No. 11299 of 2020 students/parents, especially the fee demanded on certain heads, like Development, Uniform, Conveyance, etc. which the petitioners are terming unreasonable. Learned Advocate General informed the Court that the Secretary, School & Mass Education Department, Odisha, Bhubaneswar is prepared to convene a meeting of the representatives of the Private Un-Aided and Aided Educational Institutions and representatives of the parents and teachers' association. He however submitted that for a meaningful discussion in an orderly manner, not more than five representatives from each of the three grounds, should be allowed to attend such deliberations but they should be required to give their choice to participate in such meeting either physically or by virtual mode.

Having regard to the aforementioned submissions, it is directed that five representatives from Confederation of Odisha Public Schools, five representatives from parents, three of whom shall be the President, the Vice-President and the Secretary respectively of Odisha Abhibhabak Mahasangha, and one parent each as 3 nominated by the petitioner in W.P.(C) No.11299 of 2020 and the petitioner in W.P.(C) No.11263 of 2020 and five representatives of teachers' to be nominated by Odisha Private Schools Teachers Association, shall participate in such deliberations. Their names shall be conveyed to the Secretary, School and Mass Education Department positively by 2.00 P.M. on 03.09.2020, along with their preference whether they would like to attend such meeting physically or by video conferencing.

The Secretary, School & Mass Education Department shall make an endeavour in the proposed meeting whether the private educational institutions can be persuaded for waiver of a portion of fees payable by the students or accept part of the fees by deferring remaining part or whether any other kind of consensus can be arrived at on such terms that may be agreed upon between the parties, in view of the ongoing pandemic COVID-19 and also examine whether any unreasonable and excessive fees is being demanded by any of the private educational institutions on unreasonable head such as development fee, uniform charges, conveyance charges, or other charges of the like nature.

The Secretary, S & ME Department may convene the meeting preferably at 12 Noon on 04.09.2020 and if the same remains inconclusive, on any other date and time within a week (next seven days). Report of the deliberations may be produced before the Court on the next date.

The matter to come up on 14.09.2020.

Learned counsel for the parties may in the meantime file their written note of submissions."

8. At the hearing of the case on 29th September, 2020 the Court took on record the report of the Principal Secretary to Government, S & ME Department which had been prepared pursuant to the order dated 1st September, 2020.

Report of the Principal Secretary, S&ME Dept.

9. At this stage a reference ought to be made to the report of the Principal Secretary, S & ME Department which recorded the MoU. It must be noticed that 14 of the private unaided schools agreed to waiver of fees at a flat rate in different slabs as set out in para 8 of the report, which is Annexure-C/2 to the affidavit dated 1st December, 2020 filed by the Additional Secretary to Government, S & ME Department. The position as set out in a tabular form is as under:

Sl.No.	School Type	School Fees (Per annum) either as tuition fees or Composite Fees Waiver %
1	All Schools fees upto Rs.6,000/-	Nil
2	All Schools fees > Rs.6,001/- to Rs.12,000/- p.a.	7.5%
3	All Schools fees & Rs 12,001/- to Rs.24,000/- p.a.	12%
4	All Schools fees > Rs.24,001/- to 48,000/- p.a.	15%
5	All Schools fees > Rs.48,001/- to Rs.72,000/- p.a.	20%
6	All Schools fees > Rs.72,001/- to Rs.1,00,000/- p.a.	25%
7	All Schools fees above 1,00,000/- p.a.	26%
8	Transport and Food Charges	As per actual
9	i. Transport and Food Charges as per actual	
	ii. Hostel fees : Flat 30% waiver to be given.	
	iii. The Other Optional Fees as per para 3 and 4 of MoU shall not be charged during pandemic period till Schools re-open.	
10	Any School which has not increased School Fees consecutively in the last two years will not be covered in this School Fees Waiver understanding subject to proper certification from SMC (School Management Committee) (2018-19 & 2019-20).	

10. The Report further noted as under:

> "From the deliberations, it could be noticed that near unanimity was achieved except one member i.e. Shri Baikuntha Prasad Das, representative of the petitioners in WPC No.11299/2020. All 14 members signed the Memorandum of Understanding and also authenticated their signatures on 10th Sept., 2020 before my authorized representative. It is a fact that due to the unprecedented COVID-19 pandemic situation, all stakeholders in the education system like the Schools, Teachers, Parents as well as the Students have been affected beyond the control of any individual entity despite the best efforts taken by the State, in providing education through online and offline modes as per the extant guidelines of Government of India and State Government issued under COVID-19 pandemic. As directed by the Hon'ble Court, maximum effort has been taken to persuade all the stakeholders present during the discussions to reach a unanimous decision in this unique situation which has occurred for the first time."

Stand of the State Government

11. A counter affidavit was filed on 21st May, 2020 by the Director of Elementary Education of Odisha mentioning *inter alia* that:

> (i) no tuition fees are collected from students in Government Schools or from old Grant-In-Aid (GIA)/Fully Aided schools or even from new GIA Schools that receive partial funding from the Government;
>
> (ii) the other category of schools are the Unaided Private Schools which include English Medium schools as well as Odia Medium schools affiliated to Board of Secondary Education, Odisha.
>
> (iii) In the private unaided schools, 25% seats are reserved for the weaker sections and disadvantage groups under Section 12-C of the Right to Education Act, 2009 in respect of which the cost of education was borne by the Government of Odisha at a uniform rate arrived at every year.

12. This was followed by another affidavit dated 4th November, 2020 i.e. after the report submitted by the Principal Secretary to Government, S & ME Department. The stand of the State Government as stated in para 10 of the affidavit was that there is no provision under the Orissa Education Act, 1969 ('OE Act') and the Rules framed thereunder for fixation of fee structure of different unaided schools. A reference has been made to the order dated 22nd March, 2013 of the Supreme Court in Civil Appeal No.4556 of 2014 (***D.A.V. College Managing Committee through Regional Director v. Laxminarayan Mishra***) whereby the DAV School authorities were directed to make an application for fixation of fees structure of the school before the Fee

Structure Committee (FSC), Odisha headed by Justice K.P. Mohapatra, a former judge of this Court.

13. It was further stated in the final judgment dated 16th April, 2014 in the aforementioned Civil Appeal No.4556 of 2014, the Supreme Court accepted the recommendations of the of the Committee and directed the concerned educational institutions to revise their fee structure with immediate effect. It is further pointed out in the affidavit that this Court in W.A. No.89 of 2015 (***Buxi Jagabandhu English Medium School Parents Association v. State of Odisha***) by an order dated 8th September, 2016 directed that the fees structure of the concerned schools as per the recommendation of Justice K.P. Mohapatra Committee be effective from the beginning of the financial year 2014-15.

14. As regards the report submitted by the Principal Secretary to Government, S & ME Department pursuant to the direction of this Court in the present batch of writ petitions, the stand of the State Government is that the Court may accept the Memorandum of Understanding (MoU) signed by all the stakeholders, as recorded by the report and pass appropriate directions.

15. In its affidavit dated 1st December, 2020 the S & ME Department stated as under:

> "….it is humbly submitted that besides the decision taken by the different stakeholders in the meeting held under the Chairmanship of Principal Secretary as set out in the MOU dated 10.09.2020, there is no policy decision of the Government as regards waiver or reduction of school fees during Lock Down period caused due to COVID-19 pandemic. However, the contents of the MOU is in the knowledge of Government and if the same is given effect to, it will also assuage the difficulties being faced by the parents whose income has been adversely affected during this pandemic."

16. Mr. Ashok Kumar Parija, learned Advocate General appearing for the State of Odisha, while placing the contents of the aforementioned report, which incorporates MOU, has made a categorical statement that notwithstanding the statements made in para 4 of the affidavit dated 1st December, 2020 of the S & ME Department that there is no provision under the OE Act or the Rules framed thereunder to regulate the fees structure of those private unaided schools affiliated either to the Board of Secondary Education, Odisha or the CBSE and the ICSE, the Government of Odisha would strictly enforce the terms and conditions set out in the Resolution

dated 23rd September, 1996 concerning grant of NOCs to such private unaided schools.

The Resolution dated 23rd September, 1996

17. At this stage, reference be made to the relevant portion of the said resolution. The said resolution was issued by the S & ME Department, Government of Odisha drawing attention to Section 6 (5) of the OE Act and the fact that it had become imperative to prescribe certain guidelines before according NOC/Recognition to the institutions and to withdraw such recognition in the event of violation of any of the instructions issued in the Resolution. The Resolution deals with several matters including 'Accommodation,' 'Recruitment and Service Condition of the staff' 'Medium of instruction' and so on. Para 4 of the Resolution deals with fees, and reads as under:

> "4.(1) Fees- Fees and charges should be common with the facilities provided by the institution. Fees should normally be charged under the heads prescribed by the Department of School and Mass Education. No capitation fees or voluntary donations for gaining admission in the school or for any other purpose should be charged/collected in the name of the school. In case of such malpractices, the Government may take drastic action leading to withdrawal of No Objection Certificate of the school.
>
> (ii) In case a student leaves the school for such compulsion as transfer of parents or for health reason or in case of death of the student before completion of the session, pro rata return of quarterly/term/annual fees should be made.
>
> (iii) The schools should consult parents through parents, representatives before revising the fees. The fee should not be revised during the mid-session."

18. Further paras 9 and 10 of the resolution read as under:

> "9. The N.O.C. issue in favour of any school shall always be subject to the terms and conditions prescribed in this Resolution.
>
> 10. All Schools who have been issued N.O.C. shall fulfill the terms and conditions provided herein before and satisfy the requirements prescribed in this Resolution within a period of she months from the date of issue of this Resolution failing which proceedings for withdrawal of N.O.C./Recognition shall be notified by the Government."

19. That the Government of Odisha is prepared to implement the aforementioned resolution is clear from the categorical stand of the learned

Advocate General, as taken on record by this Court, that notwithstanding what may have been stated in the affidavit filed in these matters, appropriate action would be taken against the schools who do not fulfill the terms and conditions set out in the aforementioned Resolution. This stand is consistent with Section 6 (5) of the OE Act read with Sections 6-A and 6-B thereof. In this context, a reference may also be made to Section 5 of the OE Act which sets out the requirement for establishment of an educational institution.

20. This should allay the apprehension expressed by Mr. Goutam Mukherjee, learned Senior Advocate appearing for Sai International School Parents Forum that the State Government may not strictly enforce the above Resolution against the defaulting private unaided institutions.

21. The Court now truns to the submission of the learned counsel appearing for some of the intervenors like the Association of Orissa ICSE and the DAV School Association and the Odisha Abhibhaka Mahasangha, who have expressed reservations as reagrd some of the some of the terms of the MoU. There are also certain apprehensions expressed on behalf of minority institutions.

Scope of judicial review

22. In the context of the above submissions, it might be useful to recapitualte the legal position on the scope of the powers of judcial review inof this Court in matters of the present nature, with particular reference to the issue of fixation of fees chargeable by private unaided educational institutions.

23. In ***T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481*****,** the Constitution Bench of the Supreme Court explained that with regard to core components of the rights under Articles 19 and 26 (a) of the Constitution of India, while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. It was further observed that in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the

betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. In the same decision it was noted that the fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

24. Specific to the issue of fixation of fees, the Supreme Court in ***T.M.A. Pai Foundation*** *(supra)* observed as under:

> "56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense a prospective students has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government."

25. The Supreme Court however pointed out that Government could make regulations to ensure excellence in education while forbidding the charging of capitation fee and profiteering by the institution. It was observed in this context that in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.

26. In ***Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697*** directions were issued to the respective State Government/Public Authorities to set up a Committee headed by a retired High Court Judge nominated by the Chief Justice of the concerned State. This was in the nature of a follow up on the directions issued in ***T.M.A. Pai Foundation*** *(supra)* to

ensure that the institutions are not profiteering or charging capitation fee. In the considered view of the Court the spirit of Resolution dated 23rd September, 1996 issued by the S & ME Department is consistent with these decisions of the Supreme Court.

27. In ***Modern School v. Union of India (2004) 5 SCC 583,*** the above observations of the Supreme Court in ***T.M.A. Pai Foundation*** *(supra)*were reiterated. Likewise, in ***PA Inamdar v. State of Maharashtra (2005) 6 SCC 537*** on the aspect of fee regulation, the Supreme Court concluded thus:

> "140. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in Pai Foundation. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 [Answer to Q.5(c)] of Pai Foundation are relevant in this regard)".

28. Given the limited scope of interference in the matters of this nature, consistent with the legal position explained in the above decisions, this Court is not persuaded to further issue directions in the matter in light of the MOU arrived at between 14 educational institutions in Odisha on the question of fee waiver during the period of the Covid-19 pandemic. The problems faced by any of the parties in relation to any of the terms of the MOU will have to be agitated in other separate proceedings and examined on a case by case basis. No omnibus directions in that regard can possibly be issued at this stage.

Decisions of the High Courts

29. Counsel for the parties have referred to certain decisions of other High Courts which dealt with the issues faced by the students, parents, teachers and the educational institutions themselves arising out of the COVID-19 pandemic. These included the decision dated 20th April, 2020 of the learned Single Judge of Delhi High Court in *W.P.(C) No.2977/2020 & C.M. No.10327-28/2020 (**Rajat Vats v. Govt. of NCT of Delhi**);* the judgment dated 13th October, 2020 of the High Court of Calcutta in WPA 5890 of 2020 (***Vineet Ruia v. Principal Secretary, Department of School Education, Government of West Bengal***), the decision dated 30th June, 2020 of the learned Single Judge of the High Court of Punjab and Haryana in CWP 7409 of 2020 (***Independent Schools Association Chandigarh (Regd.) v. State of***

Punjab), and the decision dated 12th May, 2020 of the Division Bench of Uttarakhand High Court in WP (PIL) No.59 of 2020 (***Japinder Singh v. Union of India***).

30. The Court does not propose to discuss these decisions at length because of the peculiar situation obtaining in each of the aforementioned States, which may not be comparable with the situation present here. For instance, there is no indication in any of the above decisions that there was any MOU arrived at between the private institutions, with the mediation of the State, agreeing to waiver of fees in a graded manner. Nevertheless, it must be clarified that while this Court has recorded the fact of the MOU having been entered into, this will not preclude individual institutions or parties, who may be aggrieved or who may have a different point of view than that recorded in the MOU, or seek strict enforcement of the terms and conditions of recognition or grant of NOC as set out in the Resolution dated 23rd September 1996, from seeking appropriate reliefs in separate proceedings as are permissible to them in accordance with law.

Conclusions

31. In the result the writ petitions and all pending applications are disposed of in the above terms. The interim orders are vacated. However, there shall be no order as to costs.

32. As the restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize a soft copy of this order/judgment available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587 dated 25th March, 2020.

—— o ——

2021 (I) ILR - CUT- 12

MOHAMMAD RAFIQ, C.J & DR. B.R. SARANGI, J.

WRIT PETITION (CIVIL) (PIL) NO.12434 OF 2020
AND
WRIT PETITION (CIVIL) (PIL) NO. 18169 OF 2020

ARUN KUMAR ACHARYA .....Petitioner

.V.

NATIONAL HIGHWAY AUTHORITY OF INDIA & ORS. .....Opp. Parties

WRIT PETITION (CIVIL) (PIL) NO.18169 OF 2020

BISWANATH DAS & ORS. .....Petitioners

.V.

UNION OF INDIA & ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petitions in the nature of PIL – Challenge is made to the decision of HPCL for establishment of retail outlet – Advertisement for establishment of retail outlet was issued on 25.11.2018 – LOI was issued on 16.10.2019 and thereafter on 21.11.2019 the HPCL issued a letter to the Collector to issue NOC – NOC in favour of the HPCL was issued on 19.03.2020 – PIL petitioners got information on 20.12.2019, but they kept silent over the matter – When HPCL went ahead with construction work writ petition was filed on 19.05.2020, and to cover up the lacunae in the said writ petition, another set of people filed another writ petition on 03.08.2020 – Prior to filing of writ petition a suit was filed and is pending – Having failed to get any interim relief in the said suit, the present writ petitions have been filed in the garb of public interest litigation, particularly when the civil suit is pending – Held, in the above background, at best it can be construed that the petitioners are fence sitters and they have approached this Court, after selection process was over, on a frivolous and flimsy ground relying upon a guideline, which has been revised in the meantime – As such, without knowing the present status in proper prospective, the petitioners have approached this Court in a camouflage manner to cause prejudice to the selected candidate – Writ petitions dismissed – Cost imposed.

(Paras 23 & 24)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petitions in the nature of PIL – Challenge is made to the decision of HPCL for establishment of retail outlet – PIL – Scope of interference and duty of the court while entertaining a PIL – Held, in view of the law laid down by the apex Court, in our considered opinion, on Public Interest Litigation (PIL), redressal of public injury, enforcement of public duty, protection of social rights and vindication of public interest must be the parameters for entertaining a PIL – The Court has a bounden duty to see whether any legal injury is caused to a person or a cluster of persons or an indeterminate class of persons by way of infringement of any constitutional or other legal rights while delving

into a PIL – The existence of any public interest as well as bona fide are the other vital areas to come under the Court's scrutiny – In absence of any legal injury or public interest or bona fide, a PIL is liable to be dismissed at the threshold – It is to be borne in mind that ultimately it is the rule of law that is to be vindicated – As such, there is a need for restrain on the part of the public interest litigants when they move Courts – The Courts should also be cautious and selective in accepting PIL as well – Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation' – If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well – There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe – It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity – Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction – A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have *locus standi* and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. (Paras 31 & 32)

Case Laws Relied on and Referred to :-

1. (2016) 15 SCC 480 : Indian Oil Corporation Ltd. Vs. Arti Devi Dangi.
2. 2018 (2) ABR (NOC) 38 (BOM.) at Nagpur Bench: Ujwala Santosh Kendre Vs. Bharat Petroleum Corporation Limited, Nashik.
3. AIR 2013 (NOC) 312 (CAL.) : Rananjoy Bhattacharya Vs. Union of India.
4. AIR 2000 SC 3266 : M.S. Jayaraj Vs. Commissioner of Excise, Kerala.
5. AIR 2004 SC 1576 : Mehsana District Central Cooperative Bank Ltd. Vs. State of Gujarat.
6. (2011) 11 SCC 800 : Meghwal Samaj Shiksha Samiti Vs. Lakh Singh.
7. AIR 2005 SC 1 : Friends Colony Development Committee Vs. State of Orissa.
8. 1996 (II) OLR 13 : Dilip Kumar Prusti Vs. Collector and District Magistrate, Sambalpur.
9. (2011) 2 SCC 568 : Prafull Goradia Vs. Union of India.
10. 2016 (I) OLR (SC) 179 : D.N. Jeevaraj Vs. Chief Secretary, Govt. of Karnataka.
11. 2012 (I) OLR (SC) 116 : Kanwar Singh Saini Vs. High Court of Delhi.
12. (2009) 7 SCC 314 : Santosh Sood Vs. Gajendra Singh.
13. AIR 1974 SC 960 : Ms. Gammon India Ltd., Vs. Union of India.
14. AIR 1999 SC 1218 : M/s Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, Haryana.

15. (2016) 15 SCC 480 : Indian Oil Corporation Ltd. Vs. Arti Devi Dangi.
16. (2003) 8 SCC 311 : Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education,
17. (2013) 2 SCC 398 : Kishore Samrite Vs. State of U.P.
18. (2008) 12 SCC 481 : K.D. Sharma Vs. Steel Authority of India Ltd.
19. (1996) 5 SCC 530 : Dr. Budhi Kota Subbarao Vs. K. Parasaran.
20. (2010) 3 SCC 402 : State of Uttaranchal Vs. Balwant Singh Chaufal.
21. 122 (2016) CLT 609 : Chhabindra Mukhi Vs. State of Odisha.
22. (2007) 8 SCC 212 : Chief Commercial Manager, South Central Railway, Secunderabad Vs. G. Ratnam,
23. (2006) 1 SCC 314 : S.K. Shukla Vs. State of U.P.
24. 2004 (I) Cr.L.J. 165 : Laxmidhar Roul Vs. Devraj Mohanty.
25. (2000) 5 SCC 287 : Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar.
26. (2016) 15 SCC 480 : Indian Oil Corporation Ltd. Vs. Arti Devi Dangi.
27. 2018 (2) ABR (NOC) 38 (BOM.)(NAGPUR BENCH) : Ujwala Santosh Kendre Vs. Bharat Petroleum Corporation Limited, Nashik.
28. AIR 2013 (NOC) 312 (CAL.) : Rananjoy Bhattacharya Vs. Union of India.
29. AIR 2000 SC 3266 : M.S.Jayaraj Vs. Commissioner of Excise, Kerala.
30. AIR 2004 SC 1576 : Mehsana District Central Cooperative Bank Ltd. Vs. State of Gujarat
31. AIR 2005 SC 1 : Friends Colony Development Committee Vs. State of Orissa.
32. 1996 (II) OLR 13 : Dilip Kumar Prusti Vs. Collector and District Magistrate, Sambalpur.
33. (2006) 1 SCC 314 : S.K. Shukla Vs. State of U.P.
34. 2004(1) Cr.L.J. 165 : Laxmidhar Roul Vs. Devraj Mohanty.
35. AIR 1971 SC 246 : Nagar Rice and Flour Mills Vs. N.T. Gowda.
36. AIR 1976 SC 578 : J.M. Desai Vs. Roshan Kumar.
37. AIR 1980 SC 517 : Ibrahim Khan Vs. State of M.P.
38. (1999) 6 SCC 552 : Malik Bros Vs. Narendra Dadhich.
39. 2003 (9) Scale 741: Ashok Kumar Pandey Vs. State of West Bengal.
40. (2006) 5 SCC 28 : T.N. Godavarman Thirumulpad Vs. Union of India.
41. AIR 1982 SC 149 : 1981 Supp. SCC 87 : S.P. Gupta Vs. President of India.
42. AIR 1993 SC 892 : Janata Dal Vs. H.S. Chowdhary.
43. AIR 1993 SC 852 : Ramjas Foundation Vs. Union of India.
44. (1994) 6 SCC 620 : K.R. Srinivas Vs. R.M. Premchand.
45. (1995) 1 SCC 242 : Noorduddin Vs. K.L. Anand.
46. AIR 1996 SC 2687 : Dr. Buddhi Kota Subbarao Vs. K. Parasaran.
47. AIR 1997 SC 1236 : Ramniklal . N. Bhutta Vs. State of Maharashtra.
48. (2010) 11 SCC 557 : Manohar Lal Vs. Ugrasen.
49. (2011) 7 SCC 639 : M.P. Vs. Narmada Bachao Andolan.

For Petitioners : Dr. A.K. Mohapatra, Sr. Adv. M/s. A.K. Patra and B. Shadangi, [in W.P.(C)(PIL) No.12434/2020]

Mr. Yeeshan Mohanty, Sr. Adv., M/s. R.K. Routray, K.K. Mohapatra, B.P.B. Bahali & Dr. S.K. Kanungo [in W.P.(C)(PIL) No. 18169]

For Opp. Parties : Mr. S. Palit, Addl. Govt. Adv.
Mr. A.K Bose, Asst. Solicitor General for India
Mr. S.P. Mishra, Sr. Adv. & Mr. S.Mishra, (For HPCL)

Mr. Amitav Das, (For NHAI)

Mr. D.P. Dhal, Sr. Adv.
M/s. B.S. Dasparida, S.K. Dash, S.Mohapatra,
K. Mohanty & M.K. Agrawalla,
[For O.P.-4 in W.P.(C)(PIL) No.12434/2020]
[For O.P.-6 in W.P.(C)(PIL) No. 18169/2020]

Mr. B.P.B. Bahali & Associates[For intervenor petitioners]

Mrs. Sujata Jena & Associates[For intervenor petitioners]

JUDGMENT Date of Hearing : 04.09.2020 : Date of Judgment: 24.09.2020

PER: DR. B.R. SARANGI, J.

Both the writ petitions, in the guise of public interest litigation espousing the public cause, have been filed seeking quashment of order dated 19.03.2020 passed by the Collector, Jagatsinghpur granting "No Objection Certificate" (NOC) under Rule 144(5) of the Petroleum Rules, 2002 in favour of Hindustan Petroleum Corporation Ltd. (HPCL), Odisha for permitting Usharani Sahoo to set up retail outlet over plot no. 1002(P), Khata No. 124 and Plot No. 1004(P), Khata No. 119, Kisam Gharabari, Mouza- Iswarpur, Tahasil- Balikuda, Dist- Jagatsinghpur on the ground that the same is violative of Gazette Notification dated 24.01.2020 and the guidelines issued on 24.07.2013 by the Government of India, Ministry of Road Transport & Highways.

Since relief sought in both the writ petitions is akin to each other and their cause of action is also common, they were heard together and are disposed of by this judgment, which will govern both the cases.

2. The factual matrix of the case, in hand, is that the Indian Roads Congress (IRC), which is the apex body of Highway Engineers in the country, was set up in December, 1934 on the recommendations of the Indian Road Development Committee, otherwise known as Jayakar Committee, set up by the Government of India with objectives of road development in India. IRC works in close collaboration with Ministry of Road Transport and Highways (MoRTH). The Director General (Road Development) and Special Secretary, MoRTH is the honorary treasurer of the IRC. The IRC issues

guidelines from time to time on the location, layout and access to fuel stations in the National Highway, State Highways and Major District Roads for greater need, for road safety and also on other subject matter of road construction, which are universally followed by the Central Government and several State Governments, including Odisha in PWD and other concerned departments. MoRTH in its letter dated 20.09.2019 on road safety measures stressed on the strict adherence to the codes and guidelines issued by the Ministry and IRC from time to time, non-implementation of which was very seriously viewed by the Supreme Court Committee on road safety.

2.1. As per Clause 1.2 of the IRC guidelines on the establishment of fuel outlets, the norms were finalized in consultation with the Ministry of Petroleum and the oil companies, which are binding on them. Similarly, as per Clauses 3.2 and 4.5 of the IRC guidelines, the norms and distances are applicable to all fuel stations along the undivided and divided carriageway sections of all categories of roads, i.e., National Highway, State Highways, Major District Roads and Rural Roads in plain, rolling and hilly terrain.

2.2. The guidelines/norms were issued by the MoRTH on 24.07.2013 for access permission to fuel stations etc. along National Highways. As per Appendix-I of the said guidelines, an applicant should submit self-certified proposal for seeking access permission to the Highway Administration. It is also specified in Clause-1 of the Appendix-I that the norms have been finalized in conformity to IRC: 12. In clause- 4.2 thereof it is categorically prescribed that the location of the proposed fuel station should not interfere with future improvements of the highway and the nearby intersections/junctions. Clause-4.5, 4.5.1, 4.6, 6 and 8 thereof prescribe the minimum distance criteria and the same should be adhered to.

2.3. In consonance with the guidelines, referred to above, an advertisement was issued on 25.11.2018 by the HPCL for appointment of retail outlet dealerships in the State of Odisha. Therein at serial no.2 for Bhubaneswar region in the district of Jagatsinghpur for location Balikuda Block (Balikuda Block Chowk to Saw Mill Chhak on RHS of NH.55) of regular type of RO (Retail Outlet) for category OBC was advertised. Pursuant to such advertisement, Usharani Sahoo applied for the said retail outlet offering her land situated at plot no. 1002 (p), Khata No. 124 and plot no. 1004 (p), Khat No. 119, Mouza- Iswarpur, Tahasil- Balikuda, Dist.- Jagatsinghpur. The HPCL, finding the site as most suitable, issued Letter of

Intent (LOI) in favour of Usharani Sahoo on 16.10.2019. Accordingly, the HPCL, as per Rule 144 (5) of the Petroleum Rules, 2002, applied for grant of NOC in its favour from the Collector, Jagatsinghpur for installation of retail outlet at the proposed site, along with relevant documents, on 21.11.2019. The Revenue Inspector, Kusunpur submitted a report on 04.01.2020 to the Tahasildar, Balikuda furnishing the required information on the grant of NOC. In the said report at serial no.2 it was categorically reported that both the plots of proposed site are adjacent to NH-55 and Nayanjori (roadside land) and it is 100 metres away from inhabitation. At serial no.3, it was however reflected that the proposed land is situated at a distance of 7 meters from NH-55. At serial no.6 it was indicated that the proposed land is situated 300 metres away from Iswarpur Primary School. At serial no.9 it was reported that the proposed land is situated 50 metres away from ESSAR Petrol pump. The Tahasildar Balikuda, on 07.01.2020, forwarded the report of the Revenue Inspector to the Addl. District Magistrate, Jagatsinghpur.

2.4 At that point of time, an extraordinary gazette notification was issued by the MoRTH of the Central Government on 24.01.2020 in regard to the details of land acquisition specifying the State, district, tahasil and village, as per the schedule to the said gazette notification, for up-gradation to 2/4 laning with paved shoulders of certain distance of NH-55. During the enquiry conducted by the R.I., basing on which report dated 04.01.2020 was submitted, the schedule land, along with village Iswarpur, was coming under NH-55. After the notification dated 24.01.2020 issued by MoRTH, the suit plots and mouza-Iswarpur were not coming under NH-55. Consequently, as per instructions of the Collector & District Magistrate, Jagatsinghpur, vide letter dated 29.02.2020, Tahasildar, Balikuda directed R.I., Kusunpur to cause enquiry and submit a report. Accordingly, an enquiry was conducted by the R.I., Kusumpur and report was submitted on 06.03.2020. Basing on such report, Tahasildar, Balikuda submitted a check list on 06.03.2020 for NOC clarifying therein that Iswarpur village is not coming under the NH-55, as per the gazette notification dated 24.10.2020. After considering the same, the Collector, Jagatsinghpur, vide order no. 4059 dated 19.03.2020, granted NOC in favour of HPCL for setting up of a retail outlet over the schedule land, which is subject matter of challenge in both the writ applications.

3. Dr. A.K. Mohapatra, learned Sr. Counsel appearing along with Mr. A.K. Patra, learned counsel for the petitioner in W.P.(C) No.12434 of 2020 contended that the NOC granted by the Collector, Jagatsinghpur in favour of

HPCL for installation of retail outlet at the proposed location, which has been allotted in favour of Usharani Sahoo, is not sustainable in the eye of law as the said location does not fulfill the eligibility criteria and requirement as per the IRC guidelines read with the guidelines issued by the MoRTH on 24.07.2013 requiring to maintain distance of 300 metres from the intersection or road and inhabitation, as well as another petrol pump and, as such, adherence to such distance is mandatory. More so, the area being accident prone due to traffic jam and in the nearby vicinity schools are situated and that apart one 11 KV electricity line is running over the proposed location, it is contended that the writ petitions have been filed in the greater public interest and, therefore, the NOC issued by the Collector, Jagatsinghpur in favour of the HPCL should be quashed.

To substantiate his contention, he has relied upon the judgments of the apex Court as well as of this Court in ***Indian Oil Corporation Ltd. v. Arti Devi Dangi,*** (2016) 15 SCC 480; ***Ujwala Santosh Kendre v. Bharat Petroleum Corporation Limited, Nashik***, 2018 (2) ABR (NOC) 38 (BOM.) at Nagpur Bench; ***Rananjoy Bhattacharya v. Union of India***, AIR 2013 (NOC) 312 (CAL.); ***M.S. Jayaraj v. Commissioner of Excise, Kerala***, AIR 2000 SC 3266; ***Mehsana District Central Cooperative Bank Ltd. v. State of Gujarat***, AIR 2004 SC 1576; ***Meghwal Samaj Shiksha Samiti v. Lakh Singh***, (2011) 11 SCC 800; ***Friends Colony Development Committee v. State of Orissa***, AIR 2005 SC 1; and ***Dilip Kumar Prusti v. Collector and District Magistrate, Sambalpur,*** 1996 (II) OLR 13.

4. Mr. Y. Mohanty, learned Sr. Counsel appearing along with Mr. S.K. Kanungo, learned counsel for the petitioner in W.P.(C) No.18169 of 2020 endorsed the arguments advanced by Dr. A.K. Mohapatra, learned Sr. Counsel appearing on behalf of the petitioner in the connected writ petition and contended further that while granting NOC the Collector, Jagatsinghpur has not passed a reasoned order and, as such, NOC has been granted without any application of mind. It is further contended that the Collector, Jagatsinghpur has given NOC in favour of the HPCL in respect of the site belonging to Usharani Sahoo, who is a single applicant pursuant to advertisement issued for grant of retail outlet at Iswarpur. The proposed site at Iswarpur is within SH-43 and the lay out plan of which has been approved on 14.11.2019 and, as such, the NOC has been granted in violation of gazette notification dated 24.01.2020. It is further contended that the specific location, i.e., on RHS of NH-55 is an essential condition, as per the

advertisement, and compliance of the same is mandatory in nature, but the proposed location is under NH-55 at the time of advertisement dated 25.11.2018, and in view of the gazette notification dated 24.01.2020 the proposed Iswarpur village is not coming under NH-55. Thereby, the NOC, having been granted by the Collector without any application of mind, cannot be sustained in the eye of law. As such, the NOC has been granted in deviation of the specific condition in the advertisement and against the touchstone of public interest. It is also contended that by letter dated 11.07.2019, the Executive Engineer, NH Division informed that the alignment of NH-55 from Kandarpur to Nuagaon, including proposed by-pass from Balikuda-Kania-Borikina-Ibrisingh, 17.60 KM is under active consideration for approval from NHAI and, as such, the matter is still pending. Therefore, it is contended that the NOC so granted by the Collector cannot sustain in the eye of law and the same should be quashed.

To substantiate his contention, he has relied upon the judgments of the apex Court in ***Prafull Goradia v. Union of India***, (2011) 2 SCC 568; ***D.N. Jeevaraj v. Chief Secretary, Govt. of Karnataka***, 2016 (I) OLR (SC) 179; and ***Kanwar Singh Saini v. High Court of Delhi***, 2012 (I) OLR (SC) 116.

5. Though notice was issued to all the opposite parties and the matter was heard and judgment was reserved vide order dated 13.08.2020, but in course of preparing judgment it was revealed that notice as against opposite party no.1-NHAI was not made sufficient. Therefore, the matter was listed under the heading "to be mentioned" and the same was taken up on 19.08.2020, on which date direction was given to the petitioners to serve copy of the writ petitions on Mr. Amitav Das, learned counsel who usually appears for NHAI. In compliance of the said order, copy of the writ petitions were served on Mr. Amitav Das, who entered appearance and filed memo contending that NHAI be deleted from the cause list, as vide notification dated 15.03.2016 the Central Government, in exercise of power conferred by Section 5 of the National Highway Act, 1956, directs the State Government of Odisha to execute the new NH-55. Thereby, NHAI has no role to play in the matter. Consequentially, learned State Counsel was called upon to obtain instructions, vide order dated 31.08.2020, to file specific affidavit with regard to applicability of the guidelines and norms issued by the MoRTH dated 26.06.2020. Therefore, in view of the memo filed by Mr. Amitav Das, learned counsel, though he was present in Court but he did not participate in the hearing.

6. Mr. S.P. Mishra, learned Sr. Counsel appearing along with Mr. S. Pattnaik, learned counsel for HPCL raised preliminary objection with regard to maintainability of the public interest litigation by the petitioners and contended that at the behest of the proprietor of a nearby retail outlet the petitioners have been set up to file present writ petitions before this Court because of business rivalry, for which the same should be dismissed. He has justified the NOC granted by the Collector, Jagatsinghpur in favour of HPCL and contended that the petitioners have not come up to this Court with clean hands by disclosing the correct facts. It is contended that an advertisement was issued on 25.11.2018 for appointment of Regular/Rural outlet dealerships for various location at Balikuda Block chowk to saw mill chhak on the right hand side of NH-55 under type of retail outlet being regular for OBC category. As per the terms and conditions mentioned in the broacher for dealership selection 2018, Usharani Sahoo offered land for retail outlet purpose which was abutting to NH-55 and she being the sole applicant for the aforesaid location, was duly selected as per the prescribed procedure. It is further contended that as per the dealership guidelines the applicant was asked to obtain information from National Highway Authorities about the status of the road in respect of the advertised location at Balikuda Block (Balikuda Block chowk to saw mill chhak on RHS of NH-55). Accordingly, the Executive Engineer, NH Division, vide letter dated 11.07.2019 responded that vide letter no.RO/BBSR/11011/NH/IAHE/39/ORS/10-11/08/178 /2010-2449 dated 14.03.2019 the alignment of NH-55 from Kandarpur to Nuagaon, including the proposed bye-pass from Balikuda-Kania-Borikina-Ibrisingh-17.60 km is under active consideration for approval. The plot offered by Usharani Sahoo is situated in between Balikuda Block chowk to saw mill chhak and is not coming under the proposed bye-pass in the proposed alignment. Therefore, the Corporation issued letter of intent on 16.10.2019 selecting Usharani Sahoo for the purpose of setting up of the retail outlet, after the selection process was completed on 14.10.2019, accordingly LOE was issued on 16.10.2019. By the subsequent gazette notification dated 24.01.2020 issued by the MoRTH in respect of NHAI, the mouza/village Iswarpur was excluded from the National Highway. Therefore, the location of the land where the retail outlet is proposed to be established remains to be the same, as the selection process for the said retail outlet for the advertized location "Balikuda Block chowk to saw mill chhak" in the district of Jagatsinghpur, was completed on 14.10.2019. It is further contended that HPCL, after obtaining due statutory approval from the district administration under Rule 144 of Petrol Pump Rules, 2002, undertaken the development of

the land by the dealer to make it habitable and imbedded the storage tank in the earth and provided the pumps and other facilities considered necessary at the retail outlet and, as such, due investments have also been made by the HPCL and the selected candidate. As such, the retail outlet of the HPCL has been commissioned on 27.06.2020 and petroleum products have already been supplied to Usharani Sahoo. But while awaiting for final approval to commence its operation, at that point of time, these public interest litigations have been filed at the behest of the rival businessmen, whose petrol pumps are situated nearby vicinity, and thereby the writ petitions in the guise of public interest litigation are liable to be dismissed as not maintainable.

To substantiate his contention, he has relied upon the judgments of the apex Court in ***Santosh Sood v. Gajendra Singh***, (2009) 7 SCC 314; ***Ms. Gammon India Ltd., v. Union of India***, AIR 1974 SC 960; ***M/s Saraswati Industrial Syndicate Ltd. v. Commissioner of Income Tax, Haryana***, AIR 1999 SC 1218; and ***Jasmine Sirajudeen v. State of Kerala, High Court of Kerala, Ernakulam***, (W.A. No. 27 of 2020 and batch of matters disposed of on 05.03.2020).

7. Mr. S. Palit, learned Addl. Government Advocate appearing for opposite parties contended that the Addl. District Magistrate, Jagatsinghpur directed the Tahasildar, Balikuda on 05.12.2019 to submit a detailed inquiry report in order to grant NOC for setting up of the retail outlet by HPCL. In response thereto, on 07.01.2020, the Tahasildar, Balikuda submitted a detailed inquiry report, basing on the joint inquiry report dated 04.01.2020 of the Revenue Supervisor, Balikuda and R.I. Kusunupur along with the objection filed by Mr. Ajayananda Mohaptra, Advocate, Bhanjanagar, Ganjam. Thereafter, notification was issued by MoRTH on 24.01.2020. Therefore, the Collector, Jagatsinghpur, vide letter dated 29.02.2020, directed the Tahasildar, Balikuda to submit a specific report on serial no.1 and 5 of the enclosed check list for taking further action at his end. Accordingly, the Tahasildar submitted the enquiry report, vide letter dated 06.03.2020. In the joint enquiry report submitted by Revenue Supervisor, Balikuda and R.I. Kusunupur on 04.01.2020 it had been mentioned that the suit plots i.e., nos.1002 and 1004 of mouza-Iswarpur were coming under NH-55, which is reflected in the advertisement made by the HPCL describing the location of proposed retail outlet from Balikuda Block chhak to Saw mill chhaka on RHS of NH-55. As per the instructions of the Collector and District Magistrate, Jagatsinghpur, vide letter dated 29.02.2020, the Tahasildar,

Balikuda directed the Revenue Inspector, Kusunupur to cause an enquiry and submit report and accordingly enquiry was conducted by the R.I. Kusunupur and report was submitted on 06.03.2020. Pursuant thereto, the Tahasildar, Balikuda submitted his report describing lawful possession of Usharani Sahoo over the plots in question and clarified that during the enquiry conducted by the Tahasildar the suit plots were coming under NH-55, but after the gazette notification of Government of India dated 24.01.2020, the suit plots in the mouza-Iswarpur were not coming under NH-55 and, as such, this change was communicated by the Tahasildar, Balikuda, vide letter dated 06.03.2020. Further, the objection which had been filed by Mr. Ajayananda Mohapatra, Advocate with a prayer not to issue NOC to HPCL, relying upon the circular dated 24.07.2013, as the said suit plots are not coming under the NH-55, in view of the notification dated 24.01.2020 of MoRTH, was considered by the Collector and NOC was granted in favour of HPCL. Thereby, no illegality and irregularity has been committed by the Collector by issuing such NOC in favour of the HPCL.

It is further contended that the matter was reserved on 13.08.2020 for judgment and again thereafter it was listed under the heading "to be mentioned" on 19.08.2020, on which date this Court directed to serve copy of the writ petitions on Mr. Amitav Das, learned counsel who usually appears on behalf of NHAI. On receipt of copies of the writ petitions, he filed a memo indicating that NHAI has nothing to do in the matter and the disputed lands belonged to NH Division of the State Government and not pertaining to NHAI. Thereafter, I.A. No. 9782 of 2020 was filed by the Executive Engineer, NH Division, Cuttack seeking intervention in the matter, which was allowed and consequentially he sought time to file specific affidavit as regards the applicability of the guidelines and norms dated 26.06.2020 issued by MoRTH.

It is contended, by referring to the affidavit filed by the Executive Engineer, that power to give permission for access to national highways lies with the Highway Administration as per the Highway Administration Rules, 2004 under the Control of National Highways (Land and Traffic) Act, 2002. Vide circular dated 24.07.2013 MoRTH, Government of India enunciated guidelines/norms for access permission to fuel stations, private properties, rest area complexes and such other facilities along National Highways. The said guidelines have been revised/superseded by circular dated 26.06.2020 by which power to give permission for access to the National Highways is

vested with the competent authority of the National Highways. It is further contended that in view of the procedure, as stipulated under the guidelines for access permission to fuel station, the beneficiary has to apply the highway administration so that the competent authority can consider and scrutinize the site of the fuel station. So far as the present case is concerned, no application has been submitted to the competent authority by the beneficiary so as to assess the viability of installation of the fuel station for the safety of the people and for larger interest of the public. Therefore, the HPCL /private party has to apply with all the relevant documents, before Executive Engineer, and the same shall be considered by the proposing authority, i.e., Executive Engineer, National Highways, Public Works Department. Therefore, it is contended that the writ petitions should be dismissed on that count only.

To substantiate his contention, he has relied upon the judgments the apex Court as well as this Court in ***Indian Oil Corporation Ltd. v. Arti Devi Dangi***, (2016) 15 SCC 480; ***Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education***, (2003) 8 SCC 311; ***Kishore Samrite v. State of U.P.***, (2013) 2 SCC 398; ***K.D. Sharma v. Steel Authority of India Ltd.***, (2008) 12 SCC 481; ***Dr. Budhi Kota Subbarao v. K. Parasaran***, (1996) 5 SCC 530; ***State of Uttaranchal v. Balwant Singh Chaufal***, (2010) 3 SCC 402; ***Chhabindra Mukhi v. State of Odisha***, 122 (2016) CLT 609; ***Chief Commercial Manager, South Central Railway, Secunderabad v. G. Ratnam***, (2007) 8 SCC 212, ***S.K. Shukla v. State of U.P.***, (2006) 1 SCC 314; ***Laxmidhar Roul v. Devraj Mohanty***, 2004 (I) Cr.L.J. 165; and ***Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar***, (2000) 5 SCC 287.

8. Mr. D.P. Dhal, learned Sr. Counsel appearing along with Mr. S. Mohapatra, learned counsel for opposite party-Usharani Sahoo contended that these public interest litigations have been filed with an ulterior motive, as the petitioners are no way connected with the installation of petrol pump, rather they have been planted to file such writ petitions. It is further contended that NOC had been granted by the Collector, Jagatsinghpur in favour of HPCL, without violating the gazette notification dated 24.01.2020, as mouza-Iswarpur was not coming under NH-55. It is further contended that the writ petitions are filed at the behest of one Sarat Chandra Nayak of village-Bhagabanpur, who is the proprietor of a nearby outlet, namely, ESSAR Petrol Pump. More so, the petitioner in W.P.(C) No. 12434 of 2020 is not a resident of Balikuda Block but of village Kantaballvapur under

Jagatsinghpur Block and his house is situated around 25 kms away from Balikuda Block. So far as the report of the R.I. is concerned, it is stated that at the initial stage the schedule land was coming under NH-55 but subsequently as per the notification dated 24.01.2020, the position of the land was changed due to alignment. Therefore, the District Magistrate-cum-Collector, Jagatsinghpur has duly considered the same in proper perspective and, as such, the schedule plots do not come under the alignment of NH-55, i.e., Kandarpur to Nuagaon as well as proposed bye-pass from Balikuda-Kania-Borikina-Ibrisingh 17-60 kms, the location of the outlet was changed which is around 4 kms away from the schedule land. Therefore, the NOC has been granted taking into consideration the report furnished by the Tahasildar, Balikuda dated 06.03.2020 and S.P. Jagatsinghpur for installation of the outlet. But all the times, attempt was made by Sarat Chandra Nayak, the rival businessman to see that NOC should not be issued for installation of the outlet by Usharani Sahoo. Apart from the same, Mr. Ajayananda Mohapatra also filed C.S. No. 108 of 2020 before the Civil Judge (Sr. Division), Jagatsinghpur seeking direction to the District Magistrate-cum-Collector, Jagatsinghpur not to issue NOC in favour of HPCL for opening of the retail outlet. He having failed in his attempt to get any interim relief in the said suit, in the garb of public interest litigation, the present writ petitions have been filed and, as such, the civil suit is still pending consideration. Therefore, it is contended that it is a camouflage approach at the behest of Sarat Chandra Nayak, the rival businessman, and consequentially the writ petitions cannot sustain and are liable to be dismissed with heavy cost.

It is further contended that after the NOC was granted to HPCL, immediately permission was granted to Usharani Sahoo to go ahead with the work and accordingly huge investments have been made for establishment of fuel outlet. As such, the outlet was scheduled to be opened on 04.07.2020, but before that because of the interim order passed by this Court on 09.06.2020, the function of the outlet has been stalled causing huge loss to the opposite party-Usharani Sahoo and HPCL. Therefore, it is contended that these types of litigations should not be encouraged at the instance of the persons those who are acting at the behest of the above named rival businessman.

9. Mr. A.K. Bose, learned Asst. Solicitor General appearing for Regional Officer, Ministry of Road Transport and Highways, Bhubaneswar, Government of India contended that MoRTH issued a comprehensive

guidelines/norms on 26.06.2020 for access permission to fuel stations, private properties, rest area complexes and such other facilities along National Highways. The power to give permission for access to national highways lies with the Highway Administration, as per the Highway Administration Rules, 2004 under the control of National Highway (Land and Traffic) Act, 2002. It is contended that Government of India vide gazette notification nos.S.O. 3292(E) and S.O. 3293(E) dated 16.09.2019 authorized the Regional Officer of the MoRTH to exercise the powers conferred under Sections 25, 28, 31 and 43 of the said Act in respect of their respective territorial jurisdiction. Therefore, as per the guidelines issued on 26.06.2020, the applicant would submit a self certified proposal for seeking access permission to the Highway administration along with all the documents. As per clause-2.5.2, the Executive Engineer of the National Highways wing of the State PWD in respect of their territorial jurisdictions shall be the proposing authority and Regional Officer of MoRTH shall be the competent authority for approval of the proposal.

It is further contended that vide notification dated 15.03.2016, the Central Government directed for execution of new NH-55, which shall be exercisable by the State Government as per letter dated 21.03.2016 issued by the Chief Engineer NH Division, Odisha. It is further contended that the stretch in question pertaining to NH-55 was handed over to the Executive Engineer, NH Division, vide letter dated 10.05.2016, in which village Balikuda finds place and it was stated that mouza-Iswarpur is about 3 km away from Balikuda in Balikuda-Borikina Road Section. It is contended that the circular dated 26.06.2020 clearly stipulates that notwithstanding NOC granted by the licensing authority the concerned Highway Authority has to issue NOC, which will be by the competent officers of MoRTH, after receiving proposal of designated proposing authority (Highway Administration), which in this case is Executive Engineer, NH, PWD, as contained at sl.no.5 of table-5 under para-5 of the circular dated 18.09.2019 issued by the MoRTH. Therefore, it is contended that the writ petitions merit no consideration and are to be dismissed.

10. Mr. B.P.B. Bahali, learned counsel filed I.A. No. 8423 of 2020 on behalf of intervenor petitioners, namely, Harekrushna Mohanty, Biswendu Swain, Nabakishore Barik, Debendra Kumar Maharana and Satyananda Barik and supported the contention raised by learned Senior Counsel appearing for the petitioners and laying emphasis on the guidelines dated

24.07.2013 issued by MoRTH contended that in view of that guidelines since the proposed retail outlet is situated within 300 metres, from intersection of the SH, NOC granted by the Collector is without any application of mind, therefore seeks for quashing of the same. It is further contended that even if subsequent revised guidelines issued by the authority have not been fulfilled by Usharani Sahoo, therefore selection and allotment of retail outlet in her favour is in gross violation of the guidelines issued by the IRC as well as NHAI. Therefore, claims that NOC granted in favour of HPCL for opening of retail outlet by Usharani Sahoo should be quashed.

To substantiate his contention he has relied upon ***Indian Oil Corporation Ltd. v. Arti Devi Dangi***, (2016) 15 SCC 480; ***Ujwala Santosh Kendre v. Bharat Petroleum Corporation Limited, Nashik***, 2018 (2) ABR (NOC) 38 (BOM.)(NAGPUR BENCH); ***Rananjoy Bhattacharya v. Union of India***, AIR 2013 (NOC) 312 (CAL.); ***M.S.Jayaraj v. Commissioner of Excise, Kerala***, AIR 2000 SC 3266; ***Mehsana District Central Cooperative Bank Ltd. v. State of Gujarat***, AIR 2004 SC 1576; ***Friends Colony Development Committee v. State of Orissa***, AIR 2005 SC 1; and ***Dilip Kumar Prusti v. Collector and District Magistrate, Sambalpur***, 1996 (II) OLR 13.

12. Mrs. Sujata Jena files affidavits of Harekrushna Mohanty, Nabakishore Barik, Debendra Kumar Maharana and Satyananda Barik, who are intervenors in I.A. No. 8423 of 2020 and for whom Mr. B.P.B. Bahali was appearing, contending therein that they had never signed any application to appear in the case as intervenors and they are not subscribing to such signature and as such they do not know anything about the case itself. They also contend that fraudulating their signatures if any application has been filed, the action as deemed fit should be taken against the person concerned. It is also further contended that the petitioners in order to fulfill their ill intention made conspiracy with the proprietor of ESSAR Petrol Pump, namely, Sarat Chandra Nayak, having failed to get an interim order in C.S. No. 108 of 2020 pending before the learned Civil Judge (Senior Division), Jagatsinghpur, filed these frivolous applications and, therefore, contended that the intervention application be dismissed with cost.

13. This Court heard through video conferencing Dr. A.K. Mohapatra, learned Senior counsel appearing along with Mr. A.K. Patra, learned counsel for the petitioner in W.P.(C) No. 12434 of 2020; Mr. Yeesan Mohanty,

learned Senior Counsel appearing along with Mr. R.K. Routray, learned counsel for the petitioners in W.P.(C) No. 18169 of 2020; Mr. S. Palit, learned Addl. Govt. Advocate appearing for the State opposite parties in both the writ petitions; Mr. A.K Bose, learned Asst. Solicitor General appearing for Govt. of India in both the writ petitions; Mr. S.P. Mishra, learned Senior Counsel appearing for HPCL in both the writ petitions; Mr. Amitav Das, learned counsel appearing for NHAI in both the writ petitions; Mr. D.P. Dhal, learned Senior Counsel appearing along with Mr. S. Mohapatra, learned counsel for Usharani Sahoo-opposite party no.4 in W.P.(C)(PIL) No.12434/2020 and opposite party no.6 in W.P.(C)(PIL) No. 18169/2020; Mr. B.P.B. Bahali, learned counsel appearing for the intervenors in I.A. No. 8423 of 2020; and Mrs. S. Jena, learned counsel appearing for some of the intervenors in I.A. No. 8423 of 2020. Pleadings having been exchanged between the parties, since an interim order of status quo had been passed on 09.06.2020 with regard to the site of the retail outlet in question, with the consent of the parties, the matter has been heard and disposed of finally at the stage of admission.

14. On the basis of the undisputed facts and rival contentions raised by the learned counsel appearing for the respective parties, this Court is to consider whether:

(i) the Collector, Jagatsinghpur is justified in granting NOC vide letter dated 19.03.2020 in favour of HPCL under Rule 144(5) of the Petroleum Rules, 2002; and

(ii) both the public interest litigations at the instance of the present petitioners are maintainable.

15. Before adverting into issue no.(i) whether the Collector, Jagatsinghpur is justified in granting NOC vide letter dated 19.03.2020 in favour of HPCL under Rule 144(5) of the Petroleum Rules, 2002, it is worthwhile to delve into the relevant clauses of Indian Roads Congress (IRC) 2009 guidelines, on which much reliance has been placed. Clauses-1.2, 3.2, 4.5 and 4.5.1, which are relevant for the purpose of deciding the instant issue, are extracted hereunder:-

> *"1.2 The Ministry of Shipping, Road Transport and Highways (MOSRT&H) revised substantially the norms for location, layout and access to fuel stations along the National Highways keeping in view the increased speed of vehicles and greater need for road safety due to development of National Highways network under various phases of National Highway Development Project (NHDP) and*

other development works on National Highways. These norms were circulated in October, 2003. These norms were finalized in consultation with the Ministry of Petroleum and the oil companies.

xx xx xx

3.2 These norms are applicable to all Fuel Stations with or without other user facilities of rest areas, along un-divided carriageway and divided carriageway sections of all categories of roads i.e. National Highways, State highways, Major District Roads and Rural roads in plain, rolling and hilly terrain, and passing through rural and urban stretches including towns and cities. For this purpose hilly or mountainous terrain would be, when the cross slope of the country is more than 25%. The urban stretches, only for the purpose of this guidelines, would be, where a highway passes through towns or cities which have been notified as Municipalities or Municipal Corporations.

xx xx xx

4.5. In order to provide safe length for weaving of traffic, fuel stations along highways/roads shall be located at the minimum distance from an intersection (gap in the central median be treated as intersection), as given below. For single carriageway section, these minimum distances would be applicable for both sides. All the distances shall be measured between the tangent points of the curves of the side roads at intersections/the median openings and the access/egress roads of the fuel stations, as is applicable, in a direction parallel to the centre line of the nearest carriageway of the highway.

The above mentioned distances are applicable for setting up of fuel stations along National Highways, State Highways and Major District Roads. In case of fuel stations along the Rural Roads in plain and rolling terrain, the distance from the intersection with NHs/SHs/MDRs can be reduced to 300 m in place of 1000 m depending on the level of traffic.

4.5.1 Non-urban (Rural) stretches

1) Plain and Rolling Terrain

(i) Intersection with NHs/SHs /MDRs/City Roads	*- 1000 m*
(ii) Intersection with Rural Roads /approach roads to private and public properties	*- 300 m*

2) Hilly/Mountainous Terrain

(i) Intersection with NHs/SHs/MDRs	*- 300 m*
(ii) Intersection with all other roads and tracks	*- 100 m"*

The MoRTH had issued separate guidelines on access permission to fuel stations, service stations, rest areas etc., vide circular dated 25.09.2003/17.10.2003, and access permission to private properties etc. along

the National Highways, vide circular dated 31.08.2000. With the improvement in the National Highway network, a greater need for road safety of the users had been felt along with stricter enforcement of the guidelines, for which it was decided that unified norms of access to fuel stations, service stations, private properties, rest areas and other such facilities along the national highways to be evolved. Accordingly, a guideline was issued on 24.07.2013, in which clauses-4.2, 4.5, 4.5.1 and 4.6 of Appendix-I, on which much reliance has been placed, read thus;

> *"4.2 It should be ensured that the location of the proposed fuel station does not interfere with future improvements of the highways and the nearby intersections/junctions.*
>
> *xx xx xx*
>
> *4.5 In order to provide safe length for weaving of traffic, fuel stations along National Highways shall be located at the minimum distance from an intersection (gap in the central median be treated as intersection) as given below. For Single carriageway section, these minimum distances would be applicable for both sides. All the distances shall be measured between the tangent points of the curves of the side roads at intersections/ the median openings and the access/egress roads of the fuel stations, as is applicable, in a direction parallel to the centre line of the nearest carriageway of the National Highway.*
>
> *4.5.1 Non-Urban (Rural) stretches.*

I	*Plain and Rolling Terrain*	*Distance*
(i)	*Intersection with NHs/SHs/MDRs*	*1000 m*
(ii)	*Intersection with Rural Roads/ approach roads to private and public properties*	*300 m*
2.	*Hilly/Mountainous Terrain*	
(i)	*Intersection with NHs/SHs/MDRs*	*300 m*
(ii)	*Intersection with all other roads and tracks*	*100 m*

> *xx xx xx*
>
> *4.6. The minimum distance between two fuel stations along with the National Highway would be as given below:-*

4.6.1	***Plain and Rolling Terrain in Non-Urban (Rural)***	***Distance***
(i)	*Undivided carriageway (for both sides of carriageway)*	*300, (Including deceleration and acceleration lanes)*
(ii)	*Divided carriageway (with no gap in median at this location and stretch)*	*1000m (Including declaration and acceleration lanes)*
4.6.2	***Hilly/ Mountainous Terrain and Urban Stretches***	
(i)	*Undivided carriageway (for both sides of carriageway)*	*300m (clear)*
(ii)	*Divided carriageway (with no gap in median at this location and stretch*	*300m (clear)*

xx *xx* *xx*

On a conjoint reading of the IRC guidelines and MoRTH guidelines, referred to above, it can be seen that the intersection with NH/SHs/MDRs has been fixed to 300 metres. Similarly, undivided carriageway (for both sides of carriageway) has been prescribed to 300 metres. Therefore, it is contended that there is no strict adherence to the above guidelines. In the memo of NHAI dated 26.08.2020, it has been clarified that the disputed land belongs to NH Division of State Government and not pertaining to NHAI. The said disputed stretch was notified as new NH-55, vide notification dated 17.09.2015. As such, vide notification dated 15.03.2016, the Central Government, in exercise of the power conferred by Section-5 of the NH Act, 1956 directed the State Government of Odisha to execute the new NH-55.

16. To fortify the above stand, reliance has been placed on the judgment of the apex Court in ***Arti Devi Dangi*** (supra). In paragraphs 7, 9 and 10 thereof, the apex Court held as follows:-

> *"**7.** ..... We, therefore, hold that the fulfilment of the requirements spelt out by the IRC Guidelines relevant to the present cases to be a mandatory requirement of the tender conditions. ……*
>
> ***9.** In view of the above conclusion reached, it is not necessary for us to consider the arguments advanced on the question of permissibility of deviations from the tender conditions on the touchstone of public interest or the issue of understanding the requirement of the IRC Guidelines as implied terms of the tender document.*
>
> ***10.** For the aforesaid reasons, the orders of the learned Single Judge as well as the Division Bench of the High Court cannot be sustained. We, therefore, set aside the same and allow the appeals."*

Similarly, in ***Dilip Kumar Prusty*** (supra) this Court held as follows:-

> *"2.……..As ultimately, No Objection Certificate" has been granted without considering the objections raised by the petitioner and without affording him an opportunity, he has visited this Court challenging the decision.*
>
> *12.……..On the basis of the preceding analysis, we are of the view that the learned Additional District Magistrate has not kept the norms while passing the order granting 'No Objection Certificate'. We have already held the stand taken by the authority that it was not obligated to appraise itself with regard to the norms is not acceptable. On the basis of this finding alone, we could have disposed of the writ application but we would also address ourselves in regard to the decision of resitement and the execution of the said decision. The prayer in the writ application*

is for quashing of Annexure-5 the order granting 'No Objection Certificate.' Grant of No Objection Certificate is given on the basis of an application filed by the Oil Company under Rule 143. The Oil Company, a Government undertaking is required to get with fairness. They had decided for resitement which is really not open to challenge. But while proceeding with resitement they cannot loss sight of the norms prescribed by them. Norms are laid down to be followed. If a policy is formulated by Government undertaking the same has to be adhered to. True it is, the prayer is for quashing of the ultimate act but the said ultimate act is because of the execution of resitement in flagrant violation of the norms. It is settled in law that a writ Court can mould the prayer. We are persuaded to mould the prayer in the instant case. Wee notice that the real grievance is with regard to the decision for the fixation of site, indication of which has been given in Rule 143 in violation of the norms set forth y the Company. We are constrained to observe that if the area in question comes within the 'D' Class market, the same is not permissible and applicable under Rule 143 by the Company being violative of its own norms should be regarded a incomplete. To put it in another way, the decision to resite the Pump art the present site is contrary to norms of the Oil Industries and therefore, the same is not sustainable and as on the said basis, 'No Objection Certificate' has been granted, the same is not tenable……."

Similar view has also been taken by the Bombay High Court of Nagpur Bench in ***Ujwala Santosh Kendre*** (supra) and by the Calcutta High Court in ***Rananjoy Bhattacharya*** (supra).

17. As it reveals from the record, the MoRTH, vide notification dated 17.09.2015, declared that new NH-55 would be "starting from its junction with NH-53 near Sambalpur connecting Redhakhole, Angul, Banarpal, Dhenkanal, Cuttack, Jagatsinghpur, Balikuda and terminating at Nuagaon in the State of Odisha". Thereafter, vide notification dated 15.03.2016, the Central Government directed that the execution of new NH-55 shall be exercisable by the State Government as per letter dated 21.03.2016 issued by the Chief Engineer NH Division, Odisha. The stretch in question pertaining to new NH-55 was handed over to the Executive Engineer, NH Division on 10.05.2016, in which letter the village Balikuda finds place and it is stated that mouza Iswarpur is about 3 km. away from Balikuda in Balikuda-Borikina Road Section. Vide Circular dated 18.09.2019 the designated proposing authority has been prescribed as Executive Engineer, National Highway, Public Works Department as provided at serial no.5 under table-5 of paragraph-5. Therefore, power to give permission for access to National Highways lies with the Highway Administration as per the Highway Administration Rules, 2004 under the control of National Highways (Land and Traffic) Act, 2002. Vide circular dated 24.07.2013, the MoRTH

enunciated Guidelines/Norms for access permission to fuel stations, private properties, rest area complexes and such other facilities along National Highways. Paragraph-3 of the said guidelines reads as follows:-

> *"The power to give permission for access to National Highways lies with the Highway Administration as per the Highway Administration Rules, 2004 under the Control of National Highways (Land and Traffic) Act, 2002. All such access permissions to the National Highways are to be given under Section 28 and 29 of Chapter-IV and Section 38 of Chapter-VI of the Control of National Highways (Land & Traffic) Act, 2002. These permissions are to be given by the concerned Highway Administration notified by the Central Government under sub-section (1) of Section 28 as per the Guidelines and instructions issued by the Central Government under sub-section(2) of Section 28 of the Control of National Highways (Land & Traffic) Act, 2002."*

The said guideline dated 24.07.2013, on which reliance has been placed by the counsel for the petitioners, has been revised/superseded by MoRTH, vide circular dated 26.06.2020, and the above requirements have been reiterated under paragraphs 2.2. and 2.3, whereby it has been stated that "the persons or entities requiring and applying for access to a National Highway, shall submit a self-certified proposal for obtaining access permission to the concerned Authority, to whom such Highway is entrusted". As per the notification dated 18.09.2019, the competent authority is the Highway Administration for Control and Management of National Highways. In paragraph-5 of the said notification, it has been provided that the power to grant of right to access to the Highway is vested with the competent authority of the National Highway Administration. For just and proper adjudication of the dispute, the required portion of the guidelines dated 26.06.2020 is quoted below:-

> *"The Ministry had issued guidelines regarding Grant of permissions for construction of access to various establishments situated along the National Highways e.g. Fuel Stations, Private Properties, Rest Area Complexes and such other facilities vide Circular No. RW/NH-33023/19/99/DO-III dated 24.07.2013 and its subsequent amendments from time to time with focus on enabling smooth flow of traffic, minimum interference from vehicles entering the Right of Way of a National Highway, safety of road users etc.*
>
> *Considering the difficulties faces and the experience gained over the years, the above mentioned guidelines/Norms have been revised, the details of which are separately enclosed under (Grant of permissions for construction of access of Fuel Stations, Wayside amenities, Private Properties, Rest Area Complexes, connecting roads and such other facilities)."*

The clauses-2.2, 2.3 and 3.0 of Appendix-I of the guidelines dated 26.06.2020, which are also relevant for the purpose of deciding the present issue, are extracted hereunder:-

"***2.2 Location Norms on Rural stretches of National Highways.***

Sr. No	*Items*	*Norms applicable*
1.	*Acceleration/Deceleration lane*	*Need to construct 100m acceleration lane and 70m deceleration lane.*
2.	*Distance of any Intersection with any category of road and median gap.*	*300 m*
3	*Any barrier including that of toll Plaza and Railway Level Crossing*	*1000 m*
4.	*Distance from the Start of approach road of Road Over Bridge (ROB)*	*200 m*
5.	*Start of approach road of Grade Separator/flyover*	*300 m*
6	*Distance between two fuel stations*	*Undivided carriage way – 300 m** *Divided Carriageway -1000 m** ** Including deceleration and acceleration lanes However, this restriction shall not apply in case access/egress for all such fuel stations are provided through common service road of 7.0 m width and not direct to NH.. Further, access for fuel stations at closer proximity than above distance may be allowed provided entry/exit for both the Fuel Stations are provided though service road of 7.0m width having sufficient length; further, additional length of such service road shall be constructed at the cost of the latter fuel station owner/company seeking grant of permission for access for the facility.*

2.3 Location Norms for Urban/Mountainous stretches of National Highways.

Sr. No	*Items*	*Norms applicable*
1	*Acceleration/Deceleration lane*	*The deceleration and acceleration lanes may be dispensed with for the fuel station located along urban roads and roads in hilly and mountainous terrain*
2	*Intersection with any category of road and median gap.*	*300 m*
3	*Any barrier including that of Toll Plaza and Railway Level Crossing*	*1000 m*
4	*Start of approach road of Road Over Bridge (ROB)*	*200 m*
5	*Start of approach road of Grade Separator/flyover*	*300 m*
6	*Distance between two fuel stations*	*300 m* for both divided and undivided carriageway* ** (Including deceleration and acceleration lanes)* *However, this restriction shall not apply in case access/egress for all such fuel stations are provided through common service road of 7.0 m width and not directly to NH. Further, access for fuel stations at closer proximity than 300m may be allowed provided entry/exit for both the Fuel Stations are provided though service road of 7.0m width having sufficient length; further, additional length of such service road shall be constructed at the cost of the latter fuel station owner/company seeking grant of permission for access for the facility.*
	Notes :	*a. All the dimensions are to be measured from the boundary of the Fuel Station.* *b. In case of distance from intersection with any category of road, the roads means paved carriageway (Bituminous/ concrete/Interlocking Concrete block) of 3.0m width and having length of Minimum 300m and above irrespective of the category of road.* *c. The minimum distance between two fuel stations on both sides of the highway is applicable for undivided carriageway. In case of divided carriageway, with no gap in medians, the distance restriction is for same side and is not applicable on the opposite side of the fuel Station. However, access for fuel stations at closer proximity may be allowed provided entry/exit for both the Fuel Stations are provided through service road of sufficient length; further, additional length of such service road shall be constructed at the cost of the latter fuel station owner/company seeking grant of permission for access for the facility.* *d. Distance between the Fuel Station and the structural barrier (i.e. toll plaza, railway level crossing, check barrier etc.) shall not apply if such barriers are located on service road only and are separated from the main carriageway.* *c. The gap in the Central Median shall be treated as Intersection.*

3.0 General Conditions of Siting.

i. Rest areas should have various amenities for users e.g. fuel stations, places for parking, toilets, restaurants, rest room, kiosks for selling sundry items, bathing facilities, repair facilities crèche etc. These aspects should be incorporated while planning for improvement and up-gradation of highways and/or planning for new fuel stations along with highways. The rest area complex may be planned subject to their commercial viability.

ii. It should be ensured that the location of the proposed fuel station does not interfere with future improvements of the highway and the nearby intersections/junctions.

iii. The fuel stations would be located where the highway alignment and profile are favourable, i.e. where the grounds are practically level, there is no sharp curves not less than those specified for minimum design speed or steep grades (more than 5%) and where sight distances would be adequate for safe traffic operations. The location should not interfere with the placement and proper functioning of highways signs, signals, lighting or other devices that may affect traffic operation.

iv. If two or more fuel stations are to be sited in close proximity for some reasons these would be grouped together to have a common access through a service road of 7.0m width and connected to the highway through acceleration, deceleration lanes. Any objection from the existing fuel station owner against granting of access permission from NH for the proposed new fuel station are to be overruled and access to all fuel stations in case of clustering, shall invariably be from the service road only. Wherever longer service road exists, which may itself act as deceleration/ acceleration lane, no separate deceleration/ acceleration lane is required. New entrant would be responsible for construction and maintenance of the common service road, deceleration & acceleration lanes drainage and traffic control device. Wherever available ROW is inadequate to accommodate such service roads, deceleration/acceleration lanes etc. the additional land by the side of ROW to accommodate such service roads shall be acquired by the new entrant Oil Company."

On perusal of the above mentioned letter dated 26.06.2020, it is made clear that the guidelines dated 24.07.2013 have been revised. In clause-3.0(iv) of Appendix-I of letter dated 26.06.2020 it has been specifically mentioned that if two or more fuel stations are to be sited in close proximity for some reasons these would be grouped together to have a common access through a service road of 7.0m width and connected to the highway through acceleration and deceleration lanes. Any objection from the existing fuel station owner against granting of access permission from NH for the proposed new fuel station are to be overruled and access to all fuel stations in case of clustering, shall invariably be from the service road only. As such, the HPCL has been required in the present guidelines to apply to the competent

authority, as indicated in the guidelines dated 26.06.2020, seeking access permission along the National Highway. The power to give permission for access to National Highway lies with the Highway Administration as per the Highway Administration Rules, 2004 under the control of National Highways (Land and Traffic) Act, 2002. Vide notification dated 18.09.2019, the MoRTH under the Control of National Highways (Land and Traffic) Act, 2002 has prescribed the competent authority i.e. Highway Administration for Control and Management of National Highway. In paragraph-5 of the said notification dated 18.09.2019, the Project Director of NHAI/GM or DGM of the NHIDCL/Executive Engineer of the NH Wing of the State PWD, Regional Officer of the Ministry/NHAI/ED of NHIDCL, as per their respective territorial jurisdictions, shall exercise the powers and functions of Highway Administrators in their ex-officio capacity to discharge the functions and exercise the powers as assigned to them. As per the guidelines/norms for access permission to fuel stations, the beneficiary has to apply the Highway Administration so that the competent authority can scrutinize the site of the fuel station as per the terms and conditions laid down in the guidelines dated 26.06.2020 issued by MoRTH and such application has to be made to the Executive Engineer, Highway Administration, which is the competent authority as per the notification issued on 18.09.2019. But, as it reveals from the record, no such application has been submitted to the competent authority by the beneficiary so as to assess the viability of the installation of fuel station for the safety of the people and for larger interest of the public. In the guidelines dated 26.06.2020, it is clearly stipulated that notwithstanding NOC granted by licensing authority the NOC will be issued by the competent officers of MoRTH, after receiving proposal of designated proposing authority, i.e., NH, PWD, as described at serial no.5 of table 5 under para-5 of the circular dated 18.09.2019 issued by MoRTH. Therefore, the NOC, which has been granted by the authority, is only a permission to set up the retail outlet and the subsequent procedure has to be followed in accordance with the guideline issued on 26.06.2020.

18. In ***G. Ratnam*** (supra), the apex Court held at paragraphs 18, 19 and 20 as follows:-

> *"**18.** We are not inclined to agree that the non-adherence of the mandatory instructions and guidelines contained in Paras 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained.*

> ***19.*** *We have carefully gone through the contents of various chapters of the Vigilance Manual. Chapters II, III, VIII, IX and Chapter XIII deal with Railway Vigilance Organisation and its role, Central Vigilance Commission, Central Bureau of Investigation, investigation of complaints by Railway Vigilance, processing of vigilance cases in Railway Board, suspension and relevant aspects of Railway Servants (Discipline and Appeal) Rules, 1968 as relevant to vigilance work, etc. Paras 704 and 705, as noticed earlier, cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. Broadly speaking, the administrative rules, regulations and instructions, which have no statutory force, do not give rise to any legal right in favour of the aggrieved party and cannot be enforced in a court of law against the administration. The executive orders appropriately so-called do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued. Such an order would confer no legal and enforceable rights on the delinquent even if any of the directions is ignored, no right would lie. Their breach may expose the subordinate authorities to disciplinary or other appropriate action, but they cannot be said to be in the nature of statutory rules having the force of law, subject to the jurisdiction of certiorari.*
>
> ***20.*** *It is well settled that the Central Government or the State Government can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules, it must be shown that they have been issued either under the authority conferred on the Central Government or the State Government by some statute or under some provision of the Constitution providing therefor. Therefore, even if there has been any breach of such executive instructions that does not confer any right on any member of the public to ask for a writ against the Government by a petition under Article 226 of the Constitution of India.*

In view of the aforesaid judgment, reliance placed on ***Arati Devi*** mentioned supra by learned counsel for the petitioner, is distinguishable on its fact that IRC guidelines for petrol pumps, as noticed by the Supreme Court, have been adopted by the State PWD of the State of Madhya Pradesh. Therefore, it is presumed that their Lordships of the apex Court must have scrutinized as to whether the State PWD of Madhya Pradesh has complied with all relevant laws applicable to such adoption, i.e. a valid gazette notification as prescribed under Section 5 of the General Clauses Act, 1897.

19. In ***S.K. Shukla v. State of U.P.,*** (2006) 1 SCC 314, which has been taken note of by this Court in ***Laxmidhar Roul v. Devraj Mohanty,*** 2004(1) Cr.L.J. 165, the apex Court in paragraph-4 stated that as per Section-5 of the General Clauses Act, 1897 when any regulation is dependent on the issuance

of a notification regarding their enforcement, such regulation cannot be said to have come into force by a process of reasoning or theorizing and as such their coming into force mandatorily depends upon the issuance of a notification in the official gazette. Any adoption of the IRC Guidelines needs to be notified by the State Government in its official Gazette in order to coming into force, and without such notification, the guidelines cannot be enforced mandatorily. Absence of such notification by the State of Odisha, further establishes the contention that the IRC guidelines are merely recommendatory in nature and lacks any manner of statutory basis.

20. A perusal of the PWD code would show that it was neither framed under Article 162 nor Article 309 of the Constitution of India, but in the preamble of such code it has been specifically mentioned that it should be followed by every department. The IRC is only a society registered under the Societies Registration Act and has no statutory backing. It is the apex body of road sector engineers and professionals in the country. The recommendation made by the same have no statutory value nor is binding upon a statutory authority. The norms issued by IRC are only a guideline for access, location and layout of roadside fuel stations and service stations published by the Indian Road Congress in 2012. As such, IRC norms are only recommendatory in nature and have no statutory value.

21. The case of ***Arati Devi Dangi*** (supra), on which reliance has been placed by learned Senior Counsel appearing for the petitioners, if is analyzed factually, it was a matter between the Indian Oil Corporation and the qualified bidders. Therefore, while dealing with the said case, the apex Court came to a finding as mentioned therein. But, in the present case, the petitioners are neither the competitors nor have they got any nexus with HPCL and, as such, they have no locus to ask the correctness and validity of allotment of rural petrol pump in fvaour of Usharani Sahoo.

22. Now, even if the matter is considered from other angle, the advertisement for establishment of retail outlet at different places in the district of Jagatsinghpur, including the present site, was issued on 25.11.2018 and following the procedure as envisaged by the HPCL, Usharani Sahoo was issued with LOI on 16.10.2019 and thereafter on 21.11.2019 the HPCL issued a letter to the Collector, Jagatsinghpur to issue NOC in their favour for establishment of retail outlet by Usharani Sahoo. Pursuant thereto, steps were taken by the District Administration by causing an enquiry and finally, on the

basis of the required information submitted by the Tahasildar on 06.03.2020, the Collector, Jagatsinghpur issued NOC in favour of the HPCL on 19.03.2020. But fact remains, PIL petitioners received a copy of the letter dated 21.11.2019 issued by HPCL to the Collector, Jagatsinghpur on 20.12.2019, but they kept silent over the matter. When HPCL, after completing all formalities, permitted Usharani Sahoo to go ahead with construction work and, as such, a huge amount was invested by both HPCL as well as Usharani Sahoo for establishment of such retail fuel tank, W.P.(C) No. 12434 of 2020 was filed on 19.05.2020, and to cover up the lacunae in the said writ petition, another set of people filed W.P.(C) No. 18169 of 2020 on 03.08.2020. If the petitioners are so aggrieved for establishment of a retail outlet on the schedule land, they should have made an objection from the very beginning, i.e. from the date of issuance of advertisement.

23. It is of relevance to note that Mr. Ajayananda Mohapatra, Advocate Bhanjanagar (Ganjam) submitted objection before the Collector and the Tahasildar with a prayer not to issue NOC to HPCL, but on consideration of the said objection the Collector granted NOC. On being unsuccessful there, a civil suit was filed before the learned Civil Judge (Senior Division) bearing C.S. No. 105 of 2020 seeking direction to the District Magistrate-cum-Collector not to issue NOC in favour of HPCL for opening of the retail outlet. Having failed to get any interim relief in the said suit, the present writ petitions have been filed in the garb of public interest litigation, particularly when the said civil suit is pending in the Court of learned Civil Judge (Sr. Division), Jagatsinghpur.

24. In the above background, at best it can be construed that the petitioners are fence sitters and they have approached this Court, after selection process was over, on a frivolous and flimsy ground relying upon a guideline, which has been revised in the meantime. As such, without knowing the present status in proper prospective, the petitioners have approached this Court in a camouflage manner to cause prejudice to the selected candidate, namely, Usharani Sahoo in whose favour right has already been accrued pursuant to advertisement issued under Annexure-1.

25. It is pertinent to mention here, pursuant to advertisement dated 25.11.2018, Usharani Sahoo was the applicant for allotment of retail outlet at village Iswarpur. On scrutiny, the said application form having been found in order, LOI was issued on 16.10.2019. Thereafter, on 21.11.2019, HPCL

issued a letter to the Collector, Jagatsinghpur to issue NOC in their favour for establishment of retail outlet by Usharani Sahoo. On receipt of such letter, the Additional District Magistrate, Jagatsinghpur, vide letter dated 05.12.2019, directed Tahasildar, Balikuda to submit a detailed inquiry report in connection with grant of NOC for setting up retail outlet by HPCL. In response to same, Tahasildar, Balikuda submitted a detailed report, basing on the joint inquiry report dated 04.01.2020 of Revenue Supervisor, Balikuda Tahasil and Revenue Inspector, Kusunupur, along with the objection petition filed by Mr. Ajayananda Mahapatra, Advocate, Bhanjanagar (Ganjam), vide Tahasil Office, Balikuda letter dated 07.01.2020. In the meantime, the MoRTH issued a gazette notification on 24.01.2020, therefore, the Collector & District Magistrate, Jagatsinghpur, vide letter No.2923/(Judicial) dated 29.02.2020 directed the Tahasildar, Balikuda to submit report on Sl.Nos.1 and 5 of the enclosed check list for taking further action at his end. Accordingly, Tahasildar, Balikuda submitted the enquiry report on 06.03.2020 mentioning specifically that during the joint enquiry conducted by the Revenue Supervisor, Balikuda Tahasil and Revenue Inspector, Kusunupur on 04.01.2020 the suit plots i.e. 1002 and 1004 of mouza-Iswarpur were coming under NH-55, which is reflected in the advertisement made by HPCL that describes the location of proposed Retail Outlet (Petrol Pump) from Balikuda Block chowk to Saw-mill Chhaka on Right Hand side of NH-55. As per instruction of Collector & District Magistrate, Jagatsinghpur, vide letter dated 29.02.2020, the Tahasildar, Balikuda directed Revenue Inspector, Kusunupur to cause an enquiry and submit report accordingly. Basing on which, the enquiry was conducted by the Revenue Inspector, Kusunupur and report was submitted on 06.03.2020 and basing on such report the Tahasildar, Balikuda submitted his report, vide letter dated 06.03.2020, to the Collector & District Magistrate, Jagatsinghpur with specific query made as against Sl. No.1 & 5 of the Check List to the following effect:-

> "***Sl.No.1(i) Lawful possession of the applicant***
>
> *That the Plot No.1002, Area-Ac 0.29 Kisam-Gharabari under Khata No.124 of Mouza-Iswarpur stands recorded in the names of Sri Bhagirathi Sahoo, Sri Sashirathi Sahoo, Sons of Sri Debendra Kumar Sahoo by Caste-Khandayat of Village-Iswarpur in Stitiban Status and Plot No.1004, Kisam-Gharabari under Khata No.119 of Mouza-Iswarpur stands recorded in the name of Sri Debendra Kumar Sahoo, S/o-Sri Kasinath Sahoo by Caste-Khandayat of Village-Kuliagaon.*
>
> *The applicant's (Smt. Usharani Sahoo) husband namely Sri Bhagirathi Sahoo, S/o-Debendra Kumar Sahoo and brother-in-law Sri Sashirathi Sahoo, S/o-Sri*

Debendra Kumar Sahoo are in lawful possession in respect of plot No.1002 under khata No.124 of Mouza-Iswarpur and the father-in-law namely Sri Debendra Kumar Sahoo, S/o-Kasinath Sahoo is in lawful possession over plot No.1004 of khata No.119 of Mouza-Iswarpur.

(ii) That the flow of water will not be obstructed due to proposed installation of new retail outlet (petrol pump) over plot No.1002 & 1004.

Sl.No.5-Clearance from N.H. authority

A clearance from N.H authority on distance from intersection and distance from near Petrol Pump was required. But it was seen during the enquiry dated 06.03.2020 the suit plots of Mouza Iswarpur is not coming under N.B.-55. Accordingly the Tahasildar, Balikuda has given his report basing on The Gazette of India Notification No.S.O.377(E) dated 24th January, 2020 Ministry of Road Transport and Highways, Govt. of India that the mouza Iswarpur is not coming under N.H.-55, which implies that the suit plots are not coming under NH-55. Copy of the Gazettee of India Notification No.S.O.377(E) dated 24th January, 2020 is annexed herewith as Annexure-G/6.

Therefore, it is clarified that during the joint enquiry on 04.01.2020 the suit plots were coming under NH-55, but after the Gazette of India Notification dated 24.01.2020 the suit plots in the Mouza-Iswarpur were not coming under NH-55. This change was communicated by the Tahasildar, Balikuda vide letter dated 06.03.2020.

26. In view of such position, the NOC granted by the Collector & District Magistrate, Jagatsinghpur is well within its domain and, as such, the same was issued after making proper enquiry and by following due procedure established by law. Accordingly, issue no.(i) is answered in affirmative and against the petitioners.

27. Now comes issue no.(ii), whether both the public interest litigations at the instance of the present petitioners are maintainable. Admittedly, an advertisement for appointment of retail outlet dealerships in the State of Odisha by HPCL was published on 25.11.2018, pursuant to which Usharani Sahoo submitted her application and on her selection LOI was issued on 16.10.2019. On 21.11.2019, HPCL issued letter to the Collector & District Magistrate, Jagatsinghpur to issue NOC in their favour for establishment of retail outlet by Usaharani Sahoo. Thereafter, necessary follow up action was taken by the Collector & District Magistrate, Jagatsinghpur to cause enquiry and ultimately on receipt of the report of Tahasildar, Balikuda, vide letter dated 06.03.2020, NOC was issued on 19.03.2020 in favour of HPCL. From

25.11.2018 till issuance of NOC on 19.03.2020, admittedly the petitioners in both the writ petitions had not taken any steps assailing issuance of such NOC. Finally, on receipt of NOC, when steps were taken by the HPCL and Usharani Sahoo to go ahead with the setting up of retail outlet and when the same was at the verge of completion and scheduled for operation, these two public interest litigations were filed on 19.05.2020 and 03.08.2020 respectively.

28. On perusal of the pleadings available on records, it is made clear that the petitioners have not made out what constitutional right or personal right or statutory right or fundamental rights of theirs have been infringed while issuing NOC by the Collector & District Magistrate, Jagatsinghpur in favour of HPCL. Rather, setting up of the retail outlet in question would be beneficial to the public at large, instead of hampering their interest in any way. But fact remains, another retail outlet is continuing there called ESSAR petrol pump, and these PILs have been filed at the behest of rival businessman.

29. In ***Nagar Rice and Flour Mills v. N.T. Gowda***, AIR 1971 SC 246, the apex Court held that a rice mill-owner had no *locus standi* to challenge under Article 226 the setting up of a rice-mill at a new site by another even if such setting up be in contravention of Section 8(3)(c) of the Rice Milling Industry (Regulation) Act, 1958 because no vested right of the owner was infringed thereby.

But subsequent thereto the apex Court in many occasions had to decide the question as to whether a person in trade can object to the grant of a licence to his rival by approaching the High Court under Article 226 of the Constitution of India on the ground of violation of some statutory provision.

30. In ***J.M. Desai v. Roshan Kumar***, AIR 1976 SC 578, a four-Judge Bench speaking through Sarkaria, J. observed in paragraph-46 of the judgment as follows:-

> *"46. Thus, in substance, the applicant's stand is that the setting up of a rival cinema house in the town will adversely affect his monopolistic commercial interest, causing pecuniary harm and loss of business from competition. Such harm or loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called damnum sine*

> *injuria, the term injuria being here used in its true sense of an act contrary to law. The reason why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large."*

The said decision has also been followed in ***Ibrahim Khan v. State of M.P***., AIR 1980 SC 517.

31. Now, it is to be seen whether the present writ petitions filed in the guise of public interest litigation are for the betterment of the society at large or for benefiting any individual.

In ***Malik Bros v. Narendra Dadhich,*** (1999) 6 SCC 552, the apex Court held as follows:-

> *"… a public interest litigation is usually entertained by a Court for the purpose of redressing public injury enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effect access to justice to the economically weaker class and meaningful realization of the fundamental rights. The direction and commands issued by the courts of law in a public interest are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be the bounden-duty of the Court not to entertain such petitions as otherwise a very purpose of innovation of public interest litigation will be frustrated. It is in fact a litigation in which a person is not aggrieved personally but brings an action on behalf of the downtrodden mass for the redressal of their grievance."*

In view of the law laid down by the apex Court, in our considered opinion, on Public Interest Litigation (PIL), redressal of public injury, enforcement of public duty, protection of social rights and vindication of public interest must be the parameters for entertaining a PIL. The Court has a bounden duty to see whether any legal injury is caused to a person or a cluster of persons or an indeterminate class of persons by way of infringement of any constitutional or other legal rights while delving into a PIL. The existence of any public interest as well as bona fide are the other vital areas to come under the Court's scrutiny. In absence of any legal injury or public interest or bona fide, a PIL is liable to be dismissed at the threshold. It is to be borne in mind that ultimately it is the rule of law that is to be vindicated. As such, there is a need for restrain on the part of the public interest litigants when they move Courts. The Courts should also be cautious and selective in accepting PIL as well.

32. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be 'publicity interest litigation' or 'private interest litigation'.. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have *locus standi* and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration.

33. In ***Ashok Kumar Pandey v. State of West Bengal***, 2003 (9) Scale 741, the apex Court held as follows:

> *"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil and public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique consideration. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserves to be thrown out by rejection at the threshold and in appropriate cases with exemplary costs."*

Laying down certain conditions on which the Court has to satisfy itself it was observed:

> *"The Court has to be satisfied about-*
>
> *(a) the credentials of the applicant;*
>
> *(b) the prime facie correctness or nature of the information given by him;*

(c) the information being not vague and indefinite;

The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interest;

(i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and

(ii) *avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive action. In such case, however, the Court cannot afford to be liberal."*

The apex Court, on the point of exercising restraint, held that it has to be very careful that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to be executive and legislature. The Court hardening its stand said:-

"The court has to act ruthlessly while dealing with imposters and busy-bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono public, though they have no interest of the public or even of their own to protect."

34. In ***T.N. Godavarman Thirumulpad v. Union of India***, (2006) 5 SCC 28, the apex Court, relying upon the judgments of ***S.P. Gupta v. President of India,*** AIR 1982 SC 149 : 1981 Supp. SCC 87, ***Janata Dal v. H.S. Chowdhary***, AIR 1993 SC 892, after noticing that lakhs of rupees had been spent by the petitioner to prosecute the case, held as under:-

"it has been repeatedly held by the Court that none has a right to approach the Court as a public interest litigant and that Court must be careful to see that the member of the public who approaches the Court in public interest, is acting bona fide and not for any personal gain or private profit or political motivation or other oblique consideration.

..... while the Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow their process to be abused by a mere busybody, or a meddlesome interloper or wayfarer of officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

35. Undisputedly, the petitioners have approached this Court of equity invoking jurisdiction under Articles 226 and 227 of Constitution of India.

In ***Ramjas Foundation v. Union of India***, AIR 1993 SC 852, the apex Court held that who seeks equity must do equity. The legal maxim

"*Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem*", means that it is a law of nature that one should not be enriched by the loss or injury to another.

Similar view has also been taken in ***K.R. Srinivas v. R.M. Premchand,*** (1994) 6 SCC 620, where the apex Court held that when a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective.

In ***Noorduddin v. K.L. Anand*** (1995) 1 SCC 242, the apex Court held that Judicial process should not become an instrument of oppression or abuse of means in the process of the Court to subvert justice for the reason that the interest of justice and public interest coalesce. The Courts have to weigh the public interest vis-à-vis private interest while exercising their discretionary powers. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions.

Similar view has also been taken in ***Dr. Buddhi Kota Subbarao v. K. Parasaran*****,** AIR 1996 SC 2687, and ***Ramniklal N. Bhutta v. State of Maharashtra*****,** AIR 1997 SC 1236.

36. In W.P.(C) No.12434 of 2020, an interlocutory application bearing no.8423 of 2020 was filed by five intervenor-petitioners seeking to be impleaded as parties to support the case of the petitioners. As such, the said application was not allowed, but Mr. B.P.B. Bahali, learned counsel appearing for the intervenor-petitioners was permitted to address the Court. He supported the arguments advanced by the learned Senior Counsel appearing for the petitioners, but subsequently, Mrs. S. Jena, learned counsel filed four affidavits of Harekrushna Mohanty, Nabakishore Barik, Debendra Kumar Moharana and Satyananda Barik stating that they have not subscribed any signature before the High Court and they do not know anything about the case and such signatures have been obtained by one Susanta Kanungo, son of Sarat Kishore Kanungo of village-Kania, where the intervenors were asked to be members of an anti-corruption organization formed by him and obtained their signatures in blank papers and such blank papers have been utilized in the present case. Therefore, request was made to delete their names from the cause title of intervention petition and further sought for

appropriate action against such persons. When out of five intervenor-petitioners, four have recused themselves on the ground mentioned above, only one person remained, namely, Biswendu Swain for whom Mr. B.P.B. Bahali, learned counsel appeared and was permitted to address the Court. As it appears from the cause list, Mr. B.P.B. Bahali, learned counsel was appearing along with Mr. Yeesan Mohanty, learned Senior Counsel appearing for the petitioners in W.P.(C) No.18169 of 2020.

In any event, this Court did not feel inclined to go into the correctness of the affidavits filed by the respective intervenor petitioners, but, however, gave opportunity of hearing to all of them to participate in the process of hearing, and ultimately it revealed that these PILs have been moved in a camouflage manner to unsettle a settled position against the interest of general public at large.

37. In ***Kishore Samrite*** (supra), the apex Court laid down guidelines to the Court, in the matter of entertaining the PIL, to the following effect:-

> *"(1) The obligation to approach the Court with clean hands is an absolute obligation.*
>
> *(2) Quests for personal gains haver become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.*
>
> *(3) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not settled to any relief, interim or final.*
>
> *(4) The Court must ensure that its process is not abused and in order to prevent abuse of the process the Court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would duty bound to impose heavy costs.*
>
> *(5) Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.*
>
> *(6) It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs"*

Similarly in ***K.D. Sharma*** (supra), the apex Court held that no litigant can play 'hide and seek' with the Courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the Court.

38. In ***Balwant Singh Chaufal*** (supra), the apex Court in paragraphs-143 and 181 of the judgment held as follows:-

> *"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts.*
>
> *181. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:*
>
> *(1) The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.*
>
> *(2) Instead of every individual Judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.*
>
> *(3) The Courts should prima facie verify the credentials of the petitioner before entertaining a PIL.*
>
> *(4) The Courts should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.*
>
> *(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.*

(6) The Courts should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations".

Similar view has also been taken by this Court in ***Chhabindra Mukhi*** (supra).

39. Applying the settled principles of law, as discussed above, to the issue at hand, there are enough circumstances to infer that by filing the present writ petitions in the garb of public interest litigation an attempt has been made at the behest of a rival businessman much after the decision was taken to establish retail outlet in question and having failed to obtain an interim order from the common law forum by filing a civil suit which is still pending. Thereby, filing the instant writ petitions in the nature of public interest litigation is nothing but abuse of the forum of public interest litigation.

40. It is well settled principle of law laid down by the apex Court that public interest litigation is a weapon to be used with great care and that is why the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. As such, it should not be used for suspicious products of mischief and it should not be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.

As is revealed, on careful examination of the facts, the petitioners in the instant writ petitions in approaching this Court have not acted bona fide, rather for their personal gain, and private motive they have approached this Court by using attractive brand name of public interest litigation. The credential of the petitioners vis-à-vis the intervenors is also doubtful. Therefore, the Court has to take a stringent step while dealing with such persons, as they have acted impersonating as public-spirited holy man. As a matter of prudence, the petitioners owe an obligation to approach the Court with clean hands, but a perusal of the factual matrix of both the cases would reveal that the petitioners and intervenors, being the litigants, attempt to

pollute the stream of justice or touch the pure fountain of justice with tainted hands. Therefore, this Court is of the considered view that the petitioners and the intervenors have abused the process of Court by filing the instant writ petitions with an oblique motive and filing of such frivolous public interest litigations should be discouraged.

41. In ***Manohar Lal v. Ugrasen***, (2010) 11 SCC 557, the apex Court held that filing a totally misconceived petition amounts to 'abuse of process' of the Court. Such a litigation is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose, amounts to 'abuse of the process' of the Court.

Similar view has also been taken by the apex Court in State of ***M.P. v. Narmada Bachao Andolan***, (2011) 7 SCC 639.

In view of the above discussion, issue no.(ii) is answered against the petitioners.

42. It is revealed that the writ petitioners and intervenors have consumed valuable judicial time of the Court during extraordinary situation of pandemic Covid-19. As such, they have not satisfied any of the guidelines prescribed by the apex Court. Therefore, the writ petitions deserve to be dismissed with exemplary cost, which is quantified at Rs.25,000/- (twenty-five thousand) for each of the two writ petitions. The total cost of Rs.50,000/- (fifty thousand) for both the writ petitions shall be deposited in the Advocate's Welfare Fund of Orissa High Court Bar Association and receipt thereof shall be filed before this Court within a period of three months, failing which steps, as deemed fit and proper, against the petitioner (s) of each of the writ petition for realization of such amount shall be taken in accordance with law.

43. In view of the answers given hereinbefore to the issues framed, both the writ petitions merit no consideration and the same are hereby dismissed. As a consequence thereof, the interim order of status quo granted by this Court vide order no.2 dated 09.06.2020 in W.P.(C) No. 12434 of 2020 stands vacated.

As Lock-down period is continuing for COVID-19, learned counsel for the petitioner may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587 dated 25.03.2020.

2021 (I) ILR – CUT- 52

MOHAMMAD RAFIQ, C.J & K. R. MOHAPATRA,J.

OJC NO. 5277 OF 1994,
W.A. NOS. 355, 356 & 357 OF 2015

M/S. ORISSA MINING CORPORATION LTD. ……Petitioner
.V.
UNION OF INDIA, MINISTRY OF LABOUR . ……Opp. Party

W.A. NO. 355 OF 2015
UNION OF INDIA, MINISTRY OF LABOUR ……Appellant
.V.
PATNAIK MINERALS (P) LTD. ……Respondent.

W.A. NO. 356 OF 2015
UNION OF INDIA, MINISTRY OF LABOUR ……..Appellant
.V.
M/s. B.D. Pattnaik . ……..Respondent.

W.A. NO. 357 OF 2015
UNION OF INDIA, MINISTRY OF LABOUR ……..Appellant
.V.
M/S. ARYAN MINING & TRADING CORPN.(P) LTD. ……..Respondent

WORDS AND PHRASES – "Per incuriam" – Meaning and definition thereof – Held, A judgment can be per incuriam if any provision of a statute, rule or regulation, was not brought to the notice of the court – Moreover, a decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench – Since the learned Single Judge in the decision impugned in three writ appeals has neither noted the complete definition of "appropriate government" in Section 2(a) (i) what includes "a mine" making Central Government as the appropriate government, nor noticed the above referred to binding decision of the Division Bench, upholding validity of very same notification dated 17.3.1993, the impugned decision for these reasons shall be per incuriam. (Para 17)

Case Laws Relied on and Referred to :-

1. 68(1989) CLT 175 : Zenith Industrial Services and Ors. Vs. Union of India & Ors.
2. 73(1992) CLT 373 : Tata Refractories Ltd. & Ors. Vs. Union of India.
3. AIR 1985 SC 409 : BHSE Workers Association Vs. Union of India.
4. AIR 1985 SC 670 : Workmen of FCI Vs. M/s. Food Corporation of India.
5. AIR 1987 SC 777 : Cleaners of Southern Railways Vs. Union of India.
6. 103 (2007) CLT 461 : Bishra Stone & Lime Co. Ltd. Vs. Union of India.
7. (2014) 16 SCC 623 : Sundeep Kumar Bafna Vs. State of Maharashtra & Anr.

(1) Mr. Anup Kumar Bose
Asst. Solicitor General : For Appellant in WA Nos.355, 356 & 357 of 2015
(2) Mr. A.K. Panigrahi : For Petitioner in OJC- 5277/1994
(3) Mr. P.K. Padhi, CGC : For Opp. Party in OJC- 5277/1994
(4) Mr. Srada P. Sarangi : For respondent in W.A. Nos.355 & 357 of 2015
(4) Mr. Satyajit Mohanty : For respondent in W.A.No.356/2015

JUDGMENT Date of Hearing : 25.08.2020 : Date of Judgment: 28.09.2020

PER: MOHAMMAD RAFIQ, C.J.

Since the writ petition (OJC No.5277 of 1994) and all the three Writ Appeals (W.A. Nos. 355, 356, & 357 of 2015) arise out of identical Notifications, and involve identical questions of law, all these matters were heard together and are being decided by this common judgment.

2. Under challenge in OJC No. 5277 of 1994, filed by the petitioner-M/s. Orissa Mining Corporation Ltd. is validity of the Notification dated 23.03.1993 under Annexure-1, issued by the opposite party-Union of India in exercise of its power conferred by Section 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter in short called 'the CLRA Act'), prohibiting employment of contract labour in works specified the schedule therein, in the Manganese Mines in the country, with immediate effect, in relation to the following:

> "1. Raising of mineral, its breaking, seizing and sorting;
> 2. Screening and jigging at mine site; and
> 3. Loading and unloading and transporting at mine site."

The Writ Appeal No. 357 of 2015 has been filed by the Union of India, questioning the correctness of the judgment dated 03.04.2015 passed by the learned Single Judge in OJC No. 2172 of 1994, vide which writ petition filed by M/s. Aryan Mining and Trading Corporation (P) Ltd. was allowed in terms of the judgment passed by him in OJC Nos. 9630 & 9632 of 1993, holding that the said Notification dated 23.03.1993 (which is also subject matter of challenge in above OJC No. 5277 of 1994), issued by the Union of India under Section 10(1) of the CLRA Act, abolishing the contract labour system, is not applicable to the petitioner's establishment-Manganese Mines.

The Writ Appeals No. 355 & 356 of 2015, also filed by the Union of India, questions correctness of the common judgment dated 03.04.2015 passed

by the learned Single Judge in aforesaid OJC Nos. 9630 & 9632 of 1993, vide which the writ petitions filed by M/s. Patnaik Minerals (P) Ltd. and M/s. B.D. Pattnaik Ltd. respectively, were allowed holding that Notification dated 17.03.1993 issued by the Union of India under Section 10(1) of the CLRA Act, abolishing the contract labour system, is not applicable to the petitioners' establishment, being not passed by the appropriate Government i.e., State Government. The impugned Notification dated 17.03.1993 challenged in the said two writ petitions (OJC Nos. 9630 & 9632 of 1993), prohibits contract labour in respect of limestone/dolomite mines, in relation to following activities:-

> "1. Raising of minerals including breaking, seizing and sorting of limestone/dolomite, and
>
> 2. Transportation of limestone and dolomite which includes loading into and unloading from trucks, dumper, conveyors and transportation from mine site to factory;"

3. In order to encapsulate the questions of law involved in these cases, the factual matrix and contentions of the parties for the sake of convenience need be delineated separately.

FACTUAL MATRIX & SUBMISIONS IN OJC No. 5277 of 1994

4. The case set up by the petitioner, M/s. Orissa Mining Corporation Ltd. in the writ petition in brief is that it is a Corporation under the Government of Orissa and has extensive mining operation of Manganese Ore in the districts of Keonjhar and Rayagada. Manganese is one of the basic raw-materials required for manufacturing Iron and Steel. The petitioner-Corporation engages contract labour for raising of Manganese ore, including breaking, sizing and sorting and also for loading, unloading for transportation thereof. The licensed contractors under the petitioner-Corporation engage local labourers for such purpose by paying the wages higher than the rates prescribed under the Minimum Wages Act and also give them other amenities/benefits similar to those applicable to the workmen employed directly. The mining activities of Manganese is not of permanent nature, and it usually continues till Manganese is available. Once the Manganese reserve is exhausted, mining activities stop. For that reason, the petitioner-Corporation engages contract Labour, since employment of permanent labour is not commercially viable. Notwithstanding the aforesaid facts, the Government of India in exercise of power under Section 10(1) of the CLRA

Act, has issued the impugned Notification dated 25.03.1993 prohibiting employment of contract labour in Manganese Mines for raising and transportation of minerals, which according to the petitioner, is unjust and illegal. Hence the writ petition.

5. Mr. A.K. Panigrahi, learned counsel for the petitioner submitted that the activity of the transport contract involving transportation of materials ready for sale and supply from the mines to places far away from the mines, by road, is not an activity which is carried on in the mines or a place adjacent to the mines. Therefore, the activities of transport contract do not fall within the definition of a "Mine" under the Mines Act, 1952 and if so, it cannot be contended that the 'appropriate Government' defined u/s 2 of the Industrial Disputes Act, 1947 (hereinafter called the 'ID Act') would be the Central Government. The Central Government, not being the 'appropriate Government', has no jurisdiction to issue the impugned Notification under Section 10 of the CLRA Act. It is submitted that restrictions imposed by the impugned Notification violate the rights of the petitioner to trade as guaranteed under Article 19(1)(g) of the Constitution of India. Learned counsel relying upon a judgment of this Court in **Zenith Industrial Services and Ors. Vs. Union of India & Ors.,** 68(1989) CLT 175; submitted that similar Notification dated 22.12.1979 issued by the Government of India, prohibiting the contract labour in Limestone and Dolomite and Manganese Ores, was quashed by this Court. Another similar Notification dated 4.2.1987 issued by the Central Government imposing restriction in respect of fireclay mines of the country, which was subject matter of challenge before this Court in **Tata Refractories Ltd. & Ors. Vs. Union of India,** 73(1992) CLT 373, was also quashed by the Division Bench of this Court. In both these judgments, it was held that the Central Government had not complied with the mandatory requirements of Section 10(2) of the CLRA Act before issuance of the impugned Notification.

6. The opposite party-Union of India has filed counter affidavit contesting the stand of the petitioner. It submitted that the CLRA Act is meant to regulate the employment of contract labour in certain establishments which provides for abolition of contract labour in respect of such categories as may be notified by the appropriate Government. In the instant case, the Central Government constituted Central Advisory Contract Labour Board (for short-the CACLB) as per Section 3 of the CRLA Act read with Rule 3 of CLRA Central Rules, 1971. The CACLB, in exercise of power conferred by

Section 5 of the CLRA Act, constituted a Committee as per Section 3 of the CLRA Act to go into the question of working of contract labour system in Manganese mines in the country. Considering the importance of the matter, involving a large number of Manganese mines in the public and private sector spread all over the country and number of user industries, a seven member Tripartite Committee was constituted to examine the question of working of contact labour in Manganese Mines in the country. Various federations of the employers as well as employees were represented before the said Committee, which, after making an indepth study on the contract labour system in the Manganese Mines and considering the availability of essential amenities, submitted its report recommending prohibition of contact labour in certain jobs in the Manganese Mines of the country. The report of the Committee was placed before the CACLB and thereafter, keeping in view the guidelines laid down in Clauses (a) to (d) of Section 10(2) of the CLRA Act, the Central Government issued the Notification dated 23.03.1993, which is impugned in this writ petition. The impugned Notification has been issued in adherence to Rule 25(2)(v)(a) of the CLRA Central Rules, 1971 for giving equal treatment to the contract labourers, and no rights of any person has been taken away by this Notification. Further, as per the definition of 'appropriate Government'as contained in the CLRA Act read with provisions under Section 2 of the ID Act, the 'appropriate Government' in respect of mines is the Central Government. Transportation of minerals at mines site is also an activity which is incidental to and closely connected with the mining operations and cannot be separated or treated in isolation and therefore, it has been included in all similar Notifications in respect of other minerals. Contention of the petitioner that the Central Government, not being the appropriate Government, could not issue the impugned Notification, is not tenable and is liable to be rejected.

7. Mr. P.K. Padhi, learned Central Government Counsel appearing on behalf of opposite party-Union of India in OJC No. 5277/1994, in addition to reiterating all the arguments taken in the counter filed by the Central Government, submitted that the Hon'ble Supreme Court has gone into such issues time and again in **BHSE Workers Association Vs. Union of India**, AIR 1985 SC 409; **Workmen of FCI Vs. M/s. Food Corporation of India**, AIR 1985 SC 670, **Cleaners of Southern Railways Vs. Union of India**, AIR 1987 SC 777, and held that the appropriate government before arriving at its decision is required to consult the Central Board or the State Board, as the case may be. In the instant case, the Central Government has followed all the

procedures as prescribed under the law and has thereafter issued the impugned Notification. Further, it is submitted that the Orissa High Court while disposing of the writ petitions i.e, OJC No. 372-376 of 1985 vide common judgment dated 20.11.1990, has already held that such Notification issued by the Central Government under Section 10 of the Act, prohibiting contract labour in chromite mines, is valid.

FACTUAL MATRIX & SUBMISSIONS : (W.A. Nos. 355, 356 & 357 of 2015) :

8. The facts giving rise to these appeals in nutshell are that all the respondents are the Companies under the Companies Act. The respondents in W.A. Nos. 355 & 356 of 2015 are engaged in mining of Limestone and Dolomite mining. The respondent in W.A. No. 357/2015 carries Manganese Ore mining in different district of Odisha. They dispatch the same to various steel plants of the country. The respondents-companies engage contract labour for raising of Manganese, Limestone, Dolomite (hereinafter referred as 'Minierals') including breaking, sizing and sorting thereof and for loading, unloading and transportation of the said minerals. According to them, the mining activities of such minerals are not of permanent or perennial in nature as the mining activities are carried out only till the minerals are available. Once the minerals are exhausted, the mining activities are abandoned. The respondents-companies engage contract labours for that purpose. As per definition of 'appropriate Government', as under the CLRA Act, which has been adopted from the definition given under Section 2 of the ID Act, appropriate Government in these two establishments, in so far it relates to activities of transportation, is the State Government. The learned Single Judge, in the impugned judgment rightly held that petitioners' establishments are covered under Section 2(a)(ii) of the ID Act and not under Section 2(a)(i) of the ID Act. Hence the State Government is the 'appropriate Government' in relation to the petitioners' establishments for all purposes. The Central Government had no competence to issue the impugned notification under Section 10(2) of the CLRA Act.

9. Mr. A.K. Bose, learned Asst. Solicitor General of India appearing on behalf of the appellant-Union of India, while adopting the stand taken by the appellant in its counter affidavit filed in the connected OJC No. 5277 of 1994, submitted that the learned Single Judge in the impugned judgment has lost sight of the fact that the definition of "appropriate government" under Section 2 (d)(e) of the I.D.Act takes into its ambit "a mine" and the conclusions arrived at by the learned Single Judge that the respondents' establishment do not come under the

purview of Section 2(a)(i) of the ID Act is not correct. Since the impugned Notifications specially prohibit employment of contract labour in the works specified in the schedule that includes not only excavation of the Limestone, Dolomite and Manganese, but also its transportation, which are incidental activities, the appropriate government for such activities is the "Central Government". Considering that the work of mining all those minerals is of permanent nature, the Central Government after following all the procedures as prescribed under the law, has rightly issued the impugned Notifications. It is further submitted that the issues raised before the learned Single Judge with regard to prohibition of contract labours have already been decided by this Court in number of earlier decisions. This Court in identical writ petitions – viz; OJC Nos. 372 to 376 of 1985, 388 of 1985, 424 of 1985 and 690 of 1986, titled M/s. Miter Sen & Company vrs Union of India & others and connected matters, by its judgment dated 20.11.1990 upheld validity of similar Notification dated 20.11.1984 relating to prohibition of contract labour in Chromite Mines. The learned Single Judge has taken a contrary view ignoring the binding precedent of a larger Bench of this Court. The impugned judgment, having been rendered in ignorance of the relevant provisions of the CLRA Act and ID Act and having not considered the earlier binding decisions of this Court, being *per incuriam*, is unsustainable in law.

10. Refuting the stand taken by the Central Government in these writ appeals, learned counsel on behalf of the respondents-writ petitioners in respective appeals submitted that the respondents are required to excavate surface, soil, refuse, spoils, dead stone and ferruginous clay for the purpose of mining of said minerals. Since all these works are casual in nature, the respondents engage contractors from time to time. It is submitted that Section 10 of the CRLA Act has vested power in the appropriate Government to prohibit the contract labour in any process, operation or other work in any establishment but such power has to be exercised in accordance with sub-sections (1) and (2) thereof. The relevant factors provided under sub-section (2) are required to be strictly adhered to prior to issuance of such Notifications. In the instant case however, no material has been placed before this Court to indicate the nature of the consultation the appellant had with the Central Board before issuance of the impugned Notifications. Placing reliance on the judgment of the Supreme Court in ***Catering Cleaners of Southern Railway (supra)***, learned counsels on behalf of the respondents submitted that decision of the appropriate government prohibiting employment of contract labour is always subject to judicial review. The

impugned Notifications have been issued without satisfying the mandatory requirements of Sections 10(1) & 10(2) of the CLRA Act. Therefore, the learned Single Judge, relying on a Division Bench decision of this Court in **Zenith Industrial Services (supra),** has rightly allowed the writ petitions filed by the respondents.

11. We have given our anxious consideration to rival submissions and perused the materials on record.

12. Although OJC No. 5277 of 1994 and W.A. Nos. 355, 356 & 357 of 2015 arise out of different Notifications, relating to different minerals, issued by the Central Government in exercise of its power under Section 10(1) of the CLRA Act, but the relevant provisions which are attracted in the present set of matters being common, are reproduced hereunder for the facility of reference:-

Contract Labour (Regulation and Abolition Act, 1970

"10. Prohibition of employment of contract labour.- (1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by Notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment."

(2) Designated Authority:-

(a) The "appropriate Government" may be notification in the Official Gazette appoint a designated authority to advise them on the question whether any activity of a given establishment is a core-activity or otherwise;

(b) If a question arises as to whether any activity of an establishment is core activity or otherwise the aggrieved party may make an application in such a form and manner as may be prescribed, to the appropriate Government for decision;

(c) The appropriate Government may refer any question by itself or such application made to them by any aggrieved party as prescribed in clause (b), as the case may be, to the designated authority, which on the basis of relevant material in its possession, or after making such an enquiry as deemed fit shall forward the report to the appropriate Government, within a prescribed period and thereafter the appropriate Government shall decide the question within the prescribed period." - Andhra Pradesh Act 10 of 2003, S.4.

The 'appropriate Government' under Section (2)(a) of the CLRA Act has been defined as under:-

"appropriate government" means-

(i) in relation to an establishment in respect of which the appropriate government under the Industrial Disputes Act, 1947 (14 of 1947), is the Central Government, the Central Government;

(ii) in relation to any other establishment, the Government of the State in which that other establishment is situated;

Section (2)(e) of the CLRA Act also defined 'establishment', which reads as under:-

"establishment" means-

(i) any office or department of the Government or a local authority,

or

(ii) any place Where any industry, trade, business, manufacture or occupation is carried on;

Industrial Disputes Act, 1947

Since the definition of the 'appropriate Government' has been incorporated in the Contract Labour (Regulation and Abolition) Act, 1970 by way of reference from the Industrial Disputes Act, 1947, it would be apposite to reproduce hereunder the 'appropriate Government' contained in Section 2(a) of the Industrial Disputes Act, 1947:-

"(a) "appropriate government" means-

(i) In relation to any industrial disputes concerning [3][***] any industry carried on by or under the authority of the Central Government. [4][***] or by a railway company [5][or concerning any such controlled industry as may be specified in this behalf by the Central Government] [6][***] or in relation to an industrial dispute concerning [7][8][9][10][a Dock Labor Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948), or the [11][the Industrial Finance Corporation of India Limited formed & registered under the Companies Act, 1956) (1 of 1956), or the Employees' State Insurance Corporation established under Section 3 of the Employees' State Insurance Act, 1948 (34 of 1948), or the Board of Trustees constituted under Section 3-A of the Coal Mines Provident Fund & Miscellaneous Provisions Act, 1948 (46 of 1948), or the Central Board of Trustees & the State Boards of Trustees constituted under Section 5-A & Section 5-B, respectively, of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (19 of 1952), [12][***], or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956), or [13] [the Oil & Natural Gas Corporation Limited registered under the Companies Act. 1956 (1 of 1956), or the Deposit Insurance & Credit Guarantee Corporation established under Section 3 of the Deposit Insurance & Credit Guarantee Corporations Act, 1961 (47 of 1961), or the Central Warehousing Corporation established under Section 3 of the Warehousing Corporation Act, 1962 (58 of 1962), or the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963, or the Food Corporation of India established under Section 3, or a Board of Management

established for two or more contiguous States under Section 16 of the Food Corporation Act, 1964 (37 of 1964), or [14] [the Airports Authority of India constituted under Section 3 of the Airports Authority of India Act, 1994 (55 of 1994)], or a Regional Rural Bank established under Section 3 of the Regional Rural Banks Act, 1976 (21 of 1976), or the Export Credit & Guarantee Corporation Limited or the Industrial Reconstruction Bank of India Limited], [15] [the National Housing Bank established under Section 4 of the National Housing Bank Act, 1987 (53 of 1987)], or [16][17] an air transport service, or a banking or an insurance company], a mine, an oil-field] 18[a Cantonment Board,] or a [18a] [major port, any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or any corporation, not being a corporation referred to in this clause, established by or under any law made by Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government, the Central Government, and]

[18b](II) In relation to any other industrial dispute, including the State Public Sector undertaking, subsidiary companies set up by the Principal undertaking & autonomous bodies owned or controlled by the State Government, the State Government;"

*(**Underlying ours**)*

"Mine" that has been referred to in Section 2 (a)(i) of the Industrial Disputes Act, has been defined in clause (J) of Sub-section (1) of Section 2 of the Mines Act 1952, thus:

"(j) "mine" means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes: (i) all borings, bore holes, oil wells and accessory, crude conditioning plants, including the pipe conveying mineral oil within the oil fields;

(ii) all shafts, in or adjacent to and belonging to a mine, whether in the course of being sunk or not;

(iii) all levels and inclined planes in the course of being driven;

(iv) all open cast workings;

(v) all conveyors or aerial ropeways provided for the bringing into or removal from a mine of minerals or other articles or for the removal of refuse therefrom;

(vi) all adits, levels, planes, machinery, works, railways, tramways, and sidings in or adjacent to and belonging to a mine;

(vii) all protective works being carried out in or adjacent to a mine;

(viii) all workshops and stores situated within the precincts of a mine and under the same management and used primarily for the purposes connected with that mine or a number of mines under the same management;

(ix) all power stations, transformer substations, converter stations, rectifier stations and accumulator storage stations for supplying electricity solely or mainly for the purpose of working the mine or a number of mines under the same management;

(x) any premises for the time being used for depositing sand or other material for use in a mine or for depositing refuse from a mine or in which any operations in connection with such sand, refuse or other material is being carried on, being premises exclusively occupied by the owner of the mine;

(xi) any premises in or adjacent to and belonging to a mine on which any process ancillary to the getting, dressing or preparation for sale of minerals or of coke is being carried on."

13. The case set up by the petitioner-M/s. Orissa Mining Corporation Ltd. in OJC No. 5277 of 1994 that the 'appropriate Government' in respect of the transportation of the minerals would be the State Government, is also the argument which has found favour with the learned Single Judge in the judgment impugned in the aforementioned three Writ Appeals. While the Notification dated 23.03.1993 impugned in OJC No. 5277 of 1994 filed by M/s. Orissa Mining Corporation Ltd. issued with regard to Manganese Mines, in clause-3 of its schedule covers "Loading and unloading and transporting at mine site.", clause-2 of the schedule of the Notification dated 17.03.1993 issued with regard to Limestone/dolomite Mines covers "Transportation of limestone and dolomite which includes loading into and unloading from trucks, dumper, conveyors and transportation from mine site to factory". Factual matrix of the dispute of these matters, despite the difference in minerals, is substantially identical. What is contended on behalf of the petitioner M/s. Orissa Mining Corporation Ltd. in OJC as well as by the original writ petitioners in the Writ Appeals is that since the activities of transportation do not fall within the definition of a "Mine" under the Mines Act, 1952, the State Government, and not the Central Government, would be the 'appropriate Government' under Section 2(a) of the ID Act. Reliance has been placed on the judgment of this Court in **Zenith Industrial Services (supra)** and **Tata Refractories Ltd. (supra)**. Both the aforesaid judgments dealt with challenge to similar notifications. Under challenge in **Zenith Industrial Services (supra),** was the Notification dated 15.12.1979 issued by the Ministry of Labour, New Delhi, Government of India under Section 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970, prohibiting employment of contract labour in the works for overburden, removal and drilling and blasting in Limestone, Dolomite and Manganese Mines in the country. The petitioner in that case contended that the said

Notification was issued by the Central Government without duly complying with the provisions of of Section 10 (1) and (2) of the Contract Labour (Regulation and Abolition) Act, 1970. This Court held that there was nothing on record to show as to what are the relevant factors that weighed with the Central Government in issuing the general Notification abolishing the contract labour in the overburden removal and drilling and blasting works in the limestone, dolomite and manganese mines in the country. The impugned notification was therefore quashed. In **Tata Refractories Ltd. (supra),** similar Notification dated 04.02.1987 issued under Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 prohibiting the engagement of contract labour in the fireclay mines of the country was challenged. The stand of the Central Government in that case before this Court was that it had referred the matter to the Central Advisory Board, who had in its turn constituted a Committee and that Committee had taken into account the relevant factors as contained in sub-section (2) of Section 10 of the CLRA Act and submitted a report, on the basis of which the Central Government, exercising its power under Section 10(1) of CLRA Act, issued the Notification. This Court, relying on the earlier judgment in **Zenith Industrial Services (supra),** held despite several opportunities given to the Standing Counsel for the Central Government to do so, neither the report of the Advisory Board nor that of the Committee constituted by the said Board was produced before the Court, to satisfy as to whether or not the factors mentioned in Clauses (a) to (d) of Section 10(2) of the CLRA Act were at all taken into account by the said Committee. The writ petition was therefore allowed and the impugned notification was quashed.

14. We may at this stage refer to a Division Bench judgment of this Court in the case of ***Bishra Stone & Lime Co. Ltd. v. Union of India,*** reported in 103 (2007) CLT 461, wherein validity of the very same Notification dated 17.3.1993, which has been set aside by the learned Single Judge in OJC Nos. 9630 and 9632 of 1993, out of which the Writ Appeals No. 355 and 356 of 2015 arise, was upheld. In fact, neither of the parties cited this judgment, either before the learned Single Judge or even during hearing of the present matters. The issues that are involved in the present matters are squarely covered by the said judgment. Argument which has found favour with learned Single Judge was specifically dealt with by the Division Bench in Para-10 of the said judgment, which is reproduced hereunder:

> "*10. The contention of the Learned Counsel for the petitioner that the Central Government having not consulted the Central Advisory Contract Labour Board as contained in Clauses*

(b), (c) and (d) of Section 10 of the CLRA Act, the impugned Notification is vitiated and liable to be quashed has to be rejected. Central Government has taken the specific stand that before issuing Notification dated 17.3.1993 vide Annexure-1 the requirements of the Section were complied with and the Central Advisory Contract Labour Board was duly consulted. Keeping with their recommendation, the employment of contract labour in works specified in the schedule to Annexure 1 was issued and therefore there is no violation of any statutory provision. It has further been stated that the Central Advisory Contract Labour Board constituted the Committee to make an indepth study of the matter and make their recommendation to the Board. The Board on consideration of the recommendation of the Committee and having done an indepth study of the matter made their recommendations to the Central Government. The stand taken by the Central Government has not been controverted by the petitioner. In view of the uncontroverted factual position, the assertion of the petitioner that the Central Government had not duly consulted the Advisory Board before issuing the impugned Notification is without any basis."

The question with regard to the validity of Notification dated 17.3.1993 thus stood finally concluded by the aforesaid judgment. Eight identical writ petitions in M/s. Miter Sen (supra), repelling similar arguments, while upholding validity of identical notification prohibiting contract labour in Chromite mines, were also dismissed by a Division Bench of this Court vide common judgment dated 20.11.1990.

15. Section 3 of the CLRA Act provides for constitution of a Central Advisory Contract Labour Board, which has to advise the Government on matters concerning the contract labour system. Rule 3 of the CLRA Central Rules, 1971, which has been framed under the CLRA Act, provides that the CACLB shall consist of (a) Chairman to be appointed by the Central Government, (b) Chief Labour Commissioner, (c) one representative of the Central Government (d) two persons representing the Railways, (e) five persons-one representing the employers in coal mines; two representing the employers in other mines and two representing contractors to whom the Act applies; (f) seven persons- two representing the employees in Railways, one representing employees in coal mines, two representing the employees in other mines and two representing the employees of contractors to whom the Act applies. The CACLB in these matters considering a large number of mines of Manganese, limestone and dolomite, in public and private sector spread all over the country and number of user industries, constituted the Committees in both the matters to examine the question of working of contract labour. Various federations of the employers as well as employees were represented before the said Committees, which after making indepth study on the contract labour system, considering perennial nature of the work and availability of essential amenities, submitted their report recommending prohibition of contract labour in certain jobs in mining of those minerals. As

per the assertion of the Central Government, such report in both the matters was placed before the CACLB. The Board in these matters, considering the guidelines laid down in Clauses (a) to (d) of Section 10(2) of the CLRA Act, made its recommendation to the Central Government which then issued the impugned Notifications. The Central Government upon satisfying itself that the operation of the mines was a work of perennial nature and the work of transporting the excavated mineral was incidental to and necessary for the work of mining, issued the impugned notifications. Rule 25(2)(v)(a) of the CLRA Central Rules, 1971 clearly provides that in cases where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by the principal employer of the establishment on the same or similar kind of work. The CLRA Act in itself is a piece of social legislation for protection of the contract labourers, who are vulnerable to exploitation and, as such, it should be liberally construed. The purpose of issuing the impugned Notification is to give statutory protection to the poor and unorganized contract labourers. The impugned Notifications do not in any manner interfere with the right of any citizen to practice any profession or to carry on any occupation, trade or business. It merely prohibits engagement of contract labourers in such works specified in the schedule to impugned notification. Therefore, argument of the petitioner that it has affected the rights of the petitioner under Article 19(1)(g) of the Constitution of India, cannot be countenanced.

16. The issue that appropriate government for the activities of "Loading and unloading and transporting at mine site." in so far as Notification dated 23.3.1993 assailed in OJC No. 5277 of 1994 and the "Transportation of limestone and dolomite which includes loading into and unloading from trucks, dumper, conveyors and transportation from mine site to factory;" in the aforementioned three writ appeals, would be State Government as per Section 2(a)(ii) of the Industrial Disputes Act, 1947, also stands concluded by the aforesaid judgment of this Court in ***Bishra Stone & Lime Co. Ltd. (supra).*** Before referring to that judgment, we may, however, examine the argument advanced in the writ appeals that the impugned judgment passed by the learned Single Judge proceeds on misreading of the definition of 'appropriate Government' under Section 2(a)(i) of the ID Act. It was argued that the learned Single Judge has in the impugned judgment completely

omitted to consider the import of the words "a mine", specifically included in the said definition clause. This is because the activities of "Transportation of limestone and dolomite which includes loading into and unloading from trucks, dumper, conveyors and transportation from mine site to factory;" were incidental to and closely connected with the main activity of the mining, i.e. the raising of mineral, its breaking, seizing and sorting of limestone/dolomite were perennial in nature. The 'appropriate Government' as defined in the Contract Labour (Regulation and Abolition) Act, 1970 read with Section 2(a)(i) of the Industrial Disputes Act, 1947 in respect of mines, has to be the Central Government and not the State Government. Reference in this behalf may be made to the following observations of the Division Bench of this Court in ***Bishra Stone & Lime Co. Ltd. (Supra).***

> *"8. The next submission of the Learned Counsel for the petitioner is that the impugned Notification dated 17.3.1993 issued by the Central Government is otherwise illegal and ultra vires and is in excess of the jurisdiction so far as it prohibits employment of contract labour for transportation of limestone from mines site to factory inasmuch as the appropriate Government in respect of such transportation contractors is the State Government has also to be rejected. We have already held that the appropriate Government in respect of mines is the Central Government in view of the clear provision of Section 2(a) of the Industrial Disputes Act read with Section 2(1)(a) of the CLRA Act and Section 2(1)(f) of the Mines Act. However, it has to be seen whether the work transport operation said to have been undertaken by the contract labour in the mines of the petitioner are within the purview and ambit of the mining operation as claimed. The question is whether process, operation or other work like transportation of sized stone from the mining faces into railway wagons, transportation of boulder from mining faces to the crushing plants, transportation of sized stone converted from boulder into the railway wagons or loading plants and transportation of rejected stone and spoils from mining faces for development of working face comes within the activities of mining operation as defined under the Act.*
>
> *9. A reference has already been made to the provision of Section 2(j) of the Mines Act and the definition of "Mine" in the Mines Act has been quoted herein before. A perusal of Clause (v) of Section 2(j) would make it clear that all conveyors or aerial ropeways provided for bringing into or removal from a mine of minerals or other articles or for the removal of refuse therefrom are included within the category of mining operation. Similarly under Clause-vi thereof all adits, levels, planes, machinery, works, railways, tramways, and sidings in or adjacent to and belonging to a mine are also inclusive of the definition. Similarly, under Clauses (x) & (xi), any premises for the time being used for depositing sand or other material for use in a mine or for depositing refuse from a mine or in which any operations in connection with such sand, refuse or other material is being carried on, being premises exclusively occupied by the owner of the mine and any premises in or adjacent to and belonging to a mine on which any process ancillary to getting, dressing or preparation for sale of minerals or of coke is being carried on are also covered within the scope and ambit of mine as defined under the Act. In view of the provision of law, there cannot be any doubt that the operation in question, the*

manner of operation and the process are ancillary and/or incidental to the mine and as such have to be held to be activities coming within the purview of the Act and, therefore, the impugned Notification (Annexure-1) issued by the Central Government in exercise of powers conferred under Sub-section (1) of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970, prohibiting employment of contract labour in limestone/dolomite mines and transportation of limestone and dolomite which includes loading into and unloading from trucks, dumpers, conveyors and transportation from mine site to factory as mentioned in Annexure-1 has to be held as valid and cannot be termed as illegal, arbitrary or beyond the powers conferred under the statute on the Central Government."

17. A judgment can be *per incuriam* if any provision of a statute, rule or regulation, was not brought to the notice of the court. Moreover, a decision or judgment can also be *per incuriam* if it is not possible to reconcile its *ratio* with that of a previously pronounced judgment of a co-equal or larger Bench. Since the learned Single Judge in the decision impugned in three writ appeals has neither noted the complete definition of "appropriate government" in Section 2(a) (i) what includes "a mine" making Central Government as the appropriate government, nor noticed the above referred to binding decision of the Division Bench, upholding validity of very same notification dated 17.3.1993, the impugned decision for these reasons shall be per incuriam. We are in taking that view fortified from the judgment of the Supreme Court in the case of ***Sundeep Kumar Bafna v. State of Maharashtra and another,*** reported in (2014) 16 SCC 623, reproduced relevant para-19 hereunder:-

"19. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."

18. In the light of the view that we have taken of in the matter, the OJC No. 5277 of 1994 is liable to be dismissed and the same is accordingly dismissed. The Writ Appeal Nos. 355, 356 & 357 of 2015 deserve to succeed and are accordingly allowed. Consequently, OJC No. 9630 of 1993, OJC No.9632 of 1993 and OJC No.2172 of 1994 shall stand dismissed. There shall be however no order as to costs.

2021 (I) ILR - CUT- 68

MOHAMMAD RAFIQ, C.J & DR. B.R. SARANGI, J.

WRIT PETITION (CIVIL) NO. 25359 OF 2020

SIDHESWAR PANIGRAHI .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Challenge is made to the rejection of tender on the ground of non-submission of original solvency certificate – State could not produce any material to indicate the requirement of production of original solvency certificate/bank guarantee in respect of a tender where the tenderer has applied for more than one source – Reasons indicated in the counter affidavit not reflected in the rejection order – Whether can be accepted? – Held, No.

"There is no dispute that the bid submitted by the petitioner has been rejected due to non-submission of original solvency certificate/bank guarantee. As such, nothing has been placed on record that the petitioner has to submit the original solvency certificate or bank guarantee along with the tender, but the reasons which has been assigned in the counter affidavit, as quoted above, is not made available in the order impugned in Annexure-2, whereby the tender of the petitioner has been rejected. Therefore, by way of filing counter affidavit, reasons cannot be supplemented or supplanted to the order impugned in the writ petition. As such, the subsequent explanation given in the counter affidavit filed by opposite parties no.2 and 3 cannot be taken into consideration in view of the judgment of this Court in ***M/s Shree Ganesh Construction v. State of Orissa****, 2016 (II) OLR 237, which has been passed by following the judgment of the apex Court in* ***Mohinder Singh Gill v The Chief Election Commissioner, New Delhi****, AIR 1978 SC 851." (Para 8)*

Case Laws Relied on and Referred to :-

1. 2016 (II) OLR 237 : M/s Shree Ganesh Construction Vs. State of Orissa.
2. AIR 1978 SC 851 : Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi.
3. AIR 1952 SC 16 : Commissioner of Police, Bombay Vs. Gordhandas Bhanji.

For Petitioner : M/s. S. Mallik & P.C. Das.

For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 10.11.2020

PER: DR. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order under Annexure-2 dated 15.09.2020 rejecting his tender, as well as fresh

notification dated 22.09.2020 in Annexure-5; and further seeks for a direction to opposite party no.3 to settle the lease of Paikaminigudi sand quarry no. 2 of 2020 in his favour, he being the highest bidder pursuant to notification under Annexure-1 dated 14.08.2020, by holding that the reason of rejection i.e., non-submission of original solvency certificate as illegal being not a requirement of law as well as the terms of the tender notification.

2. The factual matrix of the case, in hand, is that the Tahasildar, Nandahandi in the district of Nabarangpur floated a tender on 14.08.2020 inviting applications in prescribed form in respect of Paikaminigudi sand quarry under khata no. 329, plot no. 922 measuring 1.25 hec. The last date of submission of application was 15.09.2020. So far as Paikaminigudi sand quarry is concerned there were four applicants, including the petitioner, and as such, the petitioner quoted the highest rate of royalty i.e. @ Rs.54/- per cum. The scrutiny committee of the Tahasil office opened the tender at 3.30 pm on 15.09.2020 and the result was published on 22.09.2020 rejecting all the applications. In the order, the rate quoted by different applicants was disclosed, but the petitioner's application was rejected on the ground of non-submission of original solvency certificate. The petitioner, being aggrieved by such decision, submitted an application on 22.09.2020 to the Tahasildar-opp. party no.3 stating therein that submission of original solvency certificate was not the requirement of law. Neither the provisions of rules nor the terms of the advertisement require for submitting original solvency certificate. In the past years, the tender applications were considered valid on submission of xerox copies of solvency certificates. When a person applies for more than one source, he cannot submit his original certificate in all his applications. Further, solvency certificates are being issued by the Tahasil office and the tender applications are being considered by the Tahasildar in a committee. In case of doubt, they can verify the authenticity of the solvency certificates from their office. Therefore, there is no necessity of production of any original solvency certificate in the tender documents, when a tenderer applies for more than one source. Consequently, the petitioner requested for allotment of quarry in his favour being the highest bidder. But the Tahasildar having not considered the same, the petitioner also preferred an appeal before the Collector, Nabarangpur on 23.09.2020 challenging the decision of the Tahasildar rejecting his claim on the plea of non-submission of original solvency certificate which was not the requirement of law. The said appeal is still pending before the Collector. But during pendency of the appeal, since the Tahasildar proceeded in issuing a fresh auction notice in respect of very

same quarry on 22.09.2020, the date the petitioner made representation for consideration, finding no other alternative, the petitioner has approached this Court by filing this application.

3. Mr. S. Mallik, learned counsel for the petitioner contended that the Tahasildar showing undue haste has proceeded with the matter without considering the grievance made by the petitioner and, as such, when the petitioner's appeal is pending before the appropriate forum, the Tahasildar should not have issued a fresh notice on 22.09.2020 annexed as Annexure-5 to the writ petition. It is further contended that the petitioner has quoted highest price for payment of royalty per cum, but the tender submitted by the petitioner has been rejected on a flimsy ground that due to non-submission of original solvency certificate/bank guarantee the bid of the petitioner has not been accepted in respect of Paikamuniguda sand quarry TMC No. 02/2020. It is further contended that there is no specific provision contained either in the rules or in government notification or even in the tender notice to produce the original solvency certificate or bank guarantee for consideration of the tender submitted by the petitioner. It is also contended that if the petitioner applies for more than one source, while submitting tender documents, it is not possible to produce original solvency certificate in all places. Therefore, the document submitted by the petitioner should have been taken in to consideration, as in the past the very same authority had accepted the photocopy of the solvency certificate submitted by the tenderers for various sources. It is also contended that the Tahasildar being the authority for issuance of solvency certificate, authenticity of the photocopy of solvency certificate can be verified from his office. But instead of doing so, the tender submitted by the petitioner has been rejected. Thereby, the Tahasildar has acted arbitrarily, unreasonably and contrary to the provisions of law. Therefore, the petitioner seeks for quashing of the order of rejection passed in Annexure-2 dated 15.09.2020.

4. Mr. P.K. Muduli, learned Addl. Government Advocate appearing for State-opposite parties contended that the authorities are insisting upon production of the original solvency certificate due to the fact that on the face value of one solvency certificate the petitioner has submitted multiple bid applications to acquire sairat source in different Tahasils. Therefore, there may be a deliberate concealment of fact and, as such, in Form-M vide point no. 4(iv) he has mentioned "NO", thereby, denying his participation in tender process of other Tahasils. Subsequently, in case of his default in payment in

respect of more than one sources, a confusion may arise as to who will get to exercise claim over the solvency of the petitioner. Thereby, the need arises to ask for original solvency certificate and thus contended that the impugned order of rejection of the tender submitted by the petitioner is well justified and the same should not be interfered with in this proceeding.

5. This Court heard Mr. S. Mallik, learned counsel for the petitioner and Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State opposite parties on virtual mode. Pleadings having been exchanged, with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

6. Indisputably, the petitioner submitted his tender pursuant to advertisement issued in Annexure-1 in respect of Paikamuniguda sand quarry TMC No. 02/2020. Along with the petitioner, three others had also applied for the same, well within the time specified and the tender documents of all the four bidders, which were opened on 15.09.2020, were rejected. The ground of rejection of the tender submitted by the petitioner reads as follows:-

> *"Rejected due to non-submission of original solvency certificate/bank guarantee"*

On query being made by this Court, learned Addl. Government Advocate could not be able to produce any material before this Court to indicate the requirement of production of original solvency certificate/bank guarantee in respect of a tender where the tenderer applied for more than one source. In any case, the reasons for rejection of the tender documents have been specified in Annexure-2 in its proceedings of the scrutiny committee for finalization of tender application pertaining to sairat sources of Nandahandi Tahasil held on 15.09.2020 by 3.30 pm in the office of Tahasildar Nandahandi. The petitioner had also made a grievance before the Tahasildar on 22.09.2020, but the same was rejected subsequently on 23.09.2020. Therefore, he preferred appeal before the appellate authority. When the matter is pending before the appellate authority, a fresh tender notice has been issued by the Tahasildar vide Annexure-5 dated 22.09.2020. Therefore, even though appeal is pending for consideration, since steps have been taken by the Tahasildar by issuing a fresh tender notice, finding no other alternative, the petitioner has approached this Court by filing this writ petition. While entertaining this writ petition, this Court vide order dated

07.10.2020 issued notice to the opposite parties and directed to serve three extra copies of the writ petition on Addl. Government Advocate, who accepted notice on behalf of opposite parties no. 1 to 3 and issued notice to opposite party no.4 by speed post with A.D. returnable by 10.11.2020 and passed interim order to the following effect:-

> *"It is directed that fresh tender pursuant to advertisement dated 22.09.2020 (Annexure-5) shall not be finalized till the next date."*

7. The opposite parties no. 2 and 3 have filed their counter affidavit and have admitted that the petitioner had quoted highest price and also stated that he was the successful bidder but because of the submission of photocopy of the solvency certificate, his bid has not been accepted. Paragraph-6 of the counter affidavit reads as follows:

> *" That, in reply to the averments made in paragraph-1 of the Writ Petition, it is submitted that the Auction Notice dated 14.08.2020 was prepared on the basis of order No. 465/ R&DM, dtd. 02.01.2020 (**ANNEXURE- F/3**) wherein at Point No. 6, it is mentioned that "Issue of solvency certificate shall be phased out. No department shall ask for solvency certificate for grant of license for issuing licenses to storage agents, grant of renewal of excise license, quarry lease, etc. Instead they will ask for IT Returns, Bank Guarantee etc. for issuing such linceses." Accordingly, in Point No. 1(iv) of the Auction Notice No. 1400, dtd. 14.08.2020 it is clearly indicated about submission of Bank Guarantee with a validity period of 18 months for the offered amount of additional charges. In addition to this, it is a fact that the petitioner is also the successful bidder in respect of Sandhidangariguda and Saraguda Sand Sources under Dabugam Tahasil. In the event of participating in more than one tender process under different Tahasils, submission of photocopy of Solvency Certificate instead of the original one, obviously renders the purpose of such Solvency Certificate ineffective.*
>
> *The Petitioner has admitted the fact that on Solvency Certificate, he has submitted multiple bid applications to acquire sairat source in different Tahasils, but he has deliberately concealed this fact and filled the application in Form-M vide Point No. 4(iv) as "NO" **(Annexure-G/3),** thereby denying his participation in tender process of other Tahasils. In case of his default in payment in respect of more than one sources, a confusion arises as to who will get to exercise claim over the solvency of the Petitioner, thereby the need arises to ask for original Solvency Certificate."*

8. There is no dispute that the bid submitted by the petitioner has been rejected due to non-submission of original solvency certificate/bank guarantee. As such, nothing has been placed on record that the petitioner has to submit the original solvency certificate or bank guarantee along with the tender, but the reasons which has been assigned in the counter affidavit, as quoted above, is not made available in the order impugned in Annexure-2, whereby the tender of the petitioner has been rejected. Therefore, by way of

filing counter affidavit, reasons cannot be supplemented or supplanted to the order impugned in the writ petition. As such, the subsequent explanation given in the counter affidavit filed by opposite parties no.2 and 3 cannot be taken into consideration in view of the judgment of this Court in ***M/s Shree Ganesh Construction v. State of Orissa***, 2016 (II) OLR 237, which has been passed by following the judgment of the apex Court in ***Mohinder Singh Gill v The Chief Election Commissioner, New Delhi***, AIR 1978 SC 851. In paragraphs-7 and 8 of the judgment in ***Shree Ganesh Construction*** mentioned supra, this Court observed as under:-

> "*7. In the counter affidavit filed, the reasons have been assigned, which are not available in the impugned order of cancellation filed before this Court in Annexure-4 dated 5.2.2016. More so, while cancelling the tender, the principles of natural justice have not been complied with. It is well settled principle of law laid down by the Apex Court in* ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others****, AIR 1978 SC 851 that :*
>
> *"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."*
>
> 8. *In* ***Commissioner of Police, Bombay v. Gordhandas Bhanji****, AIR 1952 SC 16, the Apex Court held as follows :*
>
> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."*

9. In absence of any reasons specified in the order impugned, subsequent explanation given in the counter affidavit cannot be taken in to consideration. In that view of the matter, this Court is not inclined to accept the reasons assigned in the counter affidavit as the order impugned has been passed bereft of any other reasons other than what has been specified therein. Thereby, rejection of the bid submitted by the petitioner on the ground of non-submission of original solvency certificate/ bank guarantee cannot sustain in the eye of law. Accordingly, the order impugned in Annexure-2, so far it relates to Paikaminigudi sand quarry in respect of the petitioner is

concerned, is hereby quashed. The matter is remitted back to the Tahasildar, Nandabandi to reconsider the claim of the petitioner taking into consideration the documents submitted by him in accordance with law as expeditiously as possible, preferably within a period of three weeks from the date of production of this order. Till that period, the interim order passed by this Court on 07.10.2020 shall remain in force.

10. The writ petition is accordingly allowed. However, there shall be no order as to costs.

As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed vide Court's Notice No.4587 dated 25.03.2020.

—— o ——

2021 (I) ILR - CUT- 74

MOHAMMAD RAFIQ, C.J & DR. B.R. SARANGI, J.

WRIT PETITION (CIVIL) (PIL) NO. 24450 OF 2020

BIBHURANJAN DALAI & ORS. .....Petitioners

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition in the nature of PIL – Petitioners are villagers – Incident of death of loving couple – Circumstances show the incident was an outcome of 'honour killing' – Allegation of improper investigation by police – Plea by petitioners to handover the investigation to any other agency – Matter was examined in details with reference to the investigation conducted by the police – Held, in view of the provisions of law, as discussed above, it clearly reveals that further investigation can be permissible in respect of an offence by different investigating agency, as prima facie this Court is of the considered view that the investigation in the instant case has been undertaken in a negligent and perfunctory manner and, as such, it requires further investigation by a different investigating agency other than the local police authority – Ordered accordingly.

Case Laws Relied on and Referred to :-

1. AIR 2006 SC 2522 : Lata singh Vs. State of U.P.

2. (2006) 5 SCC 457 : Jyoti @ Jannat Vs. State of U.P.
3. AIR 2010 SC 3071 : Krishna Master Vs. State of U.P.
4. (2011) 6 SCC 396 : Bhagaban Das Vs. State of NCT of Delhi.
5. (2011) 6 SCC 405 : Arumugam Servai Vs. State of Tamilnadu.
6. (2003) 6 SCC 195 : Union of India Vs. Prakash P. Hinduja.
7. AIR 1959 SC 707 : State of Madhya Pradesh Vs. Mubarak Ali.
8. (1980) 1 SCC 554 : AIR 1980 SC 326 : State of Bihar Vs. J.A.C. Saldanna and R.P. Singh Vs. J.A.C. Saldanna.
9. (1992) Supp 1 SCC 335 : AIR 1992 SC 604 : State of Haryana Vs. Ch. Bhajan Lal.
10. K. 1991 (3) SCC 655 : Veeraswami Vs. Union of India.
11. AIR 2003 SC 2612 : Union of India Vs. Prakash P. Hinduja.
12. AIR 2007 SC 1087 : M.C. Mehta Vs. Union of India.
13. 2004 (2) Orissa LR 193 : Smt. Sabita Praharaj Vs. Smt. Gitarani Praharaj.
14. (1994) 5 SCC 188 : Meharaj Singh Vs. State of U.P.
15. (1998) 4 SCC 605 : George Vs. State of Kerala.
16. AIR 1964 SC 221 : State of U.P. Vs. Bhagwant Kishore Joshi.
17. (1998) 4 SCC 517 : Ram Bihari Yadav Vs. State of Bihar.
18. (2003) 2 SCC 518 : Amar Singh Vs. Balwinder Singh.
19. AIR 2006 SC 1367 : Zahira Habibulla Sheikh Vs. State of Gujarat.
20. (2007) 2 SCC (Cri) 72 : Sasi Thomas Vs. State.

For Petitioners : Mr. B.N. Satapathy.

For Opp. Parties : Mr. D. Mohanty, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 16.11.2020

PER: DR. B.R. SARANGI, J.

The petitioners, who are villagers of village Duadia and the members of Bajarangbali Gramya Paribes and Banasurakhya Samiti, by way of public interest litigation filed this writ petition challenging the action/inaction of the opposite parties, particularly opposite party no.5- Inspector in-charge of Kujanga Police Station, who has not properly investigated into Kujanga P.S. U.D. Case No. 10/2020 dated 01.07.2020, as a result of which the death of the lovers, namely, Tushar Palai (19 years), son of Adikanda Palai and Bebina Das (27 years), daughter of Pandaba Das of village Duadia has been shown as suicidal hanging instead of an "Honour Killing" based on a pre-planned and brutal murder executed by the blood relations in connivance with the law enforcing agencies, as would be available from the circumstantial evidences, nature of injuries sustained, the materials used for the death of the lovers and the captured photographs, which is clear violation of Articles 14, 15(1) and (3), 19 and 21 of the Constitution of India, and therefore seek for a direction to opposite party no.4- Superintendent of Police, Jagatsinghpur to

handover the case to a competent officer of the impartial agencies like CBI or Crime Branch of Odisha Police to investigate into the allegations made by the petitioners and to take action against the erring officials involved during the investigation of the case in accordance with law.

2. The factual matrix of the case, in hand, is that the petitioners are the president, secretary and members of Bajarangbali Gramya Paribes and Banasurakhya Samiti, Duadia having registration no. 1994/52/2013-14 and also residents of the said village. On 01.07.2020 (Wednesday), the present petitioners and other villagers of village Duadia found two lovers, namely, Tushar Palai (19 years), son of Adikanda Palai and Bebina Das (27 years), daughter of Pandaba Das of village Duadia dead in a hanging condition on the branches of Dimiri tree and the said incident was intimated to IIC, Kujanga Police Station immediately. The elder brother of the deceased Bebina Das, namely, Ranjan Kumar Das, son of Pandaba Das had lodged an information before the IIC, Kujanga Police Station alleging therein that on 30.06.2020 his younger sister Bebina Das was missing and that on 01.07.2020 he and his family members searched her and found her hanging in a Dimiri tree, along with one Tushar Palai (20 years), S/o- Adikanda Palai of his village, in the backside of Basudev Primary School, and both had died. Having received information, the IIC, Kujanga Police Station registered Kujanga P.S.U.D. Case No. 10/2020 on 01.07.2020 at about 08.15 p.m. and directed A.S.I. D.K. Sahoo to take up enquiry into the U.D. Case.

2.1 The present petitioners submitted representations on 06.07.2020 to opposite parties no.3 to 5 by meeting them personally, as well as to all the opposite parties on 29.07.2020 by registered post with A.D. highlighting their grievance, but till date no action has been taken. The IIC, Kujanga P.S.- opposite party no.5 and the Investigating Officer had sat over the matter silently as if the real truth has come out. The petitioners time and again approached the parents of the deceased persons to take prompt steps to find out the cause of the death of their children but it was seen that they had only lodged the information as per the instruction of the opposite party no.5 as if their duties are over and their reaction revealed that they were sitting silently by concealing something under pressure or else they were feeling guilty for the commission of the murder of their children out of anger or on the name of honour. The ring ceremony (nirbandha) of the deceased Bebina Das was scheduled to be held on 02.07.2020 and having heard that Bebina fled away from the village with Tushar on 30.06.2020, parents of the deceased persons contacted the lovers over mobile phones and called them to the place of

occurrence. On the intervening night i.e. on 30.06.2020, steps were taken to burn down Tushar by using petroleum products and to kill both the lovers pressing the necks by means of rope. At the time of recovery of the dead bodies, it was found that the legs and hands of Tushar were burnt down which reveals that in the event Tushar commits suicide by hanging then why the legs and hands of Tushar were burnt. The opposite party no.5 seized some amount as well as a mobile phone from the dead body of Tushar and the I.O. could have found out the real cause of death from the call details of the seized mobile phone of Tushar. The parents of the deceased persons were unhappy with their love relationship, because Tushar was younger than Bebina and the parents of the deceased Bebina fixed "Nirbandha" after arranging the marriage of Bebina with another person except Tushar on 02.07.2020. Even though such grievance was made by the villagers, there was inaction on the part of the opposite parties no. 4 and 5. Hence, this application.

3. Mr. B. Satpathy, learned counsel for the petitioners states that the death of both the lovers comes within the domain of "honour killing", which means and includes killing of a relative, especially a girl or woman, who is perceived to have brought dishonor on the family. It is a killing of a person on the name of honour and such a killing is done to save the prestige of a family or done in order to make it an example for others or done out of rage and anger, reason can be many. It is a pre-planned, brutally executed more often than not within blood relations and that too in connivance with the law enforcing agencies. Therefore, the defence should not be made ordinarily available and are not ordinarily justified in the eyes of law. Honour killing in India occurs because of certain age old practices like casteism, religions, traditions, cultures etc., thereby, it violates articles 14, 15(1) & (3), 19 and 21 of the Constitution of India. It is mainly directed towards woman and thus gives rise to gender inequality. Thereby, the petitioners seek an independent investigation by handing over the case to a competent officer of impartial agency like CBI or Crime Branch of Orissa Police to find out the truth behind such death and to take action against the erring officers involved during investigation of the case in accordance with law. To substantiate his case, he has relied upon the judgments of the apex Court in ***Lata singh v. State of U.P.,*** AIR 2006 SC 2522; ***Jyoti @ Jannat v. State of U.P.,*** (2006) 5 SCC 457; ***Krishna Master v. State of U.P.,*** AIR 2010 SC 3071, ***Bhagaban Das v. State of NCT of Delhi,*** (2011) 6 SCC 396; and ***Arumugam Servai v. State of Tamilnadu,*** (2011) 6 SCC 405.

4. Mr. Debakanta Mohanty, learned Addl. Government Advocate contended that on 01.07.2020 at about 8.15 pm, one Ranjan Kumar Das, son of Pandaba Das of village Duadia lodged a written report alleging therein that on 30.06.2020 he reported at police station regarding missing of his younger sister Bebina Das. On 01.07.2020, he along with his family members searched his sister Bebina Das and came to know that in the backside of Basudev Primary School in the middle point of pandanus bush, she had committed suicide by hanging in a sycamore tree with the help of a rope along with another co-villager Tushar Palai, son of Adikanda Palai, who also committed suicide by hanging in the same rope. Therefore, he requested for investigation. Accordingly on receipt of said FIR, Kujanga P.S. U.D. Case No. 10 dated 01.07.2020 was registered by IIC, Kujanga P.S. and one Debendra Kumar Sahoo, ASI, Kujanga P.S. was appointed as I.O. in the case and directed to take the charge of investigation of the U.D. Case. Accordingly, the I.O. started investigation and immediately the commandant Prasant Kumar Das and Biswamitra Kanhar of Kujanga P.S. were directed to guard the dead bodies of both deceased Bebina Das and Tushar Palai and assist the I.O. during the time of investigation of the case. The I.O. recorded the statement of the informant- Ranjan Kumar Das under Section 161 Cr.P.C. and submitted a letter to the Sub-Collector, Jagatsinghpur to depute one Executive Magistrate to the spot to remain present during the period of inquest over the dead bodies of the deceased persons. The I.O. also recorded the statements of fathers of both the deceased Bebina Das and Tushar Palai, namely, Pandaba Das and Adikanda Palai respectively under Section 161 Cr.P.C. He visited the spot, but inquest could not be conducted on the same day over the dead bodies of both the deceased persons due to odd hours of night. On 02.07.2020, in presence of the Executive Magistrate and witnesses, inquest over the dead bodies of both the deceased persons was conducted and accordingly inquest report was prepared. The statements of the witnesses to the inquest and that of the Executive Magistrate were also recorded by the I.O. under Section 161 Cr.P.C. Thereafter, the dead bodies of both the deceased persons were dispatched to the Medical Officer, Postmortem Centre, Kujanga for conducting autopsy over the dead bodies and opined the cause, nature and duration of the death. Besides, on 02.07.2020, the I.O. also seized a black colour mobile handset from the spot and prepared the seizure list and recorded the statement of the seizure witnesses under Section 161 Cr.P.C. In addition to the same, the I.O. recorded the statement of three witnesses of the same village who are also the relatives of the deceased persons, namely, Rohit Das, Khirod Palai and Chandrasekahr Das on the

same day during course of investigation of the case. After the postmortem examination, the dead bodies of the deceased persons were handed over to their family members for funeral with proper acknowledgement. The I.O. seized wearing apparels of deceased Tushar Palai and deceased Bebina Das, prepared seizure list and recorded the statement of seizure witnesses under Section 106 Cr.P.C. in furtherance to the investigation. On 05.07.2020, during course of investigation, the I.O. also recorded the statement of relatives and some villagers of the deceased persons, namely, Sarat Dalai, Gopinath Gochhayat and Nrusingha Palai. Besides, the I.O. also made a prayer to the S.P., Jatatsinghpur to provide CDR, SDR and location of the SIM (No. 6370338782) of the seized mobile from 01.06.2020 to 01.07.2020 for the purpose of enquiry. The postmortem report was received on 01.10.2020 of both the deceased persons. It is opined by the doctor, who conducted autopsy over the dead bodies that cause of death was due to asphyxia by hanging, suicidal in nature. It is also opined that the rope examined was capable to bear the weight of the deceased and can cause death. It is contended that investigation of the I.O. is fair and transparent and, therefore, there is no necessity to handover the case to the Crime Branch, Odisha for investigation.

5. This Court heard Mr. B.N. Satapathy, learned counsel for the petitioners and Mr. D. Mohanty, learned Addl. Government Advocate appearing for the State through virtual mode. Pleadings having been exchanged, taking into consideration the gravity of the allegations made in the writ petition and urgency in the matter, with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

6. The factual matrix, as mentioned above, clearly reveals that Bebina Das, daughter of Pandaba Das fell in love with Tushar Palai, younger son of Adikanda Palai, who admittedly five years younger than her and they have got distant relationship as aunt and nephew and it was not appreciated by both the family members and as such, the family members of Bebina Das arranged her marriage with one Bruhaspati Das, S/o- Babaji Das of village-Gadaromita, P.S.- Marsaghai, Dist- Kendrapara on the mediatorship of Babuli @ Alekh Choudhury of village Gadaromita. Tushar Palai developed possessiveness with his aunt Bebina Das and both orchestrated to marry each other. But the societal hazards got birthed on two reasons i.e. Bebina Das was five years older than Tushar Palai and also happens to be his aunt. None of

their family members acquiesced with such proposal. Being cognizant of the fact and being unable to face the societal barriers both Bebina Das and Tushar Palai eloped from their houses on 30.06.2020 morning. In this connection, Kujanga P.S. Man Missing entry no. 36/2020 and GD No. 08 dated 30.06.2020 got featured on the report of the informant Ranjan Kumar Das towards missing of his sister Bebina Das. Both Bebina Das and Tushar Palai, being unable to bear the wear and tear of life, decided and committed suicide. Ultimately on search being made by family members, their dead bodies were found in the branch of one sycamore tree situated behind the Primary School of village Duadia, at the outskirt of village at a distance of 4 KMs east to Kujang PS being surrounded by wild pandanus bush. The branch of suicide stands at height of about 6'4" from the ground. On the basis of the FIR lodged by Ranjan Das, U.D. case was registered and investigation was conducted by the Investigating Officer.

7. On the above background, the petitioners have approached this Court by filing this PIL. While issuing notice, on 30.09.2020, this Court directed to serve five extra copies of the writ petition on the learned Addl. Government Advocate to enable him to obtain instructions in the matter. When the matter was listed on 05.10.2020, Mr. D.K. Mohanty, learned Addl. Government Advocate appearing for the State opposite parties prayed for time to file counter affidavit and also inform the Court about progress of the investigation. On 14.10.2020, this Court passed the following order.

> *"The Court is convened through Video Conferencing."*
>
> *Mr. S. Palit, learned Additional Government Advocate for the State-opposite parties submits that counter affidavit in this case has already been filed by opposite party no.5. He further submits that investigation in the matter is still pending.*
>
> *Considering the seriousness of allegations, we direct that the case in connection with Kujang P.S. U.D. Case No. 10 of 2020 be investigated under the supervision of Additional superintendent of Police, Paradeep and progress report thereof shall be produced before this Court along with copy of the up-to-date case diary on the next date.*
>
> *The matter to come up on 11.11.2020."*

In compliance thereof, the Addl. Superintendent of Police, Paradeep, Dist. Jagatsinghpur submitted a report on 25.10.2020, which was produced in a sealed cover and placed on record. At the time of hearing, the sealed cover was opened and it was found therein that he has simply endorsed the

investigation conducted by the original investigating officer and ignored many such aspects which ought to have engaged his attention to investigate the matter all over again from a different perspective. We do not wish to discuss the conclusion recorded in that report in detail, least it may prejudice the case of the parties. Suffice it to say that investigation so far been conducted in a lopsided and lackadaisical manner. The copy of the above mentioned report was not served on learned counsel for the petitioner. But, on the basis of the materials available on record, which were filed by opposite party no.5 in its counter affidavit, Mr. Satpathy, learned counsel appearing for the petitioners brought to the notice of this Court and referring to the case diary contended that UD Case was registered on 01.07.2020 and accordingly investigation was conducted by the I.O. during course of which inquest was conducted and evidences were recorded. Subsequently, the dead body of deceased Bebina Das was dispatched at 10.20 a.m. with a request to conduct autopsy over her dead body and opine the cause, nature and duration of death at an early date. Similarly, in case of Tushar Palai, the body was dispatched at 10.50 am with a request to conduct autopsy over his dead body and opine the cause, nature and duration of death at an early date. Though autopsy was conducted by the Medical Officer, Dr. P.K. Panda, Superintendent of CHC, Kujanga, Jagatsinghpur, but the postmortem reports in respect of deceased Bebina Das and deceased Tushar Palai were not made available till 16.08.2020. When the medical officer was contacted on the same day (16.08.2020), he contended that he was busy in medical work and would submit the same later on. Again on 19.09.2020, similar reply was given by the medical officer, and finally on 01.10.2020, the medical officer submitted his report opining that cause of death was due to asphyxia by hanging, suicidal in nature and time since death to post mortem was within 72 to 84 hours, and the ligature rope was capable to bear the weight of the deceased persons and can cause death.

8. Mr. S. Satapathy, learned counsel for the petitioners brings to the notice of this Court that the medical report also indicates that the rope was ½ inch thick and the death of both the deceased was caused by a single rope of 6 feet length, and that the spot report reveals that height of the branch of the tree on which two dead bodies were found hanging was barely 6 feet and 4 inches from ground, therefore, it creates a suspicion and rather does not inspire confidence that their death was caused due to suicidal hanging. Referring to inquest reports of both the deceased Tushar Palai and Bebina Das, he submits that clause-5 of the inquest report of deceased Tushar Palai

indicates that on examination of the body it was found that there were blisters in the entire body and a rope tied on the neck and, as such, under clause-9 the inquest witness Govinda Palai had opined that after causing death of his nephew the dead body was hanged. Such inquest report has been enclosed and placed on record at page 37 of the counter affidavit filed on behalf of opposite party-State. Similarly, in the inquest report of deceased Bebina Das in clause-9 the opinion of the witnesses with regard to cause of death has been recorded that there was a doubt with regard to the death of the deceased Bebina Das and its truthfulness should be unveiled.

9. The above sequence of events would clearly indicate that the investigation has been done in a casual and slipshod manner without giving any importance to the death of two young persons and, more so, the doctor, who conducted autopsy on 02.07.2020, submitted post-mortem report after three months, i.e. 01.10.2020 and that itself creates suspicion with regard to the functioning of the authority concerned. On perusal of the inquest report of both the deceased, it would be seen that the opinion of the inquest witnesses as to cause of death has been indicated differently. The police would have given more importance and, as such, recorded the evidence of such persons and given importance to such statements, but it reveals from the records available that in a routine manner the investigating officer has conducted the investigation and so also the medical officer submitted his post-mortem report in a mechanical manner. When a direction was given by this Court, vide order dated 14.10.2020, the superior officer, namely, the Additional Superintendent of Police, Paradeep submitted his supervision report on 25.10.2020, without touching to the seriousness of the allegations made. A cumulative effect of all these clearly creates a suspicion with regard to the investigation conducted to the allegations made in the application itself. As such, till date the charge-sheet has not been submitted by the police. Meaning thereby, the investigation has not been concluded till date. The cavalry manner of investigation and the report submitted by the medical officer as well as the supervision report submitted by the Additional Superintendent of Police enhanced the suspicion which requires further investigation by an agency other than the agency which has done the same.

10. The word "**investigation**" has been defined under Section 2(h) of the Criminal Procedure Code, 1973 as follows:-

> *"**investigation**" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."*

11. Chapter-XII of the Criminal Procedure Code, 1973 deals with "**information to the police and their powers to investigate**", which includes Sections 154 to 176. For just and proper adjudication of the case, Sections 154, 156 and 174 are quoted below:-

> ***154. Information in cognizable cases.***—*(1) Every information relating to the commission of a cognizable offence, if given orally to an officer incharge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant ; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*
>
> *(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.*
>
> *(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if statisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer incharge of a police station in relation to that offence.*
>
> ***156. Police officer's power to investigate cognizable case.***—*(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.*
>
> *(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.*
>
> *(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.*
>
> ***174. Police to enquire and report on suicide, etc.***—*(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate*

empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub- divisional Magistrate.

[(3) When—

(i) the case involves suicide by a woman within seven years of her marriage; or

(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf ; or

(iv) there is any doubt regarding the cause of death; or

(v) the police officer for any other reason considers it expedient so to do,

he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate."

12. The word "**investigation**", as defined under Section 2(h) of the Code mentioned supra, includes all the proceedings under the said Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in that behalf. This question has already been answered by the apex Court in ***Union of India v. Prakash P. Hinduja***, (2003) 6 SCC 195.

Therefore, it follows that there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Court to intervene in an appropriate case.

13. In ***State of Madhya Pradesh v. Mubarak Ali***, AIR 1959 SC 707, the apex Court held that the word "**investigation**" defined under Section 2(h) of the Code, which was in Section 4(1) of the Code of Criminal Procedure, 1898, defines investigation as to include all the proceedings under that Code for the collection of evidence conducted by the police officer or other persons other than a Magistrate in that behalf. Under the Code, investigation consists generally of the following steps (i) proceeding to the spot; (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence which may consist of (a) the examination of the various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (v) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

14. In ***State of Bihar v. J.A.C. Saldanna*** and ***R.P. Singh v. J.A.C. Saldanna***, (1980) 1 SCC 554 : AIR 1980 SC 326, the apex Court held that "**investigation**" of an offence is the field exclusively reserved for the executive through the Police Department, the Superintendence over which vests in the State Government.

Similarly, in ***State of Haryana v. Ch. Bhajan Lal***, (1992) Supp 1 SCC 335 : AIR 1992 SC 604, the apex Court held that the "**investigation**" of an offence is the field exclusively reserved for the police officers whose powers in the field are unfettered so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of Code of the Criminal Procedure and the Courts are not justified in obliterating the track of investigation when the investigating agencies are well within their legal bounds as aforementioned.

Therefore, the word "**investigation**" has been defined under Section 2(h) of the Code and the expression therefore is used with definite meaning in the strict legal sense and not in a loose or general sense.

15. In ***K. Veeraswami v. Union of India***, 1991 (3) SCC 655, the apex Court held that investigation is a systematic minute and thorough attempt to learn the facts about something complex or hidden; it is often formal and official. "Investigation" consists of the following steps: (i) proceeding to the spot; (ii) ascertainment of the facts and circumstances of the case; (iii) discovery and arrest of the suspected offender; (iv) collection of evidence relating to the commission of the offence which may consist of the examination of various persons (including the accused) and the reduction of their statement into writing, if the officer thinks fit; search of places and seizure of things considered necessary for investigation and for production at the trial; and (v) formation of the opinion as to whether on the materials collected there is a case to place the accused before the Magistrate for trial and, if so, taking necessary steps for the same by filing a charge sheet under Section 173 Cr.P.C.. Thus the purpose of the investigation is to find out whether materials exist to place the accused before the Magistrate for trial.

Similar view has also been taken by the apex Court in ***Union of India v. Prakash P. Hinduja***, AIR 2003 SC 2612 and ***M.C. Mehta v. Union of India*** , AIR 2007 SC 1087 and by this Court in ***Smt. Sabita Praharaj v. Smt. Gitarani Praharaj***, 2004 (2) Orissa LR 193.

16. Chapter XII of the Code of Criminal Procedure, 1973 deals with information to the police and their power to investigate. However, the provisions of the sub-section (3) of Section 154 of the Code empower the investigation either by the officer-in-charge of the Police Station or he may direct the investigation to be made by the Police Officer subordinate to him. If the investigation is done by the officer subordinate to the officer-in-charge of the Police Station at his direction, such subordinate officer as stipulated under Section 168 of the Code requires to report the final result of the investigation to the officer-in-charge of the Police Station. Reading of the provisions of Sections 157, 161, 165, 166A, 167 and 168 of the Code clearly demonstrate that, the investigation in respect of cognizable offence could be made either by the officer-in-charge of the Police Station or any other officer as provided.

17. An officer in charge of a police station and other police officers specially empowered in this behalf are required by Section 174 to make investigation into cases of suicides and other unnatural or suspicious deaths and to report to the District Magistrate or the Sub-Divisional Magistrate.

18. In ***Meharaj Singh v. State of U.P.***, (1994) 5 SCC 188, the apex Court held that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The report prepared is indeed aimed at serving a statutory function, to lend credence, to the prosecution case. However, the details of the FIR and the gist of the statements recorded during inquest proceedings get reflected in the report.

19. In ***George v. State of Kerala***, (1998) 4 SCC 605, the apex Court held that reliance on the statements in the inquest report to the extent they relate to what the investigating officer saw and found is permissible but any statement made therein on the basis of what he heard from others would be hit by Section 162.

20. Though ordinarily investigation is undertaken on information received by a Police Officer, the receipt of information is not a condition precedent for investigation. Section 157, Code of Criminal Procedure prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise.

21. In ***State of U.P. v. Bhagwant Kishore Joshi***, AIR 1964 SC 221, the apex Court held that the provisions contained in Section 157 Cr.P.C. make it clear that an officer-in-charge of a police station can start investigation either on information or otherwise.

22. In ***Ram Bihari Yadav v. State of Bihar***, (1998) 4 SCC 517, the apex Court held that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice.

Similar view has been reiterated in ***Amar Singh v. Balwinder Singh***, (2003) 2 SCC 518. All these decisions have also been followed by the apex Court in ***Zahira Habibulla Sheikh v. State of Gujarat***, AIR 2006 SC 1367.

23. In ***Sasi Thomas v. State***, (2007) 2 SCC (Cri) 72, the apex Court held that proper and fair investigation on the part of the investigating officer is the backbone of the rule of law. A proper and effective investigation into a serious offence and particularly in a case where there is no direct evidence assumes great significance as collection of adequate materials to prove the circumstantial evidence becomes essential. Unfortunately, the applicant has not been treated fairly. When a death has occurred in suspicious circumstances and in particular when an attempt had been made to bury the dead body hurriedly and upon obtaining apparently an incorrect medical certificate, it was expected that upon exhumation of the body, the investigating authorities of the State shall carry out their statutory duties fairly.

24. Now, taking into consideration the provisions of Section 173(8) of the Cr.P.C., the words "further investigation" in Section 173(8) Cr.P.C. are not linked with the words "the officer-in-charge of the police station by the word 'by'. The words "further investigation" are suffixed by the words "in respect of an offence". Therefore, further investigation by a different investigation agency is not ruled out under Section 173(8) Cr.P.C.

25. In view of the provisions of law, as discussed above, it clearly reveals that further investigation can be permissible in respect of an offence by different investigation agency, as prima facie this Court is of the considered view that the investigation in the instant case has been undertaken in a negligent and perfunctory manner and, as such, it requires further investigation by a different investigating agency other than the local police authority.

26. In ***Lata Singh*** (supra), the apex Court held that the acts or threats or harassment are wholly illegal and those who commit them must be severally punished. Once a person becomes a major he or she can marry whomsoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage, the maximum they can do is that they can cut off social relations with the son or daughter, they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. The Bench also said that there is nothing honorable in such killings and in fact they are nothing but barbaric and shameful acts of murder committed by brutal and feudal minded persons who deserve harsh punishment.

27. In ***Jyoti @ Jannat*** (supra), the apex Court held that the law deems that a major understands his/her welfare. Hence, a major can go wherever he/she likes and live with anybody. India is a free, democratic and welfare country. If a person is major even parents cannot interfere with that individual. Once a person becomes major that person cannot be restrained from going anywhere and live with anyone. Individual liberty under Article 21 has the highest place in the constitution.

The other judgments which have been relied upon by the learned counsel for the petitioners may not have relevance to the present case.

28. Taking into consideration the facts and law, as discussed above, this Court is of the considered view that investigation of the above noted U.D. case should be handed over to the Crime Branch of Odisha Police to cause further investigation in accordance with law in order to unearth the truth or otherwise of the allegations levelled by the petitioners.

Accordingly, the writ petition is allowed. However, there shall be no order as to costs.

As lock-down period is continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed vide Court's Notice No.4587 dated 25.03.2020.

—— o ——

2021 (I) ILR - CUT- 89

KUMARI SANJU PANDA, J & S. K. PANIGRAHI, J.

W.A. NO. 62 OF 2020

CHAIRMAN, ODISHA GRAMYA BANK .....Appellant

.V.

RAMA CHANDRA BEHERA .....Respondent

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ jurisdiction – Scope of interference in disciplinary enquiry and punishment matters of Govt. employees – Principles – Discussed.

"In exercise of its powers under Article 226/227 of the Constitution of India, the Writ Court should not venture into re-appreciation of the evidence. The High Court can only see whether:

a. the Inquiry is held by a competent authority;

b. the Inquiry is held according to the procedure prescribed in that behalf;

c. there is violation of the principles of natural justice in conducting the proceedings;

d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case ;

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence. Under Article 226/227 of the Constitution of India, the High Court shall not:

i. re-appreciate the evidence;

ii. interfere with the conclusions in the Inquiry, in case the same has been conducted in accordance with law;

iii. go into the adequacy of the evidence;

iv. go into the reliability of the evidence;

v. interfere, if there be some legal evidence on which findings can be based;

vi. correct the error of fact however grave it may appear to be;

vii. go into the proportionality of punishment unless it shocks its conscience. The conclusions drawn in the impugned Inquiry Report over the particularized allegations are based on consideration of relevant materials and evidence. This Court while exercising powers under Article 226/227 of the Constitution of India cannot re-appreciate the evidence nor can it interfere with the conclusion of the Inquiry report if it has been conducted in accordance with law." *(Para 15)*

Case Laws Relied on and Referred to :-

1. (AIR 1969 SC 966) : Union of India, New Delhi Vs. Niranjan Singh

2. AIR 1963 SC 1723 : State of Andhra Pradesh and others Vs. S Sree Rama Rao.[2]
3. AIR 2014 SC 1141 : Chennai Metropolitan Water Supply and Sewarage Board Vs. T. Murali Babu
4 (1995) 6 SCC 749 : B.C. Chaturvedi Vs. Union of India & Ors.
5 (1997)7 SCC 463 : Union of India & Anr. Vs. G. Ganayutham.
6 (2001) 2 SCC 386 : Om Kumar and others Vs. Union of India.
7 (2007) 4 SCC 669 : Coimbatore District Central Co-operative Bank Vs. Coimbatore District Central Co-operative Bank Employees Association & Anr.
8 (2009)15 SCC 620 : Chairman-cum-Managing Director, Coal India Limited & Anr. Vs. Mukul Kumar Choudhuri & Ors.
9 1990(II) OLR-70 : Chiranjib Parida Vs. State of Orissa represented by the Secretary to the Govt. in Education & Youth Services & Ors.
10 (1991) 1 SCC 319 : Central Bank of India Vs. C. Bernard.
11 AIR 1999 SC 1437 : Jalandhar Improvement Trust Vs. Sampuran Singh.
12. AIR 2005 SC 446 : Harshad Chiman Lal Modi Vs. D.L.F. Universal Ltd. & Anr.
13. (1977) 2 SCC 491 : V. R. Krishna Iyer has frowned upon in State of Haryana and Anr Vs. Rattan Singh.

For Appellant : Mr. Manoj Kumar Mishra, Sr. Adv.,
M/s. T. Mishra, S. Senapati, S. S. Parida & A. Mishra.
For Respondent : Mr. Jayant Kumar Rath, Sr. Adv., M/s. D. N. Rath,
P. K. Rout, A. K. Saa & N. Panda-A.

JUDGMENT Date of Hearing : 11.11.2020 :Date of Judgment : 27.11.2020

S. K. PANIGRAHI, J.

This Writ Appeal assails the judgment dated 24.12.2019 passed by learned Single Judge in W.P.(C) No.6558 of 2002 which allowed the Writ Petition filed by the present respondent while interfering in the inquiry process by setting aside the appointment of Sri P. K. Bose as an Inquiry Officer along with all proceedings conducted by him including the second show-cause notice in holding that the inquiry proceedings initiated against the present respondent by Sri P.K. Bose is unsustainable, illegal, improper, unjust and also contrary to the settled principle of law.

2. The factual conspectus of the case rests on the fact that the present respondent was appointed as Clerk-cum-Cashier in Balasore Gramya Bank on 13.01.1982 and posted in Mitrapur Branch of Balasore Gramya Bank in the District of Balasore on 12.06.1985. Subsequently, he was promoted to the Officer Scale-I w.e.f. 28.04.1989. However, later, he was placed under suspension on the ground of financial irregularities, fraudulent activities, misappropriation of public/Bank's money and manipulating Bank's record while working as an Additional Officer in Mitrapur Branch of Balasore Gramya Bank.

3. On the basis of breadth and depth of charges leveled hereinabove, the Respondent was slapped with Article of Charges with statement of allegations on 24.09.1998 and additional Article of Charges with statement of allegations on 25.10.1998. The said Article of Charges and statement of allegations portrays the commission of major financial irregularities by way of fraudulent activities, misappropriation of public/Bank's money, disbursement of loans and advances by manipulating bank records, deliberate flouting of Bank's Rules and procedures, displaying gross negligence in duty, failure to serve the Bank faithfully and honestly which is grossly deviated from the proverbial 'reasonable person'.

4. Accordingly, the present respondent submitted his reply/ statement of defence in respect of both the charge-sheets. He was afforded opportunity of being heard and procedural fairness. However, the competent authority was not very satisfied with the reply given by the delinquent officer/present respondent and the said competent authority directed commencement of domestic inquiry by appointing Sri P. K. Bose as an Inquiry Officer. The said inquiry was conducted with a view to prove the allegations or charges framed against the present respondent without compromising the principles of natural justice.

5. Upon completion of the inquiry, the report was submitted by the Inquiring Officer with a finding that the charge-sheet leveled against the respondent are proved. The said inquiry report was also concurred by the Chairman and competent authority and came to a conclusion that the respondent had indulged in gross negligence of duty and failed to exercise due care and caution while discharging his duty and responsibility. In addition to this, he was also charged with commission of fraud and misappropriation causing withdrawal from the SB Account and wilfully flouting the Rules and Regulations of the Bank by misutilizing his official position.

6. The inquiry report was submitted on 02.12.2002 and reply was sought in the second show-cause notice issued to the present respondent within fifteen days from the date of receipt of letter.

7. Aggrieved with the aforesaid report, the present respondent sought to challenge the second show-cause notice by way of W.P.(C) No.6558 of 2002 with a prayer to quash the second show-cause notice. After hearing the said Writ Petition preferred by the respondent herein, the learned Single Judge

passed the judgment vide order dated 24.12.2019 setting aside the appointment of Sri P.K. Bose as Enquiry Officer along with all proceedings conducted by him including the second show-cause notice. He has also held that the appointment of Sri P. K. Bose as an Inquiring Officer remains unsustainable and perverse since it is contrary to provision of Bank's Service Regulation. Hence, it is illegal, improper and unjust.

8. Combating the aforesaid view by the learned Single Judge, Mr. M.K. Mishra, learned Senior Counsel for the appellant assailed the impugned judgment and order dated 24.12.2019 wherein the appointment of Sri P. K. Bose as an Inquiring Officer was set aside and all proceedings conducted by him including the second showcause notice was quashed. He further contended that the jurisdiction of learned Single Judge is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice but not otherwise. He further averred that the present respondent has participated in the inquiry proceeding before the Inquiring Officer appointed by the competent authority without raising tantrum. The procedural fairness and principles of natural justice were duly complied in a substantive sense. He further reiterated that the findings recorded by the Inquiry Officer are basically findings of fact based on evidence on record and there is no perversity.

9. While the inquiry report was not palatable to him, he turned around and subsequently contended that the appointment and competency of Sri P. K. Bose as an Inquiry Officer was unsustainable. The Respondent herein has waived his right to question the competency of the Inquiry Officer at this stage. The findings of the learned Single Judge quashing the appointment of Sri P. K. Bose as an Inquiring Officer and the proceeding connected thereto to including the Second show-cause notice is unsustainable, perverse and contrary to the facts on record.

10. In the second limb of his argument he submitted that as per Section 17(1) of RRBs Act, 1976, which states that the sponsored bank is permitted to send such number of officers or other employees on deputation to Regional Rural Banks as may be necessary or desirable for the efficient performance of the Bank. The said provision is extracted herein below: -

> **"*17. Staff of Regional Rural Banks*.-** *(1) A Regional Rural Bank may appoint such number of officers and other employees as it may consider necessary or desirable*

(in such manner as may be prescribed) for the efficient performance of its functions and may determine the terms and conditions of their appointment and service:

Provided that, it shall be lawful for a Sponsor Bank, if requested so to do by a Regional Rural Bank sponsored by it, to send [***] such number of officers or other employees on deputation to the Regional Rural Bank as may be necessary or desirable for the efficient performance of its functions:

Provided further that the remuneration of officers and other employees appointed by a Regional Rural Bank shall be such as may be determined by the Central Government, and, in determining such remuneration, the Central Government shall have due regard to the salary structure of the employees of the State Government and the local authorities of comparable level and status in the notified area.

(2) Notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947), or any other law for the time being in force, no award, judgment, decree, decision or order of any industrial tribunal, Court or other authority, made before the commencement of this Act, shall apply to the terms and conditions in relation to the persons appointed by a Regional Rural Bank.

(3) The officers and other employees of a Regional Rural Bank shall exercise such powers and perform such duties as may be entrusted or delegated to them by the Board."

According to the above percepts, Sri P. K. Bose, who is an Officer in the rank of Middle Management Grade Scale-II by sponsored Bank, was brought on deputation to Orissa Gramya Bank from Uco. Bank which is the sponsoring Bank which was perfectly as per the provisions of the RRBs Act.

11. He further drew support from the certificatory letter with respect to the question of appointment on deputations as Inquiry Officer from other Banks like Sri P. K. Bose in the instant case. In fact, as per Sponsor Bank letter No.PD/RRB/HO/390/X-14/90 dated 23.02.1990 which has been issued as clarificatory Letter by the NABARD, Head Office, Mumbai, wherein it is stated that the officer of sponsored bank on deputation can be appointed/ entrusted with the task of Inquiry. In view of the matter, appointment of Sri P. K. Bose as an Inquiring Officer is not per se illegal or wrong as canvassed by the counsel for the Respondent.

12. The contention of the present respondent with regard to the seniority of Sri P. K. Bose is also grossly erroneous and not based on facts. Learned Counsel for the Appellant contended that Regulation of Section 30(3) of Balasore Gramya Bank Service Regulations stipulates that the Inquiry Officer to be appointed by the competent authority and he should be a grade higher to the delinquent officer which is in sync with spirit of the said regulation which is extracted herein below:-

> ***"30(3) The inquiry under this regulation and the procedure with the exception of the final order, may be delegated in case the person against whom proceedings are taken as an officer to any officer who is in a grade higher than such officer and in the case of an employee to any officer. For purpose of inquiry, the officer or employee may not engage a legal practitioner."***

In the present case, the Inquiring Officer was a grade higher than that of the present respondent which is also completely in conformity with regulation, hence there is no procedural failing.

13. The contentions of the present respondent as articulated by Mr. J K Rath, learned Senior Advocate, regarding unsuitability of Sri P. K. Bose to be appointed as an Inquiring Officer because of his deputationist status wrongly premised because there is nothing in the Regulation which excluded an officer to be appointed to the service in the RRB fold on deputation. Therefore, an officer of the Sponsored Bank on deputation to the RRB, is also an officer of RRB for all practical purposes and he is covered within the meaning of definition of officer as contained in Regulation-2(i) of Model (Staff) Service Regulations. The said Regulation 2(i) is extracted herein below:-

> ***2(i) "officer" means a person appointed to any of the posts specified in sub-regulation (2) of regulation 3.***

In view of the above, the learned Single Judge has failed to navigate the facts in proper prospective and set aside the appointment of Sri P. K. Bose as Inquiring Officer.

14. We have carefully considered the submission of the learned counsels for the parties and perused the records. On bare perusal of the inquiry report shows that the Appellant was confronted with the oral, documentary evidences and procedural fairness have been duly complied. The allegations against the present respondent are quite serious in nature and the competent authority has concurred with the findings of the Inquiring Officer appointed to prove against the delinquent officer. The objection raised by the Counsel for the respondent with respect to the competency of Sri P. K. Bose as an Inquiring Officer is quite erroneous, contrary to the RRB Act and the Service Regulations. As per the conjoint reading of the provisions of Regional Rural Bank's Act 1976 read with Model (Staff) Service Regulations and the relevant provisions which have been extracted hereinabove, the appointment of Sri P. K. Bose to conduct the inquiry against the delinquent officer does

not portray any departure from law. Despite the well-settled position, it is painfully disturbing to note that the learned Single Judge has acted like an appellate authority of the disciplinary proceedings and quashed the proceedings wrongly.

15. In exercise of its powers under Article 226/227 of the Constitution of India, the Writ Court should not venture into reappreciation of the evidence. The High Court can only see whether:

> *a. the Inquiry is held by a competent authority;*
>
> *b. the Inquiry is held according to the procedure prescribed in that behalf;*
>
> *c. there is violation of the principles of natural justice in conducting the proceedings;*
>
> *d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
>
> *e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
>
> *f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
>
> *g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;*
>
> *h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*
>
> *i. the finding of fact is based on no evidence.*
>
> *Under Article 226/227 of the Constitution of India, the High Court shall not:*
>
> *i. re-appreciate the evidence;*
>
> *ii. interfere with the conclusions in the Inquiry, in case the same has been conducted in accordance with law;*
>
> *iii. go into the adequacy of the evidence;*
>
> *iv. go into the reliability of the evidence;*
>
> *v. interfere, if there be some legal evidence on which findings can be based;*
>
> *vi. correct the error of fact however grave it may appear to be;*
>
> *vii. go into the proportionality of punishment unless it shocks its conscience.*

The conclusions drawn in the impugned Inquiry Report over the particularized allegations are based on consideration of relevant materials and

evidence. This Court while exercising powers under Article 226/227 of the Constitution of India cannot re-appreciate the evidence nor can it interfere with the conclusion of the Inquiry report if it has been conducted in accordance with law. This aspect of law has been succinctly echoed in ***Union of India, New Delhi v. Niranjan Singh***[1]***, State of Andhra Pradesh and others v. S Sree Rama Rao,***[2] ***Chennai Metropolitan Water Supply and Sewarage Board v. T. T. Murali Babu3, B.C. Chaturvedi v. Union of India and others4, Union of India and another v. G. Ganayutham***[5]***, Om Kumar and others v. Union of India***[6]***, Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Association and another***[7] and ***Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others***[8]**.**

16. The Respondent's objection regarding the deuptationist status of the Inquiry officer is also unsustainable because such status of Sri P. K. Bose does not bar his appointment as an Inquiring Officer by the competent authority. This position of law further draws credence from Section 17(1) of the Regional Rural Bank's Act 1976. Hence, the proposed inquiry report by the Inquiring Officer and the second show-cause notice cannot be held to be non est or void abinitio.

17. Another intriguing aspect of the matter forming part of the substantive argument advanced by the Respondent regarding the competency of the Inquiring Officer which was never raised during entire proceedings but when he saw the adverse wind blowing against him after conclusion of the inquiry, he raised such issues before the learned Single Judge. With the present set of facts, the inquiry has been held in précised factual contours and report has been submitted. The report has been prepared on considering the weight of evidence and materials on record after following due procedure of law. In view of the Inquiry Report, the findings cannot be interfered.

18. The Respondent cited some of the precedents like ***Chiranjib Parida V. State of Orissa represented by the Secretary to the Govt. in Education & Youth Services and others***[9]**, Central *Bank of India v. C. Bernard***[10]***, Jalandhar Improvement Trust v. Sampuran Singh***[11]***, Harshad Chiman Lal Modi v. D.L.F. Universal Ltd. And another***[12] and so on to buttress his points

(1) (AIR 1969 SC 966), **(2)** AIR 1963 SC 1723, **(3)** AIR 2014 SC 1141, **(4)** (1995) 6 SCC 749, **(5)** (1997)7 SCC 463, **(6)** (2001) 2 SCC 386, **(7)** (2007) 4 SCC 669, **(8)** (2009)15 SCC 620, **(9)** 1990(II) OLR-70, (1**0**) (1991) 1 SCC 319, **(11)** AIR 1999 SC 1437, **(12)** AIR 2005 SC 446.

but these precedents cited by him do not have any factual resemblance to the set of facts involving the present case.

19. Recounting such an issue, Justice ***V. R. Krishna Iyer has frowned upon in State of Haryana and another v. Rattan Singh***[13] "….the essence of a judicial approach needs to be based on objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiates the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. …." In the light of such observation, the findings of the learned Single Judge and reducing the Inquiry report to nothingness warrants a meaningful review by this Court.

20. In view of the above discussions and aforenoted decisions, the learned Single Judge has failed to establish intelligibly a rational nexus between the submissions of the Respondent herein and the correct position of law. The impugned order embarks upon a wrong conclusion postulating an adverse decision. The Court/Tribunal should not mechanically set aside the disciplinary proceedings on such flimsy grounds without application of juridical mind leading to erosion of institutional autonomy of the disciplinary authority.

21. In the result, the Writ Appeal is allowed and the impugned judgment dated 24.12.2019 passed by the learned Single Judge in W.P.(C) No.6558 of 2002 is set aside. No order as to cost.

(13) (1977) 2 SCC 491

——— o ———

2021 (I) ILR - CUT- 98

KUMARI SANJU PANDA, J & S. K. PANIGRAHI, J.

WRIT APPEAL NO. 586 OF 2020

ABHINASH KUMAR LOHANI ……..Appellant

.V.

JITENDRA KUMAR SAHOO & ORS. ……..Respondents

LETTERS PATENT APPEAL – Writ appeal before division bench – Exercise of the appellate jurisdiction – Scope and principles – Duty of the appellate court – Indicated.

"We have considered the respective submissions of the learned counsel for the parties. While exercising the appellate jurisdiction, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. The entire discussions indicate that the Respondent No.1 has not come forward to the Court with clean hands which sparks his contumacious conduct. It is also quite intriguing and surprising that the lease agreement has expired since 2012 and the Respondent No.1 has neither renewed the said agreement nor extended the tenure of lease. It is a well settled law that a tenancy is a creation of contract between the two persons who are capable of entering into contract called lessor/landlord and the lessee/tenant. The sanctity of the contract is lost once the lease agreement expires. The learned Single Judge has erred in entertaining an adventurous litigation without examining the conduct of the Respondent No.1 and granted interim relief like a final relief. Therefore, the writ petition is misconceived and consequential grant of interim relief is uncalled for". (Para 13)

Case Laws Relied on and Referred to :-

1. 11990 AIR 867 : Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors.
2. 22019 (5) SCALE 698 : Hammad Ahmed Vs. Abdul Majeed & Ors.
3. 1997(1) O. L. R. 323 : M/s Corona Ltd. & Ors. Vs. Krishna Chandra Patnaik.
4. (2010) 2 SCC 114 : Dalip Singh Vs. State of U.P.
5. (2010) 4 SCC 728 : Oswal Fats and Oils Ltd. Vs. Commr. (Admn).

For Appellant : M/s. Samir Kumar Mishra, A. Mohanta, J. Pradhan & P. Mohanty.

For Respondents: Bibekananda Bhuyan & S. Sahoo.

JUDGMENT Date of Hearing: 19.11.2020 : Date of Judgment: 02.12.2020

S.K. PANIGRAHI, J.

1. The present Writ Appeal seeks to challenge the Order dated 23.09.2020 passed by the learned Single Judge in W.P.(C) No.23804 of 2020 directing the electricity authority to provide temporary electricity supply in favour of the Writ Petitioner/present Respondent No.1 which amounts to granting the main relief sought for in the writ petition by the Respondent No.1.

2. The appellant's case, in nutshell, is that the respondent No.1 who is a gold merchant having a number of properties in prime locations of Keonjhar town including a huge Mall with name and style as "B.S. Mall". He was a tenant under joint family firm of the Appellant-M/s Kumar Multiplex Pvt. Ltd. and Dillip Kumar Ram for the Shop No.2 in Block-B and first floor of Block-B, Mayur Market Complex, now Mayur Complex, Keonjhar situated

over Plot No.620 under Khata No.187, Block-B, Village-Pabitradiha, District- Keonjhar vide agreement dated 21.02.2012 and 27.02.2012 respectively. The period of tenancy was up to 31.12.2012 and it was never extended even though Clause-4 of the Deed of Agreement expressly provided for extension of the lease period by renewal of the agreement. Similarly, Clause- 5 of the agreement, it was clearly stipulated that the Respondent No.1 shall not raise any alternation or construction on the permanent structure in the tenanted premises and shall hand over the premises to the landlord on the expiry of tenancy. The Respondent No.1 also agreed to pay the house rent by the end of the first week of the succeeding month and non-compliance of the Clause-12 shall be treated as a violation of the agreement and for such violation the respondent No.1 will be liable to be evicted without any further notice. The Respondent No.1 herein did not opt for any extension of the lease period in the absence of any fresh agreement. Hence, it was his solemn duty to hand over the possession of the tenanted premises to the landlord since the tenancy expired on 31.12.2012.

3. In a family partition the aforesaid property fell in the share of the present appellant. Since the tenancy period of the respondent No.1 was over in 2012, the appellant-landlord approached the respondent No.1 to enter into a fresh rent agreement or to hand over the vacant possession to him. But, the respondent No.1 took evasive plea and refused to vacate the possession. The precept of timely payment of lease rent is the essence of the Lease Agreement but it has not been respected by the Respondent No.1 herein. As a result of which, the present Appellant was compelled to file a suit for eviction and the same is pending before the learned Civil Judge (Senior Division), Keonjhar registered as C.S.No.81 of 2020.

4. There were two electricity connections in the name of the appellant's grandfather from which the electricity was sourced to the respondent No.1 shop. Since the respondent No.1 did not pay the outstanding Electricity dues, the appellant was compelled to pay the outstanding amount of Rs.54,770/- and after clearing all the dues, he was constrained to snap the connection from the Respondent's shop by way of a request letter to the Executive Engineer, NESCO, Keonjhar dated 28.08.2020. After disconnection, the respondent No.1 is generating electricity through his own Digital Generator and utilising electricity.

5. The respondent No.1 herein approached the Executive Engineer for reconnection of the snapped electricity but when the authorities sought for

NOC under Section 43 of the Electricity Act from the Landlord for reconnection, the Landlord refused to issue NOC which led to taking the matter before the office of the Chairperson, Permanent Lok Adalat, (PUS), Keonjhar which was registered as PLA Case No.257 of 2020 for reconnection of electricity without impleading the appellant as a party. The Chairperson, Permanent Lok Adalat vide its order dated 13.08.2020 asked the authorities to examine if temporary supply can be given to the petitioner's rented premises on receiving fees as admissible under rules and objection of the owner if any and directed both the parties to appear for conciliation.

6. The non-availability of the NOC from the landlord acted as a stumbling block in processing of restoration of electricity in the rented premises of the Respondent No.1. This gave rise to a cause of action for filing this Writ Appeal with a prayer for restoration of electricity to Shop No.2 in Block-B, Mayur Market Complex (First Floor) now Mayur Complex, Keonjhar situated over Plot No.620 under Khata No.187, Block-B, village-Pabitradiha, District- Keonjhar.

7. The Respondent No.1 made an application and submitted documents pursuant to order dated 18.08.2020 (Annexure-8 to the writ petition) issued by the Executive Engineer, Keonjhar Electrical Division, NESCO Utility, Keonjhar. But the Executive Engineer, vide his letter dated 25.08.2020 rejected the prayer for temporary power supply to the Respondent No.1's tenanted premises on the ground that the Respondent No.1 has not enclosed "No Objection Certificate" from the land owner along with application for temporary connection. Being aggrieved by said rejection letter, a Writ Petition was filed by the respondent No.1 herein.

8. The said Writ Petition was listed before the learned Single Judge who issued notice to the parties, but before hearing the appellant and other opposite parties, directed the authorities to provide temporary electricity connection to the writ petitioner without insisting on NOC in the shape of affidavit from the land owner for the time being, which is, in fact, the main relief sought for by the Respondent No.1.

9. Mr. Samir Kumar Mishra, learned Counsel for the Appellant submits that the learned Single Judge having opined that the matter requires consideration and accordingly issued notice to the appellant and other respondents. However, learned Single judge directed restoration of electricity

supply in the shape of interim relief before hearing the appellant and other contesting respondents, when such relief amounts to granting the final relief claimed in the writ petition. Thus, the impugned order which granted final relief in the guise of interim relief is unsustainable and erroneous which is reiterated in so many decisions of the Supreme Court and different High Courts, especially, in ***Dorab Cawasji Warden v. Coomi Sorab Warden & Ors***[1] and ***Hammad Ahmed versus Abdul Majeed and others***[2]**,** pronounced by the Supreme Court of India and held that the comparative mischief or inconvenience which is likely to cause from withholding the injunction, will be greater than which is likely to arise from granting it. Hence, the balance of convenience is in favour of the Appellant which is supervening than that of the Respondent herein. It is true that final prayer cannot be granted at the interim stage is not absolute principle having universal application. But in the case like the present one such interim relief was totally uncalled for.

10. It was brought to the notice of the Court that the Respondent herein has a massive shopping complex with name and style as "B. S. Mall" in the prime locality of the city for running his jewellery business along with other branches of business. In fact, the present shop in question has been kept locked for most of the time which clearly manifests that this shop is not required for running his business. He has unnecessarily creating tension and disturbing the peace of the present Appellant.

11. He further submitted that after the expiry of the tenancy period, the occupation of the tenant upon the tenanted property becomes like an illegal trespasser and once a tenant has become a trespasser, he cannot be in lawful occupation of the tenanted premises which is clearly reiterated in ***M/s Corona Ltd. and others v. Krishna Chandra Patnaik***[3]**.** The substance of the argument advanced by the Appellant is that law makes clear distinction between a trespasser and erstwhile tenant. Since, the Respondent No.1 is an illegal occupant of the tenanted premises, he has lost all his rights for claiming electricity connection from the Respondent-authorities.

12. Learned Counsel for the Respondent No.1, Mr. Bibekananda Bhuyan submitted that the Respondent No.1 is running a shop in the scheduled premises for earning his livelihood and the connection of electricity is absolutely necessary for running the shops in question. He further submitted that despite the order of the Permanent Lok Adalat, the Respondent Nos.3

(1) *1990 AIR 867*, **(2)** *2019 (5) SCALE 698*, **(3)** *1997(1) O. L. R. 323*

and 4 in a colourable exercise of power, intentionally failed to extend the power supply.

13. We have considered the respective submissions of the learned counsel for the parties. While exercising the appellate jurisdiction, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. The entire discussions indicate that the Respondent No.1 has not come forward to the Court with clean hands which sparks his contumacious conduct. It is also quite intriguing and surprising that the lease agreement has expired since 2012 and the Respondent No.1 has neither renewed the said agreement nor extended the tenure of lease. It is a well settled law that a tenancy is a creation of contract between the two persons who are capable of entering into contract called lessor/landlord and the lessee/tenant. The sanctity of the contract is lost once the lease agreement expires. The learned Single Judge has erred in entertaining an adventurous litigation without examining the conduct of the Respondent No.1 and granted interim relief like a final relief. Therefore, the writ petition is misconceived and consequential grant of interim relief is uncalled for.

14. It was further reiterated that the respondent No.1 did not pay the electricity dues of the rented premises and the Appellant herein was forced to pay the outstanding electric dues arising out of the use of respondent No.1. Having fully aware of the fact that the respondent No.1 herein is in a weak wicket, he has approached the Writ Court. His right to claim for temporary connection itself is questionable when his conduct is not clean. In fact, the conduct of the Respondent No.1 in seeking the intervention of this Court with unclean hands is sufficient for non-suiting to get any relief which is succinctly echoed in plethora of judgments like ***Dalip Singh v. State of U.P***[4]**.** and ***Oswal Fats and Oils Ltd. v. Commr. (Admn).***[5] Therefore, the impugned order is unsustainable and sans proper reasoning.

15. In the light of foregoing discussions, the Writ Appeal is allowed and the impugned order dated 23.09.2020 passed by the learned Single Judge in W.P. (C) No.23804 of 2020 is set aside. The Respondent No.1 is directed to vacate the rented premises and pay the entire arrear of rent and electricity dues within a period of one month from today.

(4) *(2010) 2 SCC 114,* **(5)** *(2010) 4 SCC 728*

The Respondent No.1 is also directed to pay Rs 30,000/- as litigation expenses to the Appellant within a month for dragging him to this unwarranted litigation. Consequently, the parties are directed to withdraw all the pending cases, if any, and give rest to unnecessary litigation arising out of the tenanted premises.

16. With the above observation, we dispose of the instant Writ Appeal.

—— o ——

2021 (I) ILR - CUT- 104

KUMARI SANJU PANDA, J & S. K. PANIGRAHI, J.

W.P.(C) NO. 18470 OF 2018

SATISH KUMAR ISHWARDAS GAJBHIYE @ SATISH KUMAR GAJBHIYE .....Petitioner

.V.

UNION OF INDIA & ORS. .....Opp.Parties

(A) SERVICE LAW – Preliminary inquiry – Conducted unilaterally without calling upon the petitioner to remain present and no opportunity granted – Effect of – Held, wholly unreasonable, arbitrary and unjust – This is palpably a disturbing trend and contrary to the notion of good governance – The principles of Commodum ex injuria sua nemo habere debet (No party can take undue advantage of his own wrong) – Applies. (Para 12)

(B) SERVICE LAW – Preliminary inquiry – Petitioner comes under the scheme of the All India Services (D&A) Rules, 1969 framed under the All-India Services Act, 1951 – Disciplinary authority/State Government has not passed any order to hold any inquiry against the present petitioner – Held, the entire inquiry is vitiated – The Director (Intelligence), has wrongfully assumed the power of Disciplinary Authority and proceeded to order an inquiry against the petitioner – Not sustainable as the Preliminary Inquiry cannot be ordered by any authority other than the Disciplinary Authority. (Paras 13 & 14)

(C) CONSTITUTION OF INDIA, 1950 – Article 311 – Service Law – Disciplinary proceeding – Framing of charge on the basis of preliminary inquiry by an authority not approved by the Disciplinary Authority – Effect of – Held, illegal.

"Framing charges by an authority not approved by the Disciplinary Authority is a clear violation of the Article 311 of the Constitution of India which zealously protect the interest of the All India Services Officers and extends procedural safeguards against arbitrariness. This Court also had the occasion to deal with a similar issue in Chandrabati Das vs. State of Orissa and Ors wherein it quashed the Disciplinary Proceedings in the absence of compliance with due procedure of law. Similar sentiments have succinctly resonated in the case of State of Tamil Nadu vs. Pramod Kumar IPS (supra) as well as in the case of UoI vs Sunny Abraham. In these cases, the approval of the disciplinary authority was taken for initiation of the disciplinary proceedings but no approval was sought from the disciplinary authority at the time when the charge memo was issued to the delinquent officer. The Hon'ble Apex Court has held that such charge memos to be invalid and illegal. Resultantly, the position of law is well settled that the Public Grievance Inquiry cannot be treated as Preliminary Inquiry and Inquiry cannot be conducted without the approval of the Disciplinary Authority." *(Para 15)*

(D) CONSTITUTION OF INDIA, 1950 – Article 311 – Service Law – Who is the Disciplinary Authority in respect of All India Service Officers working under the State Governments – The AIS (D & A) Rules 1969 read with DoPT memorandums designate the concerned head of department as the Disciplinary Authority, however this power has been conferred upon the State Governments – Effect of – Held, delegation of disciplinary powers to the State Governments is not only contravenes this carefully crafted scheme but also weakens the steel frame of the All India Services.

"The very essence of Article 311 of the Constitution of India is that the Authority, subordinate to the appointing authority cannot terminate the services of a public servant. The Disciplinary Authority cannot be inferior in rank and status compared to the Appointing Authority under the Constitutional scheme. After promulgation of All India Service (D & A) Rules 1969, this power has been conferred upon the State Governments. The validity of these rules doesn't seem to have been successfully challenged till now. In fact, there was no compelling justification for not obtaining the approval from the Disciplinary Authority in the instant case. The communication systems have now revolutionised and everything is now more seamlessly connected than ever before, hence obtaining approval of the appointing authority i.e. Central Government or the Disciplinary Authority is no more an uphill task. The Supreme Court in the case of Prakash Singh & Ors vs Union of India had underscored the report of National Police Commission and states that "….The report, inter alia, noticed the phenomenon of frequent and indiscriminate transfers ordered on political considerations as also other unhealthy influences and pressures brought to bear on police and, inter alia,…". The Court taking note of the aforesaid pulls and pushes which often decide the posting of such senior officers recommended fixed tenure for the DGP. However, officers down the line are still not immune from myriad factors affecting their professionalism. As such, it is prudent to obtain the approval of the Appointing Authority to initiate Disciplinary Proceedings

and issue charge memo in conformity with the mandate of Article 311 of the Constitution of India. This would safeguard against the State Government acting under local influences and cause unnecessary hardship and ignominy to the officers, as evident in the instant case. We would like to note another disturbing factor which resonates in our judicial mind with respect to an important issue pertaining to AIS (D & A) Rules 1969, which mandates prior confirmation of the Union Government in case of suspension of an All India Services Officer. Though, initially, the period for obtaining approval was 180 days, with passage of time, the period is reduced to barely 15 days. In case of suspending the IAS officer, prior approval of Union Government has been made mandatory, there is no reason why similar procedure cannot be adopted while framing the charge sheet. We believe this aspect may require attention of the concerned authorities, as necessary changes to the procedure, would instil confidence in the Officers and ensure fairness in the process. The All India Services viz. IAS, IPS & IFS are creation of Article 312 of the Constitution of India and these services were envisaged by the constituent assembly to provide a steel frame to the Federal Structure of the Government to weed out the local influences and maintain the unity of India- a Statute of Unity. The Union Public Service Commission recruits the All India Service as well the Central Service Officers through a common examination i.e. Civil Service Examination. The Central Government continues to remain the Disciplinary Authority of the Central Service Officers but this power passes into the hands of the State Government for All India Services Officers. Conferring power of Disciplinary Authority in case of All India Services officers equates them with the State Government Officers except for optional consultation with the UPSC and confirmation of the penalty. In the constitutional scheme of things, the All India Services Officers are recruited, appointed, trained and allocated to different State cadres by the Union Government. Their service conditions are also governed by the Government of India regulations. Delegation of disciplinary powers to the State Governments is not only contravenes this carefully crafted scheme but also weakens the steel frame of the All India Services." *(Paras 20 to 23)*

(E) SERVICE LAW – Natural justice – Principles – Violation thereof – Consequences – Discussed.

"The principles of natural justice are not a creation of Article 14 of the Constitution nor does Article 14 is the begetter of the principles of natural justice but is rather their constitutional guardian. The principles of natural justice include two vital rules, namely, nemo judex in cause sua (no man shall be a judge in his own cause) and audi alteram partem (hear the other side). The corollary deduced from the above two rules and particularly the audi alteram partem rule was qui aliquidstatuerit, parte inaudita altera aequum licet dixerit, haud aequumfecerit (he who shall decide anything without the other side having been heard, although he may decide rightly will not have done what is right) or more plainly expressed in the of quoted aphorism of Lord Chief Justice Hewart in R v Sussex Justices ex parte McCarthy "justice should not only be done but should manifestly be seen to be done". These two rules and their corollaries are neither new nor were they the

discovery of English Judges but were recognized across civilizations over centuries. Article 14 applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action. Violation of the principles of natural justice, no doubt, results in arbitrariness which, in essence, amounts to discrimination, and where discrimination is the result of a State action, it is a violation of Article 14. Therefore, the broader notion of "unfairness" and "unfair procedure" is a violation of a principle of natural justice is a violation of Article 14. Needless to state, the principles of natural justice apply both to quasi-judicial as well as administrative inquiries entailing civil consequences as has been held in the case of Satyavir Singh v. Union of India. In the instant case, the Disciplinary Proceedings have been initiated disregarding yardsticks of a just proceeding. It is a fundamental rule of law that no decision be taken which will affect the right of any person without being given him/her an opportunity of putting forward his/her case but in the present case this rule has been given complete go by. A proceeding which is not initiated in lawful manner sans the avowed principles of natural justice cannot be a just proceeding and is void ab initio." (Paras 24 & 26)

Case Laws Relied on and Referred to :-

1. 2009 SCC OnLine Del 910 : Rajender Kumar Vs. Govt. of NCT of Delhi.
2. 2010 SCC Online Del 1602 : Govt. of NCT of Delhi Vs. Ct Gyanender Singh.
3. (2018) 17 SCC 677 : State of Tamil Nadu Vs. Promod Kumar IPS.
4. 127 (2019) CLT 386 : Chandrabati Das Vs. State of Orissa and Ors.
5. W.P.(C) 7649/2015 and 215/2016(DHC) : UoI vs Sunny Abraham.
6. 2012 SCC OnLineJhar 1223 : Vishnu Dayal Ram (IPS) Vs. Union of India & Ors.
7. Writ Petition (Civil) No.292 of 2010 (SC) : Jharkhand High Court and JitinSahani Vs. Union of India.
8. (2006) 8 SCC 1 : Prakash Singh & Ors Vs. Union of India.
9. (2005) 13 SCC 477 Para 5 : Competent Authority Vs. Bangalore Jute Factory.
10. (2005) 1 SCC 368 Paras 25-26 : State of Jharkhand Vs. Ambay Cements.
11. (2016) 6 SCC 323 Paras 11, 17, 19 : State of Kerala Vs. Kerala Rare Earth & Minerals Ltd.
12. (2017) 3 SCC 410 Para 16 : State of J & K Vs. Distt. Bar Assn. Bandipora.
13. 1 KB 256, [1923] All ER R EP 233 : Hewart in R Vs. Sussex Justices ex parte McCarthy.
14. (1985) 4 SCC 252 : Satyavir Singh Vs. Union of India.

For Petitioner : M/s. P.K. Rath, A. Behera, S.K. Behera, P. Nayak, S. Das & S. Rath.

For Opp. Parties : Shri Dayanidhi Lenka, Central Government Counsel (For Opp.Party Nos.1 & 2)

Addl. Govt. Adv. (For Opp.Party Nos.3 & 4)

JUDGMENT Date of Hearing: 24.11.2020 : Date of Judgment: 08.12.2020

S.K. PANIGRAHI, J.

1. The factual conspectus of the matter revolves around the fact that the present petitioner is an Indian Police Service Officer of Odisha cadre

belonging to 2002 batch who has challenged the legality and validity of the final judgment/order dated 10.8.2018 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi in O.A.No.2787/2018 which was transferred from Central Administrative Tribunal, Cuttack Bench, Cuttack. The petitioner, in the said Original Application, assailed the impugned memorandum of charges handed over to him vide Memorandum No.37589/IPS dated 07.11.2015 mainly on the grounds of lack of jurisdiction.

2. The memorandum dated 07.11.2015 was issued by the Home Department, Government of Odisha to initiate the Disciplinary Proceedings against the petitioner for the alleged violation of Rule-3 of the All India Services (Conduct) Rules 1968. As per the Article of Charges, issued by the Home Department, during the incumbency of the petitioner as Superintendent of Police (S.P) Malkangiri, on 25.07.2007 a hardcore militant Maoist was arrested. Thereafter, an amount of Rs.3,55,000/- was sanctioned and remitted to the petitioner for making payment of Rs.1,55,000/- to six Police personnel who were actually involved in the arrest as reward. The specific reward amount of each of these Police personnel was indicated and the balance amount to be paid to civilian informers. The complaints of the Police personnel for alleged non-receipt of the reward amount has been the main cause of action for the Director-Cum-ADG (Intelligence) to cause an inquiry against the present petitioner through the DIG (Intelligence) namely, Sri Sanjeeb Panda, IPS so as to find out as to whom the money has been disbursed and sought a detailed Preliminary Inquiry report by 30.08.2011. But the Disciplinary Authority has neither passed any such order for this inquiry nor has he been made aware about such an inquiry.

3. Being aggrieved by the said initiation of Preliminary Inquiry and subsequent initiation of Disciplinary Proceedings against the petitioner, he approached the Central Administrative Tribunal, Cuttack vide O.A.No.229/16 primarily on the ground of lack of jurisdiction seeking quashing of the proceeding. The O.A. was then transferred to Central Administrative Tribunal, Principal Bench, New Delhi and numbered as O.A. No.2787/ 2018. After hearing the parties, the learned Bench of the CAT, New Delhi vide its order dated 10.8.2018 dismissed the O.A. stating that "*the disciplinary proceedings are reaching the final stage, we do not find it appropriate to scuttle them at this stage. If the proceedings end up in any order adverse to the interest of the applicant, he can certainly challenge that*

*raising all the grounds that range from theinitiation to the conclusion of the proceedings."*The aforesaid observation of the learned Central Administrative Tribunal, New Delhi Bench trampled Petitioner's expectation on the order being inappropriate, hence he preferred the instant Writ Petition.

4. Learned Counsel for the petitioner vehemently contends that the proceedings are void *ab initio* and the finding of the learned Tribunal that proceedings of inquiry are reaching final stage is perverse as inquiry proceedings had, in fact, not even started owing to the stay granted by the learned Tribunal.The entire proceedings are palpably based on professional vengeance with personal bias of the superior authority which breeds injustice.

5. He further contended that when the Petitioner was posted as S.P., Malkangiri in the year 2007-08 and during that period, a militant underground member of the CPI (Maoist) named Sriramulu Srinivas was arrested in Malkangiri on 25.07.2007. The Andhra Pradesh Government had announced a bounty of Rs. 5.00 lakh on this Maoist which was later enhanced to Rs.12.00 lakh vide GO No.394 dated 19.06.2008. The amount was meant to be given either to civilian informers who divulge information about the Naxalite or to be given to the Naxalite himself in the event he/she surrendered. Records are silent on how much of the amount was received by State Police Headquarters, but out of the funds received from the A.P. Government, the petitioner was provided a sum of Rs.3.55 Lakh to be given not only to the civilian sources but also to the six police personnel who were instrumental in the arrest. The said amount was remitted to the office of the Petitioner on 21.06.2008 which is the centre of controversy of the present case. In fact, a preliminary inquiry was conducted by one Mr. Sanjeeb Panda, IPS who was then Range D.I.G of South Western Range and supervising officer of the Petitioner.

6. It is further submitted that on 25.07.2007, three of the above mentioned Police personnel who were supposed to receive the amount, preferred a complaint before the I.G (Operations) regarding the non-receipt of the reward money. Thereafter, the Director (Intelligence) ordered Mr. Sanjeeb Panda, IPS, who, by that time, was posted as DIGP (Intelligence) to undertake a preliminary inquiry regarding the complaint so received and to submit a report by 30.08.2011. Accordingly, the DIGP (Intelligence) examined the three complainants (police personnel) and the remaining three non-complaining police personnel. He, however, conveniently forgot to

examine any of the civilian who were the sources of information. It is stated that he also did not bother to follow the long-established procedure of informing the petitioner nor did he give an opportunity of hearing. He went ahead with his inquiry, like the proverbial predatory-prey exercise, without even granting an opportunity of being heard to the petitioner as well as denying him opportunity to confront the witnesses for eliciting the truth. In fact, the said DIGP (Intelligence) conducted an one sided inquiry which is unknown to law and submitted his preliminary inquiry report on 19.05.2012 which is after a long delay of nine months without seeking any extension of time. The manner in which the Preliminary Inquiry was conducted by the said officer raised serious doubt regarding the fairness and a personal bias is writ large. At this backdrop, the Inquiry Officer concluded that the amount was not disbursed as per the orders. It is not clear from the records as to what transpired in between but a proceeding was initiated against the petitioner on 07.11.2015 which was the subject matter of the challenge before the learned Tribunal.

7. Learned counsel for the Petitioner also contended that certain circumstances breed certain presumptions as in the present case, when the Andhra Pradesh Government had sanctioned the amount for the informer(s)/surrendered Naxalite(s) for their rehabilitation/prevent active Naxalite threat, the Director General (Intelligence) is not authorised to modify the mandate of Andhra Pradesh Legislature and disburse a partial amount to the targetted beneficiary of the reward sum. This may seem to be a whataboutery**,** but the petitioner wonders regarding the whereabouts of the rest of the amount which was not utilized for the purpose for which it was given. Though there is no species called presumptive proof but it speaks volume about the overriding consideration to indict the present petitioner. He further contended that as per Rule 262 of the Odisha Treasury Code there is a provision of seeking only the Utilisation Certificate signed by the Superintendent of Police in lieu of distribution of Secret Service money. Thus, the petitioner could not have been asked to furnish actual receipts from the payee. It is submitted that the Preliminary Inquiry Officer (DIGP Intelligence) Mr. Sanjeeb Panda, IPS was directly supervising the Malkangiri District as the DIG, at the relevant point in time. Since Mr. Panda was the DIG of the said range, he could have pointed out the irregularity then but he did not do so.

8. The petitioner strenuously averred that the three police personnel who made complaints to the I.G (operations) have supposedly written letters from three different places and used different computer fonts while typing but the letters are not only identical but corrections by hand are also identical. This indicates sliding and sinking of the level of inquiry by adopting an outreach approach subsequently. It is further submitted that the mandate to submit the preliminary inquiry report by DIGP (Intelligence) was by 30.08.2011, however, he submitted the same on 19.05.2012 much after the stipulated period was over. While doing so, he has turned a proverbial nelson's eye to the principle of *Audi alterum partem*, which is the heart and soul of administrative law. This act of the preliminary Inquiry Officer itself has punctured the legitimacy of disciplinary proceedings in the instant case. Based on such a deflecting Preliminary Inquiry report, there has been initiation of proceedings against the present petitioner on 07.11.2015.

9. In addition to his oral submissions, from the perusal of the Writ Petition and written submissions of the Petitioner, the skeleton of the submissions may be summarised as under:

a. The impugned memorandum of charges is without jurisdiction since there is no approval from the Hon'ble Chief Minister of the State of Odisha who also holds the portfolio of the Home Minister, and is the Disciplinary Authority of the I.P.S officers in the State as per the provisions of All India Services (Discipline and Appeal) Rules, 1969. As per the mandate of Rule 7 of the All India Services (Discipline & Appeal) Rules, 1969, the authority competent to institute proceedings and to impose penalty on members of the All India Services. The said rule vests this authority either with the State Government or with the Central Government depending upon the circumstances explained therein. In respect of Indian Police Service these powers are exercised by the Ministry of Home Affairs in tandem with the State Government. The Rule 8 specifically mandates:

> *"8(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a member of the Service, it may appoint under this rule or under the provisions of the Public Servants (Inquiries) Act 1850, as the case may be, an authority to inquire into the truth thereof."*

b. The said Memorandum of charges have been issued to the petitioner in violation of Rule-8(4) and Rule 8(5) of the All India Services (Discipline and Appeal) Rules, 1969 read with DoPT OM No.11018/3/94- AIS dated 09th June 1995. The Union Government had set up a Committee headed by Sri P.C. Hota, I.A.S to suggest the procedure for disciplinary inquiry and subsequently issued DoPT OM 372/3/2007 - AVD-III (Vol.10) dated 14 Oct 2013. Non approval of the charge Memo by the Minister in charge has violated the mandate of the aforestated Office memorandum.

c. The impugned charge sheet is misconceived and contrary to mandatory provisions of Orissa Budget Manual, 1963, Orissa Treasury Code and Orissa General Financial Rules (OGFR) and Delegation of Financial Rule, 1978 and Odisha Police Manual Rules. The said manuals and rules do not contemplate the disclosure of such disbursal amount since it is secret service money.

d. The proceeding is based on the preliminary inquiry report submitted by the DIGP (Intelligence) which was conducted behind the back of the petitioner without giving him opportunity to put forth his case. He was not even given the opportunity to confront the witnesses who were examined and based on whose evidences he has been at the receiving end of the trap of indictment purely on extraneous grounds.

e. The Preliminary Inquiry Officer further relied on the Orissa Treasury Code vide Rule 262 vide Note 2 which provides that –"*when in paying rewards to informers, or in any other case it is not considered desirable to disclose the names of payees, a certificate in the handwriting of the disbursing officer, to the effect that the reward has been duly paid, should be submitted to the Accountant-General in support of the payment in lieu of the payees' receipts ordinarily required"*. Further, The Orissa Treasury Code vide Rule 249 prescribes the Cancellation and destruction of sub-voucher: "*Unless it is distinctly provided otherwise by any rule or order, no sub-vouchers may be destroyed until after a lapse of three years*." Similarly, the Orissa Police Manual Rules vide Appendix 62, vide no. 28-A prescribes that the S.P is supposed to preserve the cash account certificate and vouchers as prescribed under Rule 938 (c) and 942 for a maximum period of three years only. Therefore, any demand to produce the vouchers thereafter is not justifiable and beyond retrieval of such documents. In addition to this, in the present case, the petitioner had been transferred to another District as Superintendent of Police and he did not have control over such documents of his previous place of posting for so many years. Hence, seeking of explanation by the authority on this issue after a gap of three years is not only arbitrary and unreasonable but also contrary to the rules framed in that regard.

f. Rule 857 (b) of the Orissa Police Manual provides that-*"The Police Personnel cannot make a demand for monetary reward for due discharge of duty*." As such there was no reason for acting on the petitions of the police personnel who were demanding rewards. The entire exercise is an after thoughts and its vicissitudes traversed to indict the present petitioner.

g. Provisions of Rule 858 (d) P.M.R. which mandate- "*Rewards granted by another State Government may be received by a Superintendent and paid by him direct to the officer concerned and not credited to the treasury"*. The Petitioner also submits that the entire amount given by the Government of Andhra Pradesh should have come to the office of SP for disbursal to the informers. In the present case, lion's share of the reward money received from the Government of Andhra Pradesh went astray whereas a small sum was made available to the SP for disbursal. In fact, there should have been an inquiry on the issue of vanishing part of the reward money meant for disbursal for the purpose of reward. In fact, the Director (Intelligence) did

not have any authority to order an inquiry against the petitioner without the permission of the Disciplinary authority. This sort of vindictive approach on the part of the superior authority dehors the authority of law is quite disturbing and badly impacts the moral fabric of upright and honest officers.

h. The principles laid down in the cases of Constable ***Rajender Kumar v. Govt. of NCT of Delhi***[1] and ***Govt. of NCT of Delhi v. Ct Gyanender Singh***[2] would show that it is settled law that the preliminary inquiry has to be ordered by the Disciplinary Authority alone and no other authority can direct so. In the instant case, the Preliminary Inquiry was ordered by the DGIP (Intelligence) who was not the *"Disciplinary Authority"* which is clear violation of the law governing the field.

i. The amount to capture the Maoist had been granted by the Government of Andhra Pradesh as per their G.O. No.394 dated 19.06.2008 only to be given to the civilian informer/surrendered Naxalite. As such, the order to disburse it to Police Personnel was improper and against the mandate of the order issued by the Andhra Pradesh Government.

j. The Petitioner has placed reliance on the judgment of the Hon'ble Supreme Court of India in ***State of Tamil Nadu vs. Promod Kumar IPS***[3] wherein it has been clearly held that the Charge sheet must be approved by the Disciplinary Authority, which has not been done in the present case.

10. Per Contra, the learned Additional Government dvocate,has vehemently opposed the petition and contended the following:

a. An amount of Rs.3,55,000/- was sanctioned and remitted to the Petitioner for making payment of Rs.1,55,000/- to six police personnel who were actually involved in the arrest. After receipt of complaint from the Police Personnel a preliminary inquiry was conducted by the DIGP (Intelligence) which established that the amount was not disbursed. Accordingly, disciplinary proceeding was initiated against the petitioner.

b. The petitioner has also filed O.A. No.171/19 before the Central Administrative Tribunal, Cuttack, challenging the preliminary inquiry report dated 19.05.2012 of the DIG (Intelligence), as such this petition is frivolous.

c. In conducting the proceedings initiated against the petitioner for the alleged delinquency, the Government has followed the letter and spirit of the law and conducted the same in a transparent manner. The petitioner has approached this Courtprematurely in the matter which is yet to reach its logical conclusion. The petitioner has the liberty to prove his innocence before the Inquiring Officer. He should take shelter of law after finalisation of the proceedings.

d. It is contended that the Counter Affidavit filed before the learned Central Administrative Tribunal, it was asserted that Office Memorandum No. 11018/3/94

(1) *2009 SCC OnLine Del* 910, **(2)** *2010 SCC Online Del 1602*, **(3)** (*2018) 17 SCC 677*

AIS-III dated 09.05.1995 stipulates guidelines for processing the Disciplinary proceeding cases in respect of All India Service Officers pertaining to the period of their central deputation. As such, the State Government is competent to initiate Disciplinary Proceedings and there is no requirement for approval from the Central Government.

11. Heard Mr P.K. Rath, learned Counsel for the Petitioner, Mr. Dayanidhi Lenka, learned Central Government Counsel for the Union of India and learned Additional Government Advocate for the State of Odisha at length.

12. The entire chain of events is poised as a riddle wrapped inside a shroud of mystery-an enigma for this Court to unravel. The proceedings have been initiated on the basis of the preliminary inquiry report dated 19.05.2012 of the DIGP (Intelligence) who was the supervising officer as DIG, Malkangiri District where the petitioner was serving as S.P. The appointment of the Preliminary Inquiry Officer itself seems to be motivated and smacks personal and professional bias since the golden thread of natural justice is missing. The Inquiring Officer, who at the relevant time was Range DIG of SWR (South Western Range), Sunabeda, under which Malkangiri District falls, is a party to the transaction which he was asked to inquire. Therefore, the Inquiring Officer became judge of his own cause. The same exfacie looks impermissible given the backdrop of the wellknown Latin Maxim- *Nemo judex in causa sua* (One cannot be the judge in one's own cause). Further, the purported preliminary inquiry was conducted unilaterally without calling upon the Petitioner to remain present and to examine the witnesses is wholly unreasonable, arbitrary and unjust. This is palpably a disturbing trend and contrary to the notion of good governance. The unprecedented scale of the insensitive escalation of some imaginary guilt against the petitioner assumed a demonic dimension in the form of instituting the socalled Preliminary Inquiry dehors the principles of natural justice. The principles of *Commodum ex injuria sua nemo habere debet* (No party can take undue advantage of his own wrong) squarely applies to the instant issue. What still remains under a veil of mystery is the promptitude and undue haste employed in raking up the issue suddenly after the passage of almost three years.

13. Under the scheme of the All India Services (D&A) Rules, 1969 framed under the All-India Services Act, 1951, does not mandate the Director (Intelligence) to tinker with the Disciplinary matters of the officers belonging to All India Services. Far less without any information to and/or authority

from the State Government/DisciplinaryAuthority, the Director (Intelligence) collected a report and such report was also filed without the mandate o f the Inquiring Officer to hold such an Inquiry. Such a report emanating from an impermissible act is being utilised to the gross prejudice to the case of the petitioner. Since, the Disciplinary authority/State Government having not passed any such order to hold any inquiry against the present petitioner, the entire inquiry is vitiated. The Director (Intelligence), has wrongfully assumed the power of Disciplinary Authority and proceeded to order an inquiry against the petitioner.

14. The records of the case further reveal that the ubmissions of preliminary inquiry report was time barred by nine months and the Inquiring Officer failed to follow the principles of natural justice hence it is illegal. The entire exercise by the Department unleashes the vulnerability of the petitioner being a part of the disciplined force. We also concur with the judicial pronouncements in the case of ***Rajender Kumar v. Govt. of NCT of Delhi (supra)*** *and* ***Govt. of NCT of Delhi v. Ct Gyanender Singh (supra)*** wherein it has been held that a Preliminary Inquiry cannot be ordered by any authority other than the Disciplinary Authority. In the instant case an authority who was not competent to order an enquiry has wrongfully assumed jurisdiction and has proceeded to direct an enquiry. This act uniquely poised in an immoralised domain of law leading to erosion of public perception of disciplinary proceedings.

15. The Opposite Parties in their averments have nowhere denied that the charge memo was not approved by the Minister-incharge or Head of the Home Department as enunciated vide Memo No. DoPT OM 372/3/2007-AVD-III (Vol-10) dt. 14 Oct 2013. Framing charges by an authority not approved by the Disciplinary Authority is a clear violation of the Article 311 of the Constitution of India which zealously protect the interest of the All India Services Officers and extends procedural safeguards against arbitrariness. This Court also had the occasion to deal with a similar issue in ***Chandrabati Das vs. State of Orissa and Ors***[4] wherein it quashed the Disciplinary Proceedings in the absence of compliance with due procedure of law. Similar sentiments have succinctly resonated in the case of ***State of Tamil Nadu vs. Pramod Kumar IPS (supra)*** as well as in the case of ***UoI vs Sunny Abraham***[5]. In these cases, the approval of the disciplinary authority

(4) 127 (2019) CLT 386, **(5)** W.P.(C) 7649/2015 and 215/2016(DHC)

was taken for initiation of the disciplinary proceedings but no approval was sought from the disciplinary authority at the time when the charge memo was issued to the delinquent officer. The Hon'ble Apex Court has held that such charge memos to be invalid and illegal. Resultantly, the position of law is well settled that the Public Grievance Inquiry cannot be treated as Preliminary Inquiry and Inquiry cannot be conducted without the approval of the Disciplinary Authority.

16. We could have remitted back the proceedings to the opposite parties for rectification of the flaws. The Rules governing the field of Secret Service Expenditure provides that the voucher shall be retained for one year/three years and keeping in view its nature the voucher/Register shall have to be mandatorily destroyed which is enumerated under:

> *"Rule 938: (c) "Contingent Vouchers, for amounts exceeding Rs.25 other contract contingent vouchers are to be attached to bills presented to the treasury for payment.Other Vouchers shall be preserved* ***for three years****. Acquittance rolls shall be preserved according to instructions in Appendix 62".*

After destruction of the documents period is over the impugned inquiry was conducted even without calling upon the Petitioner. It appears that six Police Havildars submitted a Public Grievance that they have not been given the reward money. The Director (Intelligence) issued the letter authorising the Range DIG (Intelligence) to make Inquiry and submit report. But as per Orissa Police Manual Rules, the Police Personnel cannot make a demand for monetary reward for due discharge of duty which is clearly stated in Rule 857 (b): "*It is not proper for officers and men to ask for rewards"*. More importantly, the reward amount given by the Andhra Pradesh Government was meant for surrendered Naxalites and Police Informers (civilian). Therefore, six police Personnel claiming cash reward is entirely contrary to the very object of the scheme as well as the Rules. Yet the so-called inquiry was conducted only to vilify the Petitioner.

17. Another pertinent point also unintentionally strikes our judicial mind regarding the object and scheme of the GO of Andhra Pradesh Government clearly enunciates and it is further reinforced by Orissa Police Manual Rules in categorical terms:

> *Rule 858 (d): "Rewards granted by another State Government may be received by a Superintendent and paid by him direct to the officer concerned and not credited to the treasury."*

Meaning thereby, if the Orissa Government Treasury would not be accounted for the expenditure and ADG (Intelligence) Andhra Pradesh Government is the notified authority, the Director (Intelligence) has no business to institute

an Inquiry far less he has no authority to institute without any kind of approval from the State Government of Odisha. This clearly reflects that Police authority has gross misunderstanding and ignorance of cratolgoy of power and its judicious exercise.

18. Further, there cannot be inquiry on Secret Service money as decided in ***Vishnu Dayal Ram (IPS) vs Union of India & Ors***[6] ***by Jharkhand High Court*** **and JitinSahani vs Union of India**[7] wherein the Apex Court dismissed the Writ Petition seeking inquiry into utilisation of Secret Service Fund. On this count also the proceedings initiated against the petitioner are *non est* in the eyes of law. In the light of the above discussion, we hold that the preliminary report dated 19.05.2012 prepared by the DIGP (Intelligence) lacks jurisdiction hence privation of legal sanctity.

19. Before parting with this case, we would like to dwell upon the question as to who is the Disciplinary Authority in respect of All India Service Officers working under the State Governments. The AIS (D & A) Rules 1969 read with DoPT memorandums designate the concerned head of department as the Disciplinary Authority. The very essence of Article 311 of the Constitution of India is that the uthority, subordinate to the appointing authority cannot terminate the services of a public servant. The Disciplinary Authority cannot be inferior in rank and status compared to the Appointing Authority under the Constitutional scheme. After promulgation of All India Service (D & A) Rules 1969, this power has been conferred upon the State Governments. The validity of these rules doesn't seem to have been successfully challenged till now. In fact, there was no compelling justification for not obtaining the approval from the Disciplinary Authority in the instant case. The communication systems have now revolutionised and everything is now more seamlessly connected than ever before, hence obtaining approval of the appointing authority i.e. Central Government or the Disciplinary Authority is no more an uphill task.

20. The Supreme Court in the case of ***Prakash Singh & Ors vs Union of India***[8] had underscored the report of National Police Commission and states that *"….The report, inter alia, noticed the phenomenon of frequent and indiscriminate transfers ordered on political considerations as also other unhealthy influences and pressures brought to bear on police and, inter alia,…"*. The Court taking note of the aforesaid pulls and pushes which often

(6) *2012 SCC OnLineJhar 1223*, **(7)** *Writ Petition (Civil) No.292 of 2010 (SC)* **(8)** *(2006) 8 SCC 1*

decide the posting of such senior officers recommended fixed tenure for the DGP. However, officers down the line are still not immune from myriad factors affecting their professionalism. As such, it is prudent to obtain the approval of the Appointing Authority to initiate Disciplinary Proceedings and issue charge memo in conformity with the mandate of Article 311 of the Constitution of India. This would safeguard against the State Government acting under local influences and cause unnecessary hardship and ignominy to the officers, as evident in the instant case.

21. We would like to note another disturbing factor which resonates in our judicial mind with respect to an important issue pertaining to AIS (D & A) Rules 1969, which mandates prior confirmation of the Union Government in case of suspension of an All India Services Officer. Though, initially, the period for obtaining approval was 180 days, with passage of time, the period is reduced to barely 15 days. In case of suspending the IAS officer, prior approval of Union Government has been made mandatory, there is no reason why similar procedure cannot be adopted while framing the charge sheet. We believe this aspect may require attention of the concerned authorities, as necessary changes to the procedure, would instil confidence in the Officers and ensure fairness in the process.

22. The All India Services viz. IAS, IPS & IFS are creation of Article 312 of the Constitution of India and these services were envisaged by the constituent assembly to provide a steel frame to the Federal Structure of the Government to weed out the local influences and maintain the unity of India- a Statute of Unity. The Union Public Service Commission recruits the All India Service as well the Central Service Officers through a common examination i.e. Civil Service Examination. The Central Government continues to remain the Disciplinary Authority of the Central Service Officers but this power passes into the hands of the State Government for All India Services Officers. Conferring power of Disciplinary Authority in case of All India Services officers equates them with the State Government Officers except for optional consultation with the UPSC and confirmation of the penalty. In the constitutional scheme of things, the All India Services Officers are recruited, appointed, trained and allocated to different State cadres by the Union Government. Their service conditions are also governed by the Government of India regulations. Delegation of disciplinary powers to the State Governments is not only contravenes this carefully crafted scheme but also weakens the steel frame of the All India Services. The *elan vital* of

entrenched provisions of the Constitution as a result are being diluted by a piece of ubordinate legislation. Hence, Rules 7& 8 of AIS (D & A) Rules 1969 cries for a detailed examination in an appropriate case.

23. It is settled law that if an act is prescribed to be done in a particular manner by the Rules, it shall be done in that manner alone. Reliance is placed on the cases of ***Competent Authority v. Bangalore Jute Factory***[9]***; State of Jharkhand v. Ambay Cements***[10]***; State of Kerala v. Kerala Rare Earth & Minerals Ltd.***[11] and in the case of ***State of J & K v. Distt. Bar Assn. Bandipora***[12]. In the instant case, this principle has gone sabbatical due to personal and professional bias against the present petitioner.

24. The principles of natural justice are not a creation of Article 14 of the Constitution nor does Article 14 is the begetter of the principles of natural justice but is rather their constitutional guardian. The principles of natural justice include two vital rules, namely, *nemo judex in cause sua* (no man shall be a judge in his own cause) and *audi alteram partem* (hear the other side). The corollary deduced from the above two rules and particularly the *audi alteram partem* rule was *qui aliquidstatuerit*, *parte inaudita altera aequum licet dixerit*, *haud aequumfecerit* (he who shall decide anything without the other side having been heard, although he may decide rightly will not have done what is right) or more plainly expressed in the oftquoted aphorism of Lord Chief Justice ***Hewart in R v Sussex Justices ex parte McCarthy***[13] *" justice should not only be done but should manifestly be seen to be done"*. These two rules and their corollaries are neither new nor were they the discovery of English Judges but were recognized across civilizations over centuries. Article 14 applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action. Violation of the principles of natural justice, no doubt, results in arbitrariness which, in essence, amounts to discrimination, and where discrimination is the result of a State action, it is a violation of Article 14. Therefore, the broader notion of "unfairness" and "unfair procedure" is a violation of a principle of natural justice is a violation of Article 14. Needless to state, the principles of natural justice apply both to quasi-judicial as 131 KB 256, [1923] All ER Rep 233 well as administrative inquiries entailing civil consequences as has been held in the case of ***Satyavir Singh v. Union of India***[14]**.** In the instant case, the Disciplinary Proceedings have been initiated disregarding yardsticks of a just

(9) *(2005) 13 SCC 477 Para 5,* **(10)** *(2005) 1 SCC 368 Paras 25-26,* **(11)** *(2016) 6 SCC 323 Paras 11, 17, 19*
(12) *(2017) 3 SCC 410 Para 16* ***(13)*** *1KB 256, (1923) All ER Rep 233* ***(14)*** *(1985) 4 SCC 252.*

proceedings. It is a fundamental rule of law that no decision be taken which will affect the right of any person without being given him/her an opportunity of putting forward his/her case but in the present case this rule has been given complete go by.

25. Another principle which has an apt applicability to the facts of the instant case is that of *Nihil honestumessepotest, quod justltidvacat* (nothing can't be honest which is destitute of Justice). As regards the contention of the State Government that the petitioner should take shelter of law after finalization of the proceedings, we reiterate that the protection of law should always be readily available to the citizens and that justice is not meant to be doled out in an episodic manner.

26. A proceeding which is not initiated in lawful manner sans the avowed principles of natural justice cannot be a just proceeding and is void ab initio. This writ petition is allowed accordingly. Consequently, the Opposite Parties are directed to confer all the promotions and benefits appurtenant thereto retrospectively to the petitioner *vis-a-vis* his batch mates within a month from today. No order as to cost.

—— o ——

2021 (I) ILR - CUT- 120

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

DSREF NO. 3 OF 2019 & CRLA NO. 680 OF 2019

STATE OF ODISHA .....Appellant

. V.

LABA @ KALIA MANNA .....Respondent

AND

LABA @ KALIA MANNA ..... Appellant

.V.

STATE OF ODISHA ..... Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 366 – Reference for confirmation of death sentence – Conviction under sections 302, 376(2) (i), and 376-A of the Indian Penal Code read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 – Conviction based on the last seen theory, accused giving discovery U/s.27 of the

Evidence Act, Extra judicial confession and Conduct of the accused – Evidence is scanned independently – Held, regards being had to the materials on record and the circumstances established, prosecution is found to have proved offence U/s.302 I.P.C. beyond reasonable doubt against the sole accused, condemned prisoner – The offences U/s.376(2) (i) and 376-A I.P.C. and U/s.6 of POCSO Act are not proved beyond reasonable doubt and accused is to be acquitted there from – Resultant thereupon, the condemned prisoner is held guilty of the charge U/s.302 I.P.C. and his conviction by the Special Court on this count is up held – The accused is held not guilty U/s.376(2)(i) and 376-A I.P.C. and U/s.6 of POCSO Act and the conviction to that extent is hereby annulled and he is acquitted there from – Confirmation of death Sentence – Held, in the case in hand, the offence of lust is lost raising residual doubt upon the act by sexual assault – Having regards to the aggravating and mitigating circumstances, we are of the opinion that, the mitigating circumstances outweigh the aggravating factors – Conscience is shocked but there is an alternative available to the death sentence – The assumption of power to take one's breath away, in the facts proved would be stretching the direction "in rarest in rare cases" beyond the limit of limitation so far prescribed by the precedents – The sentence, Imprisonment for Life will be just and proper – The death sentence awarded by the learned Trial Court is not to be confirmed. Instead it is to be modified to Imprisonment for Life for offence U/s.302 of I.P.C.

Case Laws Relied on and Referred to :-

1. (2003) 8 SCC 551 : Bhupinder Sharma Vs. State of Himachal Pradesh.
2. AIR 1993 SC 1723 : Surinderpal Jain Vs. Delhi Administration.
3. 2001 Crl. L.J. 3317 : Gade Lakshmi Mangraju @ Ramesh Vs. State of Andhra Pradesh.
4. (2018) 16 SCC 161 : Navaneethakrishnan Vs. The state by Inspector of Police.
5. AIR 2019 SC 1674 : Pattu Rajan Vs. State of Tamil Nadu.
6. (2019) 8 SCC 333 : Sudru Vs. State of Chattisgarh.
7. AIR 1980 SC 898 : Bachan Singh Vs. State of Punjab.
8. (1983) 3 SCC 470 : Machhi Singh Vs. State of Punjab.
9. (1999) 6 SCC 60 : Akhtar Vs. State of U.P.
10. AIR 1957 SC 614 : Vadivelu Thevar Vs. State of Madras.
11. AIR 1980 SC 898 : Bachan Singh Vs. State of Punjab.
12. (1973) 1 SCC 20 : Jagmohan Singh Vs. State of U.P.
13. (1983) 3 SCC 470 : Machhi Singh and others Vs. State of Punjab.
14. (2010) 47 OCR 953 : State of Orissa Vs. Ardhu Chendreya.
15. AIR 2007 SC 2531 : Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka.
16. AIR 2008 SC 3040 : Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka.

DSREF NO.3 OF 2019

For Appellant : Mrs. Saswata Patnaik, Addl. Govt. Adv.
For Respondent : M/s. G. N. Mishra and S. C. Sahoo.
For Informant : M/s. Durga Prasad Pattanaik & T. K. Mishra, M/s. Debasnan Das, S. S. Pattanaik, N. Behuria & D. Biswal.

CRLA NO. 680 OF 2019

For Appellant : Mr. Karunakar Gaya, P. K. Maharaj, S. P. Dash, S. B. Das.
For Respondent : Mrs. Saswata Patnaik, Addl. Govt. Adv.
For Informant : M/s. Debasnan Das, S. S. Pattanaik, N. Behuria & D. Biswal.

JUDGMENT Date of Hearing : 20.02.2020 : Date of Judgment : 02.11.2020

DR. A. K. MISHRA, J.

Submission for confirmation of death sentence, a reference U/s.366 of the Code of Criminal Procedure (in short 'Cr.P.C.') is to be addressed in this judgment along with appeal filed by the condemned prisoner who has been convicted U/s.302, 376(2)(i), and 376-A of the Indian Penal Code (in short 'I.P.C.') and U/s.6 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO') by the learned Addl. Sessions Judge-cum-Special Judge, Jagatsinghpur in Special G.R. (POCSO) No.32 of 2018 on 10.09.2019. The Special Court while awarding death sentence for offence U/s.302 I.P.C. has not passed any separate sentence for other offences.

2. The deceased shall be referred to hereinafter as victim in order to avoid the disclosure of identity as observed in the case of **Bhupinder Sharma vrs. State of Himachal Pradesh, (2003) 8 SCC 551**, that the mandate of not disclosing identities of the victims of sexual offences under Section 228-A of I.P.C. ought to be observed in spirit.

3. Prosecution Case:

The victim, a 9 years old girl, was found missing on 20.03.2018 at 3 P.M. in village Godaharishpur. The family members including her father, P.W.3 searched but could not trace her. On 21.03.2018 at 6:30 A.M., a co-villager Kabita Gayan (P.W.20) while going to attend call of nature in the nearby cashew nut field, found the dead body of the victim. She immediately informed Satyaranjan Jena (P.W.5), her brother, who in turn, informed to Sarpanch (P.W.4). The father of the victim was informed. They all approached the spot and saw the dead body of the victim in naked condition. Injuries were found on her body including private part.

The father (P.W.3) lodged F.I.R. (Ext.1/1) against unknown culprit, scribed by P.W.5. The said F.I.R. was registered as Ersama P.S. Case No.42 of 2018. The investigation was undertaken by the I.I.C. (P.W.22) who swung into action to gather evidence. The spot was visited by the Executive Magistrate and members of the scientific team. The sniffer dog was deployed who led into the house of accused. The accused was not present then. The photographs of the victim at spot were taken, inquest over the dead body was made vide Ext.2. The cadaver was despatched for post mortem by issuing dead body challan (Ext.20).

In the meantime P.W.10 and P.W.18 found accused leaving the village hurriedly having attire stained with dust and blood. The accused was apprehended on 21.3.2018 at 11 P.M. at Badambadi bus stand by the police in presence of witnesses. He made confessional statement under Ext.11 and gave recovery of one gray colour chaddi stained with semen which was concealed under leaves at a distance from the spot. The same was seized under Exdt.12 at 10 A.M. The statement of two witnesses, P.W.6 and P.W.7 who had seen accused taking the victim last time on the occurrence day at about 3 to 4 P.M., were recorded U/s.164 Cr.P.C. vide Ext.3 and Ext.4 respectively. The accused was examined by the doctor P.W.24. He was found sexually potent vide Ext.30. The post mortem of the victim was conducted by P.W.21 on 22.3.2018 vide Ext.15 who found the death homicidal in nature. The wearing apparel of the deceased and accused, biological sample and the seized chaddi were sent for chemical examination. The said report was received vide Ext.28 confirming that the seized gray colour chaddi had semen stain. After completion of investigation charge sheet was submitted. Learned Special Judge took cognizance for offence U/s.302, 376(2)(i) and 376 of I.P.C. and U/s.6 of the POCSO Act.

4. Defence:-

Accused pleaded not guilty to the charge of the said offences and faced trial. Denial was his plea simpliciter.

5. Evidence:-

In order to bring home charge, prosecution examined twenty five witnesses while defence examined two. Thirty documents are exhibited by the prosecution while nothing is marked from the side of defence. Twenty three material objects are marked.

Keeping the nature of oral evidence, the witnesses are bracketed in the following compartments

P.W.3 is the father of the victim-cum-informant. P.Ws.1, 4 and 5 have stated about the missing of victim on 20.03.2018 at about 3 P.M. P.Ws.6 and 7 are witnesses to the last seen theory. P.Ws.4, 8 and 9 are the witnesses to inquest. P.W.9 and P.W.19 are witnesses to the ownership of the spot cashew nut field vide Ext.5, seizure list and zimanama (Ext.14). P.Ws.11 and 14, the school teachers, are witnesses to prove the age of the victim by admission register (Ext.6 and Ext.10). P.W.15 is an independent witness to the statement and seizure U/s.27 of the Evidence Act. P.W.23 proved the photographs taken at spot of the victim under Ext.13. P.W.25 is the doctor who examined the accused while P.W.21, conducted autopsy of the victim. P.W.22 is the investigating officer who proved inter alia the chemical examination report (Ext.28). Other witnesses are formal in nature. P.W.4, 15 and I.O. are witnesses to sniffer dog barking.

D.W.1 is the co-villager while D.W.2 is the brother of the accused who are pressed into service to prove that on 21.3.2018, on the next day of occurrence, the accused went Cuttack to go Chennai to join in his job.

6. Findings of the Trial Court:-

(i) The date of birth of the victim was 22.06.2008 as per School Admission Register (Ext.6) and oral testimonies of headmaster P.W.14 and Asst. Teacher P.W.11 and that she was reading in Class-IV and by the time of incident she was 9 years 9 months old.

(ii) Accepting the evidence of doctor P.W.21 and post mortem report Ext.15, the death of deceased on 20.03.2018 has been held homicidal in nature due to asphyxia as a result of strangulation.

(iii) Blood stain is found on the body of the accused.

(iv) The accused had taken victim while she was playing towards cashew nut jungle on 20.3.2018 at about 3 to 4 P.M. Thereafter the deceased was found dead.

(v) The accused gave recovery of his Chaddi (inner garment) having semen stain which is relevant U/s.27 of the Indian Evidence Act.

All the circumstances taken together establish that the accused has raped and murdered the victim.

Consequently, the accused has been convicted and sentenced supra.

7. Contention:

Learned counsel for the appellant Mr. G. N. Mishra would submit that

(i) The circumstances considered by the trial Court are neither singularly proved beyond reasonable doubt nor point out the guilt of the accused taken together.

(ii) The leading to discovery statement U/s.27 of the Evidence Act has no evidentiary value as the same does not find any corroboration from the chemical examination report, particularly when the said underwear is not produced before the trial court.

(iii) The extra judicial confession is not proved as the witness P.W.18 is declared hostile.

(iv) Sans blood grouping and DNA profiling as mandated U/s.53-A of Cr.P.C., the connecting link between the accused and the incident is found missing.

(v) The evidence through sniffer dog is not admissible. The testimonies of P.Ws.6 and 7 with regard to last seen theory being discrepant are not reliable. The evidence of doctor P.W.25 who examined the accused having found no injury on the body of the accused, the complicity of the accused with any sexual assault on victim is not established.

(vi) The accused being married has two children and having no criminal antecedent, should not have been awarded with death sentence as it is not covered under rarest in rare cases. He relied upon a decision of Hon‟ble Supreme Court in the case of **Dileep Banker Vrs. State of Madhya Pradesh**, (Crl. Appeal No.1059 of 2019) decided on 10.07.2019.

8. Mrs. Saswata Pattnaik, learned Addl. Government Advocate, supported the judgment of conviction and sentence on the factum found and reasoning assigned in the judgment. She further added that when victim was lastly spotted with the accused who called her to cashew nut field at 4 P.M. and her dead body was detected on the next day morning, the accused having not given any explanation, adverse inference is to be drawn and false explanation, denial, is to be considered to fortify the finding of guilt. According to her, this is a classic case of split personality for which death sentence should be confirmed. She also submitted that the injuries on the private parts prove that accused, none else, had sole intention to commit rape and murder.

9. Analysis:-

There is no direct evidence and the case is based on circumstantial evidence. The circumstances on which an inference is sought to be drawn must be cogently and firmly established and in order to sustain conviction, must be complete and must be incapable of explanation of any other hypothesis than that of guilt of the accused.

The evidence adduced in the backdrop of incident which rocked the locality, it is incumbent to ascertain first the age of the victim, the nature of death, and if any sexual assault is committed. Followed to that, the evidence which lacks either credibility or weight is to be culled out. The process will culminate in circumscribing the circumstances to arrive at a conclusion.

9-A. Age of the victim:-

The school admission register (Ext.6), evidence of Asst. Teacher and Headmaster of Gadaharishpur School, P.Ws.14 and 11 respectively ,getting corroboration from the father and brother of victim unequivocally proves that the date of birth of victim, who was reading in class-IV, was 22.6.2008 and by the time of incident on 20.03.2018, she was 9 years and 9 months old. We approbate the finding of learned Trial Court on this point.

9-B. Doctor, P.W.21 conducted post mortem over the cadaver of the victim on 22.3.2018. He found the followings which are reflected in his report (Ext.15); -

"External Injuries:-

(i) Abraded contusion of size 1 cm. X 1 Cm placed 3 cm below the right mastoid tip of the neck.

(ii) A patch of confluent reddish brown looking abrasion of size 3 X 1.5 cm placed 4.5 cm below right angle of mandible on the neck.

(iii) Red looking abraded contusion of size 3 X 3 cm on left side neck 5 cm below left angle of mandible.

(iv) An irregular shaped abraded contusion of size 4 X 4 cm in the left anterior lateral neck touching the left angle of mandible and extending downwards.

(v) Crescentic abrasion of size 0.75 cm length placed 3 cm below chin and over the similar triangular abrasion of size 0.75 X 0.5 cm placed 2 cm right to this.

(vi) On wiping the perineum, the majora are appeared on the anterior part and gapping on the posterior part with discharge of reddish brown colour blood pinked thick fluid. On further examination blood tinged fluid was found before to the majora and there were irregular ragged stretched and turned soft tissue in the adjoining perineum.

Internal injuries:-

On dissection, soft tissues corresponding to the injuries detailed in the neck are found bluish with collection of haematoma. There was haematoma

collection in the left supra clavicular fossa. The hyoid bone and tracheal rings were intact. Stomach was containing about 200 grams of partly digested rice particles. Internal organs of the generation were intact.

Opinion:-

The injuries detected are ante mortem in nature. The injuries on the neck 1 to 5 are caused by hard and blunt pressure and compression and crushed with strangulation. The genital injuries in the perineum might have been due to introduction of some hard blunt foreign body. The manner appeared homicidal in nature and the injuries are fresh in duration. Death is due to asphyxia as a result of strangulation."

In cross examination doctor has admitted that he has not seen any spermatozoa in the dissection table and that type of injury is not possible if a person falls from a tree and contacted with branches. The chemical examination report (Ext.26) reveals that no blood or semen stain was found either on the panty or on the frock of the victim. No semen was found from any biological sample collected from vagina.

From the above, what is proved beyond reasonable doubt is that the five injuries found on the neck of the victim are caused by hard and blunt pressure and compression twist with strangulation and that the death of victim is homicidal in nature and it is due to strangulation.

9-C. As far as discharge of reddish brown colour blood pink thick fluid found before to the majora and irregular ragged, stretched and turned soft tissue to the adjoining perineum, is concerned, it is stated to be due to introduction of hard blunt foreign body. The nature of hard-blunt foreign body is not stated by the doctor. The oral evidence of witnesses who saw the dead body and found blood stain on the private part of the deceased without corroboration from any scientific evidence, cannot be the basis to hold that hard and blunt foreign body was introduced to commit rape. It would be an act of paving way to their guesswork which has no place in criminal trial. We are alive of the law that rape is now defined U/s.375 of I.P.C. *inter alia* that insertion of any object to any extent into the vagina of a woman is rape. As per doctor injury nos.(i) to (v) found on the neck are the cause of death and the genital injuries are not the cause of such death. The accused, who is examined by doctor after two days of the occurrence, is found to have sustained no injury on his person including the private parts. In such a

situation, it would be a prosecutorial overreach to draw an inference that rape has been committed particularly when Chemical examination report does not show any sign of spermatozoa to establish sexual assault. Suspicion however grave may be cannot take the place of proof. Because of this, what is revealed from the evidence of doctor and chemical examination report is that the death of deceased is homicidal in nature but there is no proof beyond reasonable doubt that victim has been subjected to sexual assault .

9-D. Snitch testimony:-

Investigating officer, P.W.22, has testified to have requisitioned detective dog who reached the spot at 2:20 P.M. on 21-03-2018 and the service of sniffer dog was obtained by making the dog namely Phynix to smell the inner garment of victim who proceeded towards Manisha Devi temple to beetle shop of Ashalata Gudia and then to the house of accused. P.W.4 corroborated the same stating that sniffer dog barked in-front of the house of accused and accused was not in his house. So also P.W.15. Law is no more res Integra. The evidence of dog barking is not a circumstance which would exclude the possibility of guilt of any person. This view gets support from the decision reported in **AIR 1993 SC 1723, Surinderpal Jain Vrs. Delhi Administration**. The Hon'ble Supreme Court in the decision reported in **2001 Crl. L.J. 3317, Gade Lakshmi Mangraju @ Ramesh Vrs. State of Andhra Pradesh** has reiterated the Law in the following words-

> *"We are of the view that criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above, although we cannot disapprove the investigating agency employing such sniffer dogs for helping the investigation to track down criminals. Investigating exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."*

The dog barking evidence is not a circumstance and to that extent, the ocular testimonies are snitch-testimonies.

10. The perpetrator of murder of victim is attributed to the accused on the following circumstances:-

(i) The last seen theory;

(ii) Accused gave discovery of facts U/s.27 of the Evidence Act;

(iii) Extra judicial confession; and

(iv) Conduct of the accused.

10-A. The last seen theory:-

The father and sister have stated that the victim left house to play with her friends Sumitra and Minaxi at about 3 P.M. The sister of victim P.W.1 stated that the family members retired after lunch and at about 3 P.M. they awoke to find that the victim was not in their house and she and others searched. P.Ws.6 and 7 have testified that while they were playing with victim on 20.3.2018 at village danda, accused came there and took the victim with him towards the cashew nut field of Tapana Gaya. P.W.7 is the classmate of the victim. Her statement was recorded U/s.164 Cr.P.C. vide Ext.4. She has stated that 5 children were playing "Kitikiti" and on the next day she came to know that victim was murdered. This evidence is urged to be not reliable because she has admitted in her cross-examination that for the first time she saw the accused in the court. We do not subscribe that view. A statement having many meanings, cannot undercut the substratum of the truth. It is noteworthy that victim, the witnesses and accused are co-villagers. P.W.6, a child witness, who is found competent, has testified that accused had taken victim towards cashew jungle on 20.3.2018 at about 3 to 4 P.M. by holding her hand while they were playing. Her statement was recorded U/s.164 Cr.P.C. vide Ext.3. In further cross-examination she has admitted that she has disclosed such fact before her parents on that night. Both the witnesses P.Ws.6 and 7 have no axe to grind against the accused who is their co-villager. They were playing which indicate their innocence. When they depose later minor discrepancies are bound to occur. Such discrepancies being not cognate to the substratum is not potential to corrode the credibility.

Having carefully gone through the testimonies of P.Ws.6 and 7 situationally, we find both of them as wholly reliable witnesses and from their evidence, it is proved that accused had taken victim on 20.3.2018 at about 4 P.M. towards cashew jungle and on next day, the dead body of the victim was found. This last seen factum is proved beyond reasonable doubt by cogent and clear evidence. The accused has not given any explanation in this regard. It is needless to observe that the doctrine of last seen if proved, shifts the burden of proof on to the accused, placing on him the onus to explain how the incident occur and what happened to the victim who was lastly seen with him.

In the decision reported in **(2018) 16 SCC 161, Navaneethakrishnan Vrs. The state by Inspector of Police,** their Lordships of Hon'ble Supreme Court have held that "it is settled legal position that the law presumes that it

is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and / or could point to the guilt of the accused with some certainty. However, this evidence alone can"t discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration."

In the decision reported in **AIR 2019 SC 1674, Pattu Rajan Vrs. State of Tamil Nadu** it is held that failure on the part of accused to furnish any explanation or furnishing false explanation would provide an addition link in the chain of circumstances.

In the decision reported in **(2019) 8 SCC 333, Sudru Vrs. State of Chattisgarh** the Hon'ble Supreme Court has stated that the false explanation can always be taken into consideration to fortify the finding of guilt already recorded on the basis of other circumstances.

10-B. Discovery of fact U/s.27 of the evidence Act:-

In this connection the evidence of investigating officer P.W.22 and independent witness P.W.15 are pressed into service.

P.W.22 has testified that on 21.3.2018 he searched the accused and on getting information that he is available at Badambadi bus stand he, accompanied by P.W.15 and another, went to Cuttack. At about 11:30 P.M. they apprehended the accused and returned to Ersama. On the next day at 9 A.M. he arrested the accused. During interrogation, accused confessed and gave statement that he had concealed his inner garment – chaddi at a distance of 50 meters near the spot. He recorded his statement vide Ext.11. Thereafter he along with others took accused to the spot where he gave recovery of gray colour jockey sports chaddi and this was seized under Ext.12. He has further stated that the chaddi was kept under a cashew nut tree covered by cashew nut leaves. P.W.15 corroborated the same by admitting his signature on the seizure list and statement. The timing recorded in the seizure list corroborate the oral testimonies. This witness has admitted that the chaddi was not visible to others. The evidence of P.W.15 and P.W.22 on this score is not rattled in the cross-examination.

The accused knew that his semen stained chaddi was concealed near the spot under the leaves which was not known to others and such fact is the

confirmation of the knowledge of the accused that chaddi was thrown after commission of murder. This circumstance is proved beyond reasonable doubt and admissible U/s.27 of the Evidence Act. Section 27 permits the derivative use of custodial statement. The custodial statement directly leads to the subsequent discovery of semen stained chaddi which could not be discovered by otherwise through independent means. It is a good link in the chain of evidence. The relevancy is limited as relates distinctly to the facts thereby discovered.

In the case at hand, prosecution has successfully brought home this circumstance beyond reasonable doubt.

10-C. Extra judicial confession:-

On the point of extra judicial confession, the evidence of P.W.18 is projected. He is a co-villager of accused. He has stated that on 20.3.2018, while he was going on a motor cycle, accused asked him for a lift till Goda bus stand and he dropped him there and went away. In his cross-examination he has stated that accused confessed to his wrong when they were nearing to Goda bus stand and he had not disclosed about the confession to the outsiders there. Despite being declared hostile, his statement in the cross-examination remains unchallenged and that part of evidence which is not impeached in any manner is acceptable. It is also to be seen that P.W.18 has described the attire of the accused which was smeared with patches of sand, dirt and blood. Accused has not specifically admitted his guilt about murder of the victim. It is not an admission of guilt with regard to murder of victim. This circumstance does not unerringly point out the guilt of the accused. In our considered opinion it is the conduct of the accused which is relevant U/s.8 of the Evidence Act, but not the confession.

10-D. Conduct:-

The victim was found to have been taken by accused on 20.3.2018 at about 4 P.M. to cashew nut field. On the next day morning her dead body was found. P.W.5 stated that Kashinath Pradhan (P.W.18) has told him that accused had requested him (P.W.18) to leave accused on his motor cycle and accused reaching at Goda chowk went by Janaki bus. The evidence of P.W.18 is already analysed in the preceding para. P.W.10 has stated that while he was standing at Mayurlanji chowk on 20.3.2018 at about 4 to 4:15 P.M., found accused going towards Garia having stained with dust and blood

in his wearing apparel. When he asked him as to where he was going, accused replied in perplexed mind that he was going towards Garia. He has given description of his wearing apparel stating that the colour of pant was blue while the shirt was green colour check. He is categorical to state that accused was running towards southern side to western side. P.W.5 gets corroboration from P.Ws.10 and 18. The chemical examination report corroborates that human blood was found on the pant and shirt of the accused. The accused has no explanation for this except a denial.

Accused is a co-villager of the victim, he was found with blood stain on his pant and shirt and was leaving village without exhibiting normal behaviour to his co-villager. Such finding of blood on his wearing apparel is a circumstance which is cogently and firmly established and leads towards the guilt of the accused.

11. After culling out the circumstances which have lost its value either legally or factually, but considered by the trial court, we have now come to the conclusion that the following three circumstances, i.e, (i) last seen theory, (ii) discovery of fact U/s.27 of the Evidence Act and (iii) conduct of accused as well as availability of blood stains in his wearing apparels, are established beyond reasonable doubt and unerringly point towards the guilt of the accused. The last seen theory gets corroboration from other two circumstances, i.e. recovery of facts and the conduct of accused having blood stained apparels. Taking cumulatively, all the above circumstances form a chain so complete that there is no escape from the conclusion that the murder of victim on 20.3.2018 was committed by the accused and none else. The guilt of the accused is proved beyond reasonable doubt.

The decision of **Dileep Banker** (supra) cited by learned counsel for the appellant is in no way helpful to the facts rest upon circumstantial evidence. Rather it is a case where death sentence has been commuted to life imprisonment extending to 25 years of imprisonment.

The plea of defence is denial. The evidence through D.Ws.1 and 2 does not appear probable, rather being a false to the last seen theory, is an additional link to the guilt already established by the circumstances.

In the aforesaid **Pattu Rajan** case (supra) their Lordships have given an approach to prove beyond reasonable doubt in the following words:-

> *"It is worth recalling that while it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that such proof should be perfect, and someone who is guilty cannot get away with impunity only because the truth may develop some infirmity when projected through human processes. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Justice cannot be made sterile by exaggerated adherence to the rule of proof, inasmuch as the benefit of doubt must always be reasonable and not fanciful. (See* ***Inder Singh v. State (Delhi Administration), (1978) 4 SCC 161; State of H.P. v. Lekh Raj & Anr., (2000) 1 SCC 247; Takhaji Hiraji v. Thakore Kubersingh Chamansing & Ors., (2001) 6 SCC 145; Chaman & Anr. V. State of Uttarakhand, (2016) 12 SCC 76****)."*

12. Evidence is scanned independently as appellate court is obliged. Regards being had to the materials on record and the circumstances established, prosecution is found to have proved offence U/s.302 I.P.C. beyond reasonable doubt against the sole accused, condemned prisoner. The offences U/s.376(2)(i) and 376-A I.P.C. and U/s.6 of POCSO Act are not proved beyond reasonable doubt and accused is to be acquitted therefrom.

Resultant thereupon, the condemned prisoner is held guilty of the charge U/s.302 I.P.C. and his conviction by the Special Court on this count is up held. The accused is held not guilty U/s.376(2)(i) and 376-A I.P.C. and U/s.6 of POCSO Act and the conviction to that extent is hereby annulled and he is acquitted therefrom.

13. Sentence:-

Duelling over the life and death, the conviction has now descended into murder U/s.302 I.P.C. simpliciter. In view of the submission for confirmation of the death sentence, the question remains to be answered as to whether the death sentence should be confirmed.

13-A. Learned counsel for the condemned prisoner has submitted that for a murder simpliciter based on circumstantial evidence, the young age of accused, his family consisting of wife and two children and that he belongs to labour class having no criminal antecedent, should be considered as mitigating circumstances.

13-B. Learned Addl. Government Advocate urges to confirm the death sentence in view of rising trend of the murder of girl child betraying trust for lust and to consider the brutality perpetrated by strangulation by the accused.

14. The guidelines of Constitution Bench Judgment in **Bachan Singh Vrs. State of Punjab, AIR 1980 SC 898** are to be applied which *inter alia*

states that Life imprisonment is the rule and death sentence is an exception and a balance sheet of aggravating and mitigating circumstances has to be drawn up. In **Machhi Singh Vrs. State of Punjab, (1983) 3 SCC 470**, the principles of rarest in rare case is reiterated.

In the **Dileep Banker** case (supra), for the rape and murder of a 5 years girl, the sentence of total 25 years of imprisonment is awarded in setting aside death sentence. In **Akhtar Vrs. State of U.P., (1999) 6 SCC 60**, the Hon'ble Supreme Court has awarded life imprisonment because the evidence of witnesses showed that the murder was not committed intentionally and with any premeditation as the girl was picked up for committing rape.

15. In the case in hand, the offence of lust is lost raising residual doubt upon the act by sexual assault. Having regards to the aggravating and mitigating circumstances, we are of the opinion that, the mitigating circumstances outweigh the aggravating factors. Conscience is shocked but there is an alternative available to the death sentence. The assumption of power to take one's breath away, in the facts proved would be stretching the direction "in rarest in rare cases" beyond the limit of limitation so far prescribed by the precedents.

The sentence 'Imprisonment for Life' will be just and proper. The death sentence awarded by the learned Trial Court is not to be confirmed. Instead it is to be modified to Imprisonment for Life for offence U/s.302 of I.P.C.

16. In the result, the conviction of the condemned prisoner U/s.302 of Indian Penal Code is upheld and he is sentenced to undergo Imprisonment for Life. The death sentence awarded by the learned Trial Court is hereby set aside.

The conviction of the appellant U/s.376(2)(i) and 376-A of I.P.C. and U/s.6 of POCSO Act is set aside.

Accordingly the CRLA No.680 of 2019 is allowed in part. The DSREF is answered in negative.

Send back the L.C.Rs. forthwith.

S. K. MISHRA, J.

(Concurring) - Having carefully gone through the judgment rendered by learned brother Dr. Justice A.K. Mishra, I concur with the findings given by him, but would like to add few lines on the question of sentencing. In the reported case of ***Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614***, the Hon'ble Supreme Court held that in a case of murder, imposition of death sentence is the rule and imposition of alternative sentence of imprisonment for life is the exception. However, that view has undergone a change over the time, which is manifest from the later judgments of the Hon'ble Supreme Court.

17. For the first time, the constitutional validity of death sentence was considered by the Constitution Bench of the Hon'ble Supreme Court in the case of ***Bachan Singh vs. State of Punjab,*** *AIR 1980 SC 898*. The Constitution Bench of the Hon'ble Supreme Court taking note of the reported case of ***Jagmohan Singh vs. State of U.P.,*** *(1973) 1 SCC 20* held that the impossibility of laying down standard is at very core of the criminal law as administered in India, which invests the judge with a very wide discretion in the matter of fixing of punishment. Further, it was held that discretion in the matter of sentence is, as already pointed out, liable to be corrected by superior court. The exercise of judicial discretion of well-recognised principles is, in the final analysis, the safest possible safeguard for the accused. Holding that the provision of inflicting death penalty is not ultra virus of the constitution, the Hon'ble Supreme Court held that the authority and efficacy of the proposition laid down by the Apex Court in Jagamohan case (supra) considering the effect of the legislative changes are as follows:-

> " **160**. xxx
>
> (i) The general legislative policy that underlies the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefore, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.
>
> With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty. *(However, the Hon'ble Supreme Court in the case of* ***Machhi Singh and others vs. State of Punjab.,*** *(1983) 3 SCC 470, has struck down the provision of Section 303 of the Indian Penal Code as unconstitutional*) (italic portion added by us)

(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (Referred to Mc Gantha v. California, (1971) 402 US 183)

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in Furman v. Georgia, 33 L Ed 2d 346 : 408 US 238 (1972) decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and un-guided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in out Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an un-guided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v) (a) Relevant facto and circumstances Impinging on the nature and circumstances of the crime can be brought before the Court at the pre-conviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facto and circumstances had been specifically provided. When counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code, "the Court is principally

concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance With the provisions of the Indian Evidence Act in a trial regulated by the Cr. P. C. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), Cr. P. C. purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not tin-constitutional under Article 21.

(*emphasis added*).

161. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan's case, (1973) 2 SCR 541: (1973) 1 SCC 20: 1973 SCC (Cri) 169. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No. (iv) (a) which postulates, that according to the then extant Cr.P.C. both the alternative sentences provided in Section 302, Penal Code are normal sentences, and the Court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to ins-pose the sentence of death on that person unless there are "special reasons" - to be recorded - for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only hi extreme cases.

162. In this view we are in accord with the dictum of this Court in Balwant Singh v. State of Punjab, AIR 1976 SC 230 : (1976) 2 SCR 684 (1976) 1 SCC 425 : 1976 SCC (Cri) 43, wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J.) speaking for the Court, summed up the scope and implications of Section 354(3), thus: (SCC p.427, para 4)

Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case.

While applying proposition (iv) (a), therefore, the Court has to bear in mind this fundamental principle of policy embodied in Section 354(3).

163. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under Section 302, Penal Code, the Court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3) a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.

164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v) (b) in Jagmohan, (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 shall have to be recast and may be stated as below:

(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence,

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

165. The soundness or application of the other propositions in Jagmohan (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 and the premises on which they rest, are not affected in any way by the legislative changes since effected. On the contrary, these changes reinforce the reasons given in Jagmohan (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169, for holding that the impugned provisions of the Penal Code and the Criminal Procedure Code do not offend Articles 14 and 21 of the Constitution. Now, Parliament has in Section 354(3) given a broad and clear guideline which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of

> 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder - a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).
>
> **166.** The new Section 235(2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable and unjust. Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament. The argument to that effect is entirely misconceived. We would, therefore, re-affirm the view taken by this Court in Jagmohan, (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 and hold that the impugned provisions do not violate Articles 14, 19 and 21 of the Constitution."

18. The ratio decided in the aforesaid case was considered by the Hon'ble Supreme Court in the case of **Machhi Singh and others vs. State of Punjab,** (1983) 3 Supreme Court Cases 470. The Hon'ble Supreme Court in the aforesaid case held that the guidelines which emerge from the case of **Bachan Singh** (supra) would have to be applied to the facts of each individual case, where the question of imposition of death sentence arise:

> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

> (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

Thus, following the aforesaid principle, the Hon'ble Supreme Court in **Machhi Singh** case (supra) held that the following questions may be asked and answered as a test to determine the 'rarest of rare' case in which death sentence can be inflicted.

> "(a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

19. This Court, while considering the propriety of imposing death sentence in the case of **State of Orissa vs. Ardhu Chendreya,** (2010) 47 OCR 953, in which one of us, namely S.K. Mishra, J. was a party, has also taken into consideration the fact that, in the case of **Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka,** AIR 2007 SC 2531, the concept of irrevocability of the death sentence and whether it should be awarded in a case base entirely on circumstantial evidence was considered. In the case of **Vadivelu Thevar** (supra), the Hon'ble Supreme Court has held that while considering the quantum of sentence, the nature of proof available in the case is not relevant or important as the question of appreciation of evidence, nature of evidence, i.e. the prosecution case which alleges against the accused beyond all reasonable doubt falls within realm of the findings relating guilt or otherwise of the accused. It has nothing to do it with the question of sentencing. In the case of **Md. Mannan @ Abdul Mannan vs. State of Bihar,** decided on 20.04.2011, a three Judge Bench of the Hon'ble Supreme Court, in Criminal Appeal No.379 of 2009, the Hon'ble Apex Court has upheld the maximum sentence of death penalty, solely based on circumstantial evidence, which was brought home, the offences under Sections 366, 376, 302 and 201 of the Indian Penal Code, 1860.

In the case of **Swamy Shraddananda** (supra), the Hon‟ble Supreme Court has held as follows:-

> "89. It has been a fundamental point in numerous studies in the field of Death Penalty jurisprudence that cases where the sole basis of conviction is circumstantial

evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as full proof incidences and the fact that the same are circumstantial evidence based must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder.

90. One of the older cases in this league dates back to 1874, Merritt v. State, 52 Ga. 82, 85 (1874) where the Supreme Court of Georgia described the applicable law in Georgia as follows:-

"By the penal code of this state the punishment of murder shall be death, except when the conviction is founded solely on circumstantial testimony. When the conviction is had solely on circumstantial testimony, then it is discretionary with the presiding judge to impose the death penalty or to sentence the defendant to imprisonment in the penitentiary for life, unless the jury . . . shall recommend that the defendant be imprisoned in the penitentiary for life; in that case the presiding judge has no discretion, but is bound to commute the punishment from death to imprisonment for life in the penitentiary."

91. Later case of Jackson v. State, 74 Ala. 26, 29-30 (1883) followed the aforementioned case. [Also see S.M. Phillipps, Famous Cases of Circumstantial Evidence with an Introduction on the Theory of Presumptive Proof 50-52 (1875)]

92. In United States v. Quinones, 205 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) the court remarked:-

"Many states that allow the death penalty permit a conviction based solely on circumstantial evidence only if such evidence excludes to a moral certainty every other reasonable inference except guilt."

93. In the instant case, confession before police was taken as a gospel truth. It seems that the judicial mind has a role to play in that behalf in imposition of sentence.

94. Another aspect which needs to be considered as according to the Bachan Singh Rule (that sentencing should involve analysis about the nature of crime as well as the accused) which require consideration, is the effect of two pointers relating to the nature of crime. Firstly, the case does not seem to be an instance of what is called a diabolical murder. We come across cases of murdering wife by burning for non-fulfillment of dowry, preceded by continuous torture. Simon and Ors. v. State of Karnataka [(2004) 2 SCC 694] noting the "all murders are cruel" observation in Bachan Singh (supra) puts the law on death penalty in perspective as:

"The Constitution Bench said that though all murders are cruel but cruelty may vary in its degree of culpability and it is only then the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

20. In view of the dissenting judgments in **Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka** (1) (supra), the matter was taken up by the Hon'ble Supreme Court in a Bench having a coram of three Hon'ble judges of the Court. The judgment has been rendered by Hon'ble Justice Aftab Alam, as His Lordship the then, in the reported case of **Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka,** AIR 2008 SC 3040.

21. In this case, applying the principle as laid down in the case of **Machhi Singh** (supra), we found that the condemned prisoner is a 28 years old man belonging to low status of the society and a villager, who could not afford to engage a defence counsel on his own and was provided the assistance of a learned Advocate as State defence counsel. In this case, as already observed by my learned brother Dr. Justice A.K. Mishra, the offences under Sections 376 (2)(i) and 376-A of the IPC and Section 6 of the POCSO Act have not been established by the prosecution. There also appears to be nothing uncommon about the crime, which would render the sentence of imposition for life inadequate and calls for a death sentence. Applying the 2nd test, we are of the opinion that this is not a case where there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. The offender does not have any criminal track record. So, there is neither any material on record to show that he has been charge-sheeted by the police for committing any other offences in the past nor he has been found guilty by any court of competent jurisdiction. He is a semi-literate rustic villager earning his livelihood as a labourer, who can barely write his name as signature on the accused statement. Moreover, the accused is only 28 years old at the time of trial. So, there is every chance of his being reformed by the correctional treatments meted out by the authorities in charge of penitentiary.

Hence, I concur with the view taken by my learned brother and hold that this is not a case which falls in the category of rarest of rare cases, where all other options, but the sentence of death, is foreclosed. Hence, the appeal is allowed in-part as concluded by the learned judge in Paragraphs 15 and 16 of the judgment and the death reference is answered accordingly.

—— o ——

2021 (I) ILR - CUT- 143

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

W.P.(C) NO. 3878 OF 2008

THE WORKMEN, DHENKANAL
MEHENTAR SANGH …… Petitioner

.V.

THE MANAGEMENT OF DHENKANAL
MUNICIPALITY, DHENKANAL & ORS. …… Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the award passed by the Labour court – Plea that there is no scope to make judicial review in a certiorari proceeding – Jurisdiction and the scope of certiorari writ application – Principles – Discussed. (2019 (10) SCC 695 General Manager, Electrical Rengali Hydro Electric Project, Orissa and Others Vrs. Giridhari Sahu and Others followed.)

"Hon'ble Apex Court has held as follows:- "28.On the conspectus of the decisions and material, we would hold as follows: the jurisdiction to issue writ of certiorari is supervisory and not appellate. The Court considering a writ application of certiorari will not don the cap of an appellate court. It will not re-appreciate evidence. The writ of certiorari is intended to correct jurisdictional excesses. A writ of prohibition would issue when a tribunal or authority has not yet concluded its proceedings. Once a decision is rendered by a body amenable to certiorari jurisdiction, certiorari could be issued when a jurisdictional error is clearly established. The jurisdictional error may be from failure to observe the limits of its jurisdiction. It may arise from the 7 procedure adopted by the body after validly assuming jurisdiction. It may act in violation of principles of natural justice. The body whose decision which comes under attack may decide a collateral fact which is also a jurisdictional fact and assume jurisdiction. Such a finding of fact is not immune from being interfered with by a writ of certiorari. As far as the finding of fact which is one within the jurisdiction of the court, it is ordinarily a matter "off bounds" for the writ court. This is for the reason that a body which has jurisdiction to decide the matter has the jurisdiction to decide it correctly or wrongly. It would become a mere error and that too an error of fact. However, gross it may amount to, it does not amount to an error of law. An error of law which becomes vulnerable to judicial scrutiny by way of certiorari must also be one which is apparent on the face of record. As held by this Court in Hari Vishnu Kamath Vrs. Ahmad Ishaque, AIR 1955 SC 233, as to what constitutes an error apparent on the face of the record, is a matter to be decided by the court on the facts of each case. A finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ court to interfere. It is also to be noticed that if the overwhelming weight of the evidence does not support the finding, it would render the decision amenable to certiorari jurisdiction. This would be the same as a finding which is wholly unwarranted by the evidence which is what this Court has laid down (see Parry & Co.Ltd. Vrs. P.C. Pal: 1970 SC 1334)."

(Para 6)

Case Laws Relied on and Referred to :-

1. AIR 2006 SC 1806 : Secretary, State of Karnataka Vs. Uma Devi & Ors.
2. (2017)1 SCC 148 : State of Punjab & Ors. Vs. Jagjit Singh & Ors.
3. (2019) 10 SCC 695: General Manager, Electrical Rengali Hydro Electric Project, Orissa & Ors. Vs. Giridhari Sahu & Ors.

For Petitioner : M/s. Pradipta Mohanty, D.N.Mohaptra, Smt.J.Mohanty, P.K.Nayak, C.R.Nayak & S.N.Das.

For O.P.No. 1 : Mr. Subha Bikash Panda.

JUDGMENT Date of Hearing: 17.02.2020 : Date of Judgment: 2.11.2020

DR. A.K.MISHRA, J.

Petitioner-Dhenkanal Mehentar Sangh has filed this writ petition to quash the order dated 11.04.2007 of the Presiding Officer, Labour Court, Bhubaneswar (hereinafter referred to as "Labur Court) in I.D. Case No. 122 of 1995 in answering the reference that the workmen have no right as such to be regularized in service and to claim equal pay with their regular counterpart.

1.1. The petitioner is an association of workmen who are sweepers and sweepresses doing the work of sanitation under Dhenkanal Municipality. The workmen are NMR (Nominal Muster Roll) sweepers and sweepresses and DLR sweepers and sweepresses engaged by the Management of Dhenkanal Municipality-Opp.Party No.1. The management has also engaged regular sweepers and sweepresses against the sanctioned posts. Both the regular workmen employees and NMR sweepers and sweepresses work the same job inter changeably but NMR sweepers and sweepreses are not paid equally. A dispute arose, Government of Orissa, Labour and Employment Department vide Notification No. 14679/LE dated 21.10.1991 made the following reference to the Labour Court:-

> (1) Whether the NMR Sweepers and Sweepresses borne in the Nominal Muster Roll on daily wage of Dhenkanal Municipality are entitled to equal wage with their regular counter parts? If so, what should be details?
>
> (2) Whether Sweepers and Sweepresses of Dhenkanal Municipality borne in the Nominal Muster Roll on daily wage are entitled to regularization in the permanent posts of Sweepers and Sweepresses lying vacant? If so, what should be details?

2. Before the Labour Court, the workmen put forth their grievance that NMR and DLR sweepers are being paid a sum of Rs.650/-whereas their

counterpart in regular jobs are being paid a monthly salary of Rs.1800/- and as the sanctioned posts are lying vacant, they should be regularized and be paid equally for having done similar work.

2.1. The management filed written statement stating that the workmen who are NMR sweepers and sweepresses are not entitled to get their pay equal to their counterpart in the regular cadre as they do not carry responsibility, loyalty, sincerity and integrity like regular employees. The financial position of the management is not sound for which the regular posts are lying vacant. The management has prepared a gradation list of sweepers and sweepresses engaged by it after final discussion with all the workmen concerned and regular posts of sweepers and sweepresses would be filled up from out of the said gradation list keeping in view the financial position.

2.2. Both workmen and management adduced oral and documentary evidence. Learned Labour Court framed issues in consonance with the requirement of the reference. Learned Labour Court on analysis of evidence on record has recorded the following findings that:-

> (i) There is absolutely no defference between the nature of work of permanent sweepers and sweepresses of the management and the NMR sweepers and sweepresses of the said establishment who are workmen of this case.
>
> (ii) There is wide discrepancy between salary/wages of permanent employees and their counterparts who are NMRs of this case(Para-8).
>
> (iii) The regular sweepers and sweepresses do not posses any higher qualification and the works of both regular sweepers and sweepresses and DLR sweepers and sweepresses are equal (Para.10).
>
> (iv) Undoubtedly the workmen of this case are doing similar work as their counter parts and no specific qualification is required for being appointed as a sweeper and sweepress although in itself it is a valid ground to move the Management to consider the case of DLR/NMR sweepers and sweepresses for equally pay with their regular counterparts.

2.3. Learned Labour Court has taken note of one memorandum of ettlement Ext.3 of which Clause-14 reads as follows:-

> "14. 25 posts of sweepers and sweepress are lying vacant due to retirement on superannuation (21) and in service death (4). It was agreed upon to fill up the existing 21 vacancies arising due to retirement on superannuation from among the NMR sweepers/sweepresses engaged in cleaning on seniority and suitability. Before filling up the posts a gradation list of the NMRs. Would be prepared, duly published, inviting objections and approved. Vacancy due to in service death would

be filled up under Rehabilitation Assistance Scheme as per procedure. This will be without prejudice to I.D. Case No. 122 of 1995."

Then learned Labour Court observed that the Management had agreed to fill up 21 vacancies arising due to retirement on superannuation from among the NMRs. After preparation of Gradation list by observing all formalities.

2.4. Having reached the above findings, learned Labour Court relying upon the decision of the Hon'ble Apex Court in the case of **Secretary, State of Karnataka Vrs. Uma Devi and others**; reported in AIR 2006 SC 1806, has concluded that ad hoc or irregular appointees like NMR or DLR could not claim regularization of service as a matter of right. Further it is concluded that it is highly improper for Judges to step into this sphere to fix pay scale and blanket direction cannot be given to the anagement. As such, the reference was answered in negative.

3. Opposite party No.1 the Management has filed counter in this writ challenging its maintainability for want of necessary party, i.e. Government of Orissa, Labour and Employment Department. There is no scope to make judicial review in a certiorari proceeding and the proceeding in I.D. Case No. 122 of 1995 before Labour Court was not maintainable being hit under Section 73-C(c) of the Orissa Municipal Act, 1950. The petitioner workmen having not completed ten years of service cannot claim regularization of service.

3.1. The petitioner filed a rejoinder stating that the amendment of Orissa Municipal Act, 1950 was given effect from 19.5.1997 and it could not operate retrospectively to take away the rights already accrued to the workmen. The plea of non-joinder of necessary party is no more available as opposite party nos.3 and 4 are Government of Orissa, Labour and Employment Department and Director, Municipal Administration respectively.

4. Mr. Pradipta Mohanty, learned counsel for the petitioner strenuously urged that in view of the finding that workmen sweepers and sweepresses are not getting equal pay for equal work as of their regular counterpart and the management has agreed to make those NMR sweepers and sweepresses to regularize them, there is no justification on the part of the learned Labour Court to answer the reference in negative. In support of his contention, he

relied upon a decision reported in (2017)1 SCC 148: **State of Punjab and Others Vrs. Jagjit Singh and Others.**

5. Mr. Subha Bikash Panda, learned counsel for opposite party no.1 would submit that NMR & DLR workers cannot claim regularization of service in view of Hon'ble Supreme Court's direction and the agreement between the management, and workmen as found in Ext.3 of the lower court is not binding to that extent. He fairly submits that due to lapse of long time, he has no instruction as to the present status of the NMR and DLR sweepers and sweepresses.

6. The case involves the right of sweepers and sweepresses. Their nature of work needs no narration. To know our jurisdiction on the scope of certiorari writ, it is apt to refer (also in respect of NMR workers) the decision reported in (2019) 10 SCC 695: **General Manager, Electrical Rengali Hydro Electric Project, Orissa and Others Vrs. Giridhari Sahu and Others,** in which the Hon'ble Apex Court has held as follows:-

> "28. On the conspectus of the decisions and material, we would hold as follows: the jurisdiction to issue writ of certiorari is supervisory and not appellate. The Court considering a writ application of certiorari will not don the cap of an appellate court. It will not reappreciate evidence. The writ of certiorari is intended to correct jurisdictional excesses. A writ of prohibition would issue when a tribunal or authority has not yet concluded its proceedings. Once a decision is rendered by a body amenable to certiorari jurisdiction, certiorari could be issued when a jurisdictional error is clearly established. The jurisdictional error may be from failure to observe the limits of its jurisdiction. It may arise from the procedure adopted by the body after validly assuming jurisdiction. It may act in violation of principles of natural justice. The body whose decision which comes under attack may decide a collateral fact which is also a jurisdictional fact and assume jurisdiction. Such a finding of fact is not immune from being interfered with by a writ of certiorari. As far as the finding of fact which is one within the jurisdiction of the court, it is ordinarily a matter "off bounds" for the writ court. This is for the reason that a body which has jurisdiction to decide the matter has the jurisdiction to decide it correctly or wrongly. It would become a mere error and that too an error of fact. However, gross it may amount to, it does not amount to an error of law. An error of law which becomes vulnerable to judicial scrutiny by way of certiorari must also be one which is apparent on the face of record. As held by this Court in **Hari Vishnu Kamath Vrs. Ahmad Ishaque**, AIR 1955 SC 233, as to what constitutes an error apparent on the face of the record, is a matter to be decided by the court on the facts of each case. A finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ court to interfere. It is also to be noticed that if the overwhelming weight of the evidence does not support the finding, it would render the decisionamenable to

> certiorari jurisdiction. This would be the same as a finding which is wholly unwarranted by the evidence which is what this Court has laid down (see **Parry & Co.Ltd. Vrs. P.C. Pal**: 1970 SC 1334)."

6.1. Keeping the above law in view, we do not feel it proper to reconsider the finding of fact (supra) recorded by the learned Labour Court. What is found in the impugned order that learned Labour Court after recording the finding of fact as stated above drew the conclusion which is not inconsonance with the finding of fact as far as payment of equal wage to equal work is concerned.

6.2. In Jagjit Singh's case(supra) their Lordships of the Hon'ble Apex Court analyzing all most all decisions on this score held as follows:-

> "49. We have given our thoughtful consideration to the observations recorded by this Court in *Umadevi (3) case 43*, as were relied upon by the Full Bench(as also, by the learned counsel representing the State of Punjab). It is not possible for us to concur with the inference drawn by the Full Bench for the reasons recorded hereunder.
>
> 49.1 We are of the considered view, that in para 44 extracted above, the Constitution Bench clearly distinguished the issues of pay parity and regularization in service. It was held, that on the issue of pay parity, the concept of "equality" would be applicable (as had indeed been applied by the Court, in various decisions), but the principle of "equality" could not be invoked for absorbing temporary employees in government service, or for making temporary employees regular/permanent. All the observations made in the above-extracted paragraphs, relate to the subject of regularization/ permanence, and not, to the principle of "equal pay for equal work." As we have already noticed above, the Constitution Bench unambiguously held that on the issue of pay parity, the High Court ought to have directed that the daily-wage workers be paid wages equal to the salary, at the lowest grade of their cadre. This deficiency was made good by making such a direction."

7. In the case at hand, on the conspectus of above law, as the NMR sweepers and sweepresses cannot claim principle of equality to invoke regularization against permanent post, no error is found in the order of the learned Labour Court in answering reference No. 2.

8. Reference no.1, but stands in a different pedestal. As far as minimum wages on a par with regular employee is concerned, the Hon'ble Apex Court in the aforesaid case of Jagit Singh's case(supra) has held as follows:-

> "57. There is no room for any doubt that the principle of "equal pay for equal work" has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India under Article 141 of the Constitution of India. The parameters of the principle have been summarized by us in para-42 hereinabove. The principle of "equal pay for equal work" has also been extended to temporary employees (differently described as work-charge, daily wage, casual, ad hoc, contractual, and the like). The legal position, relating to temporary employees has been summarized by us, in para-44 hereinabove. The above legal position which has been repeatedly declared is being reiterated by us yet again.
>
> 58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities. Certainly not, in a welfare State. Such an action besides being demeaning, strikes at the very foundation of human dignity. Anyone, who is compelled to work at a lesser wage does not do so voluntarily. He does so to provide food and shelter to his family, at the cost of his self-respect and dignity, at the cost of his self-worth, and at the cost of his integrity. For he knows that his dependants would suffer immensely, if he does not accept the lesser wage. Any act of paying less wages as compared to others similarly situate constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation."

9. The workmen sweepers and sweepresses under NMR and DLR as per the finding of fact recorded by the learned Labour Court, are doing similar work as their counterpart and are not being paid equally with their regular counterpart. Once that finding of fact assumes primordial, denial of such right to pay parity on the ground of blanket order, does not stand to reason. This error is apparent on the face of record and warrants interference in exercise of jurisdiction of certiorari of this Court under Article 226 of the Constitution. The overwhelming weight of evidence from which the learned Labour Court drew support to record finding render his decision with regard to payment of equal pay to equal work amenable to certiorari jurisdiction. We are legally persuaded to see the right to pay parity is extended to the petitioner sweepers.

10. It is not brought to our notice as to the subsequent development made with regard to 26 nos. of NMRs. found place in the Gradation list vide Annexure-4, published on 28.10.2996, which was prior to the amendment of Orissa Municipal Act, dated 19.5.1997. Both parties submitted that some of them might have been regularized in the meantime.

10.1. Keeping all these facts in view, we have to conclude as follows:-

The order in answering the reference by learned Labour Court dated 11.4.2007 to the extent that workmen cannot claim equal pay with their regular counterpart is not sustainable in the eye of law and such error is rectified in exercise of jurisdiction of certiorari under Article 226 of the Constitution. We agree that the petitioner-workmen cannot claim as a matter of right to be regularized in service and to that extent the order of learned Labour Court does not warrant any interference. The workmen as per the Gradation list Annexure-4 published on 28.10.1996 by the management who are regularized in the meantime, they cannot claim any benefit further on the strength of this order. The workmen named in Annexure-4 who are not regularized but are still under engagement or are already disengaged during pendency of this writ petition by the management, they are entitled to the equal pay with their regular counterpart from the date of the publication of the Gradation list ublished on 28.10.1996(Annexure-4).

Accordingly, the writ petition is allowed in part.

—— o ——

2021 (I) ILR - CUT- 150

S.K. MISHRA, J.

W.P.(C) NO.14057 OF 2012

PRATIMA SAHOO .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner erroneously appointed as Sikhya Sahayak and subsequently disengaged – Challenge is made to the decision of authority on the plea that the decision is against the principles of promissory estoppel – Promissory Estoppel – Principles and scope – Section 115 of Evidence Act pleaded – Principles discussed.

"In the case of Shyam Babu Verma and Others –vrs.- Union of India and Others: reported in (1994) 2 SCC 521, the Hon'ble Supreme Court has held that in case higher pay scale erroneously was given to the petitioners since 1973 and the same was reduced in 1984, the petitioners received the higher scale due to no fault of theirs, it shall only be just and proper not to recover any excess amount already paid to them. Similar view has been taken by the Hon'ble Supreme Court in the case

of Sahib Ram – vrs.- State of Haryana and Others: reported in 1995 Supp.(1) SCC 18. 06.1. In the case of Sanatan Gauda –vrs.- Berhampur University and Others: reported in (1990) 3 SCC 23, the Hon'ble Supreme Court expanding the scope of promissory estoppels held that if a student is admitted, allowed to appear in examination and later admitted to the final year course but at the stage of declaration of his results of pre-Law and Inter-Law examinations, objections to his ineligibility to be admitted to the Law course raised by University on the basis of its own interpretation of the relevant regulations is to be countenance, as the University is estopped from refusing to declare the results of appellant's examination or from preventing him from pursing his final year course because the appellant has made no false statement and suppressed any evidence before the authority and the student cannot be punished by the University for negligence of the Principal or the University Authority.In the case of Minati Kar and Others –vrs.- Rashtriya Sanskrit Sansthan and Another: reported in 1993 (II) OLR 342, a Division Bench of this Court held that "xx xx xx Admittedly, the petitioners did not have 45 % of marks as required under Clause 1(a) of the prospectus.The prospectus clearly stipulated that form should be filled in only if the candidate fulfils the eligibility requirements. It is no doubt true that by permitting the petitioners to appear at the entrance test and, thereafter, by admitting them to the course and they having pursued their courses for one year, they have already wasted more than two years and it is because of the fact that the opposite parties by their conduct entertained their application forms and permitted them to appear at the test and, thereafter, on the basis of the result of the test permitted them to take admission and undergo studies for one year".

Case Laws Relied on and Referred to :-

1. (1994) 2 SCC 521 : Shyam Babu Verma & Ors .Vs. Union of India & Ors.
2. 1995 Supp.(1) SCC 18 : Sahib Ram .Vs. State of Haryana & Ors.
3. (1990) 3 SCC 23 : Sanatan Gauda .Vs. Berhampur University & Ors.
4. 1993 (II) OLR 342 : Minati Kar & Ors .Vs. Rashtriya Sanskrit Sansthan & Anr.
5. AIR 1987 Orissa 38 : Suresh Chandra Choudhury .Vs. the Berhampur University & Ors.

For Petitioner : Mr. Jagadish Biswal.M/s. D. Routray, P.K. Sahoo, S. Das, S. Jena,S.K. Samal, S.P. Nath & S. Rout.

For Opp. Parties: Mr. Karunakar Rath (A.S.C. for School & Mass Education Department)

JUDGMENT Date of Hearing : 21.10.2020: Date of Judgment : 09.11.2020

S.K. MISHRA, J.

In this writ petition, the petitioner has prayed for issuance of writ in the nature of certiorari or any other writ/ writs or direction/ directions quashing the impugned order dated 23.05.2012 i.e. Annexure-6 issued by the opposite party no.3- District Project Coordinator, SSA, Nayagarh and

directing the opposite parties more particularly the opposite party no.2-Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh, At/PO/ District- Nayagarh to engage her in the post of Sikhya Sahayak in any Primary School under Bhapur Block.

02. Facts are not in dispute.

The petitioner- Pratima Sahoo was initially engaged as Anganwadi Worker under the C.D.P.O., Bhapur Block, Bhapur and while she was continuing in the said post, an advertisement was floated for filling up of the post of Sikhya Sahayak under Bhapur Block Circle for which the petitioner who had satisfied all the eligibility criteria in terms of the said advertisement offered her candidature for the post of Sikhya Sahayak. Since the petitioner has acquired B.Ed. training, the Selection Committee after due verification, selected the petitioner for the post of Sikhya Sahayak under Bhapur Block vide letter dated 31.08.2007 and she was requested to submit necessary documents for verification, on 05.09.2007 in the office of the opposite party no.3-District Project Coordinator, SSA, Nayagarh. On the said date, the documents of the petitioner were verified.

02.1. Thereafter, the petitioner on receiving the engagement order for the post of Sikhya Sahayak resigned from the post of Anganwadi Worker and joined as Sikhya Sahayak on 17.10.2007. While she was continuing as such, all on a sudden, she got a letter on 20.02.2008 wherein the opposite party no.3- District Project Coordinator, SSA, Nayagarh had issued a show cause notice to the petitioner as to why she would not be disengaged from the post of Sikhya Sahayak since she secured less percentage of mark then other candidates.

02.2. On receipt of such letter, the petitioner challenged the same by filing W.P.(C) No.3548 of 2008 which was disposed of by this Court on 04.04.2008 directing the opposite party no.2-Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh to consider the case of the petitioner. On 26.08.2008, the petitioner was disengaged from the post of Sikhya Sahayak with immediate effect on the ground that she has secured 94.66% of mark in B.A. and B.Ed. percentage taken together whereas the lowest cut-off mark for selection in the category was 96.76%.

02.3. The petitioner, therefore, approached this Court by filing W.P.(C) No.1940 of 2009 which was disposed of at the threshold directing the

opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh to consider the representation of the petitioner within a period of four months. On 15.03.2012, the writ petition bearing W.P.(C) No.1478 of 2010 filed by the petitioner challenging the disengagement order dated 26.08.2008, under Annexure-4, was disposed of, on the basis of the instructions submitted by the District Project Coordinator of the School and Mass Education Department that there were 2 vacancies in B.Ed. category, directing the opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh to reconsider the matter, if any post is lying vacant, by taking a sympathetic view. On 23.03.2012, the petitioner filed a fresh representation before the opposite party no.2 enclosing a copy of the order dated 15.03.2012 passed by this Court in W.P.(C) No.1478 of 2010. However, the representation of the petitioner was rejected by the opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh on 21.05.2012 vide enclosed disposal order under Annexure-6 to the writ petition. That order passed by the opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh on 21.05.2012 was intimated to the petitioner vide letter dated 23.05.2012 under Annexure-6 issued by the opposite party no.3-District Project Coordinator, SSA, Nayagarh. In the order dated 21.05.2012 the exact reasons given by the opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh in rejecting the representation of the petitioner can be well perceived from the plain languages used by him.

> "In order to comply the Hon'ble High Court's order in W.P.(C) No.1940/2009, the petitioner Smt. Sahoo was heard personally on 8.4.2009 by the then Collector. The Collector observed that it is not a matter only between the Appointing Authority and the Appointee concerned. The aggrieved one can be all those who had similar or better qualification than the appointee. It will be improper to appoint a person with inferior or lower marks ignoring better candidates. Giving reengagement to such candidates will amount to perpetuation of injustice." (*underline supplied*)

03. Terming the reasoning given by the opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh to be inappropriate and erroneous, learned counsel for the petitioner submitted that while considering the case between the Appointing Authority and the Appointee concerned, the opposite party no.2- Collector-cum-Chief Executive Officer, Zilla Parishad, Nayagarh should not have taken into consideration the persons who may have higher marks than the petitioner but has accepted the *fait accompli* and have not taken any step for redressal of their grievances, if they have any.

03.1. The other distinguishing feature in this case is that the cases of some persons were considered, though they have not come forward to knock the doors of the Court or even of the authorities. But, when the petitioner was found eligible; she was given letter of appointment; she resigned from her service as an Anganwadi Worker and then joined the post of Sikhya Sahayak and continued for some time, thereafter, this matter arose.

04. Learned counsel for the petitioner argued that for no fault on the part of the petitioner, she has been left to suffer in this case. It is not the case of the Appointing Authority that the petitioner had concealed the marks she has secured or anyway made any misrepresentation in order to secure the post for which she had applied for. If there was any mistake in calculation of the percentage of marks and the *inter se* ranking between the candidates then it is the fault of the Appointing Authority and his/ her staffs. In such a situation, where the petitioner has left a gainful employment of Anganwadi Worker and joined the post of Sikhya Sahayak then the State of Orissa and the District Administration shall be the estopped from raising the plea of mistake and hence, the order of disengagement and rejection of representation of the petitioner have to be set aside.

05. The specific plea taken by the opposite party no.3- District Project Coordinator, SSA, Nayagarh, District- Nayagarh was that the petitioner had applied for the post of Sikhya Sahayak pursuant to the advertisement made in the year 2006 and the petitioner had applied for the same post for Bhapur Block under B.Ed. category vacancy. The opposite party no.3- District Project Coordinator, SSA, Nayagarh, District- Nayagarh admitted that the name of the petitioner was wrongly inserted in the select list in B.Ed. category as the mark of B.Ed. examination was calculated wrongly as 467 out of 900 which was actually 467 out of 950. It was, therefore, submitted that the total percentage in B.A. and B.Ed. taken together was wrongly calculated as 97.39% instead of 94.66%. Without detecting the above mistake, the petitioner was given engagement order at that time for the post of Sikhya Sahayak.

05.1. When the matter stood thus, pursuant to the direction of this Court in W.P.(C) No.13326 of 2007 filed by one Anusuya Pattajoshi against the State of Orissa and others, the percentage of marks of the petitioner was re-calculated and error was detected against calculating marks of B.Ed. examination. After detection of error, it was rectified and said Anusuya

Pattajoshi was given engagement in place of the present petitioner and the petitioner was disengaged immediately by the Collector-cum-Chairman, District Selection Committee due to less percentage than the selected candidates. Alternatively, it was submitted by the learned counsel for the opposite parties that this writ petitioner was an applicant to the panel of 2006-07 which had already been expired and even after that panel, two other recruitments for Sikhya Sahayak had been completed during 2010-11 and 2011-12 and hence, the engagement of the petitioner who hold the position below to some other meritorious candidates and waiting list's applicants from 2006-07 panel is now not suitable in the eyes of law.

05.2. Mr. K. Rath, learned Additional Standing Counsel for the School and Mass Education Department submitted that any order passed by this Hon'ble Court at this juncture directing engagement of the petitioner in the cadre of Sikhya Sahayak under Bhapur Block will unsettle the settled position as prevailing at present.

06. In the case of **Shyam Babu Verma and Others –vrs.- Union of India and Others**: reported in (1994) 2 SCC 521, the Hon'ble Supreme Court has held that in case higher pay scale erroneously was given to the petitioners since 1973 and the same was reduced in 1984, the petitioners received the higher scale due to no fault of theirs, it shall only be just and proper not to recover any excess amount already paid to them. Similar view has been taken by the Hon'ble Supreme Court in the case of **Sahib Ram – vrs.- State of Haryana and Others**: reported in 1995 Supp.(1) SCC 18.

06.1. In the case of **Sanatan Gauda –vrs.- Berhampur University and Others**: reported in (1990) 3 SCC 23, the Hon'ble Supreme Court expanding the scope of promissory estoppels held that if a student is admitted, allowed to appear in examination and later admitted to the final year course but at the stage of declaration of his results of pre-Law and Inter-Law examinations, objections to his ineligibility to be admitted to the Law course raised by University on the basis of its own interpretation of the relevant regulations is to be countenance, as the University is estopped from refusing to declare the results of appellant's examination or from preventing him from pursing his final year course because the appellant has made no false statement and suppressed any evidence before the authority and the student cannot be punished by the University for negligence of the Principal or the University Authority.

06.2. In the case of **Minati Kar and Others –vrs.- Rashtriya Sanskrit Sansthan and Another**: reported in 1993 (II) OLR 342, a Division Bench of this Court held that "xx xx xx Admittedly, the petitioners did not have 45 % of marks as required under Clause 1(a) of the prospectus. The prospectus clearly stipulated that form should be filled in only if the candidate fulfils the eligibility requirements. It is no doubt true that by permitting the petitioners to appear at the entrance test and, thereafter, by admitting them to the course and they having pursued their courses for one year, they have already wasted more than two years and it is because of the fact that the opposite parties by their conduct entertained their application forms and permitted them to appear at the test and, thereafter, on the basis of the result of the test permitted them to take admission and undergo studies for one year". Distinguishing the ratio decided by this Court, in the case of **Suresh Chandra Choudhury -vrs.- the Berhampur University and others**: reported in AIR 1987 Orissa 38, the Division Bench of this Court held that the plea of estoppels will not apply as the petitioner was aware of the true state of things. In the said case, this Court has not applied the principles of promissory estoppels.

07. Applying the aforesaid principles to the present case, we noticed the following silent features that are not disputed by anybody:

(i) The petitioner was holding the post of Anganwadi Worker and was discharging her duties;

(ii) The petitioner had applied pursuant to the advertisement for appointment as Sikhya Sahayak;

(iii) As per the advertisement, the petitioner was eligible to apply for the post of Sikhya Sahayak;

(iv) It is not disputed by anybody that the petitioner had made any false representation or anyway inflated the marks she has obtained;

(v) There was a mistake on the part of the Appointing Authority while calculating the petitioner's B.A. and B.Ed. combined percentage;

(vi) The petitioner was appointed pursuant to a letter of appointment issued in her favour; and

(vii) The petitioner resigned from the post of Anganwadi Worker and she joined the post of Sikhya Sahayak.

08. It is not disputed by anybody that the State of Orissa and consequently the District administration headed by the District Collector-cum-Magistrate are the State and, therefore, they should act as a model employer. They should not in any manner put any employee or any servant under them to any kind of prejudicial and disadvantage position for the fault of the employees of the Government. In this case, the petitioner has not misrepresented about her marks. The marks of the petitioner were miscalculated by the authorities-in-charge of the selection procedure. As a result of the miscalculation, the petitioner was held to be eligible to be appointed as Sikhya Sahayak. The appointment letter i.e. Annexure-1 was issued in favour of the petitioner for engagement as Sikhya Sahayak.

09. Section 115 of the Indian Evidence Act, 1872 provides for the definition of estoppel which is as follows:

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.
>
> *Illustration*
>
> A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.
>
> The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

10. Thus, in this case, the district administration, being an integral part of the State of Orissa, by its declaration i.e. act of issuing order of appointment intentionally caused the petitioner to believe that she is found to be eligible on comparison of the marks secured by all the candidates and she acted upon such belief, thereby resigned from the post of Anganwadi Worker and joined the post of Sikhya Sahayak under Bhapur Block. In such situation, neither the State of Orissa nor its representatives i.e. the district administration or the Director of the OPEPA, in any proceeding between it and the petitioner deny the truth of that thing. Once the State Government has allowed the petitioner to believe that she has qualified in the selection process and is being appointed as Sikhya Sahayak in pursuance of which she resigned from the post of Anganwadi Worker and worked for almost six to eight months as Sikhya Sahayak, the district administration/ State Government cannot deny that she does not qualify for the post of Sikhya Sahayak.

11. Hence, it is directed that the petitioner should be absorbed as Sikhya Sahayak under Bhapur Block with immediate effect. This order be complied with by the opposite parties within a period of two months hence.

Accordingly, this writ petition is disposed of.

There shall be no order as to costs.

As restrictions are continuing due to COVID-19 pandemic, learned counsel for the parties may utilize the soft copy of this order available in the High Court's official website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

—— o ——

2021 (I) ILR - CUT- 158

S. K. MISHRA, J & D. DASH, J.

W.P.(C) NO. 15349 OF 2012

SMT. SURESWARI DEVI .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 300-A – Right to Property – Land Acquisition – Right, title, interest over the property of the petitioner is conceded – Allegation of voluntary relinquishment by the petitioner – No document/evidence to that effect – Rather frequent notices of acquisition falsify the stand of voluntary relinquishment – Neither any claim with regard to raising of compensation nor with regard to restoration of possession since two decades – During the period of initial notice petitioner had claimed Rs.3000/- per decimal – Prayer of the petitioner considered – Held, the petitioner is entitled to receive Rs.3000/- per decimal together with all statutory benefits including solatium and interest as available at that point of time.

Case Law Relied on and Referred to :-

1. AIR 1995 SC 142 : Jilubhai Nanbhai Khachar, etc. Vs. State of Gujarat & Anr.

For Petitioner : M/s. S.K.Joshi, J.K.Panda & B.P. Acharya.
For Opp. Parties : Addl. Govt. Adv.

JUDGMENT Date of Judgment : 09.11.2020

D.DASH, J.

The petitioner by filing this writ application has prayed for a direction to the opposite parties (State of Odisha and its functionaries) to take steps for initiation of proceeding afresh under the Land Acquisition Act, 1894 (hereinafter, called 'the LA Act') to acquire the land measuring Ac.2.25 decimals as described in the schedule under Annexure-1 to this application and pay just and adequate compensation as assessed as per the present market rate and in accordance with law; in the alternative to deliver of possession of said land.

2. The factual matrix of the case, in hand, is that one Soubhagya Manjari, the wife of late Anup Singh was the original owner having the right, title, interest and possession of the land in question. She has died leaving behind the petitioner and other sons and daughters as her legal heirs and successors who have succeeded to all the properties of said Soubhagya Manjari.

It is stated that in the year 1974, the State having constructed the building over the land in question for use as District Agriculture Office, staff quarters, godown etc. and have been so occupying the land and buildings standing over it in running the office and other associated activities. It is further stated that although the State is in occupation of the land of the petitioner by putting up constructions over there and using those for its purpose, no such step has been taken either for payment of adequate compensation as payable for the same nor it is being vacated for being possessed by the petitioner and others as its owner exercising all such rights.

It is the case of the petitioner that Govt. in the Department of Revenue by notification dated 15.10.1976 had intended to acquire Ac.2.25 decimals of land under khata no.432, plot no.412 in Mouza-Khariar for public purpose for construction of staff quarters, garages, godown and passage to the Agriculture Office, Khariar. The notification was one under section 4(1) of the L.A. Act. Land Acquisition Case No.228 of 1976 had been registered for the purpose. The matter however did not proceed further. Be that as it may, the State again made the notification on 09.09.1986 which was published in the official gazette on 30.10.1986 as at Annexure-2 whereupon Land

Acquisition Case no. 29 of 1986 came to be registered before the Land Acquisition Officer, Khariar. Field enquiry had been conducted, demarcation of the land had also been made. The owner, Soubhagya Manjari Devi had been served with a notice dated 7.3.1987 (Annexre-3) to that effect. In response to the same, Soubhagya Manjari had asked the Authority to calculate the compensation taking the market price of the land @ Rs.3000/- per decimals. It was stated that assessment of the market price of the land as it was then prevailing was not made keeping in view the fact that the land in question is situated within the area of Khariar Notified Area Council and bounded P.W.D. Road from Khariar to Nuapada and Bhawanipatna with other offices of the Govt. situating nearby. It is further stated that although more than three and half decades have passed in the meantime, the land owner and on her death, the petitioner and other legal heirs have not been paid with the compensation. Thus it is said that the land in question is in unauthorized occupation of the State through its functionaries and its continuance as such is wholly illegal. The petitioner asserts the present market value at Rs.1.00 lakh per decimal. In the above premises, the petitioner claims that she and other legal heirs and successors of Late Soubhagya Manjari either be paid with the compensation for the said land as per the assessment in consonance with the present market price and in accordance with the law as now prevails and holds the field or the possession of the land in question be restored to them.

The opposite party no. 5, the District Agriculture Officer, Khariar has filed the counter on behalf of the opposite party nos. 2 and 5.

The settled position of law has been stated at paragraph-4 that once the land is vested in the State, free from all encumbrances, it cannot be divested and proceedings under the Act would not lapse, even if an award is not made within the statutory period. The position of law that once the land is acquired and vested free for all encumbrances, it is not the concern of the land owner whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes persona *non-grata,* once the land vests in the State and has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. It is stated that the State has no requisite power to reconvey the land to the person-interested nor can such person claim any right of restitution on any ground whatsoever unless there is some statutory amendment on the score.

Banking upon the above, it is said that the prayer of the petitioner for delivery of possession of the land is not tenable. It is next stated that the payment of compensation for the land in question by the State as per the assessment in terms of the present market price of the land is not acceptable as the land in question had been voluntarily spared by the predecessor-in-interest of the petitioner.

At paragraph-5 of the counter, it has been admitted that the land measuring Ac.1.72 decimals is in occupation of the District Agriculture Officer having godown, garage, office of Asst. Agriculture Officer etc. It is stated that construction over the land had taken place in the year 1976. The husband of Soubhagya Manjari Devi was the member of State Legislative Assembly and also the Cabinet Minister. He being a public spirited and forward looking person was taking initiative for all around development of Khariar. He wanted the Agriculture Office to be located at Kharirar instead of Nuapada which is the Sub-Divisional headquarter. So in order to ensure that said office functions there at Khariar, he and his wife Soubhagya Devi volunteered to spare the land in question for the purpose of necessary construction and user by the State and its functionaries and handed over the possession of the same whereafter constructions have been made. It is stated that such constructions have been made to the knowledge of the erstwhile owner and all her family members. After constructions, those have been used as such. It is stated that they had relinquished their right, title and interest over the said land whereafter the constructions have been made and therefore from that time onwards, no such objection was raised either by the erstwhile owner or by her legal heirs and successors nor they have advanced any claim for compensation or for restoration of possession of the land in question.

The publication of the notifications under the LA Act, as have been pleaded in paras-3 to 5 of the writ application, have not been denied. It is stated that the land acquisition proceeding was initiated by notification and Land Acquisition Case no. 228 of 1976 had been registered and the compensation for the land under occupation of the State measuring Ac.1.72 decimals was assessed at Rs.20,330/- which was not objected to by the land owner and the amount has been accordingly deposited by Bank draft dated 21.11.87.

3. The counter filed by the Land Acquisition Officer (opposite party no.3) and Asst. Collector (opposite party no.4) run in the same vein as that of the counter filled by the opposite party nos. 2 and 5.

4. Admittedly, the land measuring Ac.1.72 decimals owned by Soubhagya Manjari is in occupation of the State since the year 1976. In view of the averments taken in the counters that the land had been voluntarily spared and the rights over the land had been relinquished for the purpose of construction of the building by the State for the Agriculture Office, godown etc., this Court had directed the opposite parties to file affidavit explaining that aspect in detail.

The said affidavit of the opposite party no. 5 being relevant is placed hereunder:-

> "4. That it is admitted fact that the land measuring 1.72 Acre is in possession of the District Agriculture Officer, Khariar. There is Godown, Garage Office of the Assistant Agriculture Officer, Khariar and Agriculture. Sale Centre Godown on the said land. The District Agriculture Officer, Khariar was constructed during the year 1964 in the Government Plot, a piece of land kisam Bagicha measuring an area of Ac.2.25 dec. of mouza-Khariar of Saubhagya Manjari Devi left baron and unused adjacent to District Agriculture Office, Khariar. During the field visit of Addl. District Magisgtrate, Kalahandi (when Khariar was under Kalahandi district) to D.A.O., Khariar on 09.08.1976 was requested for acquisition of the said piece of land. Thereafter, DAO, Khariar in his letter No.4214 dated 16.8.1976 made a requisition to Land Acquisition Officer, Kalahandi for acquisition of land measuring an area of Ac.2.60 dec. out of which Ac.0.35 dec. was Anabadi. The land was taken into possession and used from 16.06.1977 with the oral consent of the owner. The L.A. proceeding was initiated under emergency clause for an area of Ac.2.25 dec. as this is an advance possession case for construction of office, garage, sale centre etc. Later on an area of Ac.0.53 dec. from Plot No. 412 was withdrawn from land acquisition with the direction of the Commissioner-cum-Secretary to Government, Revenue & Excise Department vide letter No. 3233/R dated 24.04.1979. Then a fresh proposal for an area of Ac.1.72 dec. was initiated in the land acquisition office, Kalahandi. The buildings have been constructed at various points of time starting from 1976. It is significant to note that the husband of recorded tenant Smt. Sobhagya Manjari Devi was a MLA, Khariar for a long period of time after abolition of Jamindari which was his estate Ms.Anup Singh Deo. Husband of recorded tenant was also Cabinet Minister for several terms. He was Ex-Jamindar of Khariar and was quite a forward looking, man taking initiatives for all round development of Khariar. In such a public spirit he actually wanted that the District Agriculture Officer be located at Khariar instead of Nuapada which was a head quarter of a sub-division to see that the office is located at Khariar. The recorded tenant volunteered to spare the case of land and handed over possession of the same without the land being acquired through R.A. Proceedings. As a result the aforesaid construction have been made from time to time within the knowledge and notice of the recorded tenant and his family members who have volunteered to give the land for a public purpose and thus they have acquiesced to the said construction. Since, they themselves took an active part

in sparing the land. The recorded tenants have never raised any claims of compensation on surrender of vacant position.

5. That it is humbly submitted that the gift/donation was not available in the office of the deponent for which the Land Acquisition Proceedings was initiated vide L.A. Case No. 228 of 1976 and L.A. No. 29 of 1986 during that time.

6. That it is further humbly submitted that for extension of infrastructure facilities like staff quarters, Go-down etc of District Agriculture Officer, Khariar an acre of 2.25 of plot No. 412 Khata No. 431 was selected in the year 1976 by the site selection committee comprising of District Level Officers viz. Sub-Divisional Officer, Nuapada, Sub-Division, Medical Officer, Khariar PHC, Tahasildar, Khariar, District Agriculture Officer, Khariar etc, which was under the name of Late Soubhagya Manjari Devi, wife of Late Anup Singh Deo, Maharaja-cum-MLA, Khariar. With the consent of the land owner Late Soubhagya Manjari Devi and her husband Late Anup Singh Deo, Maharaja-cum-MLA, Khariar a pucca boundary wall with iron gate was constructed in Ac.2.25 decimal over plot No. 412 and Khata No. 431 by the Executive Engineer, PWD, Kantabanji. Land Acquisition process were initiated by the District Agriculture Officer, Khariar through the Land Acquisition Officer, Kalahandi (undivided District). The draft publication U/s. (6) of the Land Acquisition Act was issued by the Collector, Kalahandi on 14.09.1976 and 4(1) Notification No. L-228/75 Kalahandi 80/85/R. Later on in the year 1986, the Government of Odisha in Revenue Department relinquished Ac.0.53 decimal land, the private party and intact Ac.1.72 decimal of land for the use of District Agriculture Officer, Khariar seeking a fresh proposal of Land Acquisition proceedings for an area of Ac.1.72 decimal a fresh proposal with all the relevant documents for Land Acquisition Process were furnished for the Land Acquisition Officer, Kalahandi by the District Agriculture Officer, Khariar in the year 1986. An amount of Rs.300/- and Rs.20,330/- were deposited in the Land Acquisition Office, Bhawanipatna vide Bank Draft No. TT/AE-88706, dated 31.03.1987 and Bank Draft No.OL/A.27-067310, dated 21.11.1987 respectively by the deponent. The compensation money has not been paid to the land looser (land owner) by the Land Acquisition Officer, Kalahandi as the Government in Revenue Department, Odisha has not issued orders under section 7 of the L.A. Act to him for acquisition of land measuring an area of Ac.1.72 decimal as per the Land Acquisition process of L.A. Case No. 29/86 which was remained uncompleted since then."

5. The averments taken in the affidavit of opposite party nos.3 and 4, which are relevant for the purpose are as follows:-

"3. That the L.A. proposal for construction of office, staff quarter and go-down etc. in Mouza-Khariar bearing Khata No. 431, plot No. 412 for an area of Ac.2.25 decimal of land had submitted by the District Agriculture Officer, Khariar to the Land Acquisition Officer, Kalahandi in the year 1976. The Land Acquisition Officer, Kalahandi has initiated a L.A. Case bearing No.46/1976. The Govt. in Revenue Department, Odisha issued Notification U/s.4(1) of the L.A. Act vide No.80135, dtd.15.10.1976.

4. The Land Acquisition Officer, Kalahandi has submitted estimate of Rs.2,485.61 to Government in Agriculture and Cooperation Department for sanction.

5. That the Declaration U/s.6(1) of the L.A. Act was issued vide No.35355 dtd. 30.05.1978.

6. That the Government in Revenue Department intimated to Agriculture and Cooperation Department about the invalidation of the L.A. Case No. 46/1976 and requested to the District Agriculture Officer, Khariar to file fresh L.A. proposal, vide No. 73711, dtd. 06.11.1980. Thereafter another L.A. proposal was submitted by the District Agriculture Officer, Khariar and L.A. Case No.29/1986 was initiated for an area of Ac.2.25 by the Land Acquisition Officer, Kalahandi.

Accordingly, the Additional District Magistrate, Kalahandi intimated the District Agriculture Officer, Khariar to file requisition afresh for Ac.1.72 decimal of land.

In the meantime, one objection was received from one Ashok Kumar Khandelwal by the Collector & District Magistrate, Kalahandi on 01.03.1982 opposing the acquisition of his land of an extent of Ac.0.53, and stating that an area of Ac.0.75 decimal of land was purchased by him vide Registered Sale Deed No.1451. Book No.22, dated 10.10.1974 for the purpose of establishing a power loom, out of which Ac.0.53 decimal of land had been included in the proposal for acquisition.

7. That after initiation of the above L.A. case, an area of Ac.0.53 decimal of land was withdrawn as per letter No. 4860, dtd. 26.09.1987 of the Additional Director, Agriculture addressed to the District Agriculture Officer, Khariar with a copy to the Land Acquisition Officer, Kalahandi. The District Agriculture Officer, Khariar also furnished certificate in Form No.17-A to the Land Acquisition Officer, Kalahandi regarding withdrawal of area of Ac.0.53 decimal of land. Accordingly, Notification was issued for acquisition of land to the extent of Ac.1.72 decimal.

8. That the Land Acquisition Officer, Kalahandi prepared an estimate of Rs.20,329.58 paisa for an area of Ac.1.72 decimal and was sent to the Agriculture and Cooperation Department for sanction on dtd.05.10.1987.

9. The Government in Agriculture and Cooperation Department sanctioned the estimated amount of Rs.20,330.00 vide No.34750, dtd. 28.10.1987 and the same amount has been deposited with the Land Acquisition Officer, Kalahandi vide Bank Draft No.OL/A27-067310, dtd.21.11.1987. Order-7 of L.A. Act has not issued by the Govt. and award had not been made to the recorded tenant."

6. The position of law is no more *res integra* that even after the right to property ceased to be a fundamental right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the law, as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute.

The same cannot be done by way of executive fiat or order or administration caprice.

7. In *Jilubhai Nanbhai Khachar, etc. v. State of Gujarat & Anr.*, AIR 1995 SC 142, it has been held as follows:-

> "In other words, Article 300-A only limits the power of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without due sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation."

Reliance is placed on the judgment In *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai*, the Apex Court held that:-

> "6..... Having regard to the provisions contained in Article 300-A of the Constitution, the State in exercise of its power of "eminent domain" may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefor must be paid."

In *N. Padmamma v. S. Ramakrishna Reddy*, the Court held that:-

> "21. If the right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300-A of the Constitution protects such right. The provisions of the Act seeking to divest such right, keeping in view of the provisions of Article 300-A of the Constitution of India, must be strictly construed."

The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension.

8. The factual setting of the case that the land measuring Ac.1.72 decimals appertaining to khata no.431 under plot no.412 of mouza-Khariar which belonged for Soubhagya Manjari Devi is in occupation of the State where District Agriculture Office, godown, garage etc. stand. Being aggrieved by the rule of Law, the State cannot arrogate itself to a status beyond the one that is provided by the constitution and the laws. The State

cannot deprive its citizen of his/her right over the property without being in adherence to the law. Here, the State having conceded the right, title and interest of Soubhagya Manjari Devi in so far as the land in question is concerned, had placed that she had voluntarily spared the land for the development of the area by construction of buildings by the State for Agriculture Office, godown, garage etc and had relinquished all her rights over the same in favour of the State. But neither a scrap of paper nor any such document in support of that stand has been placed before this Court. Moreover, repeated notifications under the LA Act and initiation of land acquisition cases for acquisition of the land as also issuance of notice to the land owner in that connection falsifies that stand of voluntary sparing and relinquishment.

The above being one part of the coin, the other part which is equally important that emerges is the conduct of the erstwhile owner and her legal heirs and successors for being taken note of for its due consideration in the matter. The case in hand does not appear to be the one that without the knowledge Soubhagya Manjari Devi, the owner, the property has been overnight taken over. Despite inaction or non-progress of the matter relating to payment of compensation to the erstwhile owner or her legal heirs and successors, as the case may have been, it appears that they have maintained sphinx like silence at least since March, 1987 after responding to the only notice given in that regard till January, 2010 when the petitioner is seem to have woken up from deep slumber after more than two decades in ventilating the grievance. During this long period, no such step has been taken in asserting the right either as to compensation or for restoration of possession and then again after about two years since that notice by the petitioner, this writ application has come to be filed without any explanation on said score.

It is pertinent to mention here that the erstwhile owner in her response to notice dated 5.3.1987 had then claimed for compensation for the land @ Rs.3000/- per decimal placing reliance on three such sale transactions of the nearby land which had been made in the year 1984 under Annexure-3, which is not denied by the opposite parties. She, however, thereafter did not raise any grievance at any time during her lifetime; this petitioner for and on behalf of all the legal heirs of Soubhagya Manjari has advanced the claim only on 14.01.2010.

9. In the above premises and in the facts and circumstances of the present case so as to redress the grievance of the petitioner and other legal heirs and successors of Soubhagya Manajari Devi once for all; We are of the considered view that ends of justice would be met by directing the opposite party no.1 to pay compensation for the land measuring Ac.1.72 decimals under khata no.431 and plot no.412 of mouza Khariar by assessing the same as then claimed by Late Soubhagya Manjari Devi @ Rs.3000/- per decimal together with all statutory benefits including solatium and interest etc. as available at that point of time, as per prevailing law within a period of three months hence treating it as a case of deemed acquisition.

10. The writ application is accordingly disposed of.

—— o ——

2021 (I) ILR - CUT- 167

D.DASH, J.

CRLREV NO. 831 OF 2018

DIPTI RANJAN PATNAIK & ANR. ……...Petitioners

.V.

STATE OF ODISHA (VIGILANCE) ……Opp. Party.

PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1) (d) and 13 (2) read with sections 420/379/120-B of the Indian Penal Code, 1860 and section 21 of the Mines and Minerals (Development & Regulation) Act, 1957 – Offence under – Framing of charge vis-a- vis discharge – Settled principles – Discussed.

"The principles of law are too well settled that while answering the question of framing the charges, a duty is cast upon the Court to consider the record of the case and documents submitted therein. In that exercise, if the decision is to discharge the accused under section 227 of the Code of Criminal Procedure (in short, 'the Code'), the Court is called upon to give a definite opinion for said discharge. Meaning thereby, that if the Court considers that there is no sufficient ground for proceeding against the accused, it shall discharge the accused after recording the reasons for doing so. The language of section 227 of the Code makes it clear that the Court cannot proceed merely on presumption and therefore, the word 'considers' finds place therein. The next parameter is that if after considering the record of the case and the documents submitted there with and hearing in that

behalf, the Court exercises the power to frame charges against the accused under section 228 of the Code, said view is tentative. Meaning thereby, that if the Court is of the opinion that there is ground for even presuming that the accused has committed an offence, he shall frame the charge in writing." (Para 12)

Case Laws Relied on and Referred to :-

1. (2011) 3 SCC 581 : Radheshyam Kejriwal Vrs. State of West Bengal and Anr.
2. (2020) 2 SCC 768 : M.E. Shivalinga Murty Vrs. CBI, Bengalore & Sevreal Ors.
3. AIR 1977 SC 2018 : State of Bihar Vrs. Ramesh Singh.
4. (2012) 9 SCC 460 : Amit Kapoor Vrs. Ramesh Chander.
5. (2020) 2 SCC 768 : M.E. Shivalinga Murthy Vrs. Central Bureau of Investigation, Bengaluru.
6. (2012) 2 SCC 398 : P. Vijayan Vrs. State of Kerala & Anr.
7. (1996) 9 SCC1 : P.S. Rajya Vrs. State of Bihar.
8. 1995 Supp.(2) SCC 724 : G.L. Didwania Vrs. ITO.

For Petitioners : M/s. Sarada Prasanna, Sarangi, P.K. Dash, S. Mohanty, P.K. Dash, S. Mohanty.

For Opp. Party : Mr. Sangram Das, Addl. Standing Counsel, (Vig. Dept.)

JUDGMENT Date of Judgment 27.11.2020

D.DASH, J.

The petitioners by filing this revision have assailed an order dated 28.07.2018 passed by the learned Special Judge (Vigilance), Keonjhar in VGR Case No. 59 of 2009 (T.R. Case No. 80 of 2011). By the said order, the petition filed by the petitioners who have been arraigned as accused persons therein for their discharge has been rejected. Thus, the legality and propriety of the said order whereby and whereunder, the court below has presumed the existence of a prima facie case against these petitioners for commission of offence under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short, "the P.C. Act") and under section 420/379/120-B of the Indian Penal Code, 1860 (in short "the IPC") as well as section 21 of the Mines and Minerals (Development & Regulation) Act, 1957 (hereinafter, called as "MMDR Act") has been called in question.

2. The factual exposition necessary for the purpose are briefly stated as under:-

The petitioner no. 2 is the lessee of Unchabali Iron and Manganese Mines situated in the revenue village Unchabali in the District of Keonjhar, Odisha. The petitioner no. 1 is the General Power of Attorney holder of

petitioner no. 2 who as such had executed the mining lease-deed on 05.02.1999 which had been granted in favour of the petitioner no. 2. The mining operation in the said mines commenced after the mining plan was approved by the Indian Bureau of Mines(IBM) as provided under section 5(2)(b) of the MMDR Act. The petitioners are thereby duly authorized to mine the iron ore and undertake the mining activities.

3. (a) On 24.09.2009, a joint physical inspection of the said mines was made by a team led by the Vigilance Authorities, consisting of Technical Experts such as Engineers, and the Officials of Revenue as well as Mining Departments. On 02.12.2009, a written information was lodged by the Deputy Superintendent of Police, Vigilance Cell, Cuttack pointing out there in certain illegalities / irregularities / deviations / deficiencies. That being treated as First Information Report (FIR) has led to the registration of Balasore Vigilance P.S. Case No. 59 of 2009 and commencement of investigation thereof.

(b) On completion of investigation, the Vigilance Department submitted charge-sheet on 02.11.2010 placing the petitioners and others for trial for commission of offence under section 13(2) read with section 13(1)(d) of the PC Act, section 420/379/120-B of the IPC as well as section 21 of the M.M.D.R. Act. The charge-sheet being filed in the Court of learned Chief Judicial Magistrate, Balasore, the record was transmitted to the learned Special Judge (Vigilance), Balasore leading to registration of T.R. Case No. 44 of 2010. The learned Special Judge (Vigilance), Balasore on receipt of the record and upon perusal of the charge-sheet, took cognizance of above offences by its order dated 06.12.2010. Subsequently, the said case has been transferred to the Court of learned Special Judge (Vigilance), Keonjhar when it was so established and vested with the power to try such offences having the jurisdiction over the area; where the above stated mines situate.

4. The joint inspection had been conducted in view of receipt of certain allegations regarding the carrying of illegal mining activities in that mines, leased out in favour of petitioner no. 2 who was acting through her power of attorney holder-petitioner no. 1. It may be mentioned here that one raising contractor had been duly engaged by the lessee for a period of one year with the clause of renewal.

During inspection, physical verification of the stock was made and the statements to that effect have been prepared. Similarly, physical verification

of the pits and the measurement of the volume excavated from the pits said to have been dug, the statement as to the total volume excavated with the map showing the pits have been recorded.

5. The accusations, as per the prosecution version constituting the factum of commission of the offences by them are as under:-

> (a) that the total production of iron ore of different grades comes to 29,18,431.00 MT till 24.09.2009 i.e. the date of joint physical verification against dispatch of 24,31,225.130 MT. Thus, there should be closing stock (Book Balance) of 4,87,205.870 MT as on 24.09.2009;
>
> (b) that the Dy. Director of Mines, Joda from 04.07.2005 to 10.08.2009 has allowed dispatch of the excess iron ore in connivance with the Senior Inspector of Mines working as such from 23.06.2006 to 03.07.2009 and the other Senior Inspector, Mines from since 06.07.2009 to 24.09.2009;
>
> (c) these officials visited the mining site from time to time, and certified the dispatch of the iron ore despite the fact that huge quantity of iron ore have been brought from outside of the mining lease area;
>
> (d) on 24.09.2009, the day of joint verification, the physical stock of iron ore were found to be 1,82,637.695 MT against the closing balance of 4,87,205.870 MT as on 24.09.2009; thus, a shortage of 3,04,568.170 MT of iron ore as on 24.09.2009, costing Rs.6000/- per MT, which has been clandestinely disposed off by the petitioners without disclosing about the same in any official records;
>
> (e) the amount royalty and Sales Tax against the above quantity of iron ore having not come to the State exchequer; the petitioners have thus cheated the State;
>
> (f) that up to the date of joint physical verification, the total dispatch was of Rs.24,31,225.130 MT as against the total production of iron ore from the excavated pit around 8,49,589.560 MT as confirmed by the expert opinion which shows that the petitioners in connivance with the public servant and the raising contractor have shown dispatch of the excess quantity of 15,81,635.57 MT (24,31,225.130 MT – 8,49,589,560 MT) which have not been excavated from the mining leasehold are and the same quantity has been unlawfully procured amounting to theft;
>
> Further, that the petitioners have fabricated records in the sale of the iron ore for which the Asst. Commissioner of Commercial Taxes (Vigilance) has assessed payment of huge sum of sales Tax remaining unpaid.

6. The petitioners before the trial court in filing the petition raised several issues explaining the allegations on the factual aspects as attributed to them relating to commission of offences as well as the legal issues in support of their prayer for discharge. Those being culled out from the averments of the said petition are stated as under:-

(I) that on the date of joint verification nor on the date of lodging of the F.I.R. which has triggered the investigation as the allegations made therein revealed commission of cognizable offences, the Vigilance Authorities were not empowered either by the Central Government or the State Government to investigate in relation to any offence under the MMDR Act and that having been made only on 27.01.2010 by a notification of the State Government, the F.I.R. as well as the charge-sheet submitted against the petitioners on completion of investigation stand vitiated;

(II) that the joint inspection having been made on 24.09.2009 and the F.I.R. based on the facts said to have been ascertained during the joint inspection when has been filed on 02.12.2009, and as by the time the Vigilance Authorities were not empowered under the provisions of the MMDR Act to conduct any investigation with regard to Mining Lease, the final outcome that is the charge-sheet cannot form the foundation for the trial of the petitioners for the offences as indicated therein;

(III) that the figures as to the production of the minerals in the Mines for the period as also the quantity of the minerals dispatched find well reflected in the record of the Deputy Director, Mines as can be seen from the information received under the Right to Informations Act which are public documents; the allegations as to clandestine sale of iron ore by the petitioners avoiding the payment of royalty and sales tax falls flat;

that, on simple evaluation of the documents from the records maintained in the office of the concerned Deputy Director, Mines; further allegation that the petitioners had indulged in illegal mining activities in violation of the terms and conditions of the Mining Lease agreement and in contravention of the provision of section 4 of the MMDR Act is not per se acceptable nor those give rise to strong suspicion in the direction of and in support of the said allegations.

(IV) that based on the F.I.R. and charge-sheet, upon which the court has taken cognizance of the offences and issued process to the petitioners, the Department of Steel and Mines, Government of Odisha demanded a sum of Rs. 11,31,72,22,470.00 under notice dated 25.11.2010. The said demand was based on the same sets of allegations / accusations/ assertions as made in the F.I.R. and charge-sheet. A revision as provided under the MMDR Act read with the Rules made thereunder being filed in questioning the said demand as well as the consequential actions as stated therein as to determination of the mining lease and forfeiture of the security deposit in the event of non-payment of the said amount to make good or remedy the breach of conditions within sixty days of receipt of notice; said revision i.e. R.A. No. 22(22)/2010 / RC-1 has been allowed and the demand as well as the above consequential actions in case of failure has been quashed. And that order of Revisional Authority having been challenged by the State by filing a writ application numbered as W.P.(C) NO. 10219 of 2012; the order of the Revisional Authority has been upheld by a judgment passed on 08.08.2016. In view of the fact that these developments have taken place subsequent to the submission of the charge-sheet, the court cannot ignore those from being taken into consideration in their proper perspective so as to judge their legal impact in deciding the question of framing the charge for the trial to commence.

(V) In addition to the above, the petitioners have gone to deny each of the factual aspect pointed out by the prosecution in great detail in asserting that actually none of the offences of which cognizance has been taken is made out against them for being charged in the case to face the trial.

7. The prosecution has filed the objection to the above petition in opposing the move for discharge of the petitioners, stating the followings:-

(i) that the Officers above the rank of Inspector of Police, Vigilance Department having been empowered to enquire/ investigate into the allegations of corruption made by the public servants and other coming within the ambit of the P.C. Act and as during investigation as such criminal misconduct has been found out, when the charge-sheet has been filed against the public servants, the petitioners and the raising contractor, there is no such illegality or irregularity and therefore all said actins right from lodging of F.I.R. till submission of charge sheet are legally valid;

(ii) that the records of the concerned Deputy Director of Mines as well as the raising contractor showing production and dispatch of the quantity of minerals during the period have been duly taken into account in course of investigation;

(iii) that during the joint physical inspection and verification on 24.09.2009, the physical stock of the minerals were taken as against the closing balance as on 24.09.2009. It is however stated that the documents obtained from the office of the Deputy Director of Mines in shape of the informations being sought for under the RTI Act require proof during the trial and now the case has to proceed on the basis of the informations provided in the charge-sheet and the supporting documents annexed thereto;

(iv) on the contention of the petitioners on the averments taken at paragraph-9 of the decision as to disposal of the revision by the Revisional Authority under the MMDR Act in their favour quashing the demand and consequential action upon failure based on same sets of factual settings as indicated in that joint inspection report and the final charge-sheet as also its confirmation by the Hon'ble High Court in the move by the State in questioning the said order of the Revisional Authority, nothing is stated in the objection in saying that such orders have either no factual or legal impact in the criminal trial.

Rather, all those factual aspects said to have been found out or ascertained during joint inspection and as noted in the report as also in course of investigation based on which charge-sheet has been filed are again narrated.

It is then stated that the materials collected during joint inspection as also subsequent thereto during investigation make out a case for commission of offences indicting the petitioners for facing the trial as to commission of said offences instead of being discharged.

8. The trial court in its order dated 26.07.2018 which has been impugned in this revision having noted the submissions of the learned counsel for the petitioners as well as the Special Public Prosecutor, first of all has gone to narrate the facts as stated in the charge-sheet. It has thereafter discussed the principle of law as to what are the considerations for framing the charges. In doing so, the learned court below has noted few decisions of the Apex Court and quoted the relevant portions from those judgments rendered under the subject. Having proceeded in the exercise to the above extent, further coming to examine the materials on record keeping in view the rival submissions and in the backdrop of the settled principle of law, the followings have been said:-

> "From the joint inspection report, it prima facie reveals that there was excess quantity of dispatch than the production of iron ore from excavated pit and the permission granted for dispatch. Though Indrani Pattanaik has executed a General Power of Attorney in favour of Dipti Ranjan Pattnaik but she was issuing different letters to different authority in connection with her mining lease. As per the principle decided by the Hon'ble Apex Court in the above cited decisions, a charge can be framed if on the basis of the material on record, the court forms an opinion that the accused might have committed the offence. The accused persons may have a good case to agitate but this is not the stage where the same should be analyzed. The proof which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage. If there is material that the allegation is not groundless so the charge can be framed.
>
> Section 21 of MMDR Act provides no cognizance can be taken if the complaint has not been filed by the competent authority. The Govt. of Orissa issued the gazette notification on 14.01.2010 authorizing the officers above the rank of Inspector of police posted under Directorate Vigilance Orissa to conduct investigation, inquiry or can take legal action under MMDR Act. In this case cog. was taken on 6.12.2010 and prior to that there was government notification authorizing the officers above the rank of Inspector of vigilance department to conduct the investigation under MMDR Act. In this case F.I.R. has been filed by Dy. Superintendent of Police, Vigilance Cell, Cuttack and charge sheet has been submitted by Dy. Superintendent of Police, Vigilance Cell Unit, Bhubaneswar. So, on no illegality has been committed by taking cognizance in this case u/s.21 of MMDR Act.
>
> In view of the above facts and circumstance and the principles decided by the Hon'ble Apex Court, the petition filed by the accused persons being devoid of any merit stands rejected. "

9. Learned Counsel for the petitioners in course of hearing advanced his submissions in reiterating the points raised before the trial court for discharge of the petitioners in their petition and further highlighted those with reference to the relevant documents.

He submitted that the allegations as to clandestine mining by the petitioners and dispatch of minerals without extracting those from within the mines area but outside when run contrary to the records maintained in the office of concerned Deputy Director, Mines and as royalty has been fully paid and all the dispatch of minerals are backed by required transit permits; the allegations made by the prosecution are wholly baseless and fall flat; thus prima facie not acceptable to be taken cognizance of or even enough to raise strong suspicion in that respect.

He further submitted that the prosecution has simply made wild allegations attributing illegal mining activities by the petitioners not only in their mines but also in the periphery without even indicating any such place or places when admittedly by the time of joint inspection, the mining operation in that mines had stretched over years. In this connection inviting the attention of this Court to the observation of the learned trial court that accused having a good case to agitate is a matter to be examined and considered in the trial but not at the stage of framing charge, he urged that having said so, the learned court below ought to have allowed the prayer for discharge of the petitioners as with such stated basic facts, it would be sheer abuse of process to place the petitioners for trial.

He then with vehemence submitted that here in the case on the same sets of allegations touching the factual aspects as are said to have been found out during joint inspection which form the basis of the F.I.R. and further investigation as have been finally so asserted in the charge-sheet; there was a proceeding in the Department of Steel and Mines in the Government of Odisha wherein the petitioner no.2 was asked to pay a sum of Rs. 11,31,72,22,470.00 within a period of 60 (sixty) days or else to suffer from fatal legal consequences. In that matter, as provided in law, the petitioner no.2 having carried a revision; that has been decided on merit and the proceeding stood quashed by order dated 16.01.2012 under Annexurer-31. He submitted that the State being aggrieved by the said order had questioned its legality and sustainability both on fact and law by carrying the matter in a writ application to the Hon'ble High Court vide W.P.(C) No. 10219 of 2012; wherein the order of the Revisional Authority in every respect has been upheld under judgment dated 08.08.2016 as at Annexure-32. He submitted that said order of the Revisional Authority as confirmed by the Hon'ble High Court has attained finality being not further challenged. He therefore, submitted that when that very proceeding before the Government in the

Department of Steel and Mines, based upon all those accusations made in the charge-sheet has been quashed exonerating the petitioners from being visited with any penal consequences concerning the operation of the mines in question, no charge can be framed for trial of the offences indicting the petitioners to have been so committed by them, on those very same sets of allegations culled out and inferred from what have been said to have been noticed during joint inspection and the records prepared in the subsequent investigation made thereto. According to him, the criminal trial under the circumstance is abuse of process as the charges have now to be said to be groundless. He contended that on this ground alone the impugned order of the learned Special Judge unsustainable. He placed reliance upon the decision of the Hon'ble Apex Court in case of *Radheshyam Kejriwal Vrs. State of West Bengal and Another;* (2011) 3 SCC 581 in support of said limb of his contention. Thus he contended that besides the grounds urged as above even on this lone ground, the impugned order rejecting the application of the petitioners for their discharge in the case and holding that prima facie case is made out for framing charge for the offences as above noted could not be sustained in the eye of law.

10. Learned Addl. Standing Counsel, Vigilance citing recent decision of the Hon'ble Apex Court in case of *M.E. Shivalinga Murty Vrs. CBI, Bengalore & Sevreal Others*; (2020) 2 SCC 768 as well as few others first of all placed the scope of consideration and the matters required to be looked into at the time of framing the charge. He submitted that in the obtained facts and circumstances, no case for discharge of the petitioners is made out. He, therefore, submitted that the trial court has rightly passed the order as the grounds raised or the case projected by the petitioners for their discharge are not permissible to be considered at that stage, although the same would stand for their due consideration in the trial.

He submitted that the finding in the revision by the Revisional Authority under the MMDR Act as also in the writ do not either operate as estoppel or resjudicata in a prosecution like the present at hand. He further contended that those are also not binding upon the criminal court, where the petitioners are facing the trial and according to him, those are not relevant. It was his submission that said proceeding and the criminal trial going on are two distinct proceedings and here the criminal trial has to end with the decision on the basis of evidence as would be piloted therein. According to him, when those two parallel proceedings can run simultaneously,

culmination of the departmental proceeding for violation of terms and conditions of the mining lease and breach of obligation, duty and responsibility inviting consequential penal action of imposition of fine, determination of mining lease etc. has no such factual or legal bearing/impact on the criminal trial which would proceed for its logical conclusion based on the evidence as would be let in. According to him, the ratio of the decision in case of *Radheshyam Kejriwal* (supra) does not come to the aid of the petitioners in the matter of their discharge as claimed. With the above, it was submitted that it does not warrant or justify in the eye of law to interfere with the said order. Thus, he contended that the revision being devoid of merit is liable to be dismissed.

The learned Counsels having filed respective written notes on their submissions, those have been taken on record and carefully perused.

11. On the above rival submissions, taking into account, the view expressed by the learned Counsel for the petitioners that his last limb of contention, if finds favour with and accepted, the other limbs would no more be required to be further dwelt at length; it is felt apposite to first take up said exercise of consideration of last limb of the contentions raised by the learned Counsel for the petitioners which corresponds to the ground raised before the trial court as indicated in the foregoing paragraph -6(iv) as to judge the impact of the decision of the Revisional Authority in the matter, which has been upheld by the Hon'ble High Court on being challenged, on the framing of charges against the petitioners in the criminal trial on hand and its progress.

12. This Court is in the seisin of the revision filed by the petitioners in questioning the sustainability of an order passed by the trial court, refusing thereby to discharge the petitioners in putting an end to the criminal trial in so far as they are concerned. At this juncture, before proceeding to dwell upon the contention as stated in the foregoing paragraph-11, it would be apt to take note of the settled principles of law in the matter of consideration of the application filed by the accused persons seeking their discharge in the criminal case.

The principles of law are too well settled that while answering the question of framing the charges, a duty is cast upon the Court to consider the record of the case and documents submitted therein. In that exercise, if the decision is to discharge the accused under section 227 of the Code of

Criminal Procedure (in short, 'the Code'), the Court is called upon to give a definite opinion for said discharge. Meaning thereby, that if the Court considers that there is no sufficient ground for proceeding against the accused, it shall discharge the accused after recording the reasons for doing so. The language of section 227 of the Code makes it clear that the Court cannot proceed merely on presumption and therefore, the word 'considers' finds place therein.

The next parameter is that if after considering the record of the case and the documents submitted there with and hearing in that behalf, the Court exercises the power to frame charges against the accused under section 228 of the Code, said view is tentative. Meaning thereby, that if the Court is of the opinion that there is ground for even presuming that the accused has committed an offence, he shall frame the charge in writing.

It has been held in case of *State of Bihar Vrs. Ramesh Singh;* AIR 1977 SC 2018 that at this initial stage, truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged upon their critical analysis. It is not obligatory at the stage to consider in any detail and weigh in a sensitive balance whether the facts if proved would be incompatible with the innocence of the accused or not.

13. In case of *Amit Kapoor Vrs. Ramesh Chander*; (2012) 9 SCC 460, it has been held that at the stage of framing the charges, the court is not concerned with the proof, when upon careful perusal of the materials placed, there arises strong suspicion in the mind of the Court that the accused has committed the offence, which if put to trial could prove him guilty, the Court would be justified in proceeding with the trial by framing the charge. Here however the rule of caution comes into play that mere suspicion is not enough and the suspicion founded upon the materials on record must be of strength persuading the court to form a prima facie opinion justifying the trial as those when proved may lead to a result in favour of the prosecution.

14. The crystallized judicial view is that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and the Court for the purpose is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. Ref.:- *State of M.P. Vrs. Mohanlal Soni*; (2000) 6 SCC 338.

15. In the recent case in *M.E. Shivalinga Murthy Vrs. Central Bureau of Investigation, Bengaluru*; (2020) 2 SCC 768, cited by the learned Additional Standing Counsel, Vigilance, the Hon'ble Apex Court referring to the earlier decisions including the one in case of *P. Vijayan Vrs. State of Kerala and Another*; (2012) 2 SCC 398 have discerned the following principles:-

(i) if two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused;

(ii) the Trial Judge is not a mere Post Office to frame the charge at the instance off the prosecution;

(iii) the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court;

(iv) if the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial;

(v) it is open to the accused to explain away the materials giving rise to the grave suspicion;

(vi) the court has to consider the board probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons;

(vii) at the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true;

(viii) there must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

The defence version not based upon the deriving no support from the materials or documents placed by the prosecution is not to be looked into at the stage when the accused seeks discharge. The 'record of the case' used in section 227 of the Code is to be understood as the documents and articles, if any produced by the prosecution.

16. In the backdrop of the above, it becomes necessary to address the last limb of the contentions of the learned counsel for the petitioners with reference to the documents placed on record being gone through. It may be

stated that said documents are not disputed. The petitioners having filed the certified copy of the order of the Revisional Authority in connection with the proceeding pursuant to the very same joint inspection and verification report before the trial court in support of that point raised for their discharge, the prosecution had nothing to dispute as to factum of passing of said order. Next, the order passed by the Hon'ble High Court on the move of the State Government in assailing that order of the Revisional Authority had also been referred to in the application for discharge filed by the petitioners before the trial court. These orders are public documents and as such can always be looked into in their proper perspective as to their impact or bearing if any over this case in accordance with law, keeping in view the fact that the proceedings initiated by the State Government and the criminal case owe their origin to that very physical inspection and verification of the mines as made on 24.09.2009, with all those same features as to stock, excavation etc. as noted therein having no such variance.

17. The petitioner no.2, the lessee of the mines in question had been served with a notice indicating the above illegalities and irregularities committed in course of operation of the mines in violation of the conditions of the mining lease as provided under Rule 27 of the Mineral and Concession Rules, 1960 (hereinafter, for short, 'the M.C. Rules') and other provisions of the MMDR Act. Based upon the same, the demand of Rs.11,31,72,22,470.00 under section 21(5) of the MMDR Act was made with further mention that unless the same would be paid within 60 days from the date of notice, the mining lease would stand determined with forfeiture of security deposit. This demand basically was raised towards the cost of 24,31,225.130 MT of iron ore stated to have been dispatched clandestinely not from mining leasehold area but by their collection from outside.

18. It has been the fist limb of allegation therein that as ascertained in the joint inspection by a team of Technical Officers, Engineers, Surveyor, Geologist, Revenue, Forest and Mining Officials on 24.09.2009, the closing stock (book balance) should have been 487205.870 MT (29,18431.00 MT**-** 24,31,225.130MT) as on 24.09. 2009, the date of joint inspection; whereas physical verification of the stock showed the availability of 182637.695 MT; giving a shortage of 304568.175 MT of iron ore. So, it was said that the aforesaid quantity of iron ore has been clandestinely sold avoiding the payment of royalty and sale-tax.

With the aforesaid, it was the next limb of allegation that at the relevant time of joint inspection, the quantity of production from May, 2008 to September, 2009 as shown was 2918431.00 MT. of iron ore; whereas the measurement of the volume of excavated pits showed the total production of iron ore was 849589.560 MT. So, it was said that having shown the production of 2068841.44 MT (2918431.00 MT-849589.560 MT), without those being actually excavated from the mining leasehold area; the same has been raised without lawful authority from the area outside the leasehold, though not so specifically pointed out. Thus, it was stated that these petitioners had indulged in illegal mining activities in violation of the terms and conditions of the mining lease agreement and in contravention of the provisions of section 4(1) of the MMDR Act.

It was further stated that on physical verification, the stock being found to be 182637.695 MT; the quantity said to have been dispatched as shown came to 2431225.130 MT. Hence, there had been clandestine dispatch of 304568.175 MT of iron ore; cost of which stand @ Rs. 6000 per MT. and as such recoverable under sub-section 5 of section 21 of the MMDR Act.

19. Being aggrieved and dissatisfied with the aforesaid action of the State Government in the Department of Steel & Mines, the petitioner no. 2 preferred a Revision vide Revision Application filed No. 22(22)/2010-RC-1 as provided under section 30 of the MMDR Act read with Rule 55 of the MC Rules, 1960 before the Revisional Authority. The Revision has been allowed and said proceeding against the petitioners has been quashed.

20. The above order passed by the Revisional Authority, was assailed by the State before this Court in W.P.(C) No. 10219 of 2012. After hearing, by judgment dated 08.08.2016, the Hon'ble Division Bench of this Court has found the Writ Application sans merit and accordingly, refused to interfere with the order of Revisional Authority which had been impugned therein. The Writ Application filed by the State has thus been dismissed.

It is stated at the Bar, that the State has not questioned the said judgment of the Hon'ble Division Bench of this Court by further carrying the matter to the Hon'ble Apex Court. The judgment dated 08.08.2016 passed by the Hon'ble Division Bench of this Court in W.P.(C) No. 10219 of 2012 confirming the order of the Revisional Authority has thus attained its finality, in so far as demand of Rs.11,31,72,22,470.00 towards cost of 24,31,225.130

MT of iron ore which was raised and demanded being based on the one and same joint inspection and verification as aforestated. The consequential action of the cancellation of mining lease and forfeiture security deposit in the event of non-payment of above demand has thus been nullified; the petitioners have been continuing to operate the said mines as its lawful lessee since then.

21. The Revisional Authority in its order no.25/2012 dated 16.01.2012 while allowing the said revisional application no.22(22)/2010-RC/1 has from the very beginning taken note of the fact that said proceeding owes its origin to the F.I.R. lodged on 02.09.2010, whereby and whereunder charge-sheet has been prepared on 22.11.2010 after completion of the investigation by the Vigilance Authority and that said F.I.R. was pursuant to the joint inspection and verification of the mines in question of which the petitioner no.2 is the lessee and the petitioner no.1 is the power of attorney holder.

It is pertinent to state that the petitioner no.2 being asked to pay the raised demand of Rs.11,31,72,22,470.00 under section 21(5) of the MMDR Act within sixty days, there was stoppage of issuance of Transit Permits bringing the dispatch of minerals from the mines and mining operation to a halt. This had also been complained of by the petitioner no.2 before the Revisional Authority as being an action not sanctioned under the law that even as per the demand before expiration of the period provided therein for compliance and before determination of the mining lease therefore for non-compliance; the mining operations in the said mines have been brought to a halt. The Revisional Authority has further noted that the said proceeding had arisen after the joint inspection and verification of the mines on 24.09.2009. Keeping in view the irregularities/illegalities as also the deficiencies pointed out in the said report which persuaded the Government in the Department of Steel and Mines to raise the demand as aforesaid so as to remedy the breach or to face determination of the mining lease and forfeiture of security deposit, then the Revisional Authority has proceeded to examine each of the allegation/ accusation in the backdrop of the projected materials in support of the same in judging whether those merit acceptance and can be sustained.

22. On a careful reading of the said order of the Revisional Authority, the following issues touching the facts are found to have been dwelt upon:-

> (i) on shortage of 304568.175 MT of iron ore as on the date of joint inspection on 24.09.2009, thereby Revisionist has evaded Rs.82,23,340.59 royalty and Rs.7,30,96,360.80 towards royalty and sales tax respectively; and

(ii) the differential quantity of iron ore of 20,68,841.44 MT said to have been illegally raised from some area outside the leasehold.

23. It has noted the contentions raised by the petitioners which are the followings:-

"31.1 On (i) above Revisionist contends that as per the month wise details received under RTI from Mining Officer, Joda vide letter dt.23.12.10 shown at Annex-J to RA, from May'08 to Sep.'10 their production comes to 27,17,082 MT. and dispatches 24,81,022 MT. According book balance as on 30.09.11 comes to 2,36,059.53 MT. These figures including closing balance exactly tally with figures in their statutory returns. There has been production of 60,051 MT and dispatch of 38.826 MT during 24.09.10 to 30.09.10.

Revisionist further contends that during verifying Physical Balance, the team ignored stock pile of 24,700 MT of BD contaminated 10-80 mm ore presumably because it was staked in non-operational area but duly reflected in stock. The physical stock of iron ore was found to be 1,82,637.695 MT only. If this is added the Physical Balance would be 2,07,337.695 (rounded 2,07,338) against 1,82,637.695 MT.

Accordingly as per the Revisionist as on 24.09.11 production and dispatches will be as under:-

Production	26,57,031	(27,17,082-60,051)
Dispatches	24,42,196	(24,82,022-38,826)
Closing Balance	2,14,835	(26,57,031-24,42,196)
Physical Balance	-2,07,338	
Shortages	7,497 MT as against alleged/ found 3,04,568.175	

Revisionist also contends that F.I.R. dated 01.12.2009 also mentions that on 24.09.09 visiting Vigilance Team had found production 26,38,831 MT (and not 29,18,431 MT as mentioned in the impugned Proceedings). Thus alleges that in the impugned Proceedings record of the Vigilance Department have been tampered by inflating the production figures. Revisionist also contends that IBM on inspection on 09.12.09 certified that production from leasehold area from May' 2008 to Nov' 2009, had been 30,86,776 MT. With backward computations Revisionist correct production as on 24.09.2009 was 26,57,031 and not 29,18,431 MT.

Revisionist finally contends that these shortages are miniscule as compared to the overall scenario and the fact the stocks were tape measured, which is a crude method, instead of taking help of some instrument like using Total Station, Theodolite etc and thus must be ignored. Besides above, the following factors are equally relevant and influence the degree of shortage between the actual book stock and the physical stock on ground.

(a) Ground loss

(b) Handling loss

(c) Compaction factors of the iron ore stack

(d) Irregular Geometrical Shape of the Iron Ore stack.

(e) Uneven ground level on which iron has been stacked.

Thus there are no mentionable or cognizable shortage.

31.2. From scrutiny of Annex-J to the RA, I observe that the this information provided under RTI Act is issued from office of Deputy Director, Joda and both the forwarding letter and the information are signed by Mining Officer, Joda, Keonjhar on 23.12.10 with official stamp. It gives month-wise production and dispatch figures from May'08 (i.e. from start of production) to Oct.'09. On comparing with the figures given in the impugned Proceedings, I observe that the figures for the months Feb., March, June and July 2009 do not tally. Whereas the same tally with the figures in statutory returns, copies whereof filed at Annex-F,G,H and I of the RA. The impugned Proceedings state that these figures mentioned therein were found from records of DDM, Joda. But these departmental figures are different from the departmental figures provided under RTI. How these figures in impugned Proceedings were arrived at or their genesis are not explained. Why the same are also not as per FIR is also not explained. One of these two sets of departmental figures have to be true and authentic departmental figures. As information received under RTI Act generally has to be true and authentic and as State Govt. has not commented on the origin and veracity of the departmental figures of the impugned, thus allegations/findings of shortages are not substantiated.

31.3. As discussed above information received under RTI Act has to be true and authentic. Further as the same has been received from the same source as mentioned in the impugned Proceedings, I consider that the figures mentioned in the impugned Proceedings (para-2) are not authentic; the State Govt.'s own Department contradicts the same. Revisionist had also submitted detailed account of discrepancies along with errors which Sate Govt. appears to have committed in these figures during months of Feb., March, June and July, 2009. She has also given detailed comparison. From above, I observe that there is no discrepancy in production and figures in their records and statutory reports, IBM reports and records of DDM, Joda given under RTI. These all tally with each other. Thus the very basis of the impugned Proceedings is wrong.

31.4. Further as discussed above, the origin or genesis of figures given in the impugned Proceedings has not been explained. Whether they are it is computed on the basis of transit passes, or on the basis of physical periodical departmental inspections or on the basis of the very statutory returns filed by Revisionist? In the absence of clarity and authenticity of these figures, the very basis of impugned proceedings is shaky.

31.5. Thus I hold that shortages 3,04,568.175 MT as alleged/found in the impugned Proceedings are not only unsubstantiated but also have been found to be alleged in contradiction to state Govt.'s own records. When the figures of three sources viz. Revisionist, IBM and departmental tally with each other, allegations of shortages based on these figures cannot sustain. Revisionist's contention that in the impugned Proceedings quantity transferred for processing/crushing from the existing stock has been accounted twice by the Department for Feb., Mar, June, July and Sept. months of year 2009 and which she has also explained with statutory returns (Annex.-F to I). Thus she has successfully demonstrated and explained where department has erred. It has added to the merit in her contention. I thus hold shortages are not as alleged but only are 7,497 MT which are too miniscule in comparison to the overall production. Even if stock pile of 24,700 MT of BD contaminated 10-80 mm ore is ignored the shortages would be 32196.445 MT which continues to be miniscule as compared to the overall production/dispatch and ignored due to non-accounting of factors mentioned at para31.1 above. In the circumstances stated above, I do not find any merit in the finding of State Govt. and reject the same.

32.1. On findings at para 30(ii) above that Revisionist has produced 29,18,431 MT of iron ore, whereas only 8,49,589.56 MT can be produced from the excavated pits, as stated above there is no basis given in the impugned Proceedings or in the reply. Nor any document/ evidence in support has been given to the Revisionist or filed before Revision Authority.

32.2. Revisionist contends that this finding is again based on no material evidence. This is also against the following arrived at from the reports of IBM. Being statutory and independent body its report is binding on both the parties.

i) That IBM on inspection on 09.12.09 certified that production from leasehold area from May' 2008 to Nov.' 2009 had been 30,86,776 MT. With backward computations Revisionist's correct production as on 24.09.2009 would be 26,57,031 and not 29,18,431 MT.

ii) That further IBM on inspection on 08.12.2008 (Annexure-M) certified that production from leasehold area from May' 2008 i.e. within a period of seven months of the start of production Revisionist's had produced 7,84,950 MT. thus approximate 92% of this production has been produced by Nov.' 2008 i.e. 10 months before the visit.

iii) Revisionist contends that admittedly the volume of pit excavated in the mining leasehold area of the Revisionist is 12,19,798.370 Cubic Meters. As per the mining plan duly approved by the IBM, the Tonnage Conversation Factor (TCF) is 3.5 MT/Cu.M for the iron ore and the Ore Incidence Factor (i.e. recovery percentage) is 70%. Against this that the State Govt. has considered TCF 1.99 and recovery percentage 35% which is wholly arbitrary, *mala fide* and liable to be rejected being contrary to the norms approved by the IBM. This is also against the general TCF in the

area found in survey report of IBNM. The IBM had surveyed the entire region of Joda and Barbil has given report and it had concluded after thorough scientific analysis that general TCF in the mines located in the subject areas is to be considered between 3.5 to 4.8 T/Cu.M (Annexure-L to RA).

Revisionist also contends that there is no allegation/evidence of clandestinely dispatch of iron ore. No area from where such ore has been alleged to have been mined has been identified. Thus these allegations / findings have no basis. It is merely surmises and conjectures.

The above contentions have been addressed in the revision as under:-

32.3. From scrutiny of impugned Proceedings, I observe that this is a bald allegation / finding. Neither any basis has been given nor has any reference point been mentioned. It is required on the part of party leveling allegations not only to substantiate the allegations but also provide its basis and provide evidence. All these are lacking in this case.

32.4. The allegation leveled is that Revisionist has produced and dispatched roughly two and half times what the excavated pit of Revisionist's mine can produce. Revisionist states it is admitted by the visiting team that volume of pit is 12,19,798.370 Cubic Meters (12.2 lakh cum). As per allegations it can produce only 8,49,589.56 MT ore. Accordingly allegation is Revisionist must have dug pit of volume 30 Lack cum approx outside lease area. If average depth of 10 mtrs. is assumed then the area of illegally mine pit(s) would be 3 lakh sq. metrs. (30 hectares/75 acres) i.e. size of 1km by 300 mtrs. or so. Over and above there must have also been constructed commensurate roads, machinery sheds, labour colony, administrative shed etc to dig, sort, dispatch, transport and sell.

32.5. Revisionist's mine has been in operation since May' 2008 and the visit was made on 24.09.09 i.e. within one and half years. As Revisionist's trend of production / dispatch remains same from start of mining operation. The allegation thus is that within this period the Revisionist has done both legal and alleged illegal mining. Impugned proceedings states that the visiting team consisted of Technical Officers, Engineers, Surveyors and Geologist, Revenue, Forest and Mining Officials. But no investigation appears to have been done either by Vigilance Directorate, or by the Steel & Mines Department or Forest Department or by any of other for almost one year to locate such a huge size pit or above stated other paraphernalia, machineries and trucks. If it exists, the same must not be far away from existing lease area. Further admittedly area is stated to be falling in forest. No case has been stated to have booked for violation of Forest (Conservation) Act, 1980. There is also no allegation of tampering of boundary pillars. Not a single dispatch has been seized. No one has also appears to have seen Revisionist doing alleged illegal mining to such a huge scale.

32.6. Entire case of State Govt. is based only on the above stated visit on 24.09.09 and the demand is made upto this date. Impugned Proceedings is also

silent about production/dispatch and also demand for the period subsequent to the visit. Whether the Revisionist suddenly stopped illegal mining from outside lease area after the visit or continued to do so. Impugned Proceedings and State Govt.'s reply/ submissions are silent on this issue. Trend and scale of production / dispatch of Revisionist after this visit appears to continue to be the same as it was before. Accordingly pit size must have increased and roads widened over the period. Alternatively another area taken for illegal mining. From records it is not clear whether any effort was made to catch the Revisionist red handed and to effect seizures of trucks/stocks or machineries etc. Whether there is any proposal also to raise demand for period beyond 24.09.09. The impugned Proceedings and State Govt.'s reply/ submissions are silent on this aspect as well.

32.7. In its report dt. 09.12.09, IBM has made observations that production has been rather lower (than mining plan). This contracts the allegation/findings of State Govt. it observes:

"Production is lower side than proposed due to lack of forest clearance."

Revisionist contends that recovery of saleable ore is 26,57,031 MT which amounts to 62% of recovery. It is lower than the norm 70% fixed in the approved mining plan. From scrutiny of report of IBM on the recent general survey of the Iron Ore title 'IRON ORE A MARKET SURVEY' issued on Oct.' 2007 (Annex-L to RA). I observe that Revisionist mining production is as per TCF and recovery percentage norms found in general survey for the local region. It is also as per the approved Mining Plan of the Revisionist.

In view of above and when an independent statutory and specialized Agency IBM mandated by MMDR Act in its routine annual inspections on two occasions (08.12.2008 and 09.12.09) oblivious of these developments has found Revisionist's production figures tallying with both the statutory returns and with the departments figurers obtained under RTI, I do not see any reason why the same shall not be accepted especially when the State Govt. has not adduced any evidence/document in support of the allegation/findings in the proceedings that the mine cannot produce that much and Revisionist has illegally mined from outside."

With all above discussion and reasons, the Revisional Authority has ordered:-

"I set aside the impugned Proceeding dated 25.11.2010 of Government of Odisha. Revision succeeds with consequential benefits."

24. Assailing this order of Revisional Authority in the writ application i.e. W.P.(C) No. 10219 of 2012; the State Government first contended that the Revisional Authority ought not to have taken up the revision for hearing for its disposal on merit as the revision was not maintainable.

Answering the point, the Hon'ble Division Bench of this Court on that has categorically said that the revision filed by the opposite party no.2 therein challenging the order under communication on dated 25.11.2010 was maintainable under section 30 of the MMDR Act.

25. Next going to address the contention of the State that the Revisional Authority ought not to have entered into the merits of the case and given its finding as to whether opposite party no.2 therein was liable to make payment of the amount determined by said order dated 25.11.2010 under section 21(5) of the MMDR Act, but should have remanded the matter to the State Government to give an opportunity to the opposite party no.2 therein to show-cause and then pass final order; the Hon'ble Division Bench of this Court has held that in the facts and circumstances placed by the parties, the Revisional Authority having decided the revision on merits, cannot be faulted and there was nothing wrong on the part of the Revisional Authority to decide the same on merit and thereafter quash the proceeding after affording opportunity of hearing to the parties.

26. Proceeding then to examine the correctness of the findings of the Revisional Authority on the shortage of minerals, the answer has been recorded that in the facts and circumstances as projected the finding so recorded by the Revisional Authority is perfectly justified and does not warrant interference.

Having said so, the Hon'ble Division Bench of this Court concurring with the findings of the Revisional Authority, has finally dismissed the writ application on 08.08.2016. With this final curtain has been drawn in that matter initiated by the Government in the Department of Steel and Mines carrying no any further action upon the petitioner no.2-Lessee has been taken as to mining operation, dispatch of minerals etc which is continuing all along.

27. In a number of judgments, the Hon'ble Apex Court have held that the standard of proof in a departmental proceeding, being based on preponderance of probability is somewhat lower than the standard of proof in a criminal proceeding which require proof of the case beyond reasonable doubt.

In *P.S. Rajya Vrs. State of Bihar*; (1996) 9 SCC1, the petitioner therein had contended that the issue in the criminal proceeding is identical to the departmental proceeding and when the very issue could not be established

in the departmental proceeding, the department is not permitted to pursue the same charge in the criminal proceeding. The question posed before the Hon'ble Apex Court was:

> "Whether the respondent is justified in pursuing the prosecution against the appellant under section 5(2) read with section 5(1)(e) of the Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."

Going to answer the above question, the Hon'ble Apex Court observed:-

> "17. At the outset, we may point out that the learned counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceeding is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it."
>
> In the background, the Hon'ble Court held that:-
>
> "23. Even though all these facts including the Report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the final proceedings and the Report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued. Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-1996 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs."

28. In case of *G.L. Didwania Vrs. ITO*; 1995 Supp.(2) SCC 724; the appellant therein was an assessee and had shown his business income from firms in Delhi and Bombay. There was another firm, M/s. Young India and Transport Company wherein the minor children of the appellant and two of his employees were partners. The firm was said to be not a genuine one and the instrument of partnership was attacked therein as invalid and inoperative. The appellant thus faced proceeding under section 147 and 148 of the Income Tax Act and his assessment was reopened and finally with his income, the income of M/s. Young India and Transport Company was added. The statement made by the appellant in the verification to the return being then

said to be false being known to the appellant, prosecution was launched and the complaint by the authorized authority was filed. Meanwhile, in the appeal before the Income Tax Appellate Tribunal, the order of the Assessing Officer was set aside holding that the premises upon which the assessing authority has concluded that the business run in the name of M/s. Young India and Transport Company belonged to the assessee i.e. G.L. Didwania are erroneous and not acceptable. This when attained finality, the appellant moved for dropping the prosecution. The learned Magistrate rejected the prayer saying that the prosecution has got a right to lead evidence in support of the complaint and the court can come to the conclusion whether or not criminal offence is made out. It was further observed that the order of the Tribunal can be taken only as evidence. The High Court having also dismissed the application in limine, there was a move before the Hon'ble Apex Court. The Hon'ble Apex Court then went to answer whether the prosecution can be sustained in view of the order passed by the Tribunal. It was held that:-

> "4. …… As noted above, the assessing authority held that the appellant assessee made a false statement in respect of income of M/s. Young India and Transport Company and that finding has been set aside by the Income Tax Appellate Tribunal. If that is the position then we are unable to see as to how the criminal proceedings can be sustained."

29. Factual settings of the case of *Radheshyam Kejriwal* (supra) cited by the learned counsel for the petitioners at this juncture need little elaboration. The Officers of the Enforcement Directorate in exercise of the power under section 35 of the Foreign Exchange Regulation Act, 1973 (for short 'the FERA') searched various premises in occupation of the appellant besides other persons. The appellant was arrested and then released on bail. On being asked to appear, he gave his statements.

Based on the materials collected during search and from the statement of the appellant, he was found to have contravened the provisions of section 9(1)(f)(i) of the FERA as also liable to pay penalty under section -50 of the FERA. The Enforcement Directorate was of the further opinion that by abetting as to contravention of the provisions of section 9(1)(f)(i) and section 8(2) read with section 64(2) of the FERA, the appellant has rendered himself liable for penalty under section 50 of the FERA. Accordingly, show-cause notice being issued, adjudication proceeding under section 51 of the FERA was initiated. The adjudication officer came to conclude that the charges

against the appellant were not sustainable. Accordingly, the adjudication officer dropped the adjudicatory proceeding. This order was not further challenged by the Enforcement Directorate. However, on the same allegation which was the subject matter of adjudication proceeding the Directorate filed a complaint against the appellant for prosecution under section 56 of the FERA in the court of law.

In the above state of the affair, the appellant filed an application for dropping the criminal proceeding *inter alia* contending that on the same allegation, the adjudication proceedings having been dropped and he has been exonerated therefrom, his continued prosecution is an abuse of process. The trial court repelled the contention and rejected the petition filed in that behalf. The High Court being approached also did not countenance with the contention. It then observed as under:-

> "Therefore, the contention of Mr. Ghosh is unacceptable that in the adjudication proceedings being held by the Department concerned, the allegations against the petitioner having not been found established the prosecution against him before a court of law cannot have any legs to stand upon, since the same departmental authority which held the enquiry against him and found no materials for establishing his guilt cannot be expected to lodge the prosecution on the self same allegations against that person before a court and cannot be expected to take a different stand on the self same materials as available against him on the record."

The Hon'ble Apex Court having discussed the relevant statutory provisions contained in FERA and upon perusal of plethora of decisions of the Court held as follows:-

> "26. We may observe that the standard of proof in a criminal case is much higher than that of the adjudication proceedings. The Enforcement Directorate has not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceedings cannot be said to be irrelevant in the criminal case. In *B.N. Kashyap* [AIR 1945 Lah 23] the Full Bench had not considered the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage of the said judgment: (AIR p.27).
>
> "….. I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal cases, it is unnecessary for me to decide in this

case. When that question arises for determination, the provisions of Section 41 of the Evidence Act, will have to be carefully examined."

xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx

29. We do not have the slightest hesitation in accepting the broad submission of Mr. Malhotra that the finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceedings cannot necessarily be held guilty in a criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case the entire burden to prove beyond all reasonable doubt lies on the prosecution.

xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx

31. It is trite that the standard of proof required in criminal proceedings is higher than that required before the adjudicating authority and in case the accused is exonerated before the adjudicating authority whether his prosecution on the same set of facts can be allowed or not is the precise question which falls for determination in this case."

30. Then referring to various judgments cited therein and the factual settings under which those have been rendered, the Hon'ble Apex Court have culled out the ratio of those decisions in paragraph 38 which are reproduced herein below:-

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."

Then the final conclusion was:-

"39.In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned shall be an abuse of the process of the court."

31. In the light of above, applying the ratio of the decision of *Radheshyam Kejriwal* (supra), in the facts and circumstances of the case of *Ashoo Surendranath Tewari Vrs. The Deputy Superintendent of Police, EOW, CBI & Another* in Criminal Appeal No. 575 of 2020 (Arising out of SLP (CRL) No. 5422 of 2015), the Hon'ble Apex Court have recently rendered its judgment on 08.09.2020.

In that case, the FIR was regarding one MSME Receivable Finance Scheme operated by the Small Industries Development Bank of India (SIDBI). Some vendors complaining of delay in getting their payments, SIDBI, in consultation with TATA Motors Limited, advised the vendors of TATA Motors Limited to furnish RTGS details for remittance of funds. It was found that for making payments in RTGS for various purchases made by the TATA Motors Ltd. from one Ranflex India Pvt. Ltd. (Vendor), 12 payments amounting to Rs.1,64,17,551/- were made through RTGS by SIDBI in the vendor's account with Federal Bank, Thriupporur. Ultimately, SIDBI was informed by the vendor that it has an account with Central Bank, Bangalore and not with Federal Bank, Thriupporur. On account of such diversion of funds as per the FIR, a number of persons came to be arraigned as accused persons in the case. The appellant therein who was accused no.9 with others had been charge-sheeted on 26.07.2011. It had been alleged that the appellant had received the e-mail on 25.05.2009 containing the RTGS details for the account with Federal Bank, Thripporur, which he then forwarded to accused-Muthukumar who is said to be the kingpin involved in the crime and apparently, based on Muthukumar's approval, the appellant then signed various cheques which were forwarded to other accounts. No sanction being obtained under the Prevention of Corruption act in so far as the appellant was concerned, the learned Special Judge decided not to

proceed against the appellant for trial of said offence(s) under the P.C. Act. Next holding that there was no need for sanction under section 197 of the Code; finding in the facts of the case that a *prima facie* case for the offences under IPC was made out against the appellant therein, the learned Special Judge refused to discharge the appellant from said offences.

The High Court found itself in agreement with the learned Special Judge that there was no need for sanction under section 197 Cr.P.C. The High Court then considered an order of Central Vigilance Commission (CVC) dated 22.12.2011 which had gone into the facts of the case in great detail and concurred with the Competent Authority that on merits no sanction ought to be accorded and no offence under the IPC was in fact made out. The report of the CVC which had been strenuously pressed into service for the purpose of discharge, the High Court brushed aside the same stating in the context:-

> "25. The Central Vigilance Commission could not have come to the aforementioned conclusion unless there was evidence to do so. This submission of the learned counsel is unfounded. The CVC had specifically observed that Shri Karade has benefited from Shri Muthukumar. The CVC ought not to have observed that they are the victims of conspiracy specially when the CVC has observed that Muthukumar had entered into conspiracy with "various other people". The petitioners would fall into the category of various other people and therefore they ought to be tried for the offence punishable under the Indian Penal Code specially for the offence punishable under Section 420 of IPC."

The Hon'ble Apex Court going through the report of the CVC have concluded that if the High Court had bothered to apply the parameter set out at para 38 (vii) of the decision in case of *Radheshyam Kejriwal* (supra) on a proper reading of the CVC report on the same facts, the appellant should have been exonerated. Having said so, the Hon'ble Apex Court applying the parameter set out at para 38 (vii) of the decision in case of *Radheshyam Kejriwal* (supra) as also other decisions have finally ordered for discharge of the appellant therein in the criminal trial involving same set of facts.

32. Keeping in view the aforestated principles, and discussions already made above in detail, let us advert to the case on hand as to its broad features. Here the proceedings initiated by the Government in the Department of Steel & Mines, against the petitioner no.2, the lessee of the mines in question for the illegalities/ irregularities/ breach / deficiencies /deviations as pointed out by the members of the team who had made the joint inspection and verification of the concerned mines and indicated in the FIR as well as the

charge-sheet giving rise to the present criminal trial have been quashed. The State Government since 08.08.2016 has accepted the said order of quashment of the proceedings for realization of heavy penalty from the petitioners and cancellation of the mining lease after having failed in the attempt by filing the writ application before this Hon'ble Court in getting the order of quashment of those proceedings passed by the Revisional Authority annulled. The Hon'ble Division Bench of this Court not only have found the order of the Revisional Authority to be on merit but also to be well in order. Accordingly, it has been held that the same does not warrant or justify interference. The Revisional Authority having made detail discussion of all the available materials, upon their critical analysis and keeping in view the rival contentions advanced before it, has held that all those very factual aspects as alleged/ projected in the charge-sheet for trial of the petitioners which form the foundations of the proceedings under challenge are not acceptable. The Hon'ble Division Bench of this Court has concurred with those categorical findings as to shortage of minerals as on the date of inspection of the mines and the sustainability of the allegations relating to lifting of minerals outside the leasehold area, dispatch and sale by the petitioners. Fact remains that they have been continuing to operate the mines, dispatch and sale under due authority. Thus the present case is not the one where it could be said that the order of the Revisional Authority in quashing the proceedings on the same set of facts, which form the foundations of this criminal case is based on technical grounds or by giving benefit of doubt wherein the merits have not been touched upon and examined and that only on such above stated grounds, the Hon'ble Division Bench of this Court have refused to interfere in the writ filed by the State.

Applying thus the aforestated principles as set forth in the judgments referred to with the facts therein and for all the above discussions of the factual settings of the case in hand with the circumstances; this Court is of the considered view that the order dated 28.07.2018 which has been impugned in this revision cannot be sustained.

Accordingly, the order dated 28.07.2018 passed by the learned Special Judge, Vigilance, Keonjhar in V.G.R. Case No. 59 of 2009 (T.R. Case No. 80 of 2011) is hereby set aside and it is directed that these petitioners be discharged from the said case.

33. The revision is disposed of accordingly.

—— o ——

2021 (I) ILR - CUT- 195

S. PUJAHARI, J.

CRLREV NO. 451 OF 2020

LAXMIDHAR BEHERA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 167 (2) – Provisions under – Benefits to the accused – Grant of – Circumstances and principles to be followed – Discussed.

"Section 167 Cr. P. C. specifically stipulates that the Magistrate in an pending investigation can remand the accused for a term not exceeding 15 days at a time and in total for a period of 90 days, in Odisha context 120 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, and 60 days, where the investigation relates to any other offence. Under this provision, the power of the Magistrate to detain the accused in custody comes to an end after expiry of the aforesaid period unless the charge sheet is filed as the learned Magistrate thereafter has no jurisdiction to remand the accused under Section 167 of Cr.P.C. in a case pending investigation. However, the same is subject to exception that if the accused after expiry of the period, even if bail is offered does not avail of the same, then under the enabling provision of the said section, the Magistrate can remand the accused, even if investigation has not been completed within the stipulated period. The Apex Court in a number of cases have held that the accused incarcerated is required to be 4 informed by the Court remanding him under Section 167 of Cr.P.C. when the investigation is not completed within the stipulated period, regarding accrual of his right to be released on bail for such default of the investigation. Reference in this regard can be made to the case Rakesh Kumar Paul v. State of Assam, reported in (2017) 15 SCC 67." *(Para 9)*

Case Law Relied on and Referred to :-

1. (2017) 15 SCC 67 : Rakesh Kumar Paul Vs. State of Assam.

For Petitioner : N. Sahani & K. Pradhan
For Opp. Party : Govt. Adv.

ORDER Date of Order : 04.12.2020

S. PUJAHARI, J.

In the wake of the pandemic Covid-19, the case is taken up through V.C.

2. This Court though generally never entertain a Criminal Revision against an order of the Magistrate and directs to approach the Sessions Judge,

but this being relating to involvement a prayer for bail and also connecting bail petition being pending, the same is entertained, as this Court is of the opinion that the due pendency of such bail application in this Court, the Sessions Judge may be loathed to take up such revision.

3. Heard.

4. This revision has been filed by the petitioner challenging the order dated 24.11.2020 passed by the learned J.M.F.C., Ranpur in 2(b)CC Case No.25 of 2020 arising out of Ranpur Range Office Offence Report No.5 of 2020-21 refusing the petitioner to extend the benefit of compulsive bail under Section 167(2) of Cr.P.C., as the investigation was completed and final P.R. was ready, but the same was submitted to this Court.

5. It appears that the petitioner has been indicated in the aforesaid case for commission of offence punishable under Section 51(1) of the Wild Life Protection Act.

6. It is not in dispute that the petitioner was remanded in the aforesaid case pursuant to prosecution report submitted by the Forest Official on 13.7.2020 before the learned J.M.F.C., Ranpur. The final P.R. in this case having not been submitted within the time stipulated before the said Court, a right had accrued in favour of the petitioner for his release on default bail. As such, the petitioner filed a petition under Section 167(2) of Cr.P.C. before the learned Magistrate for his release on default bail. However, the learned J.M.F.C. accepting the submission of the Asst. Public Prosecutor as investigation was completed and final P.R. was ready and the same had been sent to this Court in the pending bail petition, the right of the petitioner under Section 167(2) of Cr.P.C. extinguished, rejected the prayer of the petitioner.

7. It is stated by the learned counsel for the petitioner that such an approach of Court is misconceived, inasmuch as if such an interpretation is given that would frustrate the mandate of Section 167(2) of Cr.P.C. which specifically state that within the period stipulated unless the investigation is completed, proof of which is placing of final form in the shape of charge-sheet or Final P.R., as in this case, is placed before the Court remanding the accused, the accused in custody thereafter cannot be remanded to custody on expiry of the stipulated period and is entitled to the benefit in compulsive bail under Section 167(2) of Cr.P.C. Therefore, the impugned order is liable to be set aside and the petitioner deserves to be released on bail, submits the learned counsel for the petitioner.

8. Learned counsel for the State fairly concedes to such submission and also submits that no such final P.R. was received in the office of Advocate General.

9. Section 167 Cr.P.C. specifically stipulates that the Magistrate in an pending investigation can remand the accused for a term not exceeding 15 days at a time and in total for a period of 90 days, in Odisha context 120 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, and 60 days, where the investigation relates to any other offence. Under this provision, the power of the Magistrate to detain the accused in custody comes to an end after expiry of the aforesaid period unless the charge sheet is filed as the learned Magistrate thereafter has no jurisdiction to remand the accused under Section 167 of Cr.P.C. in a case pending investigation. However, the same is subject to exception that if the accused after expiry of the period, even if bail is offered does not avail of the same, then under the enabling provision of the said section, the Magistrate can remand the accused, even if investigation has not been completed within the stipulated period. The Apex Court in a number of cases have held that the accused incarcerated is required to be informed by the Court remanding him under Section 167 of Cr.P.C. when the investigation is not completed within the stipulated period, regarding accrual of his right to be released on bail for such default of the investigation. Reference in this regard can be made to the case ***Rakesh Kumar Paul v. State of Assam, reported in (2017) 15 SCC 67.***

10. Here in this case, it appears that the Magistrate has failed to intimate the accused regarding accrual of his such right of being released on bail on completion of the stipulated period for non-submission of final P.R. and extend him the benefit of compulsive bail. Not only that the learned Magistrate also rejected the prayer made for compulsive bail on a wrong impression that since the investigation has been completed, such right is not available to the accused, even though final P.R. was not placed before the Magistrate and stated to have been sent to this Court. Allowing such interpretation would frustrate the very purpose of Section 167(2) of Cr.P.C. inasmuch as strictly speak the aforesaid view of the learned Magistrate is not correct for the reason that in the absence of the charge sheet or final P.R. as in this case before the learned Magistrate indicating the completion of investigation, on expiry of the period stipulated, the learned Magistrate lacks jurisdiction to remand the accused further under Section 167 of Cr.P.C., if the

accused is ready and willing to go on bail furnishing the bail bond required. Therefore, the impugned order of the learned J.M.F.C. refusing the benefit of compulsive bail on the ground stated being contrary to law, cannot be sustained.

11. Accordingly, the Criminal Revision is allowed. The impugned order is set aside and the learned J.M.F.C., Ranpur is directed to release the petitioner on bail on his furnishing a bail bond of Rs.20,000/- (Rupees twenty thousand) with two solvent sureties each for the like amount to its satisfaction.

While parting with this case, I can not refrain myself from observing that in many cases it has come to the notice of this Court that the accused are being remanded beyond the stipulated period mentioned in Section 167 of Cr.P.C. pending investigation. The same is more so when the maximum period prescribes expires on a holiday. So also, charge-sheet / final P.R. filed are not immediately placed before Presiding Officer or his/her incharge. The aforesaid in many a times gives rise to avoidable controversy on the right of the accused for compulsive bail. Needless to say that the Court dealing with the criminal matters particularly for the purpose of remand and bail, is available 365 days. There is no holiday for the said purpose. The Court concerned, therefore, are advised to see that the remand is made pending completion of the investigation in such a manner that no remand is made beyond the period of fifteen days at a time and the last spell of remand pending investigation should not be beyond the period of 120 days or 60 days or for the period as provided in any Special Act for commission of offence under that Act with regard to applicability of Section 167 of Cr.P.C. The Presiding Officer or the Court concerned must ensure that the case record as well as the accused produced, even if the same is a holiday on the very next date of expiry of the maximum period of remand as provided in Section 167 of Cr.P.C. in a case pending investigation when the accused has / have been remanded and also intimate the accused if the investigation is not completed regarding accrual of his/her or their, as the case may be, indefeasible right of being released on bail. The accused on that day may be produced physically or if not produced physically, through electronic video linkage. There should not be any deviation from the same as the aforesaid relates to the question of fundamental right of liberty of the accused guaranteed under Article 21 of the Constitution of India. Furthermore, the charge-sheet or final form submitted when the accused is in custody being remanded, must be placed immediately, even if the same is received on a holiday before the Presiding Officer of the

Court concerned or his/her in-charge by the C.S.I. or the Dealing Assistant concerned and on such production, the Presiding Officer or his/her in-charge must note the time and date the same is produced before him/her with initial. The Presiding Officer or his In-charge must ensure the same. If any dispute arose with regard to the fact that such charge-sheet / final form submitted by the Investigating Officer, was not placed by the C.S.I. or the Dealing Assistant immediately before the Presiding Officer concerned, the same may be brought by the Investigating Agency to the notice of Presiding Officer of the Court for proceeding against them for their such dereliction in duty in an appropriate manner. The Registry of this Court shall do the needful to appraise the aforesaid order to the Judicial Officers within the State. The parties may utilize the copy of this order as per the High Court's Notice No.4587 dated 25.03.2020.

—— o ——

2021 (I) ILR - CUT- 199

BISWANATH RATH, J.

W.P.(C) NO. 4105 OF 2010

M/S. EXPRESS PUBLICATIONS (MADURAI) LTD., BHUBANESWAR .....Petitioner

.V.

THE REGIONAL PROVIDENT FUND COMMISSIONER-II, ORISSA & ANR. .....Opp. Parties

EMPLOYEE'S PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 Sections 7-Q and 14-B – Provisions under – Charging of interest and damages for delayed payment of the EPF contribution by the Employer as penalty – Scope of reduction in the interest and damages – Held, an Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation – Penalty will not also be imposed merely because it is lawful to do so – Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances – Even if a minimum penalty is prescribed, the authority

competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.." (M/s. Hindustan Steel Ltd. Vrs. The State of Orissa, reported in AIR 1970 SC 253, followed.)

Case Law Relied on and Referred to :-

1. 2003 (1) Labour Law Journal 467 (Madras) : M/s. Shanti Garments Pvt. Ltd. Vs. Regional Provident Fund Commissioner.
2. AIR 1970 SC 253 : M/s. Hindustan Steel Ltd. Vs. The State of Orissa.
3. AIR 1979 SC 1803 : Organo Chemicals Industries & Anr. Vs. Union of India.

For Petitioner : Mr. R.K. Mohanty, Sr. Adv., Mr. B.K.Nayak, Mr. D.K. Mohanty, Mr. S. Mohanty, Mr. P. Jena, Mr. S.K. Mohanty & Mr. S. Mohanty.

For Opp.Party No.1 : Mr. Bimbisar Dash, Mr. C. Mahanta.

For Opp. Party No.2: None

JUDGMENT Date of Hearing and Judgment : 15.12.2020

BISWANATH RATH, J.

The writ petition involves a challenge to the order of the Appellate Authority involving Appeal under the provision of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (in short 'the Act') vide Annexure-1 and the order at Annexure-2 being passed by the Original Authority involving a dispute U/ss. 7-Q as well as 14-B of the E.P.F. and M.P. Act.

2. The short background involving the case is that petitioner being a covered establishment under the E.P.F. and M.P. Act, vide Code No.OR/5204 was going on paying the provident fund dues involving its employees. On the premises of sustaining financial losses during the period from 1997 till 2005, it is submitted that though petitioner made the P.F. contributions of their employees, but the contributions were made by petitioner's company belatedly. For delayed payment of P.F. contribution there arose initiation of the proceeding U/ss.7-Q and 14-B of the Act for realization of interest as well as damage on account of delayed payment. It is in the process, notice was issued on 27.06.2005 by the P.F. Authority indicating its proposal to impose damage. Period involved therein was 5/97 to 2/01, 4/01, 7/01 to 2/02, 9/02 to

12/04. The notice was providing 15 days time to file show-cause, the proceeding OR/PD/5204 being P.D. Case No.132/2005-06 was next posted to 07.07.2005. Petitioner appearing therein submitted that delay in P.F. contribution occurred due to serious financial difficulty faced by the petitioner for over a long period. It is based on the objection of the petitioner, the P.D. proceeding No.132 of 2005-2006 was closed on imposition of damages for the delayed remittance of P.F. dues for the period involved therein on imposition of a sum of Rs.5,44,709/- as 14-B dues and a sum of Rs.1,13,038/- towards 7-Q as clearly borne out from Annexure-2.

Being aggrieved by the order dated 18.07.2002 vide Annexure-2, petitioner preferred appeal before the EPF Appellate Tribunal. The appeal being numbered as 748/10 of 2005, the same was finally dismissed on contest by the order of the Appellate Tribunal on 21.01.2010 vide Annexure-1 resulting filing of the present writ petition.

3. Mr.Mohanty, learned Senior Advocate for the petitioner taking this Court to the plea of the party in the original proceeding contended that petitioner company was facing financial hardship over a long period and the delay was attributable due to unavoidable circumstance and such action was neither intentional nor deliberate. Further the branches of petitioner establishment in other part of the country also for some reasons suffering during the above period. It is in this view of the matter, Sri Mohanty, learned Senior Advocate requested this Court for interfering in both the order under Annexure-2 and Annexure-1 and passing appropriate order.

4. Mr. Bimbisar Dash, learned counsel appearing for the Provident Fund Authority however taking this Court to the plea of the petitioner in the original proceeding contended that there is no proper demonstration of reasons in landing in delay deposit except the petitioner has a mere statement that the delay is attributable to uncontrolled situation. Mr.Dash thus claimed that in absence of establishing such a situation in order to help its case both the Original Authority as well as the Appellant Authority have not committed any illegality and as such, both of them are justified in passing the impugned orders. It is in this view of the matter, Mr. Dash, learned counsel appearing for the EPF Authority submitted that there is no impropriety or illegality in the orders involved herein requiring interference of this Court.

5. Considering the rival contentions of the parties, this Court finds the dispute involved collection of interest for delayed deposit of P.F. dues by the

employer applying the provision at 7-Q of the Act, 1952 and also recovery of damage on account of delay deposit applying the provision at Section 14-B of the Act, 1952. It is keeping in view the above two provisions, this Court first proceeds to consider the reason assigned by the employer, in the process from the impugned order at Annexure-2 this Court finds the Regional Provident Fund Authority has recorded the submission of the establishment that while admitting the delay deposit through details of deposit particulars, the establishment took the reason for delay attributable to unavoidable circumstance and which action was not intentional and deliberate which claim appears to have rejected by the Original Authority. It is next going through the Memorandum of Appeal filed by the petitioner at Annexure-5, it appears the petitioner took the following grounds in appeal:

"Grounds of Appeal

A. Annexure-A2 order of the respondent imposing damages of Rs.5,44,709/- is illegal, arbitrary and liable to be set aside.

B. The reasons stated by the respondent in Annexure-A2 order for imposing damages are unsustainable in law. The respondent has not considered the contentions raised by the appellant in the correct perspective. The findings of the respondent are influenced by irrelevant considerations.

C. The respondent has no case that the appellant is a habitual defaulter in payment of the P.F. contributions. There is also no proof to show that there is intentional default in payment of the P.F. contributions from the side of the appellant. Due to financial strains the appellant could not even pay the salary of the employees on time. The financial strain faced by the appellant was not for a short period. On the other hand the appellant was facing heavy financial strain for years and was consistently incurring heavy loss. The accumulated loss of the appellant for the year ending 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003 and 2003-2004 areRs.39,42,65,975/-, Rs.42,22,34,372/-, Rs.41,48,90,034/-, Rs.23,77,04,663/-,Rs.38,42,52,683/-, Rs.40,75,91,542/- and Rs.42,93,76,433/- respectively. The appellant could not pay the contributions in respect of the above referred period on time due to the heavy financial strain and difficulties. Under the above circumstance, the respondent should not have imposed damages on the appellant.

D. The finding of the respondent that since there were delay in depositing the contributions within the prescribed time limit, damages has to be imposed is unsustainable in law. The above finding of the respondent is against the provisions contained in Section 14-B of the P.F. Act. The word used in Section 14-B of the P.F. Act is 'may recover' from the employer such damages, and the word used is not 'shall recover'. This itself shows that the authority under Section 14-B of the P.F. Act has the jurisdiction to consider the facts and circumstances of each case and to take a decision whether damages should be imposed or not and if damages to

be imposed at what percentage etc. It is submitted that jurisdiction under Section 14-B of the PF Act is quasi judicial in nature and it is also discretionary. It is submitted that the respondent has not considered the issue in the correct perspective and failed to exercise the jurisdiction properly and in accordance with law.

E. The stand taken by the respondent that once there is a delay in payment of PF contribution, then the employer is liable for damages mandatorily is perverse and unsustainable. The damages provided under section 14-B of the PF Act is by way of penalty. It is a penal action. Hence it is necessary to consider the facts and circumstances under which the employer could not pay the PF contributions in time. The respondent is liable to consider whether the default in payment of contribution was intentional and there was wilful laches from the part of the employer and whether the appellant is habitual defaulter while exercising the jurisdiction under Section 14-B of the PF Act. In the instant case the respondent has not properly exercised its jurisdiction under Section 14-B of the PF Act. It is submitted that Annexure-A2 order imposing damages on the appellant is arbitrary, unjustified and liable to be set aside.

F. The decision of the respondent to levy damages at the rate prescribed under para.32A of the Scheme is arbitrary and unsustainable in law in view of the facts and circumstances of the case. It is submitted that whenever there is a delay in payment of the P.F. contributions it is not mandatory to impose damages as prescribed under para.32A of the Scheme. It is stated by the respondent that he has imposed the damages as per Annexure-A2 order to take care of the alleged loss suffered by the Department. The specific reasons stated by the respondent in Annexure-A2order is that loss of interest caused to the statutory fund is required to be made good and also increase in the cost of administration is to be taken into account and further the employer is to be penalised. It is submitted that the EPF organization is collecting interest at the rate of 12% per annum for the delayed period from the employer under Section 7-Q of the PF Act. 7-Q of the P.F. Act was introduced w.e.f. 1.7.1997. It is submitted that the rate of interest provided under Section 7-Q is also higher than the Bank rates. Therefore the loss of the P.F. organization if any caused due to delay in payment of contribution is compensated by the interest provided under Section 7-Q of the P.F. Act. Hence the decision of the respondent to impose damages on the ground of loss of interest and cost of administration is unjustified, arbitrary and illegal. There is also no justification in penalising the appellant in view of the facts and circumstances of the case. There is no intentional or deliberate delay from the side of the appellant. The delay was occurred due to the financial strain and difficulties mentioned hereinabove. The appellant is also not a habitual defaulter. It is submitted that the imposition of damages at the rate of 17% and 37% per annum on the defaulted amount is arbitrary, excessive and unsustainable in law. It is also submitted that Annexure-A2 order is not a speaking order. The respondent has not applied his mind to the facts and circumstances of the case properly and in accordance with law while imposing damages on the appellant.

G. The amount of damages imposed by the respondent is arbitrary and also highly excessive. The respondent should not have imposed damages on the appellant in view of the facts and circumstances of the case."

6. This Court here getting into the reasons for delay as assigned by the establishment find it is a fact that petitioner did not fully demonstrate the reasons for delay deposit except saying that it had financial constraint and later on developed on saying even the salary of the employees are not paid in time. But however looking to the pleadings in the Memorandum of Appeal, this Court finds most of the grounds taken therein have not been attended to by the Appellate Authority. This Court here also observes in the event the establishment did not demonstrate the reason of delay by producing materials and for the pleadings therein Appeal in the interest of justice, the matter could have been remanded to the PFAuthority to re-determine after giving opportunity to the petitioner to establish its case. Be that as it may, this Court looking to the provision of the Act, 1952 finds the provident fund contribution is a contribution mixed both by employer as well as employee. There remains no dispute that the P.F. contribution has not been deposited in time. The controversy remains here as to whether the deposit is made in time? And if not made in time if the action of the petitioner in depositing after lapse of time is bonafide and in such event what should be the quantum of damage and interest based on the provision at Sections 14-B and 7-Q of the Act?

7. This Court here taking note of the provisions in the Act need to be taken into account. The provision at Section 7-Q dealing with interest reads as follows:

> **"7-Q. Interest payable by the employer –** The employer shall be liable to pay simple interest at the rate of twelve percent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.
>
> Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.
>
> Similarly, the provision at Section 14-B dealing with power to recover damages reads as follows :
>
> "**14-B. Power to recover damages** – Where an employer makes default in the payment of any contribution to the Fund, [the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section(5) of section 17]or in the payment of

> any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme.
>
> Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard.
>
> Provided further that the central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a Scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme."

8. Section 7-Q of the Act empowers the department recovery of simple interest @12% per annum or at such higher rate as may be specified in the scheme on any amount due. Similarly, Section 14-B of the Act prescribes if an employer makes a default, the department may recover penalty such damages not exceeding the amount of arrears but after giving the employer reasonable opportunity of being heard. Section 14-B of the Act has also the rider with the Central Board to either reduce or waive the damages lying under this section, though, of course, to the establishment, which is sick Industrial Company.

In the circumstance, it appears even though there is no scope in the statute for the reduction in the interest part keeping in view the employee did not suffer for the delayed payment by the employer as the deposit position has to be maintained on the contribution of the provident fund authority but however under the provision of Section 14-B there is scope for reduction in the damages. Dealing with the case of ***M/s. Shanti Garments Private Limited vrs. Regional Provident Fund Commissioner***, reported in 2003 (1) Labour Law Journal 467 (Madras). Dealing with such case, the Madras High Court has come to hold when there is no apparent fault the quantum of damage should be compensatory rather than penal in nature. From the pleading of the employer, this Court finds the employer has the minimum pleading that it was not in a position to pay the employees their salary during this period and it has a specific case that for its facing financial hardship, it was not in a position to deposit the PF contribution in time.

9. No doubt the repartition element takes in the loss of interest which would have otherwise been credited to the individual member account but if at the same time it is to be noted that this is not only loss suffered by the fund, fund also suffers the loss, as a result of being deprived of the interest on money which are not coming on due dates by way of contribution but at the same time it is also to keep in view out it may also be a circumstance beyond control of the employer, as in the present case, the employer has taken the plea of financial hardship.

10. In the case of ***M/s. Hindustan Steel Ltd. Vrs. The State of Orissa***, reported in AIR 1970 SC 253, Hon'ble Supreme Court held as follows :

> ".... An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....."

11. Similarly, coming to another decision Hon'ble apex Court in the case of ***Organo Chemicals Industries and another Vrs. Union of India***, reported in AIR 1979 SC 1803, the apex Court observed that while fixing amount of damage the RPFC generally takes into account various factors vis-a-vis the number of defaults, the period of delay, the frequency of defaults and the amount involved. Therefore, while dealing this aspect the employer has to be given due opportunity of heard and has to be given due opportunity of hearing and this hearing would not mean mechanical hearing.

12. For loss of substantial time and looking to the fact that in the meantime 50% of amount due already deposited, this Court instead of remanding the matter directs calculation of damage @15% of the defaulted on both account no.1 and account no.10. P.F. Authority is directed to have a fresh calculation only in respect of collection under 14-B on the above accounts and then add it to the due under 7-Q and after adjusting the payment already made by the petitioner issue notice to the petitioner for payment of

balance amount, if any to the petitioner. The entire exercise shall be concluded within four weeks, notice will be served on the petitioner within one week thereafter and petitioner shall also pay the amount under notice within one month. Failure of which, the balance amount shall again carry interest @8% per annum from the date due.

13. With the above direction, the Writ Petition succeeds but to the extent indicated hereinabove. There shall be no order as to cost.

—— o ——

2021 (I) ILR - CUT- 207

S.K. SAHOO, J.

CRLMA NO. 20 OF 2020

REPUBLIC OF INDIA (CBI) ……..Petitioner

V.

SANDIP CHATTOPADHYAY .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439(2) – Cancellation of bail – Grounds to be considered – Held, (I) arbitrary and wrong exercise of discretion by the court ignoring material evidence on record and passing a perverse order granting bail in a heinous crime which has a very serious impact on the society without giving any reason – (ii) Interference or attempt to interfere with the due course of administration of justice; evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner – No satisfactory ground shown – Application seeking cncellation of bail dismissed.

Case Law Relied on and Referred to :-

1. (1978)1 SCC 118 : Singh Vs. State (Delhi Administration)

For Petitioner : Mr. Sarthak Nayak
For Opp. Party:

ORDER Date of Order : 04.12.2020

S.K. SAHOO, J.

The matter is taken up through Video Conferencing.

Heard Mr. Sarthak Nayak, learned counsel appearing for the CBI.

This is an application under section 439(2) of Cr.P.C. filed by the petitioner for cancellation of bail of the opp. party granted by the learned Special C.J.M., C.B.I., Bhubaneswar in S.P.E. No.08 of 2014 vide order dated 22.12.2018.

It appears that the opposite party Sandip Chattopadhyay while in custody approached this Court in an application for bail under section 439 of Cr.P.C. in BLAPL No.4698 of 2018 and he filed an interim application which has been registered as I.A. No.1123 of 2018 and the same was disposed of as per order dated 06.12.2018 with following observation:

> "Considering the submission of the learned counsel for the petitioner that co-accused persons similarly situated with the petitioner have already been released on bail, it is further observed that in the event the petitioner moves the Court in seisin of the case in connection with R.C. Case No.13/S/2014 corresponding to S.P.E. No.08 of 2014 pending in the file of learned Special C.J.M., C.B.I., Bhubaneswar for his release on bail, the same shall be considered on its own merit, further taking into account the factum of release of co-accused persons on bail, if similarly situated on the ground of parity as per law and disposed of early in accordance with law."

The learned Special C.J.M., C.B.I., Bhubaneswar on the basis of the said order, considered the bail application of the opposite party and after hearing the learned counsel for both the parties, analysing the materials available on record against the petitioner, passed a detailed order in allowing the bail application and the operative portion of the order dated 22.12.2018 is quoted herein below:

> "Perused the case record. The total amount alleged to be diverted by the accusedpetitioner Sandip Chhatopadhyay is somehow similar to the accused Deba Pratima Majumdar. It is alleged by the prosecution that the accused-petitioner Sandip Chhatopadhyay was the person who used to authorize board resolution of the company and to authorize the accused Partha Pratima Tewari and Leena Tewari for signing the cheques and bills on behalf of the company. However it is not disputed that as per Articles of the Association of the Company, both the accused Sandip Chhatopadhyay and Deba Pratima Majumdar stand in the equal footing. Hon'ble High Court in BLAPL No.4698 of 2018 has ordered on dtd. 06.12.2018 to consider the petition for bail on its own merit taking into account of the factum of release of co-accused person on bail if similarly situated on the ground of parity as per law. Hence, in the circumstances since Deba Pratima Majumdar was released on bail on similar grounds and considering the parity, the present accused-petitioner is released on bail similar to the accused Deba Pratima Majumdar. Let the petitioner be released on bail by furnishing a bond of Rs.2,00,000/- (two lakhs) with two solvent sureties for the like amount with the following conditions:

i. he shall furnish cash security of Rs.5,00,000/- (five lakhs);

ii. he shall surrender his passport before this Court, if not surrendered earlier and if he does not have passport, he shall file an affidavit to that effect before this Court;

iii. he shall not tamper with the prosecution evidence in any manner whatsoever;

iv. he shall appear before the Investigating Agency as and when required for the purpose of further investigation and

v. he shall not default in personal attendance of this Court during trial on each date, of course subject to the discretion of this Court under section 317 of the Cr.P.C."

Mr. Sarthak Naik, learned counsel appearing for the CBI submitted that though the opposite party Sandip Chhatopadhyay and co-accused Deba Pratima Majumdar stand on the similar footing but since one of the offence i.e. under section 409 of the Indian Penal Code carries maximum punishment of life imprisonment, the learned Special C.J.M., C.B.I., Bhubaneswar has no power to grant bail.

Section 437 of Cr.P.C. does not completely prohibit a Judicial Magistrate from granting bail for an offence punishable with life imprisonment. The Magistrate does have the jurisdiction to hold in the facts of a given case that the allegations against the accused and the materials on record are not sufficient to constitute an offence punishable with life imprisonment or with death. The Magistrate is not bound by the opinion of the Investigating Officer in regard to the applicability of the section under which the alleged offence falls. The Magistrate can prima facie look into the contents of the F.I.R. and other materials available in the case diary and disagree with the opinion formed by the police about the penal provision which covers the case.

The Hon'ble Supreme Court in the case of Gurcharan Singh -Vrs.- State (Delhi Administration) reported in (1978)1 Supreme Court Cases 118 held as follows:

"19. Section 437 Cr.P.C. deals, inter alia, with two stages during the initial period of the investigation of a non-bailable offence. Even the officer-in-charge of the police station may, by recording his reasons in writing, release a person accused of or suspected of the commission of any non-bailable offence provided there are no reasonable grounds for believing that the accused has committed a non-bailable offence. Quick arrests by the police may be necessary when there are sufficient

materials for the accusation or even for suspicion. When such an accused is produced before the Court, the Court has a discretion to grant bail in all non-bailable cases except those punishable with death or imprisonment for life, if there appear to be reasons to believe that he has been guilty of such offences. The Courts oversee the action of the police and exercise judicial discretion in granting bail always bearing in mind that the liberty of an individual is not unnecessarily and unduly abridged and at the same time the cause of justice does not suffer. After the Court releases a person on bail under Sub-section (1) or Sub-section (2) of Section 437 Cr.P.C., it may direct him to be arrested again when it considers necessary so to do. This will be also in exercise of its judicial discretion on valid grounds.

xx xx xx xx xx

21. Section 437 Cr.P.C. is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session. The language of Section 437(1) may be contrasted with Section 437(7) to which we have already made a reference. While under sub-section (1) of Section 437 Cr.P.C. the words are: "If there appear to be reasonable grounds for believing that he has been guilty", sub-section (7) says: "that there are reasonable grounds for believing that the accused is not guilty of such an offence". This difference in language occurs on account of the stage at which the two subsections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life, whereas after submission of charge-sheet or during trial for such an offence, the Court has an opportunity to form somewhat clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage, the degree of certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge-sheet. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offences; a person need not be detained in custody for any period more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be materials produced before the Courts to come to a conclusion as to the nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody. At that stage, the Court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits.

22. In other non-bailable cases, the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 Cr.P.C. if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought

> before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1), Cr.P.C. and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence."

Law is well settled that rejection of bail in a nonbailable offence at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. For illustration, broadly the grounds for cancellation of bail are as follows:-

> (i) arbitrary and wrong exercise of discretion by the Court ignoring material evidence on record and passing a perverse order granting bail in a heinous crime which has a very serious impact on the society without giving any reason;
>
> (ii) interference or attempt to interfere with the due course of administration of justice; evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner.

Concept of setting aside an unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts or certain supervening circumstances requiring such cancellation. There is distinction between the parameters for grant of bail and cancellation of bail.

If a Court of Session has granted bail to an accused, the State may move the Sessions Judge for cancellation of bail if certain new circumstances have arisen which was not earlier known to the State. However, when no new circumstances have cropped up except those already existed, the State if aggrieved by the order of the Sessions Judge granting bail has to approach the High Court being the superior Court under section 439(2) Cr.P.C. to commit the accused to custody. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court.

Grant of bail requires consideration of the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the

accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and other similar considerations. At that stage, the prosecution is required to produce prima facie evidence in support of the charge and not the evidence establishing the guilt of the accused beyond reasonable doubt.

It is the settled law that an order granting bail, by ignoring material evidence on record and without giving reasons, would be perverse and contrary to principles of law and such an order would itself provide a ground for moving an application for cancellation of bail.

In the application, no ground has been taken that the petitioner after being released on bail has committed any interference or attempted to interfere with due course of administration of justice or that he had misutilised concession granted to him in any manner and there is also no supervening circumstances for cancelling the bail. It is also not argued that the bail was granted to the opposite party ignoring material evidence on record.

In view of the foregoing discussions, I am not inclined to accept the submission made by the learned counsel for the CBI. When the Court has power to try the case and section 409 of the Indian Penal Code is a Magistrate triable but non-bailable offence and no irrelevant materials were taken into consideration while granting bail to the opposite party and there is no material on record that the opposite party either tried to tamper with the evidence or committed any other overt act which would affect the fairness of trial after being released on bail and about two years is going to be passed in the meantime since the date of bail order and similarly situated co-accused is enjoying the liberty, I am of the humble view that the learned Special C.J.M., C.B.I., Bhubaneswar has neither passed an order which can be said to be unjustified, illegal or perverse or any case is made out by the petitioner for cancellation of the bail order.

Accordingly, the CRLMA stands dismissed. A copy of the order be sent to the learned trial Court.

—— o ——

2021 (I) ILR - CUT- 213

P. PATNAIK, J.

W.P.(C) NO.13757 OF 2015

DR. DIBAKAR PANIGRAHY & ORS. ……..Petitioners.

.V.

BERHAMPUR UNIVERSITY & ORS. ……..Opp.Parties

ORISSA UNIVERSITY FIRST STATUTE, 1990 – Statute 289(1) & (3) – Choose of pension scheme from CPF to GPF – Denial by the authorities to exercise the option from CPF to GPF – Plea raised that, petitioners have not given their options within the statutory periods i.e six months from the date of enforcement of the Statute or from the date of appointments – Petitioners pleaded that, even otherwise as per Statute 289(3) they are entitled to get the benefits – Plea of the petitioners considered – Held, opposite parties are directed to consider the case of the petitioners afresh as per the Statute 289(3) of the Statute 1990 as expeditiously as possible.

Case Law Relied on and Referred to :-

1. (2006) 12 SCC 53 : Union of India & Anr. Vs. S.L. Verma & Ors.

For Petitioners : Mr. Satya Mohanty
For Opp.Parties : Mr. B.S. Mishra, Counsel for Universities.
Mr. J.P. Patra, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 17.01.2020 : Date of Judgment: 03.07.2020

P.PATNAIK, J.

In the captioned writ petition, the petitioners have assailed the action of the opposite party nos.2 and 4 in not allowing the petitioners to switch over from the Contributory Provident Fund Scheme of the University (CPF) to the Pension and General Provident Fund Scheme (GPF) in view of the Statute 289(3) of the Orissa University First Statutes, 1990 and the Syndicate decision dated 30.08.1997. Being aggrieved and dissatisfied with inaction of the opposite parties, the petitioners have sought for quashing the letter dated 23.03.2011 of opposite party no.4 under Annexure-8 to the extent it is in conflict with Statute 289(3) of the Orissa Universities First Statutes,1990

2. Bereft of unnecessary details, the facts in brief are that petitioner nos.1 to 5 are employees of the Berhampur University, who had joined before the year 1990. Vide order dated 19.11.2019, petitioner no. 6-Dr.Subasini

Pattnaik has been deleted from the cause title of the writ petition. The petitioner nos. 7 to 10 are employees of the Berhampur University who had joined after the year 1990. The petitioners are both academic and non-academic employees of Berhampur University. Prior to 1990, the Contributory Provident Fund Scheme of the University was in vogue. In the Orissa Universities First Statutes,1990, Chapter-V deals with the Terminal Benefits of the Employees. In pursuance of the Statute-289 of the Statues of 1990, the employees were provided with an option to choose between the Pension Scheme as applicable to the State Government employees i.e., Pension and General Provident Fund Scheme (herein referred to as 'GPF') or the Contributory Provident Fund Scheme of the University (CPF).

As per the Statute-289(1) an existing employee shall exercise his option in writing for either the GPF or CPF within a period of six months from the date coming into force of Statutes of 1990 and the employees recruited after the year 1990 to the service of the University shall exercise their option either for the pension or Contributory Provident Fund Scheme within a period of six months of their appointment. However, Statute 289 (3) states that if any employee fails to exercise the option required under these statutes within the prescribed time limit, he/she shall be deemed to have opted for the Pension Scheme (GPF). As the provision under Statute 289 (3) being clear and unambiguous, the University authorities did not allow some employees to change their option on the ground that the option was after the cut-off date. On the representation of the employees, the Syndicate had constituted a sub-committee to examine the issue of change of the option by the employees after the cut-off date and the Syndicate sub-committee after considering the provisions of the Statutes of 1990 and considering that the change of option from CPF to GPF not causing much administrative difficulties recommended that the change of option from CPF to GPF be allowed at any time before six months of their superannuation. However, no change of option from GPF to CPF shall be allowed as per the resolution dated 30.08.1997 of the Syndicate sub-committee vide Annexure-3 to the writ petition. After recommendation of the sub-committee, several employees were allowed to change their option from CPF to GPF as evident from Annexure-4 series and in the similar instances, the Government has permitted the employees of Sambalpur University to change their option from CPF to GPF as has been mentioned in the letter dated 22.08.1997 vide Annexure-5. When the authorities did not change the option of the petitioners from CPF to GPF, they made several representations to the authorities requesting them to

change their option from CPF to GPF to avail their benefits under the GPF scheme as applicable to the universities employees vide Annexure-6 series and subsequent to the receipt of representations from the petitioners, the University officials have written several letters to opposite party no.2 to 4 seeking the permission of the Government to change the option of the petitioner from CPF to GPF as per Annexure-7 series. The opposite party no.3 vide its reply to the University dated 23.3.2011 has stated that the change of option from CPF to GPF may be carried out as per provision in Statute 289 (1) as per Annexure-8. In the backdrop of the aforesaid facts, the petitioners have filed the writ petition invoking the extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India for redressal of their grievances.

3. Learned counsel for the petitioners submitted with vehemence that the Statute 289(3) of the Statute 1990 is very clear and unambiguously worded that if any employee fails to exercise the option required under these statutes within the prescribed time limit, he/she shall be deemed to have opted for the Pension Scheme. So from the logical corollary to the aforesaid position there is no room for any doubt or debate that an employee by default will be deemed to have opted for Pension Scheme. In other words, those employees who have not specifically exercised the option for CPF will be deemed to have opted for GPF. Learned counsel for the petitioners further submits that since the petitioners have not exercised their options within the prescribed time under the Statute 289 (1), the petitioners shall be deemed to have opted for GPF as per the Statute 289(3). Further, the petitioners have also filed representations for change of option from CPF to GPF before the six months of superannuation as has been decided vide resolution dated 30.08.1997 of the sub-committee under Annexure-3.

Further the learned counsel for the petitioner submitted that the impugned letter under Annexure-8 is an outcome of non-application of mind since in the impugned letter dated 23.03.2011 Statute 289(1) has been referred to though the petitioner's case comes under Statute 289(3).

Learned counsel for the petitioners further has forcefully submitted that the impugned letter under Annexure-8 is fraught with non-application of mind by the opposite party no.3. Since several employees of Berhampur University and Sambalpur University have been allowed change of option from CPF to GPF after expiry of time limit prescribed under Statute 289(1). Therefore, the petitioners are entitled to the benefit under Statute 289(3) for

change of option from CPF to GPF as per the Resolution No.188 dated 30.08.1997 of the Syndicate sub-committee under Annexure-3.

Learned counsel for the petitioners in order to buttress his submission has referred to the decision in the case of ***Simanchal Rath v. Berhampur University*** wherein this Court vide order dated 24.03.2015 has inter alia directed to consider the representation of the petitioner in the said case taking into consideration the recommendations under provision 289(3) of the University Statute. The petitioners stand in similar footing.

Learned counsel for the petitioners has also referred to the decision rendered by the Hon'ble Supreme Court in the case of ***Union of India and another v. S.L. Verma and others: (2006) 12 SCC 53***. Learned counsel for the petitioners further submitted that as per paragraph-11 of the counter affidavit filed by the State Government wherein it has been stated that all the petitioners will be considered on the basis of their willingness to come from CPF Scheme to GPF Scheme, then as per the norms the amount contributed by the University is required to be deposited by the employee concerned who happens to be beneficiary of the GPF Scheme. Learned counsel for the petitioners also submitted that the Rule-5(5) of "The Odisha Universities Employees' Pension Fund (Administration Rules),2012" states that "The Comptroller of Finance shall also deposit the amount contributed by the University to the contributory provident fund together with interest accrued therein in respect of such employees as have switched over or deemed to have switched over from the contributory provident fund scheme to the pension scheme in the account of the fund."

4. Per contra, counter affidavit has been filed by opposite party no.4 wherein it has been stated that when the University authorities sought permission for change of option from CPF Scheme to pension scheme by the employees of the Berhampur University on the basis of the decision of the Syndicate dated 30.08.1997 (Annexure-3), Govt. in Higher Education Department in due deliberation of the duties, acted upon such proposal of the University and clarified that, the change of option from CPF Scheme to pension scheme needed to be carried out as per the provision of the statute 289(1) of the Orissa Universities First Statute,1990 and held that, the decision of the Syndicate dated 30.08.1997 of Berhampur University is beyond the scope of the statutes.

When, everything was clear and the University authorities have clarified vide letter no.12923/HE dated 23.03.2011 under Annexure-8 of the writ application to act according to the provisions mentioned under the statute 289 of the Orissa Universities First Statute,1990 to govern the issue of exercising option of the employees of the University to come from CPF to pension Scheme (GPF Scheme), the University concerned without taking any action at their level tried to shirk the responsibility on Govt. by making correspondences as at Annexure-7 series.

Further it has been stated that if the employee concerned fails to exercise his option from CPF to pension scheme in time as prescribed in the statute, it will be held that, he has opted for the pension scheme as per clause-3 of Statute,289. It is to make clear that in view of the aforesaid provisions made in the statute the petitioners even though have not opted in time to come to the pension scheme from CPF scheme of which they were in receipt, they can avail the benefit of switching over to the pension scheme in view of the above.

It has been submitted further the notion of the CPF scheme is to benefit an employee after his retirement from the contribution made by him from his salary as well as the equal amount of contribution made for the purpose by the employer concerned. But, the pension scheme which includes GPF is the sole contribution of the employee concerned from his monthly salary and after his retirement he becomes eligible for availing pension as per the terms and conditions of Pension Rules,1992. If at all in the present case, the petitioners who are the employees of Berhampur University will be considered on the basis of their willingness to come from the CPF scheme to GPF scheme, as per norms the amount contributed by the University in each month till the date of acceptance of their option as employer, is required to be deposited by the employee concerned who happens to be the beneficiary of the GPF Scheme.

5. Preliminary counter affidavit has been filed by opposite party nos.1 and 2 wherein it has been submitted that the Berhampur University hereinafter called as "the University" was established under the Berhampur University Act,1966 and under the said Act the Berhampur University statutes 1966 were framed by governing inter alia the service conditions of its employees.

It has been submitted that as is found from Annexure-1 of the writ petition, the petitioner nos.1 to 5 (except petitioner no.3) were appointed within 10.01.1984 to 11.04.1985 when there was no provision for pension for the employees of the University.

It has been further submitted that after joining of the said petitioners a new Chapter was added to the Berhampur University statutes 1966 on 28.5.1985 providing for exercising of option for the employees of the University to either opt for C.P.F. Scheme or for pension scheme, and it was further provided that once such option is exercised the same shall be final. It was further provided that such option shall be exercised within six months failing which it would be deemed to have opted for CPF Scheme. But the said petitioners did not exercise any option within the prescribed period of six months and therefore it was deemed that they had exercised their option to remain under CPF Scheme. It is submitted that prior to this (28.05.1985) there was no provision for pension scheme for the employees of the University.

It has been further submitted that the petitioner no.3 joined the University on 17.09.1987 and he was also governed by the statutes 237-AAC of 1966 Statutes and had to exercise his option within one year from his joining i.e., 16.09.1988 and he having not done that he is/was deemed to have opted for C.P.F. Scheme as provided under statutes 237-AAE of 1966 Statutes. However, he exercised his option on 10.05.1989 to remain under CPF Scheme and the same was recorded in his service book as evident from Annexure-A/I to the counter affidavit.

It has been further stated that on 19.11.1988 the Orissa University employees conditions of service statutes,1988 “here in after called as the 1988 statutes” came into force by governing the conditions of service of the employees the Universities including that of Berhampur University. Under Statutes 36(1) (2) of the 1988 statute, it was provided that an employee is to exercise option as to whether he desires to remain under CPF Scheme or pension Scheme. It was also provided that option so exercised shall be final.

Further it has been submitted that the petitioner no.1(Dibakar Panigrahi) exercised his option under statute 36 (I)(II) of the 1988 statutes to remain under C.P.F. Scheme and the same was recorded in his service book on 29.08.1989 as evident from Annexure-B/1 to the counter affidavit.

It has been further stated that Sri Bijaya Kumar Panda(petitioner no.2) exercised his option under statute 36 (I) (II) of 1988 statutes to remain under CPF Scheme and same has been recorded in his service book on 29.08.1989 as evident from Annexure-C/1 to the counter affidavit.

Further it has been submitted that similarly the petitioner no.4 Swarnanjali Mishra exercised her option under Statute 36 (I)(II) of the 1988 statutes to remain under CPF Scheme and same has been recorded in her service book on 10.05.1989 as evident from the Annexures-D/ and E/1 to the counter affidavit.

Similarly petitioner no.5 Sri Dillip Kumar Das exercised his option on 12.05.1989 under 36 (I)(II) of the 1988 statutes to remain under CPF Scheme and the same was recorded in his service book. Copy of the option exercised by the petitioner no.5 on 12.5.1989 is marked as Annexure-F/1 to the counter affidavit.

It has been further submitted that after the Orissa Universities Act,1989 was enacted, the Orissa Universities first statute 1990 hereinafter called as the first Statutes 1990 came into force on 01.01.1990 and the said statute was framed under Section 23(8) of the Orissa Universities Act 1989.

Further it has been submitted that under the Statutes 289 of the first statute 1990, it was provided that the existing employees who have not already exercised option under the statute shall exercise their option in writing either for pension scheme or for C.P.F. Scheme within a period of six months the statutes came into force and such option shall be final.

It has been further stated that it would thus be seen that employees who have not exercised their option under 1988 Statutes could exercise their option under Statutes 288 of first statutes 1990 and therefore the aforesaid petitioners having already exercised their option as stated earlier and the same having been accepted by the University and recorded in their Service Book, the same became final and there was no further scope for them to exercise option under the first Statutes of 1990.

Further it has been submitted that though there was no necessity for the above petitioners for exercising option under the first Statutes of 1990 yet the petitioner no.1 Dr.Dibakar Panigrahi exercised his option on 13.09.1993

to remain under CPF Scheme and Sri Bijaya Kumar Panda the petitioner no.2 exercised his option on 11.11.1993 to remain under CPF Scheme. Sri Dillip Kumar Das, the petitioner no.5 exercised his option in the year 1993 to remain under CPF Scheme and the same has been recorded in his Service Book on 17.07.1995 as evident from Annexures-G/1 and H/1 to the counter affidavit.

It has been further stated that the said petitioners have suppressed all such facts from this Court and have approached this Court with unclean hands and, therefore, the writ petition is liable to be dismissed.

Further it has been submitted that as is found from Annexure-1 of the writ petition, the petitioners nos.7 to 10 were appointed in between 23.05.1991 to 02.02.1993 by which time the Orissa Universities first statutes 1990 framed under the Orissa Universities Act,1989 had come into force.

6. Per contra counter affidavit has filed on behalf of opposite party nos.1 and 2 to the rejoinder filed by the petitioners wherein at paragraph-2 it has been submitted that petitioner nos.1 and 2 have never exercised their option before the year 1990. Such statement of the petitioners are wrong and false in as much as the petitioner no.1 Sri Dibakar Panigrahi had exercised his option on 11.05.1989 to remain under the C.P.F. Scheme. Similarly the petitioner no.2 Sri Bijaya Kumar Panda had exercised his option on 04.05.1989 to remain under the C.P.F. Scheme.

Further it has been submitted that it would thus be seen that not only the petitioners had suppressed the relevant facts from this Court and have approached with unclean hands but also they have stated false facts before this Court thereby making them liable for committing contempt of this Court.

7. In the backdrop of the respective pleadings as borne out from the records, the seminal point which hinges for determination is as to whether the case of the petitioners comes under Statute 289(1) or Statute 289(3) of the Orissa Universities First Statutes 1990.

8. In order to dilate and delve into the contentious issue, it would be relevant to refer Statute 289 which reads as under:

> "(1) The existing employees who have not already exercised their option under the Statutes shall exercise their option in writing either for the pension scheme or

> the Contributory Provident Fund Scheme under Statute 288 within a period of six months from the date these Statutes come into force. The employees recruited thereafter to the service of the University shall exercise their option either for the Pension or Contributory Provident Fund Scheme within a period of six months of their appointment:
>
> Provided that the employees who have crossed the age of 58 years but have not attained the age of 60 years shall also have the right to exercise their option as aforesaid within a period of six months from the date these statutes come into force, but not later than one month prior to the date they attain the age of 60 years.
>
> (2) The option as provided above, shall be exercisable once only in respect of either Scheme which shall be final irrespective of any change that may be made in any such scheme from time to time. The fact of exercising such option shall be recorded in the service book of the employee by the Registrar or such other officer nominated by him.
>
> (3) If any employee fails to exercise the option required under these Statutes within the prescribed time limit, he/she shall be deemed to have opted for the Pension Scheme."

9. On perusal of the impugned order under Annexure-8 it transpires that the opposite party no.4 has nullified the resolution of the syndicate on the ground that the same is beyond the scope of the statute 289(I) of the Orissa Universities First Statutes,1990.

10. The stand of the University is that once some of the petitioners have exercised their options from Contributory Provident Fund of the University (CPF) to the Pension is to be considered in the light of the Statute 289 (1) of the Orissa Universities First Statutes,1990. Moreover, there has been disputed assertion made by the petitioners as well as the University with regard to exercise of their options.

11. Counter affidavit filed by opposite party no.4 wherein the assertion made in paragraph-10 is that if the employee concerned fails to exercise his option from CPF to pension scheme in time as prescribed in the statute, it will be held that, he has opted for the pension scheme as per clause-3 of Statute, 289(1) of the Orissa Universities First Statutes,1990. Further it is to make clear that in view of the aforesaid provisions made in the statute the petitioners even though have not opted in time to come to the pension scheme from CPF scheme of which they were in receipt, they can avail the benefit of switching over to the pension scheme in view of the above.

12. Rule-5 (5) of "The Odisha Universities Employees' Pension Fund (Administration Rules), 2012" envisages that "The Comptroller of Finance shall also deposit the amount contributed by the University to the contributory provident fund together with interest accrued therein in respect of such employees as have switched over or deemed to have switched over from the contributory provident fund scheme to the pension scheme in the account of the fund."

13. The Hon'ble Apex Court in the case of ***Union of India and another v. S.L. Verma and others: (2006) 12 SCC 53*** has been pleased to observe the relevant portion in paragraph-7, which is quoted hereunder :

> "**7.** The Central Government, in our opinion, proceeded on a basic misconception. By reason of the said office memorandum dated 01.05.1987 a legal fiction was created. Only when an employee consciously opted for to continue with the CPF Scheme, he would not become a member of the Pension Scheme. It is not disputed that the said respondents did not give their options by 30-9-1987. In that view of the matter respondents 1 to 13 in view of the legal fiction created, became the members of the Pension Scheme. Once they became the members of the Pension Scheme, Regulation 16 of the Bureau of Indian Standards (Terms and Conditions of Service of Employees Regulations 1988) had become ipso facto applicable in their case also. It may be that they had made an option to continue with the CPF Scheme at a later stage but if by reason of the legal fiction created they became members of the Pension Scheme,the question of their reverting to the CPF would not arise. … … …"

14. On the cumulative effect on the reasons and judicial pronouncements, the impugned order under Annexure-8 dated 23.03.2011 passed by opposite party no.4 is quashed and set aside and further opposite parties are directed to consider the case of the petitioners afresh in view of change of stance by the Government of Odisha, Department of Higher Education with regard to change of option from Contributory Provident Fund of the University (CPF) to the Pension and General Provident Fund Scheme (GPF) as per Statutes 289 (3) of the Orissa Universities First Statutes,1990, as expeditiously as possible preferably within a period of three months from the date of receipt of copy of this order.

15. With the aforesaid observation/direction, the writ petition stands allowed.

—— o ——

2021 (I) ILR - CUT- 223

K.R. MOHAPATRA, J.

CMP NO. 627 OF 2020

ARCHANA SETHI & ANR. ……Petitioners

.V.

THE EXECUTIVE ENGINEER, SOUTHCO, DIVISION NO.II, KABISURYA NAGAR, GANJAM & ANR. ……...Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 32 Rule 6(2) – Receipt by next friend or guardian for the suit property under decree for minor – Execution case filed by appointed next friend for realization of the decreetal amount – However the executing court ordered that, realization of decreetal amount is subject to deposit of security money – Application filed to dispense with such security deposit – Application rejected – Rejection order challenged – Held, when a next friend of minor(decree holder) has already been appointed, who is otherwise eligible to receive the money, the provision under Order 32 Rule (6) (2) C.P.C ceases to operate.

Case Laws Relied on and Referred to :-

1. (1982) 53 CLT 509 : Bhagabat Sahu Vs. Parbat Samal.
2. (2018) 2 SCC 504 : Nagaiah & Anr. Vs**.** Chowdamma (Dead) by Legal Representatives & A**nr.**

For Petitioners : M/s. Sanatan Das, A.K. Panda, A.K. Choudhury, N.K. Sahoo & K.C. Sarangi.

For Opp. Parties : Mr. S.C. Dash

ORDER Date of Hearing and delivered by Virtual Mode on : 10.12.2020

K.R. MOHAPATRA, J.

Due to outbreak of COVID-19, this matter is taken up through Video Conferencing.

2. Heard Mr. Sanatan Das, learned counsel for the petitioners and Mr. S.C. Dash, learned counsel for the opp. Parties-SOUTHCO.

3. The petitioners in this writ petition pray for a direction to set aside the orders dated 18.06.2020, 03.09.2020 and 14.09.2020 (Annexure-3) passed by learned Civil Judge (Senior Division), Aska in Execution Petition No. 8 of 2014.

4. In course of hearing, Mr. Das, learned counsel for the petitioners submits that he does not want to press the prayer in respect of order dated 14.09.2020, as such, this CMP is confined to orders dated 18.06.2020 and 03.09.2020. By order dated 18.06.2020, learned Civil Judge, while exercising power under Order XXXII Rule-6(2) of the C.P.C., directed the petitioners-Decree Holders (D.Hrs.) to furnish security to receive 25% of the decreetal amount by the next friend and by order dated 03.09.2020, he rejected an application filed by the petitioners-D.Hrs to dispense with furnishing of security as directed vide order dated 18.06.2020.

5. Mr. Das, learned counsel for the petitioners submits that C.S. No. 51 of 2012 was filed by the plaintiffs-petitioners, who are two minors, namely, Archana Sethi and Suchitra Sethi, being represented by their next friend, for a decree of compensation to the tune of Rs.4,30,000/- with interest @ 12% per annum. Initially, the maternal grandfather, namely, Abhimanyu Sethy, was the next friend of the plaintiffs. The suit was allowed vide judgment dated 28.01.2014 with the following direction:

> *"The suit of the plaintiffs be and the same is decreed on contest against the defendants, but without cost. The defendants are hereby directed to pay a compensation of Rs.3,93,500/- (Rupees three lakh ninety three thousand five hundred) only with pendetelite and future interest @ 6% per annum from the date of filing of the suit till actual payment is made within three months hence, failing which the plaintiffs are at liberty to realize the same through the process of the Court. It is further ordered that out of the total compensation amount 75% of the money be deposited in any nationalized bank in the name of the plaintiffs till they attain their majority."*

6. The said judgment was challenged before the learned Addl. District Judge, Aska in RFA No. 86 of 2014, which was dismissed vide judgment dated 13.01.2020. Accordingly, the plaintiffs through their next friend initiated Execution Petition No. 8 of 2014 for realization of the decreetal amount. It is submitted that the decreetal amount has already been deposited by the defendants-judgment debtors (J.Drs.). During pendency of the execution proceeding, the maternal grandfather of the plaintiffs-D.Hrs. expired and one Sri Srikanta Sethi, who is the maternal uncle of the plaintiffs, has been permitted vide order dated 17.03.2020 passed by learned Civil Judge (Senior Division), Aska (the Executing Court) to represent as next friend of the minor D.Hrs.. It is submitted that the plaintiff no.2 is a blind child and the plaintiff no. 1 is prosecuting her studies. Thus, the D.Hrs. through their next friend filed an application for release of 25% of the decreetal amount in their favour to be received by their next friend and the

same was allowed by learned Civil Judge with a condition of furnishing security to that effect in terms of Order XXXII Rule 6(2) of the C.P.C.**.**

7. It is submitted by Mr. Das learned counsel that the petitioners are represented by their next friend appointed by the competent court of law. Thus, the provision of Order XXXII Rule 6(2) C.P.C. has no application to this case and there is no difficulty in releasing 25% of the decreetal amount, which will be received by the next friend on behalf of the minor D.Hrs. Learned Civil Judge without considering the same directed for furnishing of security to receive 25% of the decreetal amount by his order dated 18.06.2020. Hence, the petitioners filed an application under Section 151 C.P.C. with a prayer to dispense with furnishing such security stating that the next friend of the minor D.Hrs. namely, Sri Srikanta Sethi (their maternal uncle), is a very poor person and is maintaining the minors with much difficulties. As such, he is not in a position to furnish security to receive the amount and the same is also otherwise not required for release of 25% of the decreetal amount. But, said petition was also rejected by order dated 03.09.2020. Hence, this CMP has been filed.

8. Mr. Das, learned counsel relied upon the decision in the case of ***Bhagabat Sahu v. Parbat Samal***, reported in (1982) 53 CLT 509, wherein it has been held at paragraph-3 as follows:

> *"**3.** The question that is canvassed has two facets:—*
>
> *(i) Whether the legal representatives of the original defendant were really unrepresented and,*
>
> *(ii) in case they, admittedly minors, went unrepresented, whether the decree was a nullity and could be ignored by the executing court.*
>
> *I have already pointed out that when the original defendant died, the legal representatives were brought on record. The minor children were asked to be represented by their mother, the natural guardian. The natural guardian received summons from the court and entered appearance. She also participated in the final decree proceeding and even took steps before the Pleader-Commissioner but later chose not to appear in the proceedings and allowed the matter to get concluded ex parte.*
>
> *Order 32, R. 3 C.P.C. requires that where the defendant is a minor, the court, on being satisfied of the fact of minority, is to appoint a proper person to be guardian for the suit for such minor. This provision was obviously applicable to the facts of this case. The court had done its duty in ensuring that the minor children of the*

original defendant were appropriately represented by their natural guardian. If the final decree proceeding had been allowed to continue without the legal representatives of the defendant being represented, possibly it would be a clear case of the decision being a nullity. It is open to a guardian representing the interests of the minors after he or she is aware of the scope of the litigation while acting prudently not to contest the lis. This would be certainly a matter of prudent management of the minors' interests and, therefore, a matter within the competence of the guardian. Once the defendants are appropriately impleaded and represented, the duty under R. 2 of O. 33, C.P.C. would come to an end and the proceeding before the court must be taken to have been duly constituted. A distinction must be drawn between a case where the minors are not adequately represented from the commencement and the proceeding at its inception, therefore, is a nullity and a case where the minors are adequately represented and there is a duly constituted proceeding where the guardian acts for some time and then omits to take steps."

(*emphasis supplied*)

9. Mr. Das, learned counsel for the petitioners, therefore, prays for setting aside the orders dated 18.06.2020 and 03.09.2020 (Annexure-3) and to direct the learned Executing Court to release 25% of the decreetal amount without asking for any security.

10. Mr. S.C. Dash, learned counsel for the opposite parties submits that he has nothing to say with regard to release of the decreetal amount as the opposite parties being the J.Drs. have already deposited the entire decreetal amount before the executing court.

11. In order to decide the issue with regard to applicability of Order XXXII Rule 6(2) of C.P.C. in the instant case, it will be profitable to refer to the relevant provisions of the Code of Civil Procedure. Order XXXII Rule 6 deals with receipt of the decreetal amount under a decree or order by the next friend or guardian for a minor, which read as follows:

*"**6. Receipt by next friend or guardian for the suit of property under decree for minor***

1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either-

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to

> *receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste. and ensure its proper application:*
>
> *Provided that the Court may, for reasons to be recorded, dispense with such security while granting leave to the next friend or guardian for the suit to receive money or other movable property under a decree or order where such next friend or guardian-*
>
> *(a) is the manager of a Hindu undivided family and the decree or order relates to the property business of the family; or*
>
> *(b) is the parent of the minor."*

12. The provision under Rule 6 (2) of Order XXXII C.P.C. comes into play when court grants leave for release of money or other movable property under a decree or order to a minor and no such next friend or guardian of the minor in the suit has been appointed or having been so appointed or declared, is under any disability known to the court to receive the money or other movable property on behalf of any minor, then the court shall require such security and give such direction as will, in its opinion sufficiently protect the property from waste and ensure its proper application. Proviso to Sub-rule (2) makes it clear that the Court in its discretion may also dispense with such security, while granting leave to receive money or other movable property under a decree or order under two circumstances, i.e. *firstly*, when the next friend or guardian is the manager of a Hindu undivided family and the decree or order relates to the property or business of the said family or *secondly*, the next friend or guardian is the parent of the minor concerned.

13. The object and purpose of representation of a minor-plaintiff by 'next friend' and appointment of a 'guardian' for a minor-defendant is well discussed in the case of ***Nagaiah*** **and another –v-** ***Chowdamma (Dead) by Legal Representatives & another*****,** reported in ***(2018) 2 SCC 504***. Relevant paragraphs for the purpose of just adjudication of this case are reproduced hereunder:

> *"10. A bare reading of Order XXXII Rule 1 of the CPC makes it amply clear that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the "next friend" of the minor. The next friend need not necessarily be a duly appointed guardian as specified under clause (*b*) of Section 4 of the Hindu Minority and Guardianship Act. "Next friend" acts for the benefit of the "minor" without being a regularly appointed guardian as per the Hindu Minority and Guardianship Act. He acts as an officer of the court, especially appearing to*

look after the interests of a minor whom he represents in a particular matter. The aforesaid provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order XXXII of the Code.

11. Order XXXII Rules 1 and 3 of the CPC together make a distinction between a next friend and a guardian ad litem; i.e., (a) where the suit is filed on behalf of a minor, and (b) where the suit is filed against a minor. It was held that in case, where the suit is filed on behalf of the minor, no permission or leave of the court is necessary for the next friend to institute the suit, whereas if the suit is filed against a minor, it is obligatory for the plaintiff to get the appropriate guardian ad litem appointed by the court for such minor. A "guardian ad litem" is a special guardian appointed by a court in which a particular litigation is pending to represent a minor/infant, etc. in that particular litigation and the status of guardian ad litem exists in that specific litigation in which appointment occurs.

xxx xxx xxx

17. It is by now well settled and as per the provisions of Order XXXII of the Code that any person who is of sound mind, who has attained majority, who can represent and protect the interest of the minor, who is a resident of India and whose interest is not adverse to that of the minor, may represent the minor as his next friend. Such person who is representing the minor plaintiff as a next friend shall not be party to the same suit as defendant. Rules 6 and 7 of Order XXXII of the Code specifically provide that the next friend or guardian in the suit shall not without the leave of the court receive any money or immovable property and shall not without the leave of the court enter into any agreement or compromise. The rights and restrictions of the natural guardian provided under the Hindu Guardianship Act do not conflict with the procedure for filing a suit by a next friend on behalf of the minor. Not only is there no express prohibition, but a reading of Order XXXII of the Code would go to show that wherever the legislature thought it proper to restrict the right of the next friend, it has expressly provided for it in Rules 6 and 7 of Order XXXII of the Code. Rule 9 of Order XXXII, apart from other factors, clarifies that where a next friend is not a guardian appointed or declared by the authority competent in this behalf and an application is made by the guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the court shall remove the next friend unless it considers, for reasons to be recorded, that the guardian ought not to be appointed as the next friend of the minor."

14. Hence, the provisions under sub-rule (2) of Order XXXII makes it crystal clear that if a next friend or guardian, as the case may be, is appointed or declared by the competent Court, then no security will be required, when the Court grants leave to receive the property.

15. On perusal of the impugned order, it appears that learned Civil Judge directed the next friend to furnish security to receive the amount observing that the next friend is not the guardian of the property of the minor. Thus, it appears that learned Civil Judge misconstrued the aforesaid provision and

got confused with the terms 'next friend' and 'guardian'. It is made clear that a 'next friend' represents a minor plaintiff in a suit (Order XXXII Rule 1 CPC), whereas the 'guardian *ad litem*' represents a minor defendant (Order XXXII Rule 3 C.P.C.).

16. When a next friend of minor-D.Hrs. has already been appointed, who is otherwise eligible to receive the money, the provision under Order XXXII Rule (6) (2) C.P.C. ceases to operate.

17. Accordingly, this Court while setting aside the impugned orders under Annexure-3, directs learned Civil Judge (Senior Division), Aska to release 25% of the decreetal amount in favour of the next friend of the minor D.Hrs., namely, Sri Srikanta Sethi, the maternal uncle of the minor D.Hrs. on proper identification by furnishing an indemnity bond to that effect expeditiously following due procedure of law.

18. In view of the aforesaid discussion made above, the petitioner, who is the next friend of minor D.Hrs., is at liberty to move an application to receive the fixed deposit certificates, which are kept with the Nazir of the court of learned Civil Judge (Senior Division), Aska, on behalf of the minor-D.Hrs.. In that event, learned Civil Judge shall do well to consider the same and pass a reasoned order in accordance with law.

19. With the aforesaid observation and direction, the CMP is disposed of.

20. Authenticated copy of this order downloaded from the website of this Court shall be treated at par with certified copy in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

—— o ——

2021 (I) ILR - CUT- 229

K.R. MOHAPATRA, J.

CMP NO.1498 OF 2019

ACHYUTA MOHARANA @ NARASINGHA .....Petitioner

.V.

NABAKISHORE MOHARANA & ORS. .....Opp. Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 26, Rule 1 – Examination of Witnesses – Whether a party can examine adverse party as a witness on his behalf? – Held, there cannot be any absolute bar for a party in a suit to be examined as a witness on behalf of another – It is the discretion of the court to consider the same in the facts and circumstances of the case to allow or reject a request/ prayer made by a party to examine another as a witness in the said suit. (Paras 3 to 4)

(B) CODE OF CIVIL PROCEDURE, 1908 – Civil suit – Examination of witness – Whether a party, who is set ex parte and has not filed written statement, can be examined as a witness? – Held, an ex parte can lead evidence subject to certain riders, which can be broadly stated as follows:-(I) the witness cannot propound a new case or the case of its own (II) the witness must not have entered witness box in the said suit previously to lead evidence and has been cross-examined (III) permitting a party to the suit to be examined on behalf of another, is always at the discretion of the court. (Para 6)

Case Laws Relied on and Referred to :-

1. AIR 2003 Ori 209 : Braja Mohan Patra Vs. Ananta Charan Patra & Ors.
2. AIR 2001 Madras 410 : V.K. Periaswamy @ Perianna Gounder Vs. D.Rajan.
3. AIR 1993 Patna 122 : Sri Awadh Kishore Singh and Another .Vs. Sri Brij Bihari Singh & Ors.
4. AIR 1938 Privy Council 59 : Shatrugan Das, Mahant substituted for Mahant Ram Lakhan Das alias Ram Lakhman Das Vs. Sham Das, Bawa & Ors.
5. AIR 1978 Orissa 209 : Radhamoni Padhiari .Vs. Tangudu Jaganatham & Anr.

For Petitioner : Mr.S.K. Nayak-2, Kintara, S.S.K. Nayak & G.C. Ray

For Opp. Parties :

ORDER Date of Hearing and delivered by Virtual Mode on 11.12.2020

K.R.MOHAPATRA, J.

Due to outbreak of COVID-19, this matter is taken up through Video Conferencing.

2. Petitioner, in this CMP seeks to assail the order dated 27.11.2019 (Annexure-6) passed by learned Civil Judge (Senior Division), Bhadrak in CS No.129 of 2003 (I), whereby he rejected the evidence in affidavit of Smt. Jasoda Sutar (defendant No.1 in the suit) filed on behalf of defendant No.7-Achyutananda Maharana (petitioner herein).

3. Mr. Nayak, learned counsel for the petitioner submits that in C.S.No.1201 of 2003(I) filed for partition, Smt. Jasoda Sutar has been arrayed as defendant No.1 and the petitioner herein has been arrayed as defendant No.7. Said Smt. Jasoda Sutar has been set ex parte as she neither appeared after receiving the summons nor filed her written statement. In course of trial, defendant No.7 (petitioner herein) filed the evidence in affidavit of defendant No.1 under Order XVIII Rule 4 CPC intending to examine her as a witness on his behalf. The plaintiff objected to acceptance of the said affidavit stating that since defendant No.1 has been set ex parte and intends to support the case of the defendant No.7, without filing her written statement, she should not be permitted to be a witness and her evidence in affidavit should not be accepted. Learned trial Court considering the objection of the plaintiff rejected the said affidavit. Hence, the CMP has been filed.

3.1 Challenging the said order under Annexure-6, Mr. Nayak, learned counsel for the petitioner submits that Order XVI Rule 21 CPC, enables a party to the suit to examine another party of the said suit as witness on his behalf. Learned Civil Judge failed to appreciate that defendant No.1 is not going to lead evidence on her behalf. Instead, she is intended to be examined on behalf of defendant No.7, which is permissible under law. Even otherwise, she is a vital witness to the suit to establish the claim of defendant No.7. Thus, learned Civil Judge should not have rejected the evidence in affidavit of defendant No.7. He relied upon the ratio in the case of ***Braja Mohan Patra Vs. Ananta Charan Patra and others, reported in AIR 2003 Ori 209 as well as the case of V.K. Periaswamy @ Perianna Gounder Vs. D.Rajan, reported in AIR 2001 Madras 410*** in support of his case.

3.2 In order to examine the correctness of the submission made by Mr. Nayak, learned counsel, it would be profitable to discuss the relevant provisions of the Code of Civil Procedure, 1908 with regard to examination of witness.

3.3 Sub-rule (1) of Order-XVI Rule 1 CPC, provides that the parties shall present in Court the list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court.

3.4 Sub-rule (3) thereto provides that the Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or

otherwise, any witness, other than those whose names appear in the list referred to in Subrule (1).

3.5 Rule-1-A provides that subject to the provisions of Sub-rule (3) of Rule 1, any party to the suit, without applying for summons under Rule 1, may bring any witness to give evidence or to produce documents. Further, the Court is empowered under Order V Rule 3 to direct personal appearance of a party to the suit.

4. Thus, it is clear from the aforesaid provisions that appearance of a party to the suit to lead evidence or produce documents is not prohibited. In the case of ***Sri Awadh Kishore Singh and Another v. Sri Brij Bihari Singh and Others reported in AIR 1993 Patna 122***, it is held as under:-

> "16. Now I proceed to consider the merit of the impugned order. By the impugned order, the plaintiffs have been debarred from examining defendant No. 2 as a witness on their behalf, as no order was passed by trial Court for acceptance of written statement filed by this defendant. No provision could be brought to our notice on behalf of any of the parties to show that a party is debarred from examining its adversary as a witness on his behalf. A plaintiff can examine any witness he so likes — the witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected. Therefore, in my view, trial Court has committed material irregularity in the exercise of jurisdiction in debarring the plaintiffs from examining defendant No. 2 as a witness on their behalf." (*emphasis supplied*)

4.1 Again, this Court in the case of ***Braja Mohan Patra (supra),*** it is held at paragraph-6 as under:-

> "6. In the case of Gurbakhsh Singh (AIR 1927 PC 230) (supra) keeping in view the facts involved in that case. Privy Council deprecated the practice of calling the opponent party as a witness in the following circumstances;
>
> "It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endevours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness."
>
> In the case of Mahunt Shatrugan Das (AIR 1938 P.C. 59) (supra) Privy Council deprecated the practice of the plaintiff withholding himself from the witness box and calling the defendant to be his witness."

Similar view has also been expressed by different High Courts.

5. From the above case laws, it emanates that although in the case of ***Shatrugan Das, Mahant substituted for Mahant Ram Lakhan Das alias Ram Lakhman Das Vs. Sham Das, Bawa and others, reported in AIR 1938 Privy Council 59***, tendering evidence by other party withholding his own witness by a party to the suit is deprecated, but discussing the ratio decided therein, this Court held that a party to the suit can examine its adversary as a witness to lead evidence. Thus, there cannot be any raise of eyebrows in permitting a defendant to examine the co-defendant as a witness on his behalf.

6. In the case at hand, there is another bottleneck to examine a co-defendant, namely, defendant No.1, who has been set ex parte and has not filed her written statement. Thus, the question arises as to whether a party, who is set ex parte and has not filed written statement, can be examined as a witness. Law is no more res integra on this issue. In the case of ***Radhamoni Padhiari –vrs- Tangudu Jaganatham and another***, reported in ***AIR 1978 Orissa 209***, it is held as follows:-

> "3. Legal position is settled beyond doubt that even if a defendant does not file a written statement, he is entitled to participate in the proceedings without any written plea. After the defendant in the instant case had been set ex parte, an application had been made to recall the order and to allow her to file a written statement and to participate in the proceeding. On 2nd of March, 1977, when that application was rejected, the trial Court should have made it clear that even if on the facts of the case the defendant was not being relegated to the position as on 1-2-1977, she was free to participate in the proceeding, cross-examine witnesses of the plaintiff and even lead evidence to meet the evidence led by the adversary. Once the defendant came forward in the case to participate in the proceedings, there was no justification to keep her out and the learned trial Judge would have acted within his discretion in an appropriate way by allowing the defendant to participate in the proceedings on terms of cost." (*emphasis supplied*)

7. Thus, it is crystal clear that even a defendant who is set ex parte can lead evidence subject to certain riders, which can be broadly stated as follows :-

Firstly, the witness cannot propound a new case or the case of its own;

Secondly, the witness must not have entered witness box in the said suit previously to lead evidence and has been cross-examined; and,

Thirdly, permitting a party to the suit to be examined on behalf of another, is always at the discretion of the Court.

8. Although there are divergent views on the issue of examining of a party as witness by another, taking into consideration the aforesaid case laws, I am of the considered view that there cannot be any absolute bar for a party in a suit to be examined as a witness on behalf of another. It is at the discretion of the Court to consider the same in the facts and circumstances of the case to allow or reject a request/prayer made by a party to examine another as a witness in the said suit.

9. In the instant case, this material aspect has not been considered by the learned trial Court. Hence, this Court, while setting aside the impugned order dated 27.11.2019 under Annexure-6 passed by the learned Civil Judge (Senior Division), Bhadrak in CS No.129 of 2003 (I) remits the matter to adjudicate it afresh giving opportunity of hearing to the parties concerned.

10. Since this order is passed without issuing notice to the opposite parties, they are at liberty to seek variance of the same if they feel aggrieved.

11. Before parting with the case I record my note of appreciation for Mr. Bansidhar Baug and Mr. Bibekananda Bhuyan, learned counsels for their able assistance in deciding the aforesaid question of law.

12. With the aforesaid observation and direction, the CMP is disposed of.

12.1 Authenticated copy of this order downloaded from the website of this Court shall be treated at par with certified copy in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

—— o ——

2021 (I) ILR - CUT- 234

B.P.ROUTRAY, J.

CRLMC NO.1507 OF 2020

ADM COMMANDANT .....Petitioner

.V.

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

THE ARMY ACT, 1950 – Section 104 read with Sections 475 & 167(2) of the Code of Criminal Procedure, 1973 – Offence relating to marriage

and demand of dowry (Civil offence) committed by the Army officer (Major) – Accused arrested & produced before the learned SDJM – Application filed to hand over the accused to military custody – Application allowed by the learned SDJM – Such order challenged before the revisional Court (Session Court) – Revisional Court set aside the order of the SDJM and directed to produce the accused before the Court below (SDJM Court) – Order of Session court challenged – Held, the custody of Army Officer cannot be examined at this stage pending investigation and the stage to exercise the option for custody has not reached yet awaiting submission of police report U/s.173(2) of the Cr.P.C. – Hence the order of the Session Court does not require any interference.

Case Law Relied on and Referred to :-

1. AIR 1969 SC 814 : Som Datt Datta Vs. Union of India & Ors.
2. 2011(15) SCC 492 : S.K.Jha Commodre Vs. State of Kerala and Anr.

For Petitioner : Mr.Gyanaloka Mohanty.
For Opp. Parties : Mr.M.K.Mohanty,Addl. Standing Counsel, (For O.P.No.1)
Mr.Gokulananda Mohapatra, (For O.P.No.2)
Mrs.Rajdipa Behura, (For O.P.No.3)

JUDGMENT Date of Hearing :13.11.2020 : Date of Judgment:02.12.2020

B.P.ROUTRAY, J.

The petitioner, who is officiating as Adm Commandant, For Station Commander, Station Headquarters, Bhubaneswar has challenged the impugned order dated 20.10.2020 passed by the learned Sessions Judge, Khurda in Criminal Revision No.74 of 2020 by invoking jurisdiction under Section 482 of the Cr.P.C..

2. The necessary facts of the case, without unnecessary details, are stated as follows:-

Opposite party No.3, Soumya Ranjan Pati is presently serving as Major of 17 Sikh L.I. in Indian Army. He married to opposite party No.2, namely, Tejesmita Mohapatra in the year 2013. On 7.10.2020, she lodged the F.I.R. in Bhubaneswar Mahila P.S.Case No.58 dated 7.10.2020 against opposite party No.3 and others alleging commission of offences under Sections 498-A/323/326/307/ 406/506/34/120-B of the Indian Penal Code and Section 4 of the Dowry Prohibition Act. On 8.10.2020, opposite party No.3 was arrested in connection with the said case and produced before the

learned S.D.J.M., Bhubaneswar. Then a petition was filed by the present petitioner praying to deliver opposite party No.3 to military custody under the provisions of Section 104 of the Army Act read with Sections 475 and 167(2) of the Code of Criminal Procedure. The learned S.D.J.M., Bhubaneswar allowing the said prayer of the petitioner directed for handing over of military custody of opposite party No.3. The relevant portion of the said order of the learned S.D.J.M., Bhubaneswar is reproduced below:-

> "……The offences involved in this case come under the definition of civil offence as defined under the Act. As per section 69 of the Army At, 1950 as accused alleged to have committed any of the civil offences is to be tried by the court martial. Further the section 475 of the Cr.P.C. directs a court to deliver such a person to the commanding officer of the unit to which he belongs or to the nearest commanding officer for the purpose of being tried by a court martial. Honoring the provision of section 475 Cr.P.C. the provisions of army act and the object of the special statute I hold it proper to hand over the accused to the military custody for the purpose of being tried by the court martial. But at the same time to maintain sanctity of section 70 of the army act it is directed if a prima facie case concerning any offence mentioned in section 70 comes forth the commanding officer shall produce the accused before this court immediately. However, it is made clear that this order shall not prejudice the investigation of the present case……."

3. Then, opposite party No.2 filed the revision case before the learned Sessions Judge, Khurda challenging said order of the learned S.D.J.M., Bhubaneswar in handing over military custody of opposite party No.3. The learned Sessions Judge in the impugned order set aside the order of the learned S.D.J.M., Bhubaneswar. The operative portion of the order of the learned Sessions Judge is reproduced below:

> "15. In the result, therefore, the criminal revision is allowed on contest against the opposite parties. Consequently, the impugned order dated 9th October, 2020 passed by the learned SDJM, Bhubaneswar in C.T.Case No.4312 of 2020 is hereby set aside. O.P.No.2 is directed to produce O.P.No.3 before the learned Court below on 02.11.2020 positively and in the event of his production, the learned Court below shall dispose of the petition dated 09.10.2020 filed by O.P.No.2 relating to the custody of O.P.No.3 in accordance with law."

4. This order of the learned Sessions Judge, Khurda is impugned before this Court. The main thrust of argument of the petitioner before this Court is in two folds. First, the order of the learned S.D.J.M. being pure interlocutory in nature, the revision application filed under Section 397 of the Cr.P.C. before the learned Sessions Judge is not maintainable. Secondly, the learned Sessions Judge has erred in law by applying the provisions of Sections 125

and 126 of the Army Act, whereas the case of the petitioner to take custody of opposite party No.3 is under Section 104 of the Army Act.

5. Opposite party No.2, on the other hand, contends that learned S.D.J.M., Bhubaneswar has committed illegality by handing over the custody of opposite party No.3 to military before the accused is charged for the offences, which was rectified by the learned Sessions Judge in the revision application. He, thus supports the finding of the learned Sessions Judge made in the impugned order.

6. Opposite party No.3, who is accused in the criminal case, argues in the same line with the petitioner supporting the order of the learned S.D.J.M., Bhubaneswar. In addition, it is also submitted on behalf of opposite party No.3 that he is a cancer patient and presently undergoing treatment in the cancer Hospital of Army at Delhi, and therefore, he should be allowed to remain in military custody to facilitate his better treatment.

7. On the backdrop of such controversy relating to custody, the admitted facts remain that opposite party No.3 is a subject to the Army Act and he is an accused in Bhubaneswar Mahila P.S.Case No.58 of 2020 for the offences aforestated. Undoubtedly, the offences alleged against opposite party No.3 are "civil offences" within the meaning of Section 3 (ii) of the Army Act. Further, the definition of 'offence' described in Section 3(xvii) includes the civil offence. Section 475 of the Cr.P.C. read with Sections 125, 126, 69 and 70 of the Army Act and the provisions of Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1978 authorizes the Army authority for military custody of a subject of Army Act for the purpose of Court-martial.

8. The sole controversy revolves round the question, whether the custody of a subject of the Army Act accused of commission of civil offences against a non-subject of Army, can be handed over to military at the stage pending investigation?

9. The decision of the Hon'ble Supreme Court rendered in the case of ***Som Datt Datta vs. Union of India and others***, reported in AIR 1969 SC 814 is relied on in this regard by all parties. In addition to the same, opposite party No.3 further relies on a decision of the Hon'ble Supreme Court in the case *of* ***S.K.Jha Commodre vs. State of Kerala and another,*** reported in 2011(15) SCC 492, whereas the case of ***Chandra Mohan Shukla*** of Guahati High Court reported in 2007 CriLJ 4516 has been relied on by the petitioner as well as opposite party No.3.

10. In the case of *Som Datt Datta (supra)*, the Hon'ble Supreme Court has observed as follows:-

> "It was argued on behalf of the petitioner that there was no notice given by the Commanding Officer to the Magistrate under Rule 5 that the petitioner should be tried by a Courtmartial and hence the criminal court alone had jurisdiction under Rule 3 to conduct proceedings against the petitioner for the offences charged. In our opinion, the argument on behalf of the petitioner is misconceived. The rules framed by the Central Government under Section 549 of the Criminal Procedure Code apply to a case where the proceedings against the petitioner have already been instituted in an ordinary criminal court having jurisdiction to try the matter and not at a stage where such proceedings have not been instituted. It is clear from the affidavits filed in the present case that the petitioner was not brought before the Magistrate and charged with the offences for which he was liable to be tried by the Court-Martial within the meaning of Rule 3 and so the situation contemplated by Rule 5 has not arisen and the requirements of that rule are therefore, not attracted. It was pointed out by Mr.Dutta that after the First Information Report was lodged at Palavaran police station a copy thereof should have been sent to the Magistrate. But that does not mean that the petitioner "was brought before the Magistrate and charged with the offences" within the meaning of Rule.3. It is manifest that Rule 3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge-sheet. The provisions of this rule cannot be invoked in a case where the police had merely started investigation against a person subject to military, naval or air force law. With regard to the holding of the inquest of the dead-body of Spr. Bishwanath Singh it was pointed out by the Attorney-General that Regulation 527 of the Defence Services Regulations has itself provided that in cases of unnatural death that is death due to suicide, violence or under suspicious circumstances information should be given under Section 174, Criminal Procedure Code to the Civil authorities, and the conduct of Maj. Agarwal in sending information to the Civil Police was merely in accordance with the provisions of this particular regulation. For these reasons we hold that Counsel for the petitioner is unable to make good his argument on this aspect of the case."

11. In the case of Chandra Mohan Shukla, which was rendered on 17th July, 2007, it is observed by the Guahati High Court, as follows:-

> "70. What crystallizes from the above discussion is that even when an investigation by police into an offence alleged to have been committed by a person subject to the Army Act is in progress, there is no impediment, on the part of the competent military authority, to either investigate the case in terms of Chapter V of the Army Rules or in holding. Court-martial if the accused is not in the custody of the Criminal Court or in the custody of the police on the orders of the Criminal Court. The decision in Som Datt Datta 1969(Cri LJ 663 (supra) is a case of this nature, where the Army Officer was put to trial even when the investigation by police was pending. If, however, the accused is arrested during investigation and brought before a Magistrate, Rule 4 gets, attracted and a notice to the competent military authority to exercise their option to try the accused has to be given."

12. But every confusion has been cleared by the Hon'ble Supreme Court in the case of *S.K.Jha Commodre* (supra). It is a short judgment of the Hon'ble Supreme Court, which is produced below in entire.

"O R D E R

1. Heard the learned counsel for the parties in extenso.

2. It is clear to us that the judgment of the High Court is in conformity with the judgment of the Constitution Bench of this Court in *Som Dutt Datta vs. Union of India*. The Constitution Bench while construing Rule 3 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952 read with Section 549 of the CrPC,1898 (now Section 475 CrPC,1973) held that the option as to whether the accused be tried before the criminal court or by a Court Martial could be exercised only after the police had completed the investigation and submitted the charge-sheet and that the provisions of the Rule could not be invoked in a case where the police had merely started an investigation against a personnel subject to military, naval or air Force law.

3. The facts of the present case indicate that three naval officers were arrested on 10-1-2008 for offences punishable under Sections 143, 147, 148, 452, 307, 326 and 427 read with Section 149 IPC and some other penal laws. They were produced before the Magistrate on the 11-1-2008 who remanded them to judicial custody. An application was filed on 14-1-2008 by the Commanding Officer of the Naval Unit to which they belonged for handing over the accused for trial under the Navy Act, 1957. This application was rejected by the Magistrate holding that the stage of consideration of the application would arise only on the completion of the police investigation which was still at a preliminary stage and that the request of the Commanding Officer was premature. The order of the Magistrate was challenged before the High Court of Kerala in revision. This too has been dismissed on similar grounds.

4. We see from the facts that the observations of the Constitution Bench in *Som Datt Datta* case apply fully to the facts herein. The stage at which the option can be exercised by the Commanding Officer (as to whether the accused should be tried before a Court Martial or a criminal court) cannot be examined at this stage as the investigation has not been completed and a charge-sheet has yet to be submitted.

5. The appeal is accordingly dismissed."

13. In the factual aspects of the present case at hand, the same is found squarely covered by the decision of the Hon'ble Supreme Court in the case of *S.K.Jha (supra)*. Here is a case, the F.I.R. was lodged on 7.10.2020, opposite party No.3(accused) was arrested and produced on the next day before the learned S.D.J.M., Bhubaneswar and then on the same day the Military custody of the accused (opposite party No.3) was sought for by the Army authority and it was allowed. It is thus clear that, the custody of the accused was handed over to the Army authority pending investigation and before submission of the police report under Section 173(2) of the Cr.P.C.. What

is contended on behalf of the petitioner as well as opposite party No.3 that, the custody of opposite party No.3 pending investigation is in terms of provision under Section 104 of the Army Act and not under Sections 125 and 126 or under the provisions of the Criminal Procedure Code is not seen with substance. It is for the reason that the provisions of Section 104 has to be read in coherence with the provisions of 125 of the Amy Act, Section 475 of the Code and the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1978. The provisions under Section 104 cannot stand alone to decide the custody of the accused in respect of the civil offences committed against a civilian or non-subject of Army Act. Moreover, the decision rendered by the Hon'ble Supreme Court in the case of *S.K.Jha* leaves no scope or any confusion with regard to custody of opposite party No.3 in the present context.

14. It is thus clear that, the custody of opposite party No.3 cannot be examined at this stage pending investigation and the stage to exercise the option by the petitioner for custody of opposite party No.3 has not reached yet awaiting submission of police report U/s.173(2) of the Cr.P.C.. Accordingly, I do not see any merit in the present Criminal Misc. Case to interfere with the order of the learned Sessions Judge.

15. So far as the objection raised by the petitioner regarding maintainability of revision application before the learned Sessions Judge is concerned, the same is not found sustainable and in my humble opinion, the revision is maintainable. It is for the reason that, the question of custody of the accused is a matter of substantial right and the law is settled that any order which substantially decides certain rights of the parties cannot be said to be interlocutory order so as to bar the revisional jurisdiction under Section 397(2). Therefore, no impropriety or illegal exercise of jurisdiction is found with the learned Sessions Judge.

16. With regard to the submission of opposite party No.3 that he is a cancer patient and undergoing treatment at Army Hospital, Delhi, he is at liberty to make appropriate prayer in this regard before the concerned court.

17. In view of the discussions made above, the CRLMC is dismissed and the petitioner is directed to produce opposite party No.3 on any suitable date to be fixed by the learned S.D.J.M., Bhubaneswar within a period of one month from the date of production of a copy of this order, and consequently the learned S.D.J.M., Bhubaneswar is directed to proceed with the case in accordance with law.

—— o ——