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MOHAMMAD RAFIQ, C.J.

ARBP NO. 56 OF 2018

M/S. SJ BIZ SOLUTION PVT. LTD. .....Petitioner

.V.

M/S. SANY HEAVY INDUSTRY INDIA PVT. LTD. .....Opp. Party

ARBITRATION AND CONCILIATION ACT, 1996 – Section 2 and 11 read with section 20 – Provisions under – Appointment of Arbitrator – Territorial jurisdiction of High court to entertain application under section 11 of the Act – Clause of agreement specifies the place of arbitration shall be at Pune – Whether High court of Orissa has the territorial jurisdiction to appoint Arbitrator? – Held, No, – Reasons indicated.

Case Laws Relied on and Referred to :-

1. (2019) 8 SCC 714 : Mayavati Trading Private Limited Vs. Pradyuat Deb Burman.
2. (2017) 7 SCC 678 : Indus Mobile Distribution Pvt. Ltd. Vs. Datawind Innovations Private Ltd. & Ors.
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4. (2012) 9 SCC 552 : Bharat Aluminium Company (BALCO) Vs. Kaiser Aluminium Technical Services Inc.
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For the Petitioner : Mr. Avijit Pal.

For the Opp.Party : Mr. A. Bhattacharya & M/s. Baibaswata Panigrahi.

JUDGMENT Date of Judgment : 01.10.2020

MOHAMMAD RAFIQ, C.J.

Petitioner-M/s. SJ Biz Solutions Pvt. Ltd. has filed this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "Act, 1996") seeking appointment of an independent arbitrator to *arbitrate* the disputes between the petitioner and the opposite party.

The case of the petitioner as set up in the present application is that the opposite party-M/s. Sany Heavy Industry India Pvt. Ltd. is the

manufacturer of heavy construction equipments. The petitioner approached the opposite party for dealership in the State of Odisha. Accordingly, a dealership agreement was entered into between the parties in January, 2014, initially for a period of one year and it was further renewed in the year 2014, 2015 and 2016, each time for a period of one year. Lastly, the contract was extended on 01.01.2017 for a period of one year till 31.12.2017. Pursuant to the agreement, the petitioner submitted Bank Guarantee for a sum of Rs.25,00,000/- (Rupees Twenty-five Lakh) drawn in the Bank of Baroda in favour of the opposite party. Even as the dealership agreement was subsisting, the opposite party without any rhyme or reason, and without any notice to that effect, illegally terminated the agreement on 04.09.2017, much prior to expiry of the period. The opposite party did not even pay the legitimate dues of the petitioner. The representatives of the petitioner met the opposite party to discuss the pending issues. The minutes of meeting held on 28.12.2017 were drawn up for full and final settlement of dues for resolution of all the issues. The minutes were signed by the representatives of both the parties. The issues in respect of the spare parts, FOC (Free of Cost Accessories), claims regarding reimbursement, machine delivery on account of M/s. Ganesh Paltasingh and release of SY 2010 and SY 220 were discussed and finalized. The opposite party agreed to pay an amount of Rs.33,49,926/- to the petitioner in respect of the claims of FOC. The balance claim of Rs.4,44,879/- was subject to further reconciliation. The opposite party however did not make any payment till March, 2018 in terms of the above said settlement. The petitioner on 24.03.2018 requested the opposite party for release of the said amount as he had to settle the statutory dues of the Government prior to 31.03.2018. The opposite party vide its e-mail dated 30.03.2018 informed the petitioner about the amount receivable from him and requested the petitioner to get NOC from all customers in respect of FOC amount.

As the matter stood thus, the petitioner received a letter dated 05.04.2018 from Bank of Baroda, Barbil Branch, wherein it was intimated to the petitioner that they have received a notice dated 29.03.2018 from the opposite party invoking Bank guarantee in order to make payment of Rs.25,00,000/-. In these circumstances, the petitioner filed an application under Section 9 of the Act, 1996 before the learned District Judge, Khurda at Bhubaneswar vide ARBP No.25 of 2018. The learned District Judge by his order dated 09.04.2018 issued a notice to the opposite party, directing it to maintain status quo as on the date in respect of encashment of the bank

guarantee. However, despite such direction of the learned District Judge, the Bank guarantee was encashed and the money remitted to the opposite party. The petitioner therefore by letter dated 16.04.2018 submitted its claim to the opposite party, who by its e-mail dated 04.05.2018, acknowledged the receipt of the claim of the petitioner dated 16.04.2018 on 03.05.2018, but refuted all the claims of the petitioner. Disputes having thus arisen between the parties, the petitioner by its letter dated 23.07.2018 invoked the arbitration Clause 15.3 of the Dealership Agreement dated 17.01.2017 and requested the opposite party to appoint a sole Arbitrator. The said letter was received by the opposite party on 01.08.2018. Since the opposite party failed to appoint the arbitrator within a period of 30 days, the petitioner was constrained to file this petition under Section 11(6) of the Act, 1996.

Mr. Avijit Pal, learned counsel for the petitioner submitted that even if the parties in clause 15 of the Dealership Agreement (Annexure-1) agreed that the place of arbitration shall be at 'Pune', the jurisdiction of this Court to entertain the present application filed under Section 11(6) of the Act, 1996 is not excluded as cause of action, wholly, or at least in part, has arisen in the territory of the State of Orissa. It is contended that in view of Section 20(1) of the Act, 1996 the parties are free to chose the place of arbitration. The word 'place' in Section 20 has been used in the sense of the word 'Venue'. Even if the parties in the present case in clause 15.3 of the Dealership Agreement, agreed upon the place of arbitration at 'Pune', the word 'place' used therein only denotes the venue of arbitration proceedings, which can take place anywhere. This becomes further clear from clause 16 (13.4) of the agreement which provides that "all disputes arising out of or in any way connected with these presents shall be subject to the jurisdiction of the Courts, having territorial jurisdiction." Clause 17 of the agreement also clarifies this position by indicating the geographical areas of territory, would be the entire districts of Odisha. It is submitted that in view of the definition of the Court given in Section 2(1)(e) of the Act, 1996, the Courts at Bhubaneswar would have the jurisdiction to entertain the petition under Section 9 of the Act, 1996 and for the same reason, this Court would also have the territorial jurisdiction, especially in view of Section 11(11) of the Act, 1996 which provides that where the request has been made to more than one High Court, the High Court where request has been made first in point of time, which in this case is Orissa High Court, would be competent to decide the application. Learned counsel for the petitioner in support of his arguments relied upon the decision

of the Supreme Court in the case of ***Mayavati Trading Private Limited vs. Pradyuat Deb Burman, (2019) 8 SCC 714***.

Mr. A. Bhattacharya, learned counsel for the opposite party has argued that Section 20 of the Act, 1996 has given freedom to the parties to decide the place of arbitration. If the parties in the agreement have chosen a particular place as the place of arbitration, only the High Court having territorial jurisdiction over that place would be competent to entertain and decide the application under section 11 for appointment of arbitrator. It is denied that the opposite party has illegally invoked the Bank guarantee and that the opposite party has forfeited the right to appoint the Arbitrator. In fact, the opposite party has already appointed Hon'ble Justice (Retd.) Mr. S.R. Sathe, Bombay High Court, residing at Pune, as the sole arbitrator. The present application ought to be therefore dismissed as infructuous. As regards the Bank Guarantee, it is submitted that notice on the petition filed by the petitioner under Section 9 of the Act, 1996 was issued by the learned District Judge, Khurda on 09.04.2018 to the opposite party. But in the meantime, the opposite party had already invoked the bank guarantee on 29.03.2018 by encashing the amount even before receiving such notice. Therefore, the petition under Section 9 was also rendered infructuous.

Learned counsel submitted that this controversy has been set at rest by a catena of decisions of the Supreme Court. Learned counsel has in support of his argument relied on judgment of the Supreme Court in ***Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Private Ltd. & Ors.***, ***(2017) 7 SCC 678*** and ***BGS SGS Soma JV vs. NHPC Limited, (2020)4 SCC 234***. It is argued that the Supreme Court in ***Indus Mobile Distribution Pvt. Ltd., supra*** has reiterated the same law, as in ***Bharat Aluminium Company (BALCO) vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552***, as to the autonomy given to the parties to choose the place of arbitration under Section 20 of the Act 1996. These and other cited and relevant judgments shall be discussed at the appropriate place hereinafter.

I have given my thoughtful consideration to rival submissions and perused the material on record.

In order to appreciate the rival submissions, it is deemed appropriate to reproduce clause 15.3 of the dealership agreement, which reads as follows:

"All disputes arising out of the execution or in relation to this Agreement shall be settled amicably through friendly negotiation between the parties. If a settlement cannot be reached, any dispute, controversy or claim arising out of or in relation to this Agreement, including the validity, invalidity, breach or termination thereof, shall be referred for arbitration, to sole arbitrator appointed by the Managing Director/CEO of Sany Heavy Industry India Pvt. Ltd. Place of arbitration shall be at Pune & language of arbitrator proceeding shall be English."

The Parliament has in its legislative wisdom given the freedom to the parties to choose the place of arbitration, which is evident from Section 20 of the Act, 1996. The Constitution Bench of the Supreme Court in ***Bharat Aluminium Company (BALCO), supra***, examined the matter with regard to "subject matter of arbitration" vis-a-vis "subject matter of suit" in the context of the definition of the Court as given under Section 2(1)(e) of the Act, 1996. The Constitution Bench in that judgment while dealing with the concept of 'autonomy' given to the parties as to selection of the place of arbitration, also extensively examined Section 20 of the Act, 1996. Relevant discussion in para 96 to 98 of the report is reproduced hereunder:

"96. Section 2(1) (e) of Arbitration Act, 1996 read as under:

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

(a) – (d) xxx xxx

(e) "Court" in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2((1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts, i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of

arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

97. The definition of Section 2(1)(e) includes "subject-matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

"98. We now come to Section 20, which is as under:-

"20. Place of arbitration- (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

An identical issue came up before the Supreme Court in the case of ***Swastik Gases Private Limited vs. Indian Oil Corporation Limited, (2013) 9 SCC 32.*** In that case, the respondent-Indian Oil Corporation Limited appointed M/s. Swastik Gases (P) Ltd. as their consignment agent at Jaipur, Rajasthan. The relevant clause in the agreement between the parties provided that the agreement shall be subject to the jurisdiction of the Courts at Kolkata. Swastik Gases (P) Ltd. invoked clause 18 of the arbitration clause and filed application under Section 11(6) of the Act, 1996 before the Rajasthan High Court for appointment of arbitrator. The respondent-Indian Oil Corporation raised the plea of lack of territorial jurisdiction of Rajasthan High Court contending that the agreement has been made subject to jurisdiction of the Courts at Kolkata. The designated judge held that the Rajasthan High Court did not have territorial jurisdiction to entertain the application under Section 11(6) of the Act, 1996. The order of the High Court was challenged before the Supreme Court on the ground that the words like "alone", "only", "exclusive" or "exclusive jurisdiction", have not been used in the agreement. Therefore, even the Rajasthan High Court would have territorial jurisdiction. Repelling the argument, the Supreme Court held that use of such words inasmuch as non-use of such words does not make any material difference as to the intention of the parties in having in clause 18 of the agreement that the courts at Kolkata shall have the jurisdiction. Relevant discussion in paras-31 and 32 of the report is worth quoting:-

> *"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11 (12) (b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded ?*
>
> *32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata*

shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."

The Supreme Court in ***Indus Mobile Distribution Private Limited, supra*** while revisiting the Constitution Bench decision rendered in ***Bharat Aluminium Company,*** supra, considered the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) w.e.f. 23.10.2015. The Supreme Court while analyzing the definition of the 'Court' under Section 2(1)(e) and Section 20 of the Act,1996 categorically held that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. In that case, the seat of arbitration was Mumbai. The relevant clause of the agreement made it clear that the jurisdiction exclusively vests in the Mumbai courts. The Supreme Court held that under the Law of Arbitration, unlike the code of Civil Procedure, which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The observations of the Supreme Court in para-19 of the judgment in the case of ***Indus Mobile Distribution Private Limited***, supra are quoted hereunder:-

"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties."

The Supreme Court in ***M/s. EMKAY Global Financial Services Ltd. vs. Girdhar Sondhi, (2018) 9 SCC 49,*** examined the correctness of the judgment of Delhi High Court challenged before it. The case was that an award was rendered between the parties in an arbitration proceeding which was held at Delhi, whereas the parties had agreed in the agreement that the exclusive jurisdiction of the Courts would be on the Courts at Mumbai. The respondent filed a petition under Section 34 of the Act, 1996 before the Additional District Judge, who referring to the exclusive jurisdiction clause contained in the agreement, held that the Court at Delhi would have no jurisdiction to proceed further in the matter and, therefore, rejected the Section 34 application. The Delhi High Court reversed the order of the learned Additional District Judge. Challenge was made to the judgment of the Delhi High Court before the Supreme Court. The Supreme Court set aside the judgment of the Delhi High Court and restored the order of the Additional District Judge. Examining the effect of an exclusive jurisdiction clause and also considering the law laid down in ***Indus Mobile Distribution Pvt. Ltd. (supra),*** the Supreme Court in ***M/s. EMKAY Global Financial Services Ltd. Supra,*** in paras-8 and 9 of the report held as under:-

> *"8. The effect of an exclusive jurisdiction clause was dealt with by this Court in several judgments, the most recent of which is the judgment contained in Indus Mobile Distribution Pvt. Ltd. (supra). In this case, the arbitration was to be conducted at Mumbai and was subject to the exclusive jurisdiction of courts of Mumbai only. After referring to the definition of "Court" contained in Section 2(1)(e) of the Act, and Section 20 and 31(4) of the Act, this Court referred to the judgment of five learned Judges in BALCO vs. Kaiser Aluminum Technical Services Inc. in which, the concept of juridical seat which has been evolved by the courts in England, has now taken root in our jurisdiction.*
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> *xx xx xx*
> *xx xx xx*
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> *9. Following this judgment, it is clear that once courts in Mumbai have exclusive jurisdiction thanks to the agreement dated 03 July 2008, read with the National Stock Exchange bye-laws, it is clear that it is the Mumbai courts and the Mumbai courts alone, before which Section 34 application can be filed. The arbitration that was conducted at Delhi was only at a convenient venue earmarked by the National Stock Exchange, which is evident on a ready of Bye-law 4(a)(iv) read with sub-clause (xiv) contained in Chapter XI."*

The Supreme Court in a recently delivered decision in ***Brahmani River Pellets Limited vs. Kamachi Industries Ltd.***, (2020)5 SCC 462 considered whether the Madras High Court could exercise jurisdiction under

Section 11(6) of the Act, 1996 to appoint the sole arbitrator at the instance of the respondent, despite the fact that the agreement contains the clause that venue of arbitration shall be Bhubaneswar. The appellant challenged the said order by questioning the jurisdiction of the Madras High Court on the ground that since the parties had agreed that the seat of arbitration shall be at Bhubaneswar, only the Orissa High Court has exclusive jurisdiction to appoint the arbitrator. The respondent argued before the Supreme Court that since the cause of action arose at both the places, i.e., Bhubaneswar and Chennai, both Madras High Court as well as Orissa High Court will have supervisory jurisdiction. It was argued that in domestic arbitration, unless the parties tie themselves to an exclusive jurisdiction of the court in the agreement, mere mention of venue as a place of arbitration will not confer exclusive jurisdiction upon that court. It was also submitted that mere expression "venue of arbitration shall be Bhubaneswar" will not confer exclusive jurisdiction upon the Orissa High Court, particularly in view of the definition of the 'Court' as stipulated in Section 2(1)(e) of the Act, 1996, which confers power on the Principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of a suit. The Supreme Court relying the Constitution Bench decision of ***Bharat Aluminium Company i.e. Balco, supra*** repelled the argument in paras-16 and 17 of the report in ***Brahmani River Pellets Limited, supra*** *while observing thus***:-**

> *"16. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik, non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.*
>
> *17. When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside."*

The Supreme Court in ***BGS SGS SOMA JV*** supra, relied upon by learned counsel for the opposite party, was examining Sections 20 and 2(1)(e)

of the Act, 1996, in the context of clause 67.3(vii) of the agreement executed between the parties in that case which provided that "Arbitration proceedings shall be held at New Delhi/Faridabad, India". Following ratio of the Constitution Bench decision in ***BALCO*** supra, it was held that test for determination of juridical seat, wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", the seat of arbitration, where alternative venues for conduct of proceedings are mentioned in arbitration agreement, shall be determined on the basis of venue chosen for conducting arbitration proceedings, to the exclusion of all other courts, even the courts where part of the cause of action may have arisen. The issue involved in that case was thus slightly different than the one which is being examined in the present matter. Nonetheless, the law regarding the legislative recognition given to party autonomy as to the choice of the seat of arbitration has been reiterated.

Prior to Section 11(6A), the Supreme Court in several judgments, leading one being ***SBP & Co. vs. Patel Engineering Ltd. & another***, reported in (2005)8 SCC 618, had enunciated the law that at the stage of consideration of Section 11(6) application, the Chief Justice or his designate need not merely confine the examination of the existence of an arbitration clause but could also go into certain preliminary questions such as stale claim, accord, and satisfaction having been reached etc. But this position underwent a significant change after insertion of Sub-Section (6A) in Section 11 by Amending Act of 2015 w.e.f. 23.10.2015. It was this provision which the Supreme Court interpreted in ***Duro Felguera, S.A. vs. Gangavaram Port Limited, (2017) 9 SCC 729*** and held that all that the Court at the stage of Section 11 need to see is whether an arbitration agreement exists, nothing more, nothing less. It was held that legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator. The Supreme Court in ***Mayavati Trading Private Limited, supra*** relied by learned counsel for the petitioner also similarly held that after insertion of Sub-Section (6A) in Section 11 of the Act, 1996, by Amendment Act, 2015 w.e.f. 23.10.2015, the Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement. Therefore, the argument of the learned counsel for the petitioner that while considering the petition u/s 11(6) of the Act, this Court ought to only examine the existence of the arbitration agreement and should

leave all other questions, including the question of territorial jurisdiction, open for consideration by the arbitrator in the scope of section 16 of the Act, 1996, cannot be countenanced. The Supreme Court in ***Mayavati Trading Private Limited, supra*** merely held that "existence" of "arbitration" agreement as referred to in sub-section (6A) of Section 11 inserted by 2015 amendment w.e.f. 23.10.2015 has correctly been interpreted in earlier judgment in ***Duro Felguera, S.A. supra.*** The subsequent judgment in ***United India Insurance Co. Ltd. Vs. Antique Art Exports (P) Ltd., (2019) 5 SCC 362*** was held to have not laid down the correct law and was therefore, overruled. The decision in the case of ***Mayavati Trading Private Limited, supra*** therefore does not in any manner help the petitioner as it does not deal with the question of territorial jurisdiction of the High Court.

In view of the above discussion, it must be held that this Court does not have the territorial jurisdiction to entertain the present petition filed under Section 11(6) of the Act, 1996, which is accordingly dismissed as not maintainable.

With the above observations, the ARBP stands dismissed.

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.

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2020 (III) ILR - CUT- 364

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

WRIT PETITION (CIVIL) NO. 5958 OF 2019

M/S. SONA SPUN PIPE INDUSTRIES LTD. ……..Petitioner

.V.

STATE OF ODISHA, MSME DEPARTMENT & ORS. ……...Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Scope of judicial review of administrative action – When and under what circumstances – Held, (i) it is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere"- (ii) unfairness in decision making process can be set right by judicial review – (iii) the Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made, and further that the judicial review of administrative action is intended to prevent arbitrariness – If the process adopted or decision made by the authority is not mala fide, not intended to favour someone and is neither arbitrary nor irrational, and if it cannot be concluded that no responsible authority acting reasonably could have reached such a decision and if the public interest is not affected, no interference should be made under Article 226 of the Constitution – Constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case – It cannot be put in a straight-jacket formula – Settled legal proposition that normally the Constitutional Court should be slow to interfere with the opinion expressed by the team of Experts. (Paras 27 to 32)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order rejecting the claim of the petitioner for inclusion of its product i.e. AC Pressure Pipe in the rate contract list – Further prayer seeking mandamus to MSME Department to include its product – Scope of judicial review and power of the court to pass such order – Held, true it is, that the decision arrived at in the impugned order is subject to judicial scrutiny by this Court as to whether it falls within the domain of any illegality or unreasonableness and if it is so, this Court can interfere – However, this Court in exercise of power of judicial review has a limited scope to direct the Government to include a specific item of a particular industry in the rate contract list – In the instant case, the Engineer-in-Chief, RWSS Department and its team of Engineers, who are having expertise about the use and requirement of AC Pressure Pipes have vividly discussed on those aspects, therefore, this Court does not deem it appropriate to interfere with such decision making process of the Government, which it has taken relying on the opinion of various technical experts.

"In our view, the decision as to whether a particular item is required to be included in the rate contract list is completely within the domain of the Government and the decision has to be taken by the competent authority after due application of mind to relevant considerations in accordance with law. Unless the order impugned appears to be malafide, contrary to law, improper, irrational or otherwise unreasonable, this Court in exercise of power of judicial review would not be justified to interfere in such a decision. After examining the matter from all perspectives, we do not see any arbitrariness, impropriety or illegality in the impugned order, which has been passed by the authority referring to relevant provisions of Rules 2014, IPR, 2007 and on the basis of various clarifications received from the different authorities, who are having expertise in the field. Examined from the standpoint of Wednesbury's principle of unreasonableness, it cannot be said that the impugned decision is such which no reasonable person of ordinary prudent on given material could have arrived at. Even applying the doctrine of proportionality, it cannot be said that the competent authority in passing the impugned order has not maintained the sense of proportion between the goals and the means employed to achieve those goals, inasmuch as, the impugned order has a reasonable relationship to the general purpose for which it has been passed. Whatever material has been placed on record clearly establishes that the impugned decision is balanced and in proportion with the object of the power conferred upon the decision making authority."

(Paras 33 & 34)

Case Laws Relied on and Referred to :-

1. (1981) 4 SCC 716 : S.P. Kapoor (Dr.) Vs. State of H.P.
2. (2004) 2 SCC 65 : Bahadursingh Lakhu Bhai Gohil Vs. Jagdish Bhai M. Kamalia & Ors.
3. AIR 1952 SC 16 : Commissioner of Police, Bombay Vs. Gordhan Das Bhanji.
4. AIR 1978 SC 851 : Mohinder Singh Gill & Anr. Vs. The Chief Election
5. (2011) 3 SCC 287 : Commissioner, New Delhi. Kalyaneshwari Vs. Union of India & Ors.
6. (2018) 9 SCC 1 : Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Co. & Ors.
7. (2016) 8 SCC 622 : Central Coal Field Ltd. & Anr. Vs. SLL-SML (Joint Venture Consortium)
8. (1994) 6 SCC 651 : Tata Cellular Vs. Union of India.
9. (2007) 14 SCC 517 : Jagdish Mandal Vs. State of Orissa.
10. (2012) 8 SCC 216 : Michigan Rubber (I) Ltd. Vs. State of Karnataka.
11. (2018) 5 SCC 461 : Municipal Corporation, Ujjain & Anr. Vs. B.V.G. Indian Ltd. & Ors.
12. (1995) 3 SCC 42 : Consumer Education and Research Centre Vs. Union of India.
13. (1948) 1 KB 223: (1947) 2 All ER 680 : Associated Provincial Picture Houses Ltd. Vs. Wednesburry Corpn.
14. (2018) 5 SCC 462 : Municipal Corporation, Ujjain & Anr. Vs.

B.V.G. Indian Ltd. & Ors.
15. (2006) 6 SCC 162 : M.P. Gangadharan & Anr. Vs. State of Kerala & Ors.
16. (2011) 15 SCC 616 : Maharashtra Land Development Corporation & Ors. Vs. State of Maharashtra & Anr.
17. (2013) 6 SCC 620 : G. Sundarrajan Vs. Union of India.
18. AIR 1965 SC 491 : University of Mysore Vs. C.D. Govinda Rao.
19. (2003) 4 SCC 289 : Federation of Railway Officers Association Vs. Union of India.

For the Petitioner : Mr. P.P. Choudhury, Sr. Adv.
Mr. S.S. Kashyap & Mr. N.K. Rout.

For the Opp Parties : Mr. M.S. Sahoo, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 30.09.2020 : Date of Judgment: 15.10.2020

PER: MOHAMMAD RAFIQ, C.J.

This writ petition has been filed by M/s. Sona Spun Pipe Industries Ltd. challenging the order under Annexure-12 dated 31.08.2018 passed by the Additional Chief Secretary to the Government of Odisha in the Department of Micro, Small & Medium Enterprises (hereinafter referred to as 'MSME') whereby the application of the petitioner for inclusion of Asbestos Cement Pressure Pipe in the rate contract list for MSMEs, has been rejected. The petitioner has prayed to quash the said impugned order under Annexure-12 and to issue a writ of mandamus directing the opposite parties to approve the product of the petitioner for inclusion in the rate contract.

2. The case of the petitioner is that the petitioner is a limited liability Partnership Firm registered under the Indian Partnership Act, 1932, having its registered Office as well as the Factory at Gopiballavpur Road, Bankisole, Baripada in the district of Mayurbhanj. The petitioner purchased a sick unit from Odisha State Financial Corporation, Cuttack. The petitioner, being an MSME unit manufacturing Asbestos Cement Pressure Pipes (AC Pressure Pipes) was duly registered with the Directorate of Export Promotion & Marketing (hereinafter in short referred to as 'the DEP&M'), Odisha-opposite party No.2, for marketing assistance. The petitioner industry was registered with the Director of Industries and was granted DIC Production Certificate, Pollution Clearance and BUS marketing. The petitioner vide application dated 09.11.2027 under Anexure-1, applied to the DEP&M-opposite party No.2 for inclusion of its product i.e. AC Pressure Pipes in store item under the Rules for Rate Contract with Micro and Small Enterprises of Odisha, 2014 (hereinafter in short referred to as 'the Rules,

2014'). According to the petitioner, after receipt of the said application, the appropriate Sub-Committee of EP & M constituted by the State Government selected the item of the petitioner for inclusion in Rate contract and accordingly the opposite party No.2 sent the proposal to the opposite party No.1 vide letter dated 26.12.2017 under Annexure-2 series for approval. As per the petitioner, the opposite party No.1 was required to give approval immediately enabling the DEP&M to issue the Rate Contract within sixty days from the date of application as per the EP&M Manual. The Additional Secretary of the opposite party No.1 by letter dated 06.02.2018 asked the opposite party No.2 as to how many MSME Units in Odisha are producing Asbestos Cement Pressure Pipes as per standard IS:1592/2003. Upon receipt of the said letter, the O.P. No.2 vide letter dated 15.02.2018 in turn required the Director of Industries and Directorate of Bureau of Indian Standard to intimate the details of MSME Units in respect of store items of AC Pressure Pipes. The Bureau of Indian Standard vide its letter dated 19.02.2018 conveyed the opposite party No.2 that the petitioner is the only unit in Odisha which is producing AC pressure pipes. Accordingly, the opposite party No.2 vide letter dated 04.04.2018 (Annexure-6) communicated the said information to the opposite party No.1 that petitioner is the only unit in the State of Odisha which manufacturing the said item. According to the petitioner, the opposite party No.1 due to gross malafide reasons kept the matter pending. It is stated by the petitioner that it has invested more than Rs.150.00 lakhs for production of AC Pressure Pipes and due to such inaction of the opposite parties the petitioner firm has sustained heavy loss. It is further submitted that for the rate contract Govt. requirement of minimum Rs.2.00 lacs is necessary and the Engineer in Chief, Rural Water Supply & Sanitation (RWSS) Department vide letter dated 21.11.2017 (Annexure-7) has confirmed the requirement of Rs.44.64 lakhs in total per annum to the Directorate of EP & M., which is much more than the minimum requirement.

3. It is alleged by the petitioner that though the O.P. No.2 with the approval of O.P. No.1 has renewed the rate contract in favour of different units on 17.03.2018, 19.03.2018 and 24.05.2018 and has also approved the fresh rate contract of one unit on 24.05.2018, but it did not take any decision on the petitioner's matter. Therefore, the petitioner approached this Court by way of filing W.P.(C) No. 10707 of 2018 seeking issuance of a direction to opposite party No.1 to approve the product of the petitioner for inclusion in the rate contract. This Court by order dated 12.07.2018 disposed of the said writ petition with the following direction :

> "Heard learned counsel for the petitioner as well as learned Addl. Government Advocate appearing for the State-opposite parties.
>
> Though an application has been filed by the opposite parties seeking two months time to file counter affidavit, but as instructions have been received, learned Addl. Government Advocate has consented for disposal of this writ petition at this stage.
>
> The petitioner is registered as a small-scale industry and is claiming benefit under the Micro, Small and Medium Enterprises (MSME) Scheme of the State Government. The petitioner-firm produces Asbestos cement pressure pipes and is seeking its inclusion as an item in the rate contract. It is not disputed that the State Government is promoting the small scale industries through the MSME scheme. It is not understood as to why the decision on the application of the petitioner has not been taken by 5the opposite parties, especially when recommendation has already been made by the opposite party No.2 in the case of the petitioner.
>
> Learned Addl. Government Advocate states that the final decision has to be taken by the opposite party No.1-Additional Chief Secretary, MSME Department, Govt. of Odisha, Bhubaneswar.
>
> In such view of the matter, we dispose of the writ petition with a direction that opposite party No.1 shall take a final decision in the case of the petitioner (which has already been recommended by opposite party No.2) as expeditiously as possible, but not later than four weeks from the filing of certified copy of this order. It is made clear that in case the recommendation of opposite party No.2 is not accepted, opposite party No.1 shall pass a reasoned and speaking order, in accordance with law.
>
> With the aforesaid observation and direction, the writ petition stands disposed of."

4. When the aforesaid order was not complied with by the opposite party No.1, petitioner filed CONTC No. 1460 of 2018 before this Court. After receiving the notices on the contempt petition, opposite party Nos. 1 & 2 sought clarification from the opposite party No.3-Engineer in Chief, RWSS Department. The opp. party No.3 on 31.08.2018 issued the clarification, but it is alleged by the petitioner, that he manipulated the same at the instances of the opposite party Nos. 1 & 2 and issued two letters with the same dispatch numbers 7607, both are of dated 31.08.2018. While in point No.3 of the first letter it was mentioned that this item can be included in rate contract for use in PWS Contract, but in subsequent letter point No.3 was that at present there is no requirement of AC Pressure Pipe. Case of the petitioner is that on the basis of the said fabricated and manufactured document, the opposite party No.1 without considering the recommendations under Annexure-2 has rejected the application of the petitioner vide impugned order dated

31.08.2018 and refused to include the product of the petitioner in the rate contract. Hence this writ petition.

5. Shri P.P. Choudhury, learned Sr. Advocate appearing on behalf of the petitioner submitted that the impugned order has been passed in gross violation of the direction issued by this Court vide order dated 12.07.2018 in W.P.(C) No. 10707 of 2018, which required the opposite party No.1 to decide the representation of the petitioner on the basis of the recommendation of opp. party No.2 dated 26.12.2017, and in case the recommendation of O.P. No.2 is not accepted, the O.P. No.1 was required to pass a reasoned and speaking order, in accordance with law. But a bare perusal of the impugned order dated 31.08.2018 under Annexure-12, clearly shows that the O.P. No.1 has nowhere mentioned about the earlier recommendation made by the Sub-Committee as well as O.P. No.2 and further no reasons have been assigned for not considering the recommendation made by O.P. No.2. Therefore, the impugned order, being an unreasoned and non-speaking order and in violation of earlier order passed by this Court, is liable to be quashed. By placing reliance upon the judgments of the Supreme Court in ***S.P. Kapoor (Dr.) Vs. State of H.P.,*** (1981) 4 SCC 716, and ***Bahadursingh Lakhu Bhai Gohil Vs. Jagdish Bhai M. Kamalia & Ors.,*** (2004) 2 SCC 65, learned Sr. Advocate for the petitioner contended that it is a settled position of law that where an administrative authority undertakes any action in undue haste, the malafides can very well be presumed and the same is violative of Article 14 of the Constitution of India. Learned Sr. Advocate argued that though the O.P. No.1 has rejected the application of the petitioner by order dated 31.08.2018, however, during the pendency of this writ petition, an additional ground for rejecting the application has been introduced in the counter filed by opposite party No.3 raising apprehension of health-hazard likely to be caused by the item of the petitioner. On this aspect, learned Sr. Advocate for the petitioner, relying upon the decisions of the Supreme Court in ***Commissioner of Police, Bombay Vs. Gordhan Das Bhanji***, AIR 1952 SC 16; and ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi***, AIR 1978 SC 851, submitted that the validity of an order can be adjudicated only on the grounds mentioned in the said order and the respondents cannot be permitted to add or supplement reasons to justify the order impugned on a later stage of proceedings.

6. Shri P.P. Choudhury, learned Sr. Advocate argued that opposite party No.1 has committed grave illegality in not considering the recommendations

made by the Sub-Committee constituted by the Government regarding the suitability of the store-item of the petitioner i.e. AC Pressure pipes for inclusion in Rate contract fold. The reason mentioned by the O.P. No.1 that AC Pressure Pipe is not a repetitive demand, is contrary to the recommendations of the CPHEEO Manual, published by the Ministry of Housing and Urban Affairs (MoH&UF). The Ministry of Drinking Water & Sanitation vide O.M. dated 30.09.2015 directed all the Principal Secretaries/Secretaries and Engineer in Chief/Chief Engineer In-charge of RWSS of all the States to ensure adherence and implementation of recommendation of CPHEEO Manual in designing transmission and distribution pipe network for water and selection of corresponding pipe materials. Reiterating the earlier correspondence and said OM dated 30.09.2015, the Ministry of Drinking Water & Sanitation again issued communication to all Principal Secretaries/Secretaries of RWSS Department of all State/UTs informing that most of the Rural Water Supply Schemes are lying defunct and ineffective owing to failure in following adequate design procedures and hence it was directed that strict adherence and implementation on the recommendations prescribed in CPHEEO Manual in designing treatment plants, transmission and distribution pipe network for water and selection of relevant pipe material must be ensured. In view of that order, the State of Odisha was also required to follow the said Manual which recommends AC Pressure pipe in the water distribution projects, but the same has not been followed in the instant case. Further, on an earlier occasion the O.P. No.3 vide its communication dated 21.11.2017 clearly mentioned that the requirement of different size of AC Pressure Pipe under the Department is Rs. 44.64 lakhs in total per annum. The said term "in total per annum" very much reflects the repetitive demand of AC Pressure Pipe in the State of Odisha, whereas as per the Rules of Rate Contract, the minimum requirement/limit for inclusion of store item was purchase amount of Rs.2.00 lakhs per annum only. Therefore, in his letter dated 31.08.2018 issued by the O.P. No.3 to O.P. No.2, it was clearly mentioned that "However, if this is included in EP&M rate contract we may use in PWS projects as recommended by CPHEEO manual regarding use of pipe materials in water supply projects".

7. Learned Sr. Counsel argued that Rule 7(iii) of the Rules, 2014 clearly provided that "Rate contract should be concluded on receipt of three minimum offers. In case of less than three tenders/offers are received, rate contract for the item can be concluded if there is valid DGS&D rate contract

for price comparison or on the basis of costing rate collected by DEP&M." The DEP&M has already included store-item in Rate Control fold of more than 15 single units under above clause. Further, rates of AC pressure pipe are very much available in open market in the State of Odisha, such as in Schedule of Rates (SoR) of Govt. of Odisha. Authorised dealers of the manufacturing units of other States of the said item, are dealing in the State of Odisha and all the rates have already been provided by the petitioner to O.P. Nos. 1 & 2 for their ready reference. It is contended that DGS&D was abolished in 2017 and the same was replaced by GeM, wherein the rate of AC pressure pipes are readily available in the portal of GeM. Further, the Rate Contract considering GeM rate for other item of single unit has also been awarded by the DEP&M. Therefore, the petitioner unit is qualifying the requirement under the Rules of rate contract criteria. Considering the GeM rate, other items have also been included in rate contract but in case of the petitioner, the O.P. No.1 has considered the DGS&D rate as criteria, which has already been abolished much prior to the impugned order. Therefore, it is a case of clear non-application of mind by the O.P. No.1 while passing the impugned order.

8. In reply to the additional grounds taken by the opposite party No.3 raising apprehension about health hazard from the AC Pressure Pipe, it is submitted by Sri P.P. Choudhury, learned Sr. Advocate that the said ground is wholly misconceived and against all scientific studies and mandate issued by the WHO/Government of India and judgment of the Hon'ble Supreme Court of India. In this regard, he placed reliance upon the judgment of the Supreme Court in ***Kalyaneshwari Vs. Union of India & Ors***., (2011) 3 SCC 287, wherein it has been held that "the asbestos product only contains 8-10% asbestos fibre and the rest is cement (50%), clay (30-35%) and fly ash, wood pulp etc. which are not considered harmful for human health." Indian Council of Medical Research (ICMR) in the last line of the letter dated 06.10.2013 under Annexure-27, clearly stated that "Therefore from the available literature, there does not appear to be any health hazard from asbestos cement pipes used for drinking water". He also relied on the Annexure-29, a study of WHO, wherein it is concluded that there is no need to establish a guideline for asbestos in drinking water. By making the above submission, it is contended by the learned Sr. Advocate for the petitioner that the impugned order passed by the opposite party No.1 is an outcome of complete non-application of mind, mala fide and non-speaking order

violating the direction of this Court dated 12.07.2018 and hence it is required to be quashed and set aside.

9. Per contra, Shri M.S. Sahoo, learned Addl. Government Advocate on behalf of the State-opposite parties, submitted that the impugned order dated 31.08.2018 has been passed by the O.P. No.1 in accordance with Rules, 2014 registered with the Director of EP & M, Odisha which came into force on 19.06.2014. The grievance of the petitioner that the opposite parties have fabricated the letter dated 31.08.2018, is totally misleading and it is emphatically denied. It is submitted that adoption of rate contract system in the Government procurement is in the form of a market support to MSME of the State, as has been provided under para 13.1 of the Industrial Policy Resolution (IPR), 2007. The resolution of the MSME department published on 19.06.2014 i.e. the Rules of Rate Contract, 2014, in Chapter-II para-4(i) provides that any good or service for which rate contract exists shall be mandatorily procured following the rate contract system and shall not be procured by any other means. The later part i.e. "and shall not procured by any other means" is an exception to the principle of procurement by State Government that the best products should be purchased at the most suitable price in an open and transparent bidding process. The system of rate contract is in the nature of an incentive/support as an exception to the principle of equal treatment to all goods' manufacturers or service providers as far as procurement by the State is concerned. It is submitted that method of selection of the items/services of the rate contract is provided at Rule 5(i), (ii), (iii) and (iv) of the Rules, 2014. Since the rate contract is governed by the specific statutory Rules and is in the nature of an incentive to the particular manufacturer at the cost of other manufacturers, it has to be strictly interpreted as has been laid down by the Constitution Bench of the Supreme Court in ***Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Co. & Ors.*** (2018) 9 SCC 1. The Supreme Court at paragraph 62 of the said judgment observed that 'a person invoking exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision.'. It has further been observed at para-66 that "…thus, exemption notification should be interpreted strictly, the burden of proving applicability would be on the assessee to show that his case comes within parameters of the exemption clause or exemption notification."

10. Learned Addl. Government Advocate submitted that applying the above principle to the instant case, the petitioner has to satisfy the criteria

prescribed in Rule-5 of the Rules, 2014 and the main criteria which the petitioner has to satisfy are (i) AC pressure pipe is in repetitive demand and is in common use, and (ii) Annual requirement of AC pressure pipe is of substantial quantity and value. In the case at hand, the findings given by the O.P. No.3 even in Annexure-11-A the letter dated 31.08.2018, which is relied upon by the petitioner, is opposed to the above criteria as it has been specifically stated therein that "(i) A.C. pressure pipe as per IS:1592/2003 are not in repetitive demand or requirement, and (ii) No such pipes were purchased by these organization till yet". It is emphatically denied that the recommendation under Rule 5(iv) is in the nature of a binding diktat and has to be mandatorily accepted by the Government in the MSME Department. Such contention of the petitioner has no statutory basis. The recommendation to the Government has to be at the most considered in accordance with the Rate Contract Rules, 2014 and the IPR, 2007. In this connection, learned Addl. Government Advocate placed reliance on para 13.1(a) of the IPR, 2007, which provides that comprehensive review of the rate contract purchase list and exclusive purchase list, shall be undertaken by a Committee consisting of Secretary, Industries Department, Director, EP&M, Director of Industries and the representatives of Industries Association, who shall submit their recommendations for Government approval in Industries Department. Refuting the allegation of the petitioner that the opposite party No.1 has passed the impugned order violating the direction issued by this Court dated 12.07.2018, it is submitted by the learned AGA that this Hon'ble Court in the said order has not held that the recommendation of the O.P. No.2 is final and no other decision is to be taken by O.P. No.1, rather the Court has directed the O.P. No.1 to pass a reasoned and speaking order, if the recommendation of the O.P. No.2 is not accepted. Therefore, the O.P. No.1 in obedience to the order of this Court and after considering the relevant provisions of the Rules, 2014 and IPR, 2007 and clarifications given by Engineer-in-Chief, RWSS passed the impugned order by assigning the reasons. Hence, the allegation of the petitioner in this regard is not acceptable and liable to be rejected.

11. With regard to allegation of the petitioner that the letter dated 31.08.2018 has been fabricated subsequently by the opposite party No.3, learned AGA contended that the said allegation is completely misleading and baseless. The opp. Party No.3, at paragraphs 5 & 6 of his counter affidavit has given the details of the circumstances leading to issuance of two letters, which have been marked as Annexures-11 and 11A and to substantiate his bonafide, the opp. Party No.3 has placed on record the details of deliberations

in the note sheet of the Department as Annexure-B/3, (at page 201-202 of the paper book), which on examination becomes crystal clear disproving the misleading allegation of the petitioner about the manufactured letter. Further, the reasons assigned by the opp. Party No.1 in the impugned order regarding not using A.C. Pressure pipe by the Department, also find place in the Note-sheet dated 31.08.2018 of the O.P. No.3, placed under Annexure-B/3. Besides above, learned AGA submitted that no such pipes were purchased by the Department till date. Note sheet also clearly specify that AC pressure pipe as per IS 1592/2003 are not in repetitive demand/requirement by this department and the Department is using pipe materials considering all aspects of hydraulic characteristics, strength of pipe, suitability, durability, pressure rating, different conditions of topography, geology and other prevailing local conditions, leakage, cost effectiveness as laid down by the CPHEEO manual as well as the guidelines prescribed by the Ministry of Drinking Water and Sanitation, Govt. of India.

12 Shri M.S. Sahoo, learned Addl. Government Advocate, relying on the judgment of the Supreme Court in ***Central Coal Field Ltd. & Anr. Vs. SLL-SML (Joint Venture Consortium),*** (2016) 8 SCC 622, submitted that the issue of acceptance or rejection of a bid of a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. Therefore, applying this ratio, it is submitted that the present matter is also required to be looked into from the point of view of the State that would be entering into rate contract with the intending manufacturers. Since the decision making process is governed by a set of Rules i.e. Rules, 2014 and IPR, 2007, the Rules have to be given a meaning and necessary significance. Placing reliance on another judgment of the Supreme Court in ***Tata Cellular Vs. Union of India*** (1994) 6 SCC 651, it is submitted that the Courts should show judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned, but the decision-making process can certainly be subject to judicial review. In this regard, reliance is also placed on judgments of the Supreme Court in ***Jagdish Mandal Vs. State of Orissa*** *(*2007) 14 SCC 517, subsequently followed in ***Michigan Rubber (I) Ltd. Vs. State of Karnataka,*** (2012) 8 SCC 216, and in ***Municipal Corporation, Ujjain & Anr. Vs. B.V.G. Indian Ltd. & Ors.,*** (2018) 5 SCC 461.

13. Learned AGA concluded his argument by submitting that in the case at hand, the reasons given by the experts, as they find place at page-201-202

of the paper book, cannot be faulted with. Regarding the order dated 31.08.2018 nothing has been pointed out by the petitioner to show that a responsible authority acting reasonably and in accordance with the Rules, 2014 read with IPR 2007, could not have reached such decision. Lastly, it is submitted that if the decision making process adopted by the authority, which has resulted in the impugned order before this Court, is evaluated applying the principles laid down by the Supreme Court referred to above, the decision taken by the administrative authority is rational, bonafide, and is a decision which any responsible authority acting reasonably in accordance with the relevant law could have reached. Therefore, it is prayed that the petitioner having not made out a case and trying to mislead the court, the petition is liable to be dismissed.

14. We have given our anxious consideration to rival submissions, gone through the cited judgments and examined the materials on record.

15. The impugned order dated 31.08.2018 which has been challenged by the petitioner was passed by the opp. Party No.1 in compliance of the order of this Court dated 12.07.2018, as referred above, in an earlier writ petition filed by the petitioner. The contention of the learned counsel for the petitioner is that the impugned order has not been passed in conformity with Rules 4 & 5 of the 2014 Rules. In order to appreciate the rival arguments in the correct perspective, it is necessary to quote the Rules 4 & 5 of 2014 Rules, which read as under:

> "**4.** (i) To provide marketing support to Micro & Small Enterprises(MSEs) of the State in Govt. procurement Rate Contract system has been stipulated in Para 13.1 of IPR 2007 and Para 7.2(b) of Odisha MSME Development Policy 2009. Any Goods or Services for which subsisting rate contract exists shall be mandatorily procured following the rate contract system and shall not be procured by any other means.
>
> (ii) List of goods and services to be reserved for procurement from MSEs via rate contract system shall be prepared by Director, EP & M taking into account the quantity and quality of goods being manufactured and services being provided by the local MSEs and the requirement of Government Departments and Agencies under their control. The Purchasing Organisations under concerned Departments of State Govt. shall furnish a details list of items i.e. goods/services to be brought under the purview of rate contract system by Director, E.P. & M.
>
> (iii) Rate Contract in respect of specific store items/services not in the exclusive list and manufactured/provided by the local MSE shall be finalized by the Directorate of Export Promotion and Marketing on the basis of competitive

offers/tenders called from them. The State Govt. Departments and Agencies under the control of the State Govt. shall purchase the rate contract items and avail services from the rate contract holding micro and small enterprises at the rate contract price without inviting tender.

The Rate Contract items/services against which rate is fixed by Director, E.P&M. cannot be tendered by the agencies/organisations under State Government. Rate Contract items/services shall not be included in the composite tender without prior approval of Secretary MSME on recommendation of Director, EP&M.

5. SELECTION OF THE ITEMS/SERVICE FOR RATE CONTRACT:

The main criterion for selecting any item/service for rate contract shall be:-

(i) The item/service is in repetitive demand and is in common use and its price is not subject to frequent market fluctuations.

(ii) If the annual requirement of any stores/services is not of substantial quantity and value, such stores/services may not be selected for rate contract. The minimum requirement of stores/services shall not be less than Rs.2,00,000/- per annum in the Government Sector.

(iii) If any goods/services are found obsolete or no more in demand, it may be eliminated/excluded from rate contract duly approved by the Govt. in MSME Department after consultation with the stakeholders of the goods/services.

(iv) The selection of store/service for rate contract shall be examined and recommended by a Sub-Committee consisting of Director as its Chairman, Representative of Director of Industries, Odisha, Cuttack as its Member, Representative of OSIC Ltd., Cuttack as its Member, Representative of the Purchasing Department as its Member and Deputy Director (Marketing) Office of the DEP&M, Odisha as its Member-Convener vide Industries Department No. I-SI-80/2007/IND-17045, dt. 19.11.2009. The selection of store(s)/services shall be made from among the Micro and Small Enterprises located in the State and registered with the Directorate of E.P&M.

In addition to the above one representative of Industries Association on rotation basis shall be members of the Sub-Committee for selection of items for Rate Contract."

16. The petitioner has relied on Sub-Clause (iii) of Rule 4, according to which Rate Contract in respect of specific store items/services, not in the exclusive list and manufactured/ provided by the local MSE, shall be finalized by the Directorate of Export Promotion and Marketing on the basis of competitive offers/tenders called from them. The State Govt. Departments and Agencies under the control of the State Govt. shall purchase the rate contract items and avail services from the rate contract holding micro and

small enterprises at the rate contract price without inviting tender. It is revealed from the record that the Joint Secretary to Government in the MSME Department, while considering the representation of the petitioner in compliance to the direction issued by this Court in W.P.(C) No. 10707 of 2018, vide letter No. 4992 dated 3.8.2018, asked the Director, EP&M to furnish chronological history relating to store item AC Pressure Pipes as per IS: 1692/2003. On the basis of the said letter, the Director of EP&M vide its letter No. 5487 dated 04.08.2018 inquired from the Engineer in Chief, RWSS with regard to selection of the item in question. In reply to the said query of the Director, EP&M, the Engineer-in-Chief, RWSS, Odisha vide its letter No. 7146 dated 16.08.2018 intimated as under:

> :….With reference to your letter resting on above noted subject, it is to intimate that "Asbestos Cement Pressure Pipes as per IS:1592/2003 has not been used by this organization but the said pipes were used in one water supply project which has not yet been commissioned. Further it is needless to say that all the water supply works has been executed through turnkey tenders wherein the contractors/executing agencies are procuring the pipe materials i.e. HDPE/UPVC/DI/GI/MS pipes with proper quality testing of materials by the Quality Assurance Wing of CIPET."

17. Again the Director, DP&M, Odisha vide letter dated 30.08.2018 sought clarification from the Engineer in Chief, RWSS, regarding annual requirement of AC Pressure Pipes for selection of the item. Relevant portion of the said letter reads as under:

> "…I would therefore request you that, kindly clarify whether the :
>
> (i) Asbestos Cement Pressure Pipe as per IS: 1592/2003 is in repetitive demand/requirement.
>
> (ii) If in repetitive demand please intimate the annual purchases of last two years.
>
> (iii) If in repetitive demand what is the total requirement value of the item per annum.
>
> This may please be treated as MOST URGENT in view of the court matter and a clarification may be intimated by return mail."

18. In reply to the said letter, the Engineer-in-Chief, RWSS vide his letter dated 7607 dated 31.08.2018 intimated the Director, DP&M as follows:

> "With reference to above, the point wise clarification, as sought for are given hereunder:

> i. Asbestos Cement Pressure Pipe as per IS:1592/2003 are not in repetitive demand or requirement. The pipe materials used in Piped water supply projects according to the geo-hydrological condition of the concerned area.
>
> ii. No such pipes were purchased by this Organisation till yet.
>
> iii. At present there is no such requirement of A.C. Pressure Pipes."

19. The petitioner has disputed the genuineness of the aforesaid letter dated 31.08.2018 stating that another letter on the same date i.e. 31.08.2018 and with same dispatch number was issued by the Engineer in Chief, RWSS. The contents of the said letter, relied on by the petitioner, reads as under:

> "With reference to the above, the point wise clarification, as sought for is given here under:
>
> 1. Asbestos Cement Pressure Pipe as per IS:1592/2003 are not in repetitive demand or requirement. The pipe materials used in Piped water supply projects according to the geo-hydrological condition of the concerned area.
>
> 2. No such pipes were purchased by this Organisation till yet.
>
> 3. However, if this is included in EPM rate contract we may use in PWS projects as recommended by CPHEO manual regarding use of pipe materials in Water supply projects."

20. However, this aspect of the matter has been amply clarified by the opposite parties in their counter affidavit asserting that the letter is not fabricated or manufactured subsequently. It is not in dispute that both the letters originated from the Engineer-in-Chief, RWSS on the same date. Be that as it may, on scrutiny of both the letters, it is apparent that the first two clarifications issued in both the letters are same, namely, '(1) Asbestos Cement Pressure Pipe as per IS:1592/2003 are not in repetitive demand or requirement. The pipe materials used in Piped water supply projects according to the geo-hydrological condition of the concerned area, and (2) No such pipes were purchased by this Organisation till yet'. But the only dispute raised by the petitioner is with regard to clarification No.3 i.e. at Annexure-11A which is relied by the petitioner wherein it is mentioned that "However, if this is included in EPM rate contract we may use in PWS projects as recommended by CPHEO manual regarding use of pipe materials in Water supply projects.", but in Annexure-11 it is mentioned that "At present there is no such requirement of AC Pressure pipes." This discrepancy has been explained by the opposite party No.3-Engineer–in-Chief, RWSS in paragraph 5 of his counter affidavit, in the following terms:

> "On the same day i.e. on 31.08.2018, there was a vivid discussion with the fellow Engineers of the organization regarding feasibility of inclusion of AC pressure pipes in PWS Schemes. After threadbare discussion, it could be ascertained that traces of Asbestos fiber present in the AC pressure pipes may get into the water flowing through the pipes. This asbestos contaminated water can have Carcinogenic effect and may be a hazard when used. In this regard an article found online by Mr. Laure Serafin is annexed herewith and marked as Annexure-A/3 and the copy of the Note-sheet showing decision for modification of the earlier letter No. 7607 dated 31.08.2018 is also annexed herewith and marked as Annexure-B/3 for kind perusal of the Hon'ble Court. Hence the letter issued earlier during the day was modified with the self same (e-dispatch) number and intimated to The Director, EP&M regarding non-requirement of AC Pressure Pipes. As such the allegation of the petitioner regarding fabrication of the letter issued by the E.I.C. by the O.P. NO.2 is not correct and is hereby denied. As a matter of fact availability of both the letters shows that no manipulation has been done rather the things remain as it is."

21. It would be evident from the aforesaid that the Engineer in Chief, RWSS issued the another letter in view of the subsequent discussion made with the team of Engineers and in terms of the conclusion reached in that discussion, which is evident from the later part of the Note sheet drawn on 31.08.2020 in the Office of Engineer-in-Chief, RWSS, placed at page 202 of the record, which reads as under:

> "It is further discussed with departmental Officers that A.C. Pressure Pipes are having Carcinogenic effect for which we may not encourage for use of A.C. Pressure pipes in drinking water supply. Accordingly, the revised letter is issued with the same number as there was no net connection available at that time for e-dispatch in another number."

22. If we look into the earlier part of the Note Sheet of the Engineer-in-Chief of the same date at Annexure-B/3, it appears that the Engineer-in-Chief right from the beginning has given the opinion regarding non-requirement of AC Pressure Pipe at the present in the Department. The first part of the Note-sheet dated 31.08.2020 reads as under:

> "The Director EPM has sought clarification regarding annual requirement of AC Pressure Pipes as per IS 1592/2003 for selection of the item.
>
> In this connection the following points may be seen.
>
> - AC pressure pipe as per IS 1592/2003 are not in repetitive demand/requirement by this department. The Department is using pipe materials considering all aspects of hydraulic characteristics, strength of pipe, suitability, durability, pressure rating, different conditions of topography, geology and other prevailing local conditions, repair & maintenance, soil characteristics, surcharge load, losses of water by leakage, cost effectiveness as laid down by the CPHEEO manual as well as the guidelines prescribed by the MODWS, GOI.

- The AC Pressure pipes are not used by the Department due to following reasons:-

1. Not suitable for high pressure application under gravity flow;
2. Not suitable as it cannot sustain heavy traffic load;
3. Not applicable in pumping and high pressure mains;
4. Pipes cut on site need machining to correct diameter for joining;
5. Heavy and brittle;
6. Susceptible to impact damage;
7. Underground pipe location is difficult;
8. Leakage detection is complicated;
9. Installation of fittings and its reparation is complicated;
10. Shorter length so relatively more number of joints per unit length required;
11. Replacement is a major problem."

- No such pipes were purchased by this Department till date.

- Further the existing SSI unit is not in the hand of this department as they are regulated by Industrial Policy/MSME Department of the Government.

- At present, there is no such requirement of AC pressure pipe."

23. Further, we if closely examine the earlier letter of Engineer-in-Chief, RWSS, Odisha dated 16.08.2018, in which he had given clarification to the Director of EP&M pursuant to the query made by the Joint Secretary, MSME Department vide letter dated 3.8.2018, it would be evident that in the said letter also the Engineer-in-Chief had clarified the issue in the same terms that "Asbestos Cement Pressure Pipes as per IS:1592/2003 has not been used by this organization but the said pipes were used in one water supply project which has not yet been commissioned. Further it is needless to say that all the water supply works have been executed through turnkey tenders wherein the contractors/executing agencies are procuring the pipe materials i.e. HDPE/UPVC/DI/GI/MS pipes with proper quality testing of materials by the Quality Assurance Wing of CIPET."

24. The contention of the petitioner that since the Sub-Committee had recommended regarding the suitability of the store-item of the petitioner i.e. AC Pressure pipes for inclusion in Rate contract fold, and as per Rule 5(iv) of the Rules, 2014 the said recommendation and also in view of earlier order of this Court dated 12.07.2018 was required to be accepted by the authority, cannot be countenanced. This Court in the said order clearly mentioned that "in case the recommendation of opposite party no.2 is not accepted, opposite party no.1 shall pass a reasoned and speaking order, in accordance with law." Even otherwise, the petitioner has not established that the opposite party No.1 is bound to accept the recommendation of the Sub-Committee for inclusion

the item in rate contract. In our view, it is for the Government to take a decision, after examining all the aspects of the matter and not merely only on the basis of the recommendation made by the Sub-Committee, which of course can be one of the inputs for taking a decision. No where it has been stipulated, either in the Rules, 2014, or IPR, 2007 or other relevant documents produced, that it is mandatory to accept the recommendation of the Sub-Committee.

25. The opposite party No.1 in the impugned order dated 31.08.2018, taking into consideration the various letters and clarification issued by the authorities as detailed out in the afore-quoted note sheet, has decided as under:

> "Whereas, DEP&M has also submitted that Engineer-in-Chief, RWSS, Odisha, Bhubaneswar vie his letter No. 7146 dated 16.08.2018 has intimated that Asbestos Cement Pressure Pipe as per IS: 1592/2003 has not been used by his organization, but the said pipes were used in one Water Supply Project which has not yet been commissioned. All the water supply works has been executed through turnkey tenders wherein the contractors/executing agencies are procuring the pipe materials i.e. HDPE/UPVC/ DI/GI/MS pipes with proper quality testing of materials by the Quality Assurance Wing of CIPET.
>
> Whereas, Under Rule-9(IV) of Rules of rate contract for Micro, Small and Medium Enterprises, 2014 registered with the Directorate of EPM, Odisha "All Indenting Officers of Government Department/Agencies shall intimate their annual requirement of store items to the DEP&M by 31st May of every year. But no indent has been received from any Government Department/Agency for the current financial year before going for the rate contract of the store item "Asbestos Cement Pressure Pipe".
>
> Whereas, further, DEPM vide his letter No. 6206 dated 31.08.2018 has informed that the product namely, AC Pressure Pipes as per IS No. 1592/2003 do not meet the criteria as required for the rate contract under the Clause 5(i) and (i) of Rules of Rate Contract with Micro & Small Enterprises, Odisha, 2014. He has enclosed the clarification he has received vide letter No. 7607 dated 31.08.2018 from EIC, RWSS, as per which,
>
> i. Asbestos Cement Pressure Pipe as per IS:1592/2003 are not in repetitive demand or requirement. The pipe materials used in Piped water supply projects according to the geo-hydrological condition of the concerned area.
>
> ii. No such pipes were purchased by this Organisation till yet.
>
> iii. At present there is no such requirement of A.C. Pressure Pipes."
>
> Whereas, as per the reports of DEP&M, Odisha the applicant unit is a single unit, its item namely "Asbestos Cement Pressure Pipe as per IS:1592/2003" is not in repetitive demand or requirement and there is also no requirement of the A.C. Pressure Pipes as reported by the Engineer-in-Chief, RWSS and there is no valid DGS&D rate contract available, the application submitted by th e petitioner M/s.

> Sona Spun Pipe Industries Ltd., SH-19, Gopiballavpur Road, Kankisole, Post. Baripada, Dist. Mayurbhanj for rate contract of Asbestos Cement Pressure Pipe does not meet the criteria under the clause 5(i) and (ii) of Rules of Rate Contract with Micro & Small Enterprises, Odisha, 2014 and hence, rejected."

26. Contention on behalf of the petitioner that validity of the impugned order ought to be adjudicated only in view of the ground mentioned in the order and the opposite parties cannot be permitted to add or supplement additional reasons to justify the impugned order on a later stage raising apprehension about health-hazard from AC Pressure Pipes, cannot be countenanced for the reason that the documents/records which are relied by the opposite party No.1 in his order and which are also produced before this Court, reveal that the team of Engineers threadbare discussed all those aspects. In this regard, the decision relied upon by the petitioner in **Kalyaneshwari** (supra) also does not in any manner apply to the facts of the present case, because here the dispute is whether the order of the opposite party No1 refusing to enlist the item of the petitioner in the rate contract is justified or not. The Supreme Court in that case noted that as of now there is no law banning use of asbestos in manufacturing processes despite its adverse effects on human health. But it is not for the Court to legislate and ban an activity under relevant laws. The Supreme Court held that since the matter falls within the domain of legislature, which has already taken steps for enacting necessary laws, there is no justification for banning manufacturing of asbestos. On doubts being raised whether "controlled use" can be effectively implemented even with regard to secondary exposure to asbestos, the Supreme Court held that these circumstances require Government of India and State Governments to examine the matter. The Supreme Court however observed that white asbestos which is highly carcinogenic is imported in India without any restriction while even its domestic use is not preferred by exporting countries. Therefore, there is an urgent need for a total ban on import and use of white asbestos and promoting use of alternative materials. The Supreme Court in that case while declining to grant the prayers made in the writ petition, issued certain directions aimed at ensuring strict regulatory controls and reviewing safeguards for asbestos industry and ensuring healthcare of workers engaged therein by reaffirming directions earlier issued in the case of ***Consumer Education and Research Centre v. Union of India,*** reported in (1995) 3 SCC 42.

27. The famous "Wednesbury Case" ***Associated Provincial Picture Houses Ltd. Vs. Wednesburry Corpn.,*** (1948) 1 KB 223: (1947) 2 All ER 680, is considered to be landmark in so far as the basic principles relating to judicial

review of administrative or statutory direction are concerned. In the said judgment, it has been observed by Lord Greene M.R. that "It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".

28. In **Tata Cellular** (supra), the Supreme Court while dealing with scope of judicial review in the matter of administrative decision, has observed as under:

> "71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.
>
> 72. Lord Scarman in Nottinghamshir County Council v. Secretary of State for the Environment, 1986 AC 240 at 251 proclaimed : 'Judicial review' is a great weapon in the hands of the Judges; but the Judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficent power."
>
> 73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercise to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.
>
> 74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."

29. The Supreme court in ***Municipal Corporation, Ujjain & Anr. Vs. B.V.G. Indian Ltd., & Ors*.,** (2018) 5 SCC 462, while dealing with the scope of judicial review by the High Court, held that the modern trend points to judicial restraint in administrative action, the Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made, and further that the judicial review of administrative action is intended to prevent arbitrariness. If the process adopted or decision made by the authority is not malafide, not intended to favour someone and is neither arbitrary nor irrational, and if it cannot be concluded that no responsible authority acting reasonably could have reached such a decision and if the public interest is not affected, no interference should be made under Article 226 of the Constitution. Relevant paragraphs of the report, containing such observations are reproduced hereunder:

> "10. The modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides."
>
> xxx xxx xxx
>
> 14. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference under Article 226.
>
> xxx xxx xxx
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> 44. As rightly contended by respondent No. 3, a statutory authority granting licences should have the latitude to select the best offer on the terms and conditions prescribed. The technical expert in his report categorically stated that, "All the above aspects demand high level of Technicalities and Expertise rather than just depending on lowest financial price quote for a material transport." As clarified earlier, the power of judicial review can be exercised only if there is unreasonableness, irrationality or arbitrariness and in order to avoid bias and mala fides. This Court in Afcons Infrastructure (AIR 2016 SC 4305) (supra) held the same in the following manner: "13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court.
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> 64. Thus, the questions to be decided in this appeal are answered as follows:
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> (64.1) Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;"

30. In ***M.P. Gangadharan & Anr. Vs. State of Kerala & Ors***., (2006) 6 SCC 162, the Supreme Court considered a question as to whether a Family Court can be shifted from one place to another within the area of its jurisdiction. The Court while discussing the scope of judicial review in such administrative functions, observed that the constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straight-jacket formula. It must be considered keeping in view, the

doctrine of flexibility. Before an action is struck down, the court must be satisfied that a case has been made out for exercise of power of judicial review. Referring to the recent development of law, the Court further observed that 'We are not unmindful of the development of the law that from the doctrine of Wednesbury Unreasonableness, the court is leaning towards the doctrine of proportionality. But in a case of this nature, the doctrine of proportionality must also be applied having regard to the purport and object for which the Act was enacted'.

31. In ***Maharashtra Land Development Corporation & Ors. Vs. State of Maharashtra & Anr***., (2011) 15 SCC 616, the Supreme Court observed that the Wednesbury principle of reasonableness has given way to the doctrine of proportionality. As per the Wednesbury principles, administrative action can be subject to judicial review on the grounds of illegality, irrationality or procedural impropriety.The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. It was held by the Court that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. Any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. The test of proportionality is concerned with the way in which the decision maker has ordered his priorities, i.e. the attribution of relative importance to the factors in the case. It is not so much the correctness of the decision that is called into question, but the method to reach the same. If an administrative action is contrary to law, improper, irrational or otherwise unreasonable, a court competent to do so can interfere with the same while exercising its power of judicial review. It was further held that, the principle of proportionality therefore implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question. Unless the impugned administrative action is advantageous and in public interest such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred.

32. It is the settled legal proposition that normally the Constitutional Court should be slow to interfere with the opinion expressed by the team of Experts. The Supreme Court in ***G. Sundarrajan Vs. Union of India,*** (2013) 6 SCC 620, after referring to the Constitution Bench of the Supreme Court in ***University of Mysore Vs. C.D. Govinda Rao,*** AIR 1965 SC 491, held that "*normally, Court*

should be slow to interfere with the opinion expressed by the Experts and it would normally be wise and safe for the courts to leave the decisions to experts who are more familiar with the problems which they face than the courts generally can be which has been the consistent view taken by this Court".

33. In ***Federation of Railway Officers Association Vs. Union of India,*** (2003) 4 SCC 289, the Supreme Court has observed that *"in examining a question of this nature where a policy is evolved by the Government, judicial review thereof is limited. On matters affecting policy and requiring technical expertise, Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters*". Therefore, when technical questions arise and experts in that field have expressed various views and all those aspects have been taken into consideration by the Government in deciding the matter, the Court should restrain from interfering with the same when there is no malafide or unfairness.

34. The petitioner has filed this writ petition seeking issuance of a writ of mandamus to the Government in the MSME Department for inclusion of its product i.e. AC Pressure Pipe in the rate contract list. True it is that the decision arrived at by the opposite party No.1 in the impugned order is subject to judicial scrutiny by this Court as to whether it falls within the domain of any illegality or unreasonableness and if it is so, this Court can interfere. However, this Court in exercise of power of judicial review has a limited scope to direct the Government to include a specific item of a particular industry in the rate contract list. In the instant case, the Engineer-in-Chief, RWSS Department and its team of Engineers, who are having expertise about the use and requirement of AC Pressure Pipes have vividly discussed on those aspects, which is apparent from the Note-sheet dated 31.08.2018 under Annexure-B/3, as quoted above, as to why the AC Pressure Pipes are not being used by the Department and why there is no requirement of such items, and communicated the said clarifications to the authority. The authority, while taking the decision, has taken into consideration all such clarifications. Therefore, this Court does not deem it appropriate to interfere with such decision making process of the Government, which it has taken relying on the opinion of various technical experts.

35. In our view, the decision as to whether a particular item is required to be included in the rate contract list is completely within the domain of the Government and the decision has to be taken by the competent authority after

due application of mind to relevant considerations in accordance with law. Unless the order impugned appears to be malafide, contrary to law, improper, irrational or otherwise unreasonable, this Court in exercise of power of judicial review would not be justified to interfere in such a decision. After examining the matter from all perspectives, we do not see any arbitrariness, impropriety or illegality in the impugned order, which has been passed by the authority referring to relevant provisions of Rules 2014, IPR, 2007 and on the basis of various clarifications received from the different authorities, who are having expertise in the field. Examined from the standpoint of Wednesbury's principle of unreasonableness, it cannot be said that the impugned decision is such which no reasonable person of ordinary prudent on given material could have arrived at. Even applying the doctrine of proportionality, it cannot be said that the competent authority in passing the impugned order has not maintained the sense of proportion between the goals and the means employed to achieve those goals, inasmuch as, the impugned order has a reasonable relationship to the general purpose for which it has been passed. Whatever material has been placed on record clearly establishes that the impugned decision is balanced and in proportion with the object of the power conferred upon the decision making authority.

36. In view of foregoing discussions, we do not see any cogent reasons to interfere in this matter. The writ petition being devoid of merit, is liable to be dismissed and is accordingly dismissed. There shall be no order as to costs.

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2020 (III) ILR - CUT- 388

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

WRIT PETITION (CIVIL) NO. 12475 OF 2020
&
WRIT PETITION (CIVIL) NO. 14114 OF 2020

M/S. VFPL ASIPL JV COMPANY & ANR. .....Petitioners
.V.
UNION OF INDIA & ORS. .....Opp. Parties

WRIT PETITION (CIVIL) 14114 OF 2020
M/S. JRT NKBPL JV AND ANR. .....Petitioners
.V.
UNION OF INDIA AND ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Plea that writ petition cannot be entertained as there are disputed question of fact – Scope of interference by writ court – Held, can be considered – Principles – Discussed.

High Court is not deprived of its jurisdiction to entertain a petition under Article 226 of the Constitution merely in considering the petitioner's right to relief, question of facts at fault to be determined. The High Court has jurisdiction to try issues both to facts and law when the petitioner raised complex question of facts which may for their determination require oral evidence to be taken and on that account the High Court is of the view that dispute should not appropriately be tried in the writ petition, the High Court may decline to try the writ petition. It is the discretion of the High Court to exercise on sound and in conformity with judicial principle. As has been contended by learned Senior Counsel appearing for the petitioners in both the writ petitions that they rely upon the documents filed by the opposite parties depending on preliminary finding of facts, the correctness of which can be examined by invoking jurisdiction under Article 226 of the Constitution of India, and thereby the contention was raised that the disputed questions of facts are involved cannot have justification. As such, this Court is justified to entertain the writ petitions. *(Paras 16 & 17)*

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Plea of availability of alternative remedy of arbitration – Questions of maintainability of the writ petition is raised – Pleadings are complete – Effect of such plea – Held, not acceptable, as the apex Court has held that despite the existence of an alternative remedy, it is within the jurisdiction and discretion of the High Court to grant relief under Article 226 of the Constitution of India – Laws on the issue discussed. (Paras 18 to 31)

(C) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Order passed banning the petitioners from participating in future tender for a period of one year – Plea that such order was passed without following the principles of natural justice – On examination of factual aspects it is found that the principle of natural justice has not been followed – Effect of – Held, natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty – Natural justice accordingly stands for that "*fundamental quality of fairness which being adopted, justice not only be done but also appears to be done*" – Order set aside. (Paras 43 & 44)

Case Laws Relied on and Referred to :-

1. (1978) 1 SCC 405 : Mohinder Singh Gill .Vs. the Chief election Commissioner, New Delhi
2. (2014) 14 SCC 731 : Kulja Industries Limited .Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited.
3. (1983) 2 SCC 442 : Bhagat Ram .Vs. State of Himachal Pradesh.
4. (2010) 11 SCC 186 : Zonal Manager, Central Bank of India Vs. Devi Ispat Limited.
5. 2017 (3) CDR 1644 (Rajasthan) : Premier Printing Press .Vs. State of Rajasthan.
6. (2011) 5 SCC 697 : Union of India .Vs. Tantia Construction Pvt. Ltd.
7. (2014) 3 SCC 493 : Sanjay Kumar Shukla.Vs. . Bharat Petroleum Corporation Limited.
8. (2016) 10 SCC 571 : Mahanadi Coalfields Limited .Vs. Dhansar Engineer Company Private Limited.
9. AIR 1967 SC 1081 : Raja Anand .Vs. State of Uttar Pradesh.
10. (1939) 2 KB 838 : White and Collins .Vs. Minister of Health.
11. AIR 1968 SC 1186 : State of Madhya Pradesh .Vs. D.K. Jadav.
12. AIR 1974 SC 2105 : Muljibhai Patel .Vs. Nandlal Khodidas Barot.
13. AIR 1964 SC 1419 : Thansingh Nathmal .Vs. Superintendent of Taxes.
14. AIR 1962 SC 1694 : Collector of Monghyr .Vs. . Keshav Prasad.
15. AIR 1968 SC 98 : Zila Parishad, Moradabad .Vs. Kundan Sugar Mill.
16. AIR 2003 SC 3894 : Kanak .Vs. U.P. Avas Evam Vikas Parishad.
17. (2001) 10 SC 740 : State of Tripura .Vs. Manoranjan Chakraborty.
18. AIR 1957 SC 882 : Union of India .Vs. T.R. Varma.
19. AIR 1985 SC 1147 : Ram and Shyam Company Vs. State of Haryana.
20. AIR 1970 SC 645 : Champalal .Vs. CIT, West Bengal.
21. (2000) 10 SCC 482 : Union of India .Vs. State of Haryana.
22. (2011) 5 SCC 697 : Union of India .Vs. Tantia Construction Ltd.
23. AIR 1981 Gau. 15 : Abdul Sammad .Vs. Executive Committee of the Marigaon Mahkuma Parishad.
24. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. .Vs. Secy of State f or Environment
25. 1977 3 All ER 452 : R. .Vs. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ.
26. AIR 1970 SC 150= (1969) 2 SCC 262 : A.K. Kraipak and others .Vs. Union of India.
27. AIR 1978 SC 597 = (1978) 1 SCC 248 : Maneka Gandhi .Vs. Union of India.
28. AIR 1981 SC 818 : Swadeshi Cotton Mills .Vs. Union of India.
29. (1998) 8 SCC 194 : Basudeo Tiwary .Vs. Sido Kanhu University & Ors.
30. (2008) 16 SCC 276 : Nagarjuna Construction Company Limited .Vs. Government of Andhra Pradesh.
31. AIR 2009 SC 2375 : Uma Nath Panday and Ors. .Vs. State of U.P. & Ors.
32. (2010) 5 SCC 791 : Mysore Urban Development Authority by its Commissioner .Vs. Veer Kumar Jain.
33. (2009) 7 SCC 104 : Jayendra Vishnu Thakur .Vs. State of Maharashtra & Anr.
34. (2002) 1 SCC 405 : Union of India .Vs. P.D. Yadav.

35. 2016 (II) OLR 237 : Shree Ganesh Construction .Vs. State of Orissa.
36. (2008) 4 SCC 144 : Bhikubhai Vitlabhai Patel .Vs. State of Gujurat.

For Petitioners : Mr. A. K. Parija, Sr. Adv., M/s. S.P. Sarangi, P.K. Dash & A. Behera, [in W.P.(C) No.12457/2020]

Mr. A. Mohanty, Sr. Adv., M/s. D.K. Das, T. Patnaik, V. Mohapatra & S.K. Sahu. [in W.P.(C) No. 14114 of 2020]

For Opp. Parties : Mr. P.K. Parhi, Asst. Solicitor General of India [for O.P. No.1-Union of India in both the cases]

Mr. S.D Das, Sr. Adv., M/s. D. Mohanty, A. Mishra, B. P. Panda and D. Behera, [for O.Ps. No. 2 to 4-MCL in both the cases]

JUDGMENT Date of Hearing : 07.10.2020 : Date of Judgment : 15.10.2020

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

W.P.(C) No. 12475 of 2020 has been filed by a joint venture company-petitioner no.1 represented through its Project Manager-petitioner no.2 seeking following reliefs:-

> *"(i) issue a Writ and/or Writs to show cause as to why the impugned order dated 29.04.2020 passed by the Opposite Party No.3 vide Annexure-10 shall not be quashed and if the Opposite Parties fail to show cause to show or show insufficient cause make the said Rule absolute;*
>
> *(ii) to pass any other or further order (s) as deemed just and proper in the facts and circumstances of the case."*

Similarly, W.P.(C) No. 14114 of 2020 has been filed by a joint venture company-petitioner no.1 represented through its Manager and Authorized Signatory-petitioner no.2 seeking following relief:

> *"(a) Rule Nisi calling upon the Opposite Parties to show cause as to why the impugned order dated 07.05.2020 (Annexure-15) issued to the Petitioners debarring them from participating in future tenders of Mahanadi Coalfields Limited for a period of one year should not be quashed and/or set aside and if the opposite parties fail to show cause or show insufficient cause, make the rule absolute."*

2. The factual matrix of W.P.(C) No. 12475 of 2020, in a nutshell, is that petitioner no.1 is a joint venture company. It was formed by M/s. Vikash Fasteners Pvt. Ltd., having its registered office at Diamond Prestige, Room No. 310, AJC Bose Road, Kolkata, West Bengal, and M/s. Aloke Steels

Industries Pvt. Ltd., having its registered office at opposite Ashok Cinema, Ranchi Road, Marar, Ramgarh Cant., Jharkhand. Petitioner no.1's registered office is situated near P.N. Bank, Main Road, Ramgarh Cat.-829122, Dist.-Ramgarh, Jharkhand. Petitioner no.2 has been duly authorized to present the writ petition before this Court.

2.1 Pursuant to e-tender notice issued on 18.01.2018 by the General Manager (CMC) of Mahanadi Coalfields Limited (MCL) inviting online bids from eligible bidders with Digital Signature Certificate (DSC), petitioner no.1, having satisfied the eligibility criteria and complied the conditions stipulated in the e-tender notice, submitted its bid along with others. After due scrutiny, petitioner no.1, having come out successful, its letter of acceptance was issued on 31.03.2018 in Annexure-3 holding that the competent authority has accepted its offer, after reverse auction, against NIT-763(RT) dated 18.01.2018 in accordance with detailed NIT provisions. Accordingly, the work order was issued on 10.04.2018 for ***"Extraction of Coal/Coal measures strata by deploying Surface Miner on hiring basis, mechanical transfer of the same in Tipping Trucks and transportation of the same from SM Face to different destination inclusive of effective water spraying from dust suppression, dozing of Face/Siding/Stocks etc. and grading maintenance of roads etc. of Kaniha OCP, Kahina Area (NIT-763 (RT) Dtd. 18.01.18"***. Thereafter, an agreement named as "articles of agreement" was executed on 27.06.2018 between petitioner no.1 and MCL. A deed of indemnity was also executed on 26.08.2018, which includes conditions of contract, general terms and conditions and also special terms and conditions for transport contract and pre-contract integrity pact with required documents as prescribed in Annexure-I-mandate form for electronic fund transfer/internet banking payment, Annexure-II-bank guarantee for performance security, Annexure-III-bank guarantee for release of retention money/bid security deducted @ 5% from running bill, Annexure-IV-joint venture/consortium agreement, Annexure-V-undertaking, Annexure-VI-Affidavit, Annexure-VII- letter head of bidder (as enrolled online on e-procurement portal of Coal India Ltd., and Annexure-VII- letter head of bidder (as enrolled online on e-procurement portal of Coal India Ltd.).

2.2 After executing the above agreement, petitioner no.1 was discharging its obligation. During the period from May, 2018 to March, 2020, petitioner no.1 was required to extract 3,37,28,540 MT of coal and transport the same, but there was alleged shortfall of only 11,01,914.12 MT or 3.27% attributable

to petitioner no.1. As the same were for reasons beyond the control of petitioner no.1 and, as such, the same was to be condoned by MCL on payment of penalty on a monthly basis under clause-6.2 of the agreement. The petitioner no.1 received a show cause notice from MCL on 04.04.2020 wherein it is shown that since there was a shortfall of 1,98,46,915.02 MT or 58.86% of coal production, the petitioner no.1 was required to show cause as to why it shall not be banned from participating in future tender of MCL. The said show cause notice was received by petitioner no.1 on 05.04.2020. At the relevant point of time, as the office was not functioning due to restriction on account of COVID-19, petitioner no.1 sought time on 15.04.2020 to file reply to the show cause, which was rejected. Subsequently on 21.04.2020, petitioner no.1 filed show cause reply stating inter alia that MCL has already deducted/withheld penalty for the alleged shortfall in production due to petitioner no.1's fault on a monthly basis and, as such, the alleged shortfall, if any, had occurred on account of reasons beyond the control of the petitioner and admittedly, shortfall attributable to the petitioner is only 3.27 % of the scope of work. On 29.04.2020, reply given to the notice of show cause by petitioner no.1 was rejected by a cryptic order stating that the same was found to be unsatisfactory by the competent authority. Consequentially, the order impugned was passed on 29.04.2020 in Annexure-10 banning the business of petitioner no.1 in MCL for a period of one year contending that petitioner no.1 has performed only 41.14% as against the assigned target as per NIT/agreement at Kaniha OCP and there was no initiative on its part to meet the shortfall of targeted production. Therefore, in the interest of MCL, there was no option but to ban petitioner no.1 and partners of the joint venture from participation in future tenders of MCL, for a period of one year. Hence this writ petition.

3. The factual matrix of W.P.(C) No.14114 of 2020, in a short compass, is that petitioner no.1 is a joint venture company. It was formed taking into a unit of M/s Jalaram Transport and M/s NK Bhojani Private Limited. Its registered office is situated at S-2A/42, 43 and 44, Mancheswar, Bhubaneswar. The opposite party-MCL issued an e-tender notice on 19.09.2017 in Annexure-2 inviting online tender from eligible bidders having digital signature certificate (DSC) authorized by Controller of Certifying Authority (CCA), Govt. of India in respect of the work ***"Hiring of HEMM (Shovel, Tipper, Drill, Drozer etc.) for transportation of materials in various strata including drilling, excavation, dumping, spreading, dozing and other allied works in specified areas for dumping for exposing various***

coal seams from surface, down to seam-II Boa at Kaniha OCP as per the instructions of Project Officer/Management of Kaniha OCP, Kaniha Area for a total quantity of 41.40 Million Cum." The estimated cost of the work was Rs.282,92,70,164/- and period of completion of the work was 1095 days. Petitioner no.1, pursuant to the said NIT, submitted its bid as per the procedure mentioned in the NIT documents. It was emerged as successful bidder and accordingly a letter of acceptance vide Annexure-3 dated 27.12.2017 was issued for a total sum of Rs.307,67,61,122.40/- (including GST) and consequentially work order dated 03.01.2018 was issued. Thereafter, an agreement was executed on 26.04.2018 vide Annexure-6. The petitioner vide letter dated 20.04.2018 requested for providing encumbrance free land for working of engaged fleets and for engagement of new fleets to achieve the target and accordingly deployment of equipments under NIT-118 was there. Thereafter, by letter dated 01.05.2018, petitioner no.1 intimated to opposite party-MCL with regard to scarcity of OB for working of fleets engaged under NIT-118, but the same has not been adhered to. Thereafter, petitioner no.1 on 14.05.2018 intimated the Project Officer, Kaniha OCP with regard to stoppage of work from 15.05.2018 under NIT-118 and also stated that petitioner no.1 was not in a position to operate the existing fleets and unable to achieve the existing capacity of OB and thus it had no option except to stop engagement of the fleet from 1st shift of 15.05.2018. In response to the same, on 16.05.2018 vide Annexure-10 communication was made from opposite party-MCL to petitioner no.1 requesting to start removal of OB which had been stopped from the morning of 15.05.2018 and cooperate the management with a view not for one day but for long term business. On receipt of such letter, petitioner no.1 intimated the Project Officer, Kaniha OCP, vide letter dated 17.05.2018 under Annexure-11 series, requesting to provide adequate land both for working and dumping for continuity of work without any hindrance. Again on 21.05.2018, petitioner no.1 intimated the opposite party-MCL that due to restricted dumping site, which is one of the major constraints for the contract, the opposite party-MCL may look into the matter and give necessary instruction to provide adequate land both for working and dumping for continuity of work without any hindrance. Thereafter, correspondences went on between petitioner no.1 and opposite party-MCL seeking cooperation in all respect to carry out the contract work. But, all on a sudden, on 20.02.2020 a show cause notice of banning the business with MCL for a period of three years was issued alleging that sufficient land free from any encroachment was made available to petitioner no.1 for the work from December, 2019 but it failed to deploy

required number of equipments as per NIT. After long persuasions, petitioner no.1 deployed only five numbers of excavators and, as such, its performance was unsatisfactory. More so, several letters were issued to improve performance and also to deploy sufficient numbers of equipments to achieve the mutually agreed quantity. Thereby, petitioner no.1 was called upon to show cause why it should not be banned for doing any business with MCL for a period of three years. In response to such show cause notice, petitioner no.1 submitted its reply on 03.03.2020. Thereafter, the order of banning of business of petitioner no.1 and its partners-joint venture company with MCL for a period of one year has been passed by the Director (Tech/OP) MCL vide Annexure-15 dated 07.05.2020 stating inter alia that petitioner no.1 failed to deploy required machines which resulted in poor performance and, as such, it had performed only 23.29% of assigned target as per NIT/agreement at Kaniha OCP and there was no initiative on its part to meet the shortfall of targeted production. Therefore, in the interest of MCL, there was no option but to ban petitioner no.1 and its partners from participation in future tenders of MCL for a period of one year. Hence this writ petition.

4. Although both the writ petitions arise out of two different tender call notices, but their cause of action and principles of law, which are to be considered and decided, being similar, with the consent of learned counsel for the parties, both the writ petitions were heard together and are disposed of by this common judgment.

5. Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. A. Behera, learned counsel for the petitioners in W.P.(C) No.12475 of 2020 contended that there is no disputed questions of facts involved in this writ petition. Rather the petitioners admit the figures, as enumerated in the impugned order dated 29.04.2020 in Annexure-10, and they do not dispute such position and on the basis of admitted calculation given by the opposite parties, no case is made out against petitioner no.1 so as to impose ban for a period of 12 months. It is also contended that admittedly the agreement contains the arbitration clause, but that itself cannot dislodge the petitioners to approach this Court invoking its extra-ordinary jurisdiction under Article 226 of the Constitution of India, as the petitioners have a strong case in their favour. Meaning thereby, the petitioner no.1, having been banned/debarred from participating any other bids of MCL for a period of one year, out of which four months have already passed, serious prejudice has been caused and, therefore, there is no other efficacious remedy than to approach this

Court invoking extraordinary jurisdiction, instead of resorting to alternative remedy of arbitration available in the agreement. If at all the petitioners resort to arbitration and in the event they succeed, with the lapse of time the period of one year banning will expire, and in such event it will cast a stigma on petitioner no.1 disentitling it to participate in the tender process of the MCL, which will also cause prejudice to the petitioners. Therefore, the petitioners have a right to approach this Court, instead of availing alternative remedy as provided in the agreement itself, just to get efficacious remedy under law.

From the chart contained in the impugned order dated 29.04.2020, it reveals that petitioner no.1 had performed only 41.14 % of the agreed quantity as per the NIT, that is to say defaulted to the tune of 58.86% and that itself is contrary to the very same chart wherein it has been indicated that the default due to the fault of petitioner no.1 is only 3.27% of the agreed quantity as per the NIT. As per the statement, out of the agreed quantity 3,37,18,540 tonnes or 100%, 1,38,71,625 tonnes or 41.14% has been achieved and only 11,01,914 tonnes or 3.27% default is attributable to petitioner no.1 and 1,87,45,001 tonnes or 55.59% default is attributable to MCL. It is contended in other words, the total shortfall in production of 1,98,46,915 tonnes, 94.45% is attributable to the opposite parties and only 5.55% is attributable to petitioner no.1. It is further contended that petitioner no.1 was not allowed to do the sanctioned quantity of work for the default of MCL, as would be evident from the chart and as such, no breach can be attributed to petitioner no.1 on this score. It is further contended that the allegation made that petitioner no.1 failed to deploy adequate equipment as per the NIT, that itself is not correct in view of the fact that the default attributable to petitioner no.1 is only 3.27% which is meager one and thereby it shows that the adequate equipment had been deployed by it at the site. As such, the quantity of hindrance free work site provided by the opposite parties reduced substantially. Therefore, the issue of reduced deployment of equipment becomes wholly irrelevant. It is further contended that after passing the debarment order on 29.04.2020, vide e-mail dated 08.06.2020, revoked the debarment order but subsequently opposite party no.2 issued a cryptic order on 06.07.2020 to petitioner no.1 debarring it again from participating in the tender of MCL even though petitioner no.1 was protected by interim order passed by this Court on 04.06.2020 after hearing learned counsel for the petitioners and opposite party MCL. It is further contended that debarring petitioner no.1 from participating in the tenders for a period of

one year, pursuant to impugned order dated 29.04.2020, has been passed without affording reasonable opportunity of hearing to the petitioners. Merely issuing notice of show-cause to the petitioners cannot justify compliance of the principles of natural justice rather due to non-grant of opportunity of hearing the order impugned suffers from violation of principles of natural justice and thereby can be declared as non-est in the eye of law.

It is further contended that the opposite parties filed their counter affidavit on 03.06.2020. Taking into consideration the contentions raised in the said counter affidavit and after hearing learned counsel for the opposite parties, this Court passed interim order on 04.06.2020. But subsequently, an additional counter affidavit was filed on 03.07.2020 justifying the action taken by the opposite parties by providing a chart stating therein that petitioner no.1 has achieved 92.64% as opposed to 41.14% as alleged in the impugned order and the default on its account is a meager 7.36%. The said chart also indicates that only 44.4% hindrance free quantity of work was provided to petitioner no.1, that means the opposite parties defaulted to the tune of 55.6% of the targeted quantity. By way of filing additional affidavit, the opposite parties have tried to justify the impugned order, which is not permissible under the law, because the impugned order itself will justify the action taken against petitioner no.1. It is further contended that the debarment of petitioner no.1 from participating in the tender of the MCL for a period of one year is hit by Wednesbury's principles of unreasonableness and as such the same is disproportionate. More particularly, the order impugned suffers from the vice of non-application of mind. It is further contended that when the opposite parties have already levied penalty for shortfall of performance, the debarment of petitioner no.1 for a period of one year from participating in the tenders of MCL for self-same cause of action amounts to double jeopardy. It is further contended that the order impugned is de hors the agreement between the parties and thereby the same has to be revoked as the principles of natural justice have not been complied with.

To substantiate his contentions, learned Senior Counsel appearing for the petitioners has relied upon ***Mohinder Singh Gill v. the Chief election Commissioner, New Delhi***, (1978) 1 SCC 405; ***Kulja Industries Limited v. Chief General Manager***, ***Western Telecom Project Bharat Sanchar Nigam Limited***, (2014) 14 SCC 731; ***Bhagat Ram v. State of Himachal Pradesh***, (1983) 2 SCC 442; ***Zonal Manager, Central Bank of India v. Devi Ispat***

Limited, (2010) 11 SCC 186; ***Premier Printing Press v. State of Rajasthan***, 2017 (3) CDR 1644 (Rajasthan); ***Union of India v. Tantia Construction Pvt. Ltd***.(2011) 5 SCC 697; and ***Medipol Pharmaceutical India Pvt. Ltd. v. Post Graduate Institute of Medical Education & Research*** (C.A. No.2903 of 2020 arising out of SLP(C) No.26349 of 2019 decided on 05.08.2020) reported in MANU/SC/0585/2020.

6. Mr. Asok Mohanty, learned Sr. Counsel appearing along with Mr. V. Mohapatra, learned counsel for the petitioners in W.P.(C) No.14114 of 2020 at the outset adopted the arguments advanced by Mr. A.K. Parija, learned Sr. Counsel appearing for the petitioners in W.P.(C) No.12475 of 2020 and contended that there are no disputed facts in the present proceeding and the petitioners are relying on the documents, letters, certificates and orders issued and admitted by the MCL to demonstrate the palpable illegality in the order impugned. It is contended that the impugned order dated 07.05.2020 in Annexure-15 suffers from non-application of mind. It is further submitted that MCL has proceeded to debar petitioner no.1 on a finding that it is solely accountable for the entire shortfall of 76.71% when actually their own documents and records relied on in the impugned order speak starkly to the contrary. It is further contended that in paragraph-2 of the impugned order, MCL has relied on a chart from which it is evident that the total shortfall was 2,26,68,508.78 tonnes from total agreed quantity of 2,95,51,000 tonnes for over burden removal which amounts to a total shortfall of 76.71% of the said agreed quantity. It is further contended that out of the said shortfall of 2,26,68,508.78 tonnes, the shortfall attributable to petitioner no.1 is only 7,90,883 tonnes as per MCL's own admission and records and, as such, the same is recorded under column titled "shortfall due to contractor's fault" in the chart, which comes to only 2.67% of the total shortfall, while MCL itself is responsible for the balance 74.04% as against total shortfall of 76.71%. In fact, the shortfall of 74.04% by MCL amounts to 96.5% of the total shortfall percentage of 76.71% whereas petitioner no.1 is responsible for only 3.5%. It is contended that due to shortfall of 76.71% of agreed quantity, banning order has been imposed on petitioner no.1 which is absolutely misconceived one. If at all any shortfall would taken into consideration, it would be only 2.67% of the total shortfall, as per MCL's own record and, as such, MCL is accountable for remaining 74.04%. Therefore, basing upon such shortfall, the so called banning on petitioner no.1 cannot sustain in the eye of law. It is further contended that the opposite party-MCL has tried to improve the case by justifying the impugned order by way of filing counter affidavit on

01.07.2020 which is not permissible. As such, the order impugned should disclose reasons for such banning and subsequent clarification by supplementing and supplanting to the order impugned cannot sustain in the eye of law. It is further contended that the opposite party-MCL has pleaded in the counter affidavit that petitioner no.1 has executed 89.69% of the hindrance-free target and the shortfall by petitioner no.1 is 2.67% from available hindrance free quantity. It was also re-affirmed that petitioner no.1 is not at all responsible for the entire 76.71% of the agreed quantity on the basis of which it has been banned for a period of one year.

It is further contended that it has been alleged that petitioner no.1 failed to deploy entire fleet of equipment as per the NIT, which itself was non-application of mind, when the correspondences which have been enclosed to the writ petition clearly indicate that time and again petitioner no.1 sought cooperation from the opposite party-MCL to provide sufficient hindrance free cutting area, dumping area and separate haul roads in east and west side of the mine. Due to non-cooperation of opposite party-MCL by not providing hindrance free area, the shortfall which has been alleged as 2.67% being meager one, the imposition of ban for one year from participating in any tender is too harsh and disproportionate. It is further contended that by way of counter affidavit, the opposite parties have tried to improve their case by justifying the impugned order and also tried to fill up the lacunae and, as such, the order so passed is without complying the principles of natural justice and thus cannot sustain. It is further contended that banning petitioner no.1 for one year is hit by Wednesbury's principles of unreasonableness, as it is wholly disproportionate and amounts to double punishment, though penalty for shortfall in performance has been levied by the opposite parties. It is further contended that the order impugned is de hors the agreement and thereby cannot sustain. It is contended that the writ petition is maintainable even though alternative remedy, by way of arbitration in the agreement, is available. It is contended that the reliance placed on the judgments by Mr. A.K. Parija, learned Senior Counsel appearing for the petitioners in W.P.(C) No.12475 of 2020 shall be applicable to the present case and, therefore, the petitioners are refrained from repeating the said judgments.

7. Mr. P.K. Parhi, learned Asst. Solicitor General appearing for Union of India contended that since the dispute in both the matters is between the petitioners vis-à-vis MCL, Union of India has no reply to submit.

8. Mr. S.D. Das, learned Senior Counsel appearing along with Mr. D. Mohanty, learned counsel for MCL raised a preliminary objection contending that in view of involvement of complicated and disputed questions of facts in both the writ petitions the same cannot be adjudicated in a proceeding under Article 226 of the Constitution of India. It is further contended that clause-13-A General Terms & Conditions of the contract under NIT-763 (RT) provides for settlement of disputes through arbitration and the petitioners in both the writ petitions have also given consent regarding settlement of dispute through arbitration, in that case, due to availability of alternative remedy, both the writ petitions are to be dismissed. It is further contended that as per the undertaking given pursuant to the condition stipulated in the NIT, since there was gross violation, the action has been taken for banning petitioner no.1 in both the writ petitions for a period of one year. Thereby, no illegality or irregularity has been committed by passing the orders impugned in both the writ petitions.

It is further contended that as per clause- 8(C) the required capacity of fleet to be deployed daily for execution of work. As such, the petitioner no.1 in both the writ petitions were duty bound to make available the total equivalent capacity of equipments on daily basis. The same having not been deployed, they defaulted in carrying out such conditions, leading to cause loss to the State exchequer in terms of royalty. It is further contended that petitioner no.1 in both the writ petitions had been given adequate opportunity by communicating letters to increase deployment of machineries and achieve the targeted quantity, to which they had not given any heed. Similarly, to the show cause notices issued, the replies given by petitioner no.1 in both the writ petitions being not satisfactory, the orders impugned were passed. Thereby, no illegality or irregularity has been committed by the authority in passing such orders.

It is further contended that petitioner no.1 in both the writ petitions are liable to pay penalty in terms of clause-6.2 of the General Terms and Conditions of the NIT, but the same is without prejudice to any other right and remedy available under law to MCL on account of such breach. It is further contended that due to shortfall in performance by petitioner no.1 in W.P.(C) No.12475 of 2020 from hindrance free area though the quantity appears to be a meager 7.36%, however, the loss to MCL on account of such shortfall is Rs. 66,00,02,481.32 and loss of royalty to the Government is Rs.12,99,92,367.97, whereas the total penalty which has been recovered

under clause-6.2 is merely Rs.94,17,381.80. Similarly, the shortfall in performance by petitioner no.1 in W.P.(C) No.14114 of 2020 from hindrance free area though the quantity appears to be a meager 10.31%, however, the loss to MCL on account of such shortfall is Rs. 39.07 crores and loss of royalty to the Government is Rs.7.55 crores, whereas the total penalty which has been recovered under clause-6.2 is merely Rs.88,77,973.00. The entire action has been taken resorting to clause-9 of the undertaking. Thereby, no illegality or irregularity has been committed so as to cause interference by this Court. As such, the writ petitions are to be dismissed both on the ground of maintainability and also on merits.

To substantiate his contention he has relied upon the judgments of the apex Court in ***Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited,*** (2014) 3 SCC 493 and ***Mahanadi Coalfields Limited v. Dhansar Engineer Company Private Limited,*** (2016) 10 SCC 571.

9. This Court heard Mr. A.K. Parija, learned Senior counsel appearing along with Mr. A. Behera, learned counsel for the petitioners in W.P.(C) No.12475 of 2020; Mr. A. Mohanty, learned Senior Counsel appearing along with Mr. V. Mohapatra, learned counsel for the petitioners in W.P.(C) No. 14114 of 2020; Mr. P.K. Parhi, learned Asst. Solicitor General appearing for Union of India in both the writ petitions; and Mr. S.D. Das, learned Senior Counsel appearing along with Mr. D. Mohanty for MCL in both the writ petitions by virtual mode. Pleadings having been exchanged, with the consent of learned counsel for the parties, both the writ petitions are being disposed of finally at the stage of admission, keeping in view the fact that petitioner no.1 in both the writ petitions have been banned for a period of one year, out of which four months have already passed and with the passage of remaining time the writ petitions will become infructuous and the banning itself will remain as a stigma on them.

10. Before appreciating the factual and legal aspects involved in both the writ petitions, this Court deems it proper to refer to the various clauses of the agreement, which are relevant for the purpose of deciding both the cases.

> *"**8. Eligibility Criteria :***
>
> *xx* *xx* *xx*
>
> ***C. Fleet Requirement :** The bidder is required to give an undertaking in the form of an Affidavit in the prescribed format to deploy the following matching equipment/Tippers/Pay-Loaders either owned or hired.*

Types of Fleet /Equipment	*Measure of Capacity*	*Unit of Capacity*	*Minimum Capacity required for each fleet/equipment*	*Total Equivalent Capacity required to be deployed daily for execution of work*
Surface Miner	*Cutting Width*	*mm*	*3000*	*26990 Cum/day*
Pay Loader	*Power*	*HP*	*112*	*2800*
Tipper	*Carrying capacity*	*Kg.*	*14000*	*21,00,000*
Dozer	*Power*	*HP*	*410*	*2050*
Grader	*Power*	*HP*	*280*	*1120*
Water Tanker	*Carrying capacity*	*Litre*	*8000*	*160000"*

"6. TIME FOR COMPLETION OF CONTRACT – EXTENSION THEREOF, DEFAULTS & COMPENSATION FOR DELAY:

xx xx xx

6.2 In the event of the contractor's failure to comply with the required progress in terms of the agreed time and progress chart or to complete the work and clear the site on or before the date of completion of contract or extended date of completion, he shall without prejudice to any other right or remedy available under the law to the company on account of such breach, shall become liable to pay for penalty as under:

(a) If the average daily progress of work during the calendar months is less than the stipulated rate indicated in the detailed tender notice, penalty as detailed below will be levied.

(i) If the average daily progress of work executed during the calendar month is more than 80% and less than 100 % of stipulated rate of progress, penalty equal to 10% of the contract value of the short fall in work shall be levied.

(ii) If the average daily progress of work executed during the calendar month is less than 80% of stipulated rate, penalty equal to 20% of contract value of the short fall in work shall be levied.

The aggregate of the penalties so levied shall not exceed 10% of the total contract value.

Penalties will be calculated every month and withheld. The contractor shall be allowed to make up the shortfall in the succeeding three months within the stipulated time of completion. Once the shortfall is fully made up the so withheld penalty will be released."

"9. TERMINATION, SUSPENSION, *CANCELLATION & FORECLOSURE OF CONTRACT.*

xx xx xx

9.2. On cancellation of the contract or on termination of the contract, the Engineer-in-charge shall have powers:

(a) to take possession of the site and carry out balance work through any other agency.

(b) after giving notice to the contractor to measure up the work of the contractor and to take such whole or the balance or part thereof, as shall be unexecuted out of his hands and to give it to another contractor or take up departmentally, to complete the work. The contractor whole contract is terminated shall not be allowed to participate in future bidding for period of minimum twelve months.

In such an event, the contract shall be liable for loss/damage suffered by the employer because of action under this clause and to compensate for this loss or damage, the employer shall be entitled to recover higher of the following:

(i) Forfeiture of security deposit comprising of performance guarantee and retention money and additional performance security, if any, at disposal of the employer.

Or

(ii) 20% of value of incomplete work. The value of the incomplete work shall be calculated for the items and quantities remaining incomplete (as per provision of agreement) at the agreement rates including price variation as applicable on the date, when notice in writing for termination of work was issued to the contractor.

It is being clarified that the above liability is over and above the penalties payable by the contractor on account of shortfall in quantities as per provision of clause 6.

The amount to be recovered from the contractor as determined above, shall, without prejudice to any other right or remedy available to the employer as per law or as per agreement, will be recovered from any money due to the contractor on any account or under any other contract and in the event of any shortfall, the contractor shall be liable to pay the same within 30 days. In case of failure to pay the same the amount shall be debt payable

In the event of above course being adopted by the Engineer-in-charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased materials, equipments or entered into agreement or made advances on any account or with a view to the execution of work or performance of the contract. And in case action is taken under any provision aforesaid, the contractor shall not be entitled to recover or to be paid any sum for any work thereof or actually performed under this contract unless and unti l the

engineer-in-charge has certified in writing the performance of such work and value payable in respect thereof and he shall only be entitled to be paid the value so certified.

The need for determination of the amount of recovery of any extra cost/expenditure or of any loss/damage suffered by the company shall not be however arise in the case of termination of the contract for death/demise of the contractor as stated in 9.1(d)."

"13. SETTLEMENT OF DISPUTES

xx *xx* *xx*

13A. Settlement of Disputes through Arbitration

If the parties fail to resolve the disputes/differences by in house mechanism, then, depending on the position of the case, eight the employer/owner or the contractor shall give notice to other party to refer the matter to arbitration instead of directly approaching Court. The contractor shall, however, be entitled to invoke arbitration clause only after exhausting the remedy available under the clause 12.

In case of parties other than Govt. agencies the redressal of disputes/differences shall be sought through Sole Arbitration as under.

Sole Arbitration:

In the event of any question, dispute or difference arising under these terms & conditions or any condition contained in this contract or interpretation of the terms of, or in connection with this Contract (except as to any matter the decision of which is specially provided for by these conditions), the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be). The award of the arbitrator shall be final and binding on the parties of this Contract."

"SPECIAL TERMS AND CONDITIONS FOR THE WORK OF DEPLOYMENT OF SURFACE MINERS IN DIFFERENT OCPs/OCMs OF MCL.

xx *xx* *xx*

8.0 DEFAULT AND PENALTY

8.1 LOSS OR DAMAGE

Any loss or any expenditure for damages incurred by company will be recoverable from the contractor whether fully or partly if such expenditure for damages have been caused either directly or indirectly due to any negligence or failure on the part of the contractor.

8.2 ADDITIONAL PENALTY CLAUSE:

For failure to produce size coal as per NIT (100 mm size), the contractor shall also be liable for penalty at the rate of 10% of the awarded rate for such over size quantity.

The maximum penalty including all the penalties will remain 10% of the contract value as per Clause 6.2.

8.3 WAIVAL OF PENALTY

The company may at its sole discretion waive the payment of penalty in full or the part on request received from the contractor depending the merit of the case if the entire work is completed within the date as specified in the contract or within extended period approved without imposing penalty."

SPECIAL TERMS & CONDITIONS FOR TRANSPORT CONTRACT.

UNDERTAKING OF LETTER HEAD OF BIDDER
UNDERTAKING

I/We,……., Partner/Legal Attorney, Authorized Representative of Sri/Smt. M/s……(Name of bidder), solemnly declare that :

1. *I/we am/are submitting Bid for the work ……. Against NIT No/Tender ID…… Dated …….. and I/We offer to execute the work in accordance with all the terms, conditions and provisions of the bid.*
2. *I/We will deploy the matching Equipments/ Tippers/ Pay-Loaders as detailed in the NIT either Owned or Hired, if the work is awarded to me/us.*
3. *Myself /Our Partners/ directors don't has/have any relative as employee of Mahanadi Fields Limited.*
4. *All information furnished by me/us on-line in respect of fulfillment of eligibility criteria and qualification information on this Bid is complete, correct and true.*
5. *All copy of documents credentials and documents submitted along with this Bid are genuine, authentic, true and valid.*
6. *I/We hereby authorize department to seek references/clarifications from our Bankers.*
7. *We hereby undertake that we shall register and obtain license from the competent authority under the contract labour (Regulation & Abolition Act) as relevant, if applicable*
8. **I/We have not been banned or delisted by any Govt., or Quasi Govt. Agencies or PSUs (In case of JV, all partners are covered).*

Or

9. *If any information and document submitted is found to be false/incorrect at any time, department may cancel my/Bid and action as deemed fit may be taken against me/us, including termination of the contract, forfeiture of all dues including Earnest Money and banning/delisting of our firm and all partners of the firm etc."*

11. At this stage, it is worthwhile to quote the orders impugned in both the writ petitions. The order dated 29.04.2020 in Annexure-10, which has been impugned in W.P.(C) No. 12475 of 2020, reads as follows:-

"To

1) *M/s. VFPL ASIPL JV COMPANY, Near P. N. Bank, Main Road, Ramgarh Cantt. -829122, Dist: Ramgarh (Jharkhand), e-Mail Id: jiplsales@gmail.com.*

2) *M/s. Vikash Fastners Private Limited, At Diamond Prestige, Room No. 310, AJC Bose Road, Kolkata, West Bengal e-Mail Id: abpatodia@satyam.net.in*

3) *M/s. Aloke Steels Industries Private Limited, At Opposite Ashok cinema, Ranchi Road, Marar, Ramgarh Cantt., Jharkhand e-Mai] Id: jiplramgarh@gmail.com*

Sub : Banning of Business of your Company and Partners of your Joint Venture Company in MCL for a period of one year.

Ref:-1. MCL/SBP/GM(CMC)NIT-763(RT)/2018/1020 Dated 18.01.2018

2. LOA No. MCL/SBP/GM(CMC)NIT-763 (RT)/2018 /1215 Dated 31.03.2018

3. Work order No. MCL/GM(KA)/Mining NlT-763 (RT)/2018/18 Dated 10.04.2018.

4. Show Cause Notice for Banning of Business vide letter No. MCL/GM(KA)/Mining NIT-763 (RT)/ 2020/993 Dated 04.04.2020

5. Your reply to the Show Cause Notice vide letter under reference No. VFPL ASIPL/2020-21/01 Dated 21.04.2020.

1. You have been awarded the work of Extraction of Coal/Coal measure strata by deploying Surface Miner on hiring basis, mechanical transfer of the same in Tipping Trucks and transportation of the same from SM Face to different destinations inclusive of effective water spraying for dust suppression, dozing of Faces/Sidings/Stocks etc. and grading/maintenance of roads etc. of Kaniha OCP, Kaniha Area. [NIT-763(RT) Dated 18.01.2018] vide Letter of Acceptance under reference No. MCL/SBP/GM(CMC)/MT-763(RT)/2018/1215 Dated 31.03.2018 of General Manager(CMC), MCL and Work Order No. MCL/GM(KA)/Mining/MT-763(RT)/2018/18 Dated 10.04.2018 of Kaniha Area.

2. Whereas you have executed only 13.87 MT of Coal at Kaniha OCP, Kaniha Area against a target of 33.72 MT for the period from May-2018 to March-2020, i.e. only 41.14%. Month-wise performance of our Com an under NIT-763 R Dated 18.01.2018 from May-2018 to March-2020 is as under :-

Sl No	***Month***	***Agreed Qty (Tonnes)***	***Achieved Qty (Tonnes)***	***Total Shortfall (Tonnes)***	***Shortfall due to contractor's fault (Tonnes)***	***Penalty amount deducted/withheld (in Rs)***
1.	*May-18*	*1518340*	*220181.64*	*1298158.36*	*0*	*0.00*
2.	*Jun-18*	*1441800*	*468066.49*	*973733.51*	*3800*	*23070.00*
3.	*Jul-18*	*1489860*	*571877.16*	*917982.84*	*4067*	*27450.00*
4.	*Aug-18*	*1489860*	*389727.24*	*1100132.76*	*0*	*0.00*
5.	*Sept-18*	*1441800*	*554596.23*	*887203.77*	*0*	*0.00*
6.	*Oct-18*	*1489860*	*655147.72*	*834712.28*	*8775*	*65330.00*
7.	*Nov-18*	*1441800*	*694042.97*	*747757.03*	*1200*	*9605.00*
8.	*Dec-18*	*1489860*	*612881.48*	*876978.52*	*25302.5*	*188377.00*
9.	*Jan-19*	*1489860*	*675993.13*	*813866.87*	*15000*	*106410.00*
10.	*Feb-19*	*1345680*	*565289.98*	*780390.02*	*10000*	*70940.00*
11.	*Mar-19*	*1489860*	*930501.53*	*559358.47*	*51500*	*347573.50*
12.	*Apr-19*	*1441800*	*520501.26*	*921298.74*	*22700*	*153202.30*
13.	*May-19*	*1489860*	*615869.92*	*873990.08*	*6500*	*43868.50*
14.	*Jun-19*	*1441800*	*601453.15*	*840346.85*	*19000*	*128231.00*
15.	*Jul-19*	*1489860*	*400324.43*	*1089535.57*	*50500*	*340824.50*
16.	*Aug-19*	*1489860*	*269722.74*	*1220137.26*	*0*	*0.00*
17.	*Sept-19*	*1441800*	*248773.32*	*1193026.68*	*3000*	*20247.00*
18.	*Oct-19*	*1489860*	*456024.96*	*1033835.04*	*25500*	*172100.00*
19.	*Nov-19*	*1441800*	*508346.29*	*933453.71*	*94537*	*585184.00*
20.	*Dec-19*	*1489860*	*852938.11*	*636921.89*	*32500*	*201175.00*
21.	*Jan-20*	*1489860*	*903302.56*	*586557.44*	*157412.2*	*974382.00*
22.	*Feb-20*	*1393740*	*980342.76*	*413397.24*	*312386.23*	*4216589.00*
23.	*Mar-20*	*1489860*	*1175719.91*	*314140.09*	*258234.19*	*1742823.00*
	Total	***33718540***	***13871624.98***	***19846915.02***	***1101914.12***	***9417381.80***

3. Whereas you did not deploy sufficient equipment as specified in the MT-763(RT), the month-wise deployment of equipment by you vis-a-vis equipment to be deployed as per NIT-763(RT) Dated 18.01.2018 is as under:

Sl. No.	Month	No. of S/ Miners as per NIT	No. of S/ Miners Depl.	P/L as per NIT (Equivalent Capacity) In HP	Depl. Of P/L (Equivalent Capacity) in HP	Tippers as per NIT (Equivalent Capacity) in Te	Depl. Of Tippers (Equivalent Capacity) in Te	Dozers as per NIT (Equivalent Capacity) in HP	Depl of Dozers (Equivalent Capacity) in HP	Graders as per NIT (Equivalent Capacity) in HP	Depl. of Graders (Equivalent Capacity) in HP	Water Tankers as per NIT (Equivalent Capacity in KL	Depl. OF Waters Tanker (Equivalent Capacity) in KL
1	May-18	5	1	2800	800	2100	466	2050	840	1120	280	160	60
2	Jun-18	5	3	2800	1200	2100	1418	2050	1680	1120	280	160	60
3	Jul-18	5	3	2800	1200	2100	1418	2050	1680	1120	280	160	60
4	Aug-18	5	3	2800	1200	2100	1418	2050	1680	1120	280	160	60
5	Sep-18	5	3	2800	1200	2100	1418	2050	1680	1120	280	160	60
6	Oct-18	5	3	2800	1600	2100	1418	2050	1680	1120	280	160	60
7	Nov-18	5	3	2800	1600	2100	1418	2050	1680	1120	280	160	60
8	Dec-18	5	3	2800	1600	2100	1195	2050	1680	1120	280	160	60
9	Jan-19	5	3	2800	1600	2100	1114	2050	1680	1120	280	160	60
10	Feb-19	5	3	2800	2000	2100	1317	2050	1260	1120	280	160	60
11	Mar-19	5	3	2800	2000	2100	1398	2050	1680	1120	280	160	60
12	Apr-19	5	3	2800	2000	2100	1398	2050	1680	1120	280	160	60
13	May-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
14	Jun-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
15	Jul-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
16	Aug-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
17	Sep-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
18	Oct-19	5	3	2800	2000	2100	1418	2050	1680	1120	280	160	60
19	Nov-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
20	Dec-19	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
21	Jan-20	5	3	2800	2000	2100	1418	2050	1260	1120	280	160	60
22	Feb-20	5	4	2800	2200	2100	1580	2050	1260	1120	280	160	60
23	Mar-20	5	4	2800	2400	2100	1722	2050	1260	1120	280	160	60

4. Whereas you have been consistently performing poorly since the beginning of the Contract under NIT-763(RT) Dated 18.01.2018 at Kaniha OCP, Kaniha Area. In spite of you being given sufficient opportunities to execute the agreed quantity as per terms and conditions of Agreement and also given several letters to improve the performance and to deploy sufficient equipment as per NIT, you did not deploy

sufficient equipment as per NIT resulting in poor performance of Coal Production at Kaniha OCP, Kaniha Area.

5. Whereas 21 days Show Cause Notice for Banning of Business of your Company and all Partners of your Joint Venture Company for a period of 03 years was issued by General Manager, Kaniha Area vide letter under reference No. MCL/GM(KA)/ Mining/NIT-763(RT) /2020/ 993 Dated 04.M.2020. Your reply to the Show Cause Notice vide letter under reference No. VFPL ASIPL/ 2020-21, /01 Dated 27.04.2020 has been found to be unsatisfactory by the Competent Authority.

6. Whereas MCL has incurred a huge irreparable loss due to poor performance by you. Your consistent poor performance shows that you are likely to severely impair production capacity of our company if allowed to do business with MCL in future. The estimated loss during 2019-20 is around 66 crores and also loss of royalty to Govt. exchequer comes to around Rs. 13 Crore. Despite the repeated remainders, you failed to deploy required machines which have resulted in poor performance. You have performed only 41.1,4% of assigned target as per MT /agreement at Kaniha OCP. There was no initiative on your part to meet the shortfall of targeted production. Therefore, in the interest of MCL, there is no option but to ban you and Partners of your Joint Venture from participation in future tenders of MCL, for a period of 1 year.

In view of the above, M/s. VFPL ASIPL JV Company and its constituent Partners of Joint Venture are banned for a period of one year from participating in future tenders of MCL. Ban will come into force from the date of issue of this letter."

Similarly, the order dated 17.05.2020 in Annexure-15, which has been impugned in W.P.(C) No. 14114 of 2020, reads as follows:-

"To

1) M/s. JRT NKBPL JV, CMD Chowk,Link Road, Bilaspur (C.G.),e-Mail Id : jrtnkbpljv @ gmail.com

2) M/s. Jalaram Transport,CMD Chowk, Link Road, Bilaspur (C.G.)

3. M/s. N.K. Bhojani Pvt. Ltd. S-2/A-42, 43, 44. Mahcheswar Industrial Estate, Bhubaneswar, Odisha- 751010.

Sub : Banning of Business of your Company and Partners of your Joint Venture Company in MCL for a period of one year.

Ref:- 1.NIT No. MCL/SBP/GM(CMC)NIT-118/2017/ 611 Dated 19.09.2017

2. LOA No. MCL/SBP/GM(CMC)NIT-118/ 2017/935 Dated 23.12.2017.

3. Work order No. MCL/GM(KA)/Mining NlT-118/2018/469 Dated 03.01.2018.

4. Show Cause Notice for Banning of Business vide letter No. MCL/GM(KA)/Min/ NIT-118/2020/952 Dated 20.02.2020

5. Your reply to the Show Cause Notice vide letter under reference No. JN(JV) K.OCP/NIT-118/2019-20 Dated 03.03.2020.

1. You were awarded the work of awarded the work of Hiring the HEMM (Shovel, Tipper, Drill, Dozer etc.) for transfer & transportation of materials in various strata including drilling, excavation, dumping, spreading, dozing and other alied work in specified areas for dumping for exposing various coal seams from surface, down to seam II Boa at Kaniha OCP as per the instructions of Project Officer/ Management of Kaniha OCP, Kaniha Area for a quantity of 41.40 MCum for a period of 1095 days (Quantity Per day = 37,808 Cum/day), amounting to Rs.307,67,61,122.40 (including GST @ 18%) (NIT-118 dated 19.09.2017) vide Letter of Acceptance under reference No. MCL/SBP/GM(CMC) NIT-118/2017/935 Dated 23.12.2017 of General Manager (CMC), MCL and Work Order No. MCL/GM (KA)/ Mining/NIT-118/2018/469 Dated 03.01.2018 of Kaniha Area. The period of Contract is from 22.01.2018 to 20.01.2021.

2. Whereas you have executed only 6.88 MCum of OB Removal of Kaniha OCP , Kaniha Area against a target of 29.55 MCum for the period from January-2018 to March-2020 i.e. only 23.29 %. Month wise performance of your Company under NIT-118 Dated19.09.2017 from January-2018 to March-2020 is as under:-

Sl. No.	*Month*	*Agreed Qty (Tonnes)*	*Achieved Qty (Tonnes)*	*Total Shortfall (Tonnes)*	*Shortfall due to Contractor's (Tonnes)*	*Penalty amount deducted withheld (in Rs.)*
1.	*Jan-18*	*40000*	*33800.10*	*6199.00*	*0*	*0*
2.	*Feb-18*	*336000*	*179535.93*	*156464.07*	*0*	*0*
3.	*Mar-18*	*868000*	*198647.01*	*669352.99*	*0*	*0*
4.	*Apr-18*	*1005000*	*189663.27*	*815336.73*	*0*	*0*
5.	*May-18*	*1085000*	*99615.58*	*985384.42*	*0*	*0*
6.	*Jun-18*	*1050000*	*206792.08*	*843207.92*	*0*	*0*
7.	*Jul-18*	*992000*	*177199.42*	*814800.58*	*0*	*0*
8.	*Aug-18*	*992000*	*147639.97*	*844360.03*	*0*	*0*
9.	*Sep-18*	*1140000*	*183480.73*	*956519.27*	*2300*	*15514*
10.	*Oct-18*	*1209000*	*280206.68*	*928793.32*	*39393*	*265706*
11.	*Nov-18*	*1240000*	*301769.19*	*938230.81*	*27173*	*183282*
12.	*Dec-18*	*1240000*	*389324.14*	*850675.86*	*66620*	*449352*
13.	*Jan-19*	*1240000*	*348792.88*	*891207.12*	*14550*	*98140*
14.	*Feb-19*	*1176000*	*237412.10*	*938587.90*	*0*	*0*
15.	*Mar-19*	*1395000*	*411163.24*	*983836.76*	*0*	*0*

16.	*Apr-19*	*1260000*	*248279.27*	*1011720.73*	*0*	*0*
17.	*May-19*	*1302000*	*375339.49*	*926660.51*	*0*	*0*
18.	*Jun-19*	*1200000*	*274287.75*	*925712.25*	*0*	*0*
19.	*Jul-19*	*1085000*	*169154.21*	*915845.79*	*0*	*0*
20.	*Aug-19*	*1085000*	*0.00*	*1085000.00*	*0*	*0*
21.	*Sep-19*	*1140000*	*145089.64*	*994910.36*	*0*	*0*
22.	*Oct-19*	*1178000*	*204408.50*	*973591.50*	*0*	*0*
23.	*Nov-19*	*1200000*	*404081.47*	*795918.53*	*0*	*0*
24.	*Dec-19*	*1240000*	*422844.25*	*817155.75*	*8000*	*53960*
25.	*Jan-20*	*1240000*	*475038.53*	*764961.47*	*263847*	*3559296*
26.	*Feb-20*	*1218000*	*431164.75*	*786835.25*	*261500*	*3527635*
27.	*Mar-20*	*1395000*	*347761.04*	*1047238.96*	*107500*	*725088*
	Total	***29551000***	***6882491.22***	***22668508.78***	***790883***	***8877973***

3. Whereas you did not deploy sufficient equipment as specified in the NIT-118, Dated 19.09.2047, the month-wise deployment of equipment by you vis-à-vis equipment to be deployed as per NIT-118 IS AS UNDER:-

Sl. No.	*Month*	*Shovels as per NIT (Equivalent Capacity) in Cum.*	*Deployment of Shovels (Equipment capacity) in Cum.*	*Tippers as per NIT (Equivalent Capacity) in Cum.*	*Deployment of Tippers (Equipment capacity) in Cum.)*
1.	*Jan-18*	*50.40*	*6.2*	*782.73*	*140*
2.	*Feb-18*	*50.40*	*9.3*	*782.73*	*210*
3.	*Mar-18*	*50.40*	*9.3*	*782.73*	*210*
4.	*Apr-18*	*50.40*	*12.4*	*782.73*	*257*
5.	*May-18*	*50.40*	*9.3*	*782.73*	*163*
6.	*Jun-18*	*50.40*	*9.3*	*782.73*	*163*
7.	*Jul-18*	*50.40*	*9.3*	*782.73*	*163*
8.	*Aug-18*	*50.40*	*9.3*	*782.73*	*163*
9.	*Sep-18*	*50.40*	*9.3*	*782.73*	*163*
10.	*Oct-18*	*50.40*	*9.3*	*782.73*	*163*
11.	*Nov-18*	*50.40*	*12.4*	*782.73*	*268*
12.	*Dec-18*	*50.40*	*12.4*	*782.73*	*268*
13.	*Jan-19*	*50.40*	*15.5*	*782.73*	*326*
14.	*Feb-19*	*50.40*	*12.4*	*782.73*	*268*
15.	*Mar-19*	*50.40*	*15.5*	*782.73*	*326*

16.	*Apr-19*	*50.40*	*12.4*	*782.73*	*268*
17.	*May-19*	*50.40*	*12.4*	*782.73*	*268*
18.	*Jun-19*	*50.40*	*12.4*	*782.73*	*268*
19.	*Jul-19*	*50.40*	*12.4*	*782.73*	*268*
20.	*Aug-19*	*50.40*	*0*	*782.73*	*0*
21.	*Sep-19*	*50.40*	*12.4*	*782.73*	*268*
22.	*Oct-19*	*50.40*	*12.4*	*782.73*	*268*
23.	*Nov-19*	*50.40*	*15.2*	*782.73*	*303*
24.	*Dec-19*	*50.40*	*15.2*	*782.73*	*303*
25.	*Jan-20*	*50.40*	*15.2*	*782.73*	*303*
26.	*Feb-20*	*50.40*	*15.2*	*782.73*	*303*
27.	*Mar-20*	*50.40*	*15.2*	*782.73*	*303*

4. Whereas you have been consistently performing poorly since the beginning of the contract under NIT-118 dated 19.09.2017 at Kaniha OCP, Kaniha. Inspite of you being given sufficient opportunities to execute the agreed quantity as per terms and conditions of Agreement and also given several letters to improve the performance and to deploy sufficient equipment as per NIT, you did not deploy sufficient equipment as per NIT resulting in poor performance of OB Removal, leading to less exposure of coal at Kaniha OCP, Kaniha Area and huge loss to MCL.

5. Whereas a 21 days Show Cause Notice for Banning of Business of your Company and all Partners of your Joint Venture Company for a period of 3 years was issued by General Manager, Kaniha Area vide letter under reference No.MCL/GM(KA)/Min/NIT-118/ 2020952 dated 20.02.2020. Your reply to the Show Cause Notice vide letter under reference No. JN(JV)/K.OCP/NIT-118/2019-20/291 dated 03.03.2020 has been found to be unsatisfactory by the Competent Authority.

6. Whereas MCL has incurred a huge irreparable loss due to poor performance by you. Your consistent poor performance shows that you are likely to severely impair production capacity of our company if allowed to do business with MCL in future. The estimated loss during 2019-20 is around Rs.39 crores and also loss of royalty to Govt. exchequer comes to around Rs.7 crores. Despite the repeated reminders, you failed to deploy required machines which have resulted in poor performance. You have performed only 23.29% of assigned target as per NIT/agreement at Kaniha OCP. There was no initiative on your part to meet the shortfall of targeted production. Therefore, in the interest of MCL, there is no option but to ban you and partners of your Joint Venture from participation in future tenders of MCL, for a period of 1 year.

In view of the above, M/s JRT NKBPL JV and its constituent partners of Joint Venture, M/s Jalaram Transport and M/s N.K. Bhojani Pvt. Ltd., are banned for a period of one year from participating in future tenders of MCL. Ban will come into force from the date of issue of this order."

12. In view of the facts and circumstances, as delineated above, this Court proceeded to decide both the cases taking into consideration the factual and legal matrix involved in W.P.(C) No.12475 of 2020, which take care of the arguments and submissions made in W.P.(C) No.14114 of 2020 also, and accordingly following issues are framed to decide both the cases.

(i) whether the writ petitions are maintainable?

(ii) whether the orders impugned have been passed in compliance of the principles of natural justice? And

(iii) whether the impugned action banning petitioner no.1 in both the writ petitions for a period of one year from participating in future tenders of MCL is in conformity with the provisions of law or not?

13. **Issue No.(i):** Whether the writ petitions are maintainable?

A preliminary objection was raised by Mr. S.D. Das, learned Senior Counsel appearing for MCL that both the writ petitions involve disputed questions of facts and, therefore, the same are liable to be dismissed. Mr. A.K. Parija, learned Senior Counsel appearing for the petitioners in W.P.(C) No.12475 of 2020 and Mr. Asok Mohanty, learned Senior Counsel appearing for the petitioners in W.P.(C) No.14114 of 2020 unequivocally and solemnly stated that they are relying upon the documents filed by the opposite parties basing upon which the impugned orders of banning have been passed against petitioner no.1 in both the writ petitions and as such, they are not relying upon any other documents save and except the documents relied upon by the opposite party-MCL and also they are not disputing the figures mentioned in the orders impugned. Thereby, the allegation of disputed questions of facts does not arise.

14. In ***Raja Anand v. State of Uttar Pradesh***, AIR 1967 SC 1081, relying upon the judgment in ***White and Collins v. Minister of Health*** (1939) 2 KB 838, the apex Court held that where the jurisdiction of an administrative authority depends upon a preliminary findings of facts, the High Court is entitled in a writ proceeding to determine upon its independent judgment whether or not the finding of facts is correct.

15. In ***State of Madhya Pradesh v. D.K. Jadav***, AIR 1968 SC 1186, the apex Court held that when the jurisdiction of an administrative authority depends on preliminary findings of fact, the High Court can go into the correctness of the same under Article 226.

16. In ***Muljibhai Patel v. Nandlal Khodidas Barot***, AIR 1974 SC 2105, the apex Court held that the High Court is not deprived of its jurisdiction to entertain a petition under Article 226 of the Constitution merely in considering the petitioner's right to relief, question of facts at fault to be determined. The High Court has jurisdiction to try issues both to facts and law when the petitioner raised complex question of facts which may for their determination require oral evidence to be taken and on that account the High Court is of the view that dispute should not appropriately be tried in the writ petition, the High Court may decline to try the writ petition. It is the discretion of the High Court to exercise on sound and in conformity with judicial principle.

17. As has been contended by learned Senior Counsel appearing for the petitioners in both the writ petitions that they rely upon the documents filed by the opposite parties depending on preliminary finding of facts, the correctness of which can be examined by invoking jurisdiction under Article 226 of the Constitution of India, and thereby the contention was raised that the disputed questions of facts are involved cannot have justification. As such, this Court is justified to entertain the writ petitions.

18. Another objection was raised that due to availability of alternative remedy under clause-13-A of the agreement, the petitioners can resort to arbitration, instead of approaching this Court by way of filing the writ petitions, therefore, seeks for dismissal of the same.

19. In ***Thansingh Nathmal v. Superintendent of Taxes***, AIR 1964 SC 1419, the apex Court held as follows:-

> *"The bar of alternative remedy has been a rule of self imposed limitation- a rule of policy, convenience and discretion, rather than a rule of law. The Constitution (Forty-second Amendment) Act, 1976 had, however, placed a bar on the jurisdiction of the High Courts to entertain certain petitions if any other remedy for redress was provided for by or under any other law for the time being in force. However, the bar imposed by Forty Second Amendment was removed by the Constitution (Forty Forth Amendment) Act 1978. But the existence of an alternative remedy has always been regarded as one of the factors which a High Court is*

required to bear in mind while exercising its discretionary power under this Article."

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restriction … But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain well imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy of relief which may be obtained in a suit or other mode prescribed by the statute. Ordinarily, the court will not entertain a petition for a writ under Article 226 where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy …The High Court does not therefore act as a court of appeal against the decision of a court or tribunal to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by a statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal or even itself in another jurisdiction for obtaining redress in the matter provided by a statute, the High Court normally will not permit by entertaining under Article 226 of the Constitution the machinery created by the statute to be bypassed and leave the party applying to it to seek resort to that machinery so set up."

20. In ***Collector of Monghyr v. Keshav Prasad***, AIR 1962 SC 1694, the apex Court held that despite the existence of an alternative remedy, it is within the jurisdiction and discretion of the High Court to grant relief under Article 226 of the Constitution of India.

Similar view has also been taken by the apex Court in ***Zila Parishad, Moradabad v. Kundan Sugar Mill***, AIR 1968 SC 98.

21. Needless to mention here that after the petitioners filed their writ petitions, opposite parties have filed their counter affidavits and to that the petitioners have filed their rejoinder affidavits and on that basis arguments were advanced on merits. As such, the parties have invoked jurisdiction of this Court and thereby the objection raised that the writ petitions are not maintainable due to availability of alternative remedy cannot sustain in the eye of law.

22. In ***Kanak v. U.P. Avas Evam Vikas Parishad***, AIR 2003 SC 3894, the apex Court held that once a writ petition is entertained, the respondent files a counter-affidavit and the matter is argued on merit; it would be too late in the day to contend that the writ petitioner should have availed of the alternative remedy.

23. In ***State of Tripura v. Manoranjan Chakraborty***, (2001) 10 SC 740, the apex Court held that if gross injustice is done and it can be shown that for good reason the Court should interfere, then notwithstanding the alternative remedy which may be available by way of appeal or revision, a Writ Court can in an appropriate case exercise its jurisdiction to do substantial justice.

24. In ***Union of India v. T.R. Varma***, AIR 1957 SC 882, the apex Court held that existence of an alternative remedy does not affect the jurisdiction of the Court to issue writ.

25. In ***Ram and Shyam Company v. State of Haryana***, AIR 1985 SC 1147, the apex Court held that an alternative remedy must be effective. An appeal in all cases cannot be said to provide in all situations, where power to grant lease was exercised formally by authority set up under the Rule, but effectively and for all purposes by the Chief Minister of the State, an appeal to State Government would be ineffective and writ petition in such case maintainable.

26. The apex Court in ***Champalal v. CIT, West Bengal***, AIR 1970 SC 645, while considering the case under the Income Tax Act, held that where the party feeling aggrieved by an authority under the Income-tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and if he does not avail himself of that remedy, the High Court will require a strong case to be made out for entertaining a petition for writ.

27. In ***Zonal Manager, Central Bank of India*** mentioned supra, the apex Court held that mandamus can be issued in contractual matters and in paragraph-28 of the said judgment, the apex Court held as under:-

> *"28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs."*

Therefore, it remains no longer res integra that if instrumentality of the State acts contrary to the public good, public interest unfairly, unjustly, unreasonably, discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, the writ petition would be maintainable.

28. In ***Union of India v State of Haryana***, (2000) 10 SCC 482, the apex Court has added one more exception to the rule of alternative remedy, namely, the writ petition can be entertained despite alternative remedy if the question raised is purely legal one, there being no dispute on facts.

29. In ***Premier Printing Press*** (supra), one of us (Mr. Mohammad Rafiq, CJ), while sitting singly in Rajasthan High Court, taking into consideration various judgments of the apex Court laid down the principle that even if there is availability of alternative remedy, this Court can exercise power under Article 226 of Constitution of India. Paragraph-25 of the said judgment reads as follows:

> *"25. There are thus these seven well recognized exceptions to the rule of alternative remedy, which can be culled out from the afore discussed judgments of the Supreme Court, firstly where the writ petition has been filed for enforcement of fundamental rights; secondly where there has been violation of principle of natural justice; thirdly where the order of proceedings is wholly without jurisdiction; fourthly where the vires of any Act is under challenge; fifthly where availing of alternative remedy subjects a person to very lengthy proceedings and unnecessary harassment; sixthly where the writ petition can be entertained despite alternative remedy if the question raised is purely legal one, there being no dispute on facts and seventhly, where State or its intermediary in a contractual matter acts against public good/interest unjustly, unfairly and arbitrarily."*

30. In ***Union of India v Tantia Construction Ltd.***, (2011) 5 SCC 697, the apex Court in paragraphs-33 and 34 held as follows:-

> *"33. Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.*

34. We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits."

31. On the basis of the factual matrix of the case available on record, if the petitioners are not disputing the documents and figures mentioned therein and rather they rely on the same, in the event of relegating them to resort to the arbitration clause mentioned in the agreement that will be prejudicial to their interest, inasmuch as the banning period is for 12 months and in the meantime four months having been already elapsed, for the remaining period if the dispute is not decided and the petitioners are not allowed to participate in bid process of MCL, grave injustice will be caused to them. As such, the petitioners have made out a strong case in their favour so as to invoke jurisdiction under Article 226 of the Constitution of India. More particularly, in the event the petitioners are relegated to resort to the arbitration clause in the name of availing alternative remedy, it may not have any effect as because the time period of conclusion of arbitration proceeding is not in the hands of the petitioners. Thereby, if the banning period of one year expires and the petitioners are debarred from participating in future bids of MCL, it will be a stigma for them, for which grave prejudice will be caused to them. Therefore, the only remedy available for the petitioners at last is to invoke jurisdiction of Article 226 of the Constitution of India, which is an efficacious one. As such, Mr. A.K. Parija, learned Senior Counsel appearing for the petitioners emphatically stated that the petitioners have got efficacious remedy to invoke extraordinary jurisdiction of this Court, even though there is available of alternative remedy of arbitration under clause-13-A of the agreement.

32. The word "efficacious" is adjective according to Grammar and its noun is "efficacy". The word "efficacy" is derived from Latin word "efficacie" which means capacity to produce results. The word 'efficacious' accordingly means able to produce the intended effect or result.

33. In ***Abdul Sammad v. Executive Committee of the Marigaon Mahkuma Parishad***, AIR 1981 Gau. 15, the Gauhati High Court held that it is well-known that the meaning of the term "efficacious" is "able to produce the intended result". It is, therefore, held that the preliminary objection raised by the opposite parties with regard to maintainability of the writ petition is

hereby negatived and as such, this Court held that the writ petitions are maintainable and issue no.(i) is accordingly answered in affirmative.

34. **Issue no.(ii):** Whether the orders impugned have been passed in compliance of the principles of natural justice?

Learned Senior Counsel appearing in both the writ petitions strenuously urged that there was non-compliance of principles of natural justice while passing the orders impugned, which was disputed by learned Senior Counsel appearing for opposite party-MCL. But on perusal of the records, it appears that a notice of show cause was issued on 04.04.2020 in Annexure-6 banning the petitioners in W.P.(C) No.12475 of 2020 and due to COVID-19 pandemic, petitioner no.1, vide letter dated 15.04.2020 sought time to file show cause notice, but subsequently on 21.04.2020 it filed reply to notice of show cause. On 29.04.2020, without affording any opportunity of hearing, the order impugned has been passed banning petitioner no.1 from carrying on business for a period of one year. Similarly, in W.P.(C) No. 14114 of 2020, show cause notice was issued on 20.02.2020 under Annexure-13 and petitioner no.1 submitted reply on 03.03.2020 under Annexure-14 and order impugned has been passed without affording any opportunity of hearing on 07.05.2020 vide Annexure-15 banning petitioner no.1 for one year. As such, nothing has been placed on record, except by filing counter affidavit by the opposite parties indicating that after reply was filed they have given opportunity of hearing to petitioner no.1. Mere calling upon to file show cause and compliance thereof by filing reply cannot construe compliance of principles of natural justice, because it can be said to be an empty formality unless adequate opportunity is given to the petitioners.

35. The soul of natural justice is '*fair play in action'*

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

In ***Fairmount Investments Ltd. v. Secy of State for Environment***, 1976 2 All ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as '*a fair crack of the whip'*

In ***R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ***, 1977 3 All ER 452 (DC & CA), preferred the homely phrase '*common fairness'* in defining natural justice.

36. ***A.K. Kraipak and others v. Union of India, AIR 1970 SC 150= (1969) 2 SCC 262,*** *is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde,J. observed thus:*

> *"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry".*

In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597 = (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

37. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of 'natural justice' came for consideration before the apex Court and the apex Court observed as follows:-

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

38. In ***Basudeo Tiwary v Sido Kanhu University*** and others (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that audi alteram partem, which is facet of natural justice is a requirement of Art.14.

39. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held as follows:

> *"The rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation tha t the power should be exercised in conformity with the principles of natural justice. Thus, whenever a man's rights are*

affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration."

40. The apex Court in ***Uma Nath Panday and others v State of U.P***. and others, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

41. In ***Mysore Urban Development Authority by its Commissioner*** **v. Veer Kumar Jain,** (2010) 5 SCC 791, the apex Court held in paragraphs 17, 18 and 19, being relevant are extracted hereunder:-

"17. We may refer to some of the decisions of this Court having a bearing on the issue. In ***S.L. Kapoor v. Jagmohan*** *[(1980) 4 SCC 379] this Court rather rigidly and sternly observed: (SCC p. 395, para 24)*

"24. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

18. In ***State Bank of Patiala v. S.K. Sharma*** *[(1996) 3 SCC 364 : 1996 SCC (L&S) 717] this Court stated that the aforesaid observation should be understood in the context of the facts of that case and in the light of the subsequent Constitution Bench judgment in* ***ECIL v. B. Karunakar*** *[(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and* ***C.B. Gautam v. Union of India*** *[(1993) 1 SCC 78] . This Court observed: (****S.K. Sharma*** *cas e [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , SCC pp. 385 & 391, paras 28 & 33)*

"28. The decisions cited above make one thing clear viz. principles of natural justice cannot be reduced to any hard-and-fast formulae. As said in Russell v. Duke of Norfolk [(1949) 1 All ER 109 (CA)] way back in 1949, these principles cannot be put in a straitjacket. Their applicability depends upon the context and the facts and circumstances of each case. (See ***Mohinder Singh Gill v. Chief Election Commr****. [(1978) 1 SCC 405] .) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected.*

***

33. (6) While applying the rule of audi alteram partem (the primary principle of natural justice) the court/tribunal/authority must always bear in mind the ultimate and overriding objective underlying the said rule viz. to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them."

19. Ensuring that there is no failure of justice is as important as ensuring that there is a fair hearing before an adverse order is made. This Court in ***Roshan Deen v. Preeti Lal*** *[(2002) 1 SCC 100 : 2002 SCC (L&S) 97] held: (SCC p. 106, para 12)*

"12. … Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao [(1984) 2 SCC 673]). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

42. In ***Jayendra Vishnu Thakur v. State of Maharashtra and another,*** (2009) 7 SCC 104, the apex Court in paragraph-57 held as follows:-

"57. Mr Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In S.L. Kapoor v. Jagmohan[(1980) 4 SCC 379] this Court clearly held: (SCC p. 395, para 24)

"24. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

43. Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "*fundamental quality of fairness which being adopted, justice not only be done but also appears to be done*".

44. In view of the foregoing factual and legal discussions, it can be safely said that the principle which constitutes the minimum requirement of justice,

without adhering there to, would be a travesty. Applying the above settled position of law to the present context, this Court arrives at the conclusion that there was non-compliance of principles of natural justice while passing the orders impugned and, as such, the minimum requirement of principles of natural justice having not been complied with, the issue no.(ii) is answered against opposite parties no.2 to 4-MCL.

45. Issue No.(iii): Whether the impugned action banning petitioner no.1 in both the writ petitions for a period of one year from participating in future tenders of MCL is in conformity with the provisions of law or not?

Before delving into this issue, a reference to the chart contained in paragraph-2 of the impugned order dated 29.04.2020 in W.P.(C) No.12475 of 2020 is to be made which reads as under:-

Sl No	***Month***	***Agreed Qty***	***Achieved Qty***	***Total Shortfall***	***Shortfall due to contractor's fault (Tonnes)***	***Penalty amount deducted/withheld (in Rs)***
1.	*May-18*	*1518340*	*220181.64*	*1298158.36*	*0*	*0.00*
2.	*Jun-18*	*1441800*	*468066.49*	*973733.51*	*3800*	*23070.00*
3.	*Jul-18*	*1489860*	*571877.16*	*917982.84*	*4067*	*27450.00*
4.	*Aug-18*	*1489860*	*389727.24*	*1100132.76*	*0*	*0.00*
5.	*Sept-18*	*1441800*	*554596.23*	*997203.77*	*0*	*0.00*
6.	*Oct-18*	*1489860*	*655147.72*	*834712.28*	*8775*	*65330.00*
7.	*Nov-18*	*1441800*	*694042.97*	*747757.03*	*1200*	*9605.00*
8.	*Dec-18*	*1489860*	*612881.48*	*876978.52*	*25302.5*	*188377.00*
9.	*Jan-19*	*1489860*	*675993.13*	*813866.87*	*15000*	*106410.00*
10.	*Feb-19*	*1345680*	*565289.98*	*780390.02*	*10000*	*70940.00*
11.	*Mar-19*	*1489860*	*930501.53*	*559358.47*	*51500*	*347573.50*
12.	*Apr-19*	*1441800*	*520501.26*	*921298.74*	*22700*	*153202.30*
13.	*May-19*	*1489860*	*615869.92*	*873990.08*	*6500*	*43868.50*
14.	*Jun-19*	*1441800*	*601453.15*	*840346.85*	*19000*	*128231.00*
15.	*Jul-19*	*1489860*	*400324.43*	*1089535.57*	*50500*	*340824.50*
16.	*Aug-19*	*1489860*	*269722.74*	*1220137.26*	*0*	*0.00*

17.	*Sept-19*	*1441800*	*248773.32*	*1193026.68*	*3000*	*20247.00*
18.	*Oct-19*	*1489860*	*456024.96*	*1033835.04*	*25500*	*172100.00*
19.	*Nov-19*	*1441800*	*508346.29*	*933453.71*	*94537*	*585184.00*
20.	*Dec-19*	*1489860*	*852938.11*	*636921.89*	*32500*	*201175.00*
21.	*Jan-20*	*1489860*	*903302.56*	*586557.44*	*157412.2*	*974382.00*
22.	*Feb-20*	*1393740*	*980342.76*	*413397.24*	*312386.23*	*4216589.00*
23.	*Mar-20*	*1489860*	*1175719.91*	*314140.09*	*258234.19*	*1742823.00*
	Total	***33718540***	***13871624.98***	***19846915.02***	***1101914.12***	***9417381.80***

On the basis of such chart, allegations were made that petitioner no.1 had defaulted since inception, which itself is contrary to the data available on record. It is contended that the allegation that petitioner no.1 has performed only 41.14% pursuant to agreed quantity and solely responsible for the balance shortfall of 58.56% is also contrary to such chart. If consideration will be made to the figures available in the chart, it would be evident that the default due to fault of petitioner no.1 was only 3.27% of the agreed quantity as per the NIT. The impugned order itself indicates that petitioner no.1 has performed only 41.14% of the agreed quantity and is solely responsible for balance 58.56%. But from the chart itself, it would be evident that petitioner no.1 is only responsible for 3.27% and not 58.56% (balance of 41.14%). Such calculation has been arrived at in the additional written notes submitted on behalf of the petitioners which are extracted below:-

"11,01,914 tonnes
(Shortfall due to Contractor's fault; column 6) x 100 = 3.27%
3,37,18,540 tonnes
(Agreed Quantity; Column 3)"

46. The opposite party-MCL has debarred petitioner no.1, vide impugned order dated 29.04.2020, which is solely based upon the finding that it *"…..performed only 41.14% of assigned quantity as per NIT/agreement at Kaniha OCP……."* As such, the said order has been passed on the premise that the entire shortfall of 1,98,46,915 tonnes or 58.56% was attributable to petitioner no.1. More so, the figures stated in the impugned order clearly show that the shortfall on the part of petitioner no.1 is only 3.27%. Thereby, the allegation of performance of only 41.14% of the agreed quantity is an outcome of non-application of mind and, as such, hit by Articles 14 and

19(1)(g) of the Constitution of India. In the additional affidavit filed by opposite parties no.2 to 4, the shortfall against hindrance free quantity has been mentioned as follows:-

"Month	*Monthly Target as per Mutually agreed Time &progress chart (tes)*	*Hindrance free quantity*	*Achievement (Tes)*	*Shortfall quantity (Tes) against the HINDRACE FREE Quantity (due to fault of Contractor*
Apr-18	*28480*	*0*	*0*	
May-18	*1489860*	*220181.64*	*220181.64*	
Jun-18	*1441800*	*471866.49*	*468066.49*	*3800*
Jul-18	*1489860*	*515944.16*	*571877.16*	*4067*
Aug-18	*1489860*	*389727.24*	*389727.24*	
Sept-18	*1441800*	*554596.23*	*554596.23*	
Oct-18	*1489860*	*663922.72*	*655147.72*	*8775*
Nov-18	*1441800*	*695242.97*	*694042.97*	*1200*
Dec-18	*1489860*	*638183.98*	*612881.48*	*15302.5*
Jan-19	*1489860*	*690993.13*	*675993.13*	*15000*
Feb-19	*1345680*	*575289.98*	*565289.98*	*10000*
March-19	*1489860*	*982001.53*	*930501.53*	*51500*
April-19	*1441800*	*543201.26*	*520501.26*	*22700*
May-19	*1489860*	*622369.92*	*615869.92*	*6500*
Jun-19	*1441800*	*620453.15*	*601453.15*	*19000*
Jul-19	*1489860*	*450824.43*	*400324.43*	*50500*
Aug-19	*1489860*	*269722.74*	*269722.74*	
Sept-19	*1441800*	*251773.32*	*248773.32*	*3000*
Oct-19	*1489860*	*481524.96*	*456024.96*	*25500*
Nov-19	*1441800*	*602883.29*	*508346.29*	*94537*
Dec-19	*1489860*	*885438.11*	*852938.11*	*32500*
Jan-20	*1489860*	*1060714.16*	*903302.56*	*157412.2*
Feb-20	*1393740*	*1292728.99*	*980342.76*	*312386.23*
March-20	*1489860*	*1433954.1*	*1175719.91*	*258234.19*
Total-	***33718540***	***14973539.1***	***13871624.98***	***1101914.12***
		Total shortfall		***41.14***
		Achieved against <u>Hindrance</u> free qtnty		***92.64***
		<u>Shortfall</u> by contractor from <u>Hindrance free</u> quantity		***7.36"***

47. On perusal of the aforesaid chart, where the shortfall against hindrance free quantity has been prescribed, it would be seen that opposite

parties have provided hindrance free site of only 1,49,73,539 tonnes, out of agreed quantity of 3,37,18,540 tonnes, i.e., hindrance free site to the tune of only 44.4%. Such calculation has been arrived at in the additional written notes submitted on behalf of the petitioners which is extracted below:-

"1,49,73,539 tonnes
(Hindrance free quantity; column 3) x 100 = 44.4%
3,37,18,540 tonnes
(Agreed Quantity; Column 1)"

48. In view of such calculation, when MCL itself could make available only 44.4% of the agreed quantity of work for removal, the question of deployment of entire fleet for removal of the total agreed quantity is irrelevant. It is also contended in the additional affidavit that the opposite parties have already deducted penalty of Rs.94,17,381/- towards shortfall of 11,01,914,12 tonnes or 3.27% of the assigned target. As such, when penalty for shortfall in performance has already been levied by the opposite parties, imposition of further punishment of debarment amounts to double jeopardy.

49. In ***Union of India v. P.D. Yadav,*** (2002) 1 SCC 405, the apex Court held that the 'doctrine of double jeopardy' is a protection against prosecution twice for the same offence.

50. Clause-9.2 of the agreement between the parties provides that *"the contractor whose contract is terminated shall not be allowed to participate in future bidding for period of minimum twelve months."* Therefore, debarring petitioner no.1 from participating in the future tenders of MCL for a period of one year squarely falls under the stipulation of clause-9.2. It is undisputed that petitioner no.1 is still working at the Kaniha OCP and, as such, the agreement between the parties has not been terminated. Therefore, the pre-condition for banning petitioner no.1 having not been satisfied, the order impugned is de hors the agreement between the parties. The order of banning, being arbitrary and unjust, can be subjected to judicial review before the writ Court exercising powers under Article 226 of Constitution of India.

51. In ***Medipol Pharmaceutical India Pvt. Ltd.*** mentioned supra, the apex Court in paragraph-19 held as follows:-

> "*19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radhakrishna*

Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] ; E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ; Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] ; Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and Dwarkadas Marfatia and Sons v. Port of Bombay [(1989) 3 SCC 293] have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a writ court exercising powers under Article 226 or Article 32 of the Constitution."

52. A contention was raised by the opposite parties that the order impugned dated 29.04.2020 has been passed exclusively under the power available to the management of MCL under clause-6.2 of the General Terms and Conditions (GTC) read with clause-9 of the undertaking submitted by petitioner no.1 along with the bid. The undertaking annexed as Annexure-V to the Pre-Contract Integrity Pact is meant for consideration of the documents at the time of submission of bid and, as such, the language implied in clause-9 clearly indicates that if any information and document submitted is found to be false/incorrect at any time, department may cancel the bid and action as deemed fit may be taken against the bidder, including termination of the contract, forfeiture of all dues including, earnest money and banning/delisting of the firm and all partners of the firm etc. The order impugned does not reflect that any of the documents filed by petitioner no.1 was found to be false or incorrect, rather the information which has been furnished by way of chart, is a creation of the opposite parties. Therefore, banning petitioner no.1 for a period of twelve months invoking clause-9 of the undertaking is absolutely misconceived one and, as such, the said undertaking is required for the bidder at the time of bidding. More so, if at all clause-9 is to apply, then the authority has to come to a conclusion that the information and documents submitted are found to be false or incorrect. But nothing to that effect has been placed on record, especially in the counter affidavit filed on behalf of the opposite party-MCL. However, in the additional counter affidavit filed by the opposite party-MCL, a new case has been made out contrary to impugned order and the earlier counter affidavit filed by them and, as such, tried to justify the action taken by the authority concerned in passing the order impugned. The reasons so assigned subsequently in the additional counter affidavit justifying the impugned order cannot be taken into consideration, in view of the law laid down by the apex Court in ***Mohindor Singh Gill*** mentioned supra, which has been referred to in ***Shree Ganesh Construction v. State of Orissa***, 2016 (II) OLR 237, in paragraphs 7 and 8 this Court held as follows:-

"*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."

Similar view has also been taken by the apex Court in ***Bhikubhai Vitlabhai Patel v. State of Gujurat,*** (2008) 4 SCC 144.

53. On perusal of the impugned order, it appears that petitioner no.1 was not allowed to do the sanctioned quantity of work for the default of MCL, which is evident from the following chart:-

	Total Agreed Quantity	**Achieved Quantity**	**Total Shortfall**	**Shortfall due to Petitioners' fault**	**Shortfall due to fault of Opposite Parties**
In tonnes	3,37,18,540	1,38,71,625	1,98,46,915	11,01,914	1,87,45,000
As a percentage	100%	41.14%	58.86%	3.27%	55.59%

Ratio of shortfall attributed to Opposite Parties : shortfall attributed to Petitioners	94.45% : 5.55%

As it appears from the impugned order, allegations have been made that petitioner no.1 has not deployed adequate equipment as per NIT, but the same is not correct, rather the calculation arrived at by the MCL clearly indicates that petitioner no.1 has deployed adequate equipment to cater to hindrance free work made available by MCL at Kaniha OCP and, as such, petitioner no.1 has defaulted only 3.27%, which itself shows that adequate equipments had been deployed by it at the site. Since the quantity of hindrance free work provided by the opposite party-MCL reduced substantially, the issue of reduced deployment of equipment becomes irrelevant.

54. While entertaining this writ petition, this Court passed interim order on 04.06.2020 to the following effect:-

> "*We have heard Mr. Ashok Parija, learned Senior Counsel appearing along with Mr. S.P. Sarangi, learned counsel for the petitioners and Mr. Debraj Mohanty, learned counsel for the respondents on the prayer for interim relief.*
>
> *Mr. Ashok Parija, learned Senior Counsel submitted that even from the impugned order Anenxure-10 dated 29.04.2010, by which the petitioner-company has been banned from participating in future tenders of the respondents for one year, it would appear that out of total shortfall of 19846915.02 MT, which is approximately 58% of the total agreed quantity, the shortfall due to contractor's fault has been found to be only 1101914.12 MT, which constitutes mere 3.27% of the total shortfall. The conclusion recorded by the opposite party in the impugned order that the petitioner-company has been consistently rendering poor performance from the beginning of the contract, is also not substantiated from their own order, which is evident from para 2 of the impugned order showing that as against agreed quantity of 33718540MT, the maximum of the total shortfall i.e. 13871624 MT, constituting approximately 55% was attributable to the opposite parties themselves as against negligible quantity of 1101914 MT of that (3.27%) to the petitioner-company. As regards the allegation, that the petitioner-company has not deployed sufficient equipment as specified in NIT, learned Senior Counsel submitted that this too is an unfounded statement, because the petitioner-company could achieve 42% of the agreed quantity only because it deployed the equipments required for that much quantity. When the remaining shortfall of approximately 58% of total agreed quantity, was attributable to the opposite parties, it cannot be said that it could not be achieved because of lack of equipment. The petitioner-company, apart from the present contract, is also satisfactorily executing five other contracts with opposite party no.2. It is submitted that the opposite parties are floating new tenders on 10th, 11th and 16th of June of 2020. The impugned order has been passed without due application of mind despite all these aspects explained in details by the petitioner-company in their reply to show cause notice. Debarment for one year on touchstone of Wednesbury's principles of unreasonableness is on*

given facts wholly disproportionate. It would cause grave prejudice to petitioner-company if it is not allowed to participate in these three tenders and remedy of arbitration cannot undo that wrong.

Mr. Debraj Mohanty, learned counsel for the opposite parties submitted that the petitioner-company failed to achieve the target of agreed quantity despite several letters addressed to it and because of its poor performance the opposite party department has suffered enormous loss. The petitioner-company was duly given show cause notice, its reply was considered and thereafter the impugned order of debarment of one year has been passed. It is argued that the petitioner has alternative efficacious remedy of arbitration as per Clause 13A of the General Terms of the Contract.

In response to the query of the Court to explain the statement contained in the impugned order that as against total shortfall of 19846915.02 MT (58% of the total agreed quantity), when only 1101914.12, (3.27%) of the total quantity is attributed to the petitioner-company, and the maximum quantity of shortfall is attributable to the petitioner-company, how can it be held consistently performing poor in respect of the period from May-2018 till March-2020, even going by month-wise datas, the learned counsel for the opposite parties could not give any satisfactory answer.

Taking into consideration the rival submissions and the materials on record, we are inclined to hold that in view of what has been mentioned in the impugned order itself, the petitioner has been able to make out a prima facie case for grant of appropriate interim relief. In order however to balance equities in the facts of the case, we direct that the impugned order shall remain stayed to the limited extent qua only three tenders which are going to be floated on 10th, 11th and 16th June, 2020, to allow the petitioner-company to participate therein with a further direction that the opposite parties shall be free to open the bid and if any other bidder is found to be L-1 in respect of all or any of the three bids, the opposite parties may award contract to it/them. In case however the petitioner is not found to be L-1 in any one of them, the contract may not be awarded to it, subject to any further order that may be passed by this Court.

Considering the fact that the order of debarment has been passed for one year, matter deserves to be heard and disposed of finally at an early date. The writ petition is therefore ordered to be listed on 3rd July, 2020 for final disposal.

The parties are required to submit their written argument with supporting case laws on or before 3rd July, 2020.

The matter to come up for final argument on 3rd July, 2020."

When interim order dated 04.06.2020, which was passed after hearing learned counsel for the parties, was in operation, opposite party-MCL sent the e-mail dated 08.06.2020 that debarment of petitioner no.1 from participating in the tenders of MCL had been revoked. Vide e-mail dated 06.07.2020,

opposite party no.2 again debarred petitioner no.1 from participating in tenders of MCL and, as such, the subsequent order dated 06.07.2020 was passed without complying the principles of natural justice.

55. In the additional counter affidavit filed on 03.07.2020, opposite parties no.2 to 4 in paragraph-5 have stated as follows:-

> *"5. That the deponent most humbly and respectfully submits that except 04 months out of the total 23 months till March 2020, during the execution of the work, the petitioners have not executed l00% of the mutually agreed hindrance free quantity which ultimately causes loss to the management of MCL to a tune of Rs.66 crores, & Rs. 13 crores to the state and Central Govt. in form of ROYALTY. The quantum of loss to MCL, State exchequer and Central Govt. is shown below:*

Shortfall Quantity	*1101914.12*	
Profit on coal @ 598.96 per tone	*Rs.660002481.32*	
Basic price of Coal @ 842.64 per Tone Royalty @ t4% on Basic price	*Rs.129992367.97*	
Loss to MCL	*Rs.660002481.32*	*(Around 66 Crores)*
Loss to Govt.	*Rs.129992367.97*	*(Around 13 Crores)*

xxx xxx xxx"

On perusal of the facts mentioned in the impugned order dated 29.04.2020 read with additional affidavit dated 03.07.2020, it is clearly discernible that the impugned banning order has been passed primarily due to losses suffered by MCL on account of which the production capacity of MCL was severely impaired. It is not the petitioner no.1 but the MCL which is responsible for impairing the production capacity, since MCL is responsible for more than 94% of the total shortfall (or 55.6% of the total targeted quantity). Banning of petitioner no.1 as a consequence of shortfall of only 3.27% in performance, as is evident from the impugned order, can be construed to be unreasonable and wholly disproportionate to the findings. Even if the contention raised in the additional affidavit dated 03.07.2020 would be taken into consideration, the shortfall in performance was only 4.36% and, as such, on that score also banning of petitioner no.1 can be construed to be unreasonable. Even though the right of petitioner no.1 is in the nature of a contractual right, the manner in which the impugned decision has been taken by the MCL, which is a State

within the meaning of Article 12 of the Constitution, is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality.

56. In ***Kulja Industries Limited*** (supra), the apex Court held in paragraphs 17, 18, 19 and 20 as follows:-

> *"17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.*
>
> *18. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70] where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed: (SCC p. 75, para 20)*
>
> *"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."*
>
> *Subsequent decisions of this Court in Southern Painters v. Fertilizers & Chemicals Travancore Ltd. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engg. Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.*

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] ; E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ; Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] ; Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and Dwarkadas Marfatia and Sons v. Port of Bombay [(1989) 3 SCC 293] have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a writ court exercising powers under Article 226 or Article 32 of the Constitution.

20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in Mahabir Auto Stores v. Indian Oil Corpn. [(1990) 3 SCC 752] should, in our view, suffice: (SCC pp. 760-61, para 12)

"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] . … In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. … It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

57. In ***Sanjay Kumar Sukla*** (Supra), on which reliance was placed by the opposite party-MCL, the apex Court held that in a contractual matter, while exercising the power under judicial review, the Court should be vigilant against agitation of private disputes under writ jurisdiction when there is no improper exercise of power on the part of public authority concerned and as such, caution to be exercised while exercising extraordinary jurisdiction in contractual matters since serious consequences entail as result of entertainment of writ petition. This principle, as set out by the apex Court, is in dispute. But on the basis of the facts and circumstances of the instant case, the judgment in question cited by opposite parties no. 2 to 4 may not have any application, particularly when petitioner no.1, even after passing the banning order, has been allowed to discharge its contractual obligation by allowing it to perform the contract with the opposite party-MCL in its interest and also in the interest of the State for augmentation of revenue.

58. Reliance was also placed on behalf of the opposite party-MCL on ***Dhansar Engineering Company Private Limited*** (supra), which was decided by the apex Court on the basis of the facts of that case, and the factual matrix of that case is different from that of the present one.

59. In view of such position, the order dated 29.04.2020, which has been marked as Annexure-10 to W.P.(C) No. 12745 of 2020, and order dated 07.05.2020, which has been marked as Annexure-15 to W.P.(C) No. 14114 of 2020, cannot sustain in the eye of law. The issue no.(iii) is answered accordingly.

60. In view of answers given hereinbefore to all the issues framed and by applying the same to the factual matrix of W.P.(C) No. 14114 of 2020, the order dated 29.04.2020 in Annexure-10 to W.P.(C) No. 12745 of 2020 and order dated 07.05.2020 in Annexure-15 to W.P.(C) No. 14114 of 2020 are liable to quashed and hereby quashed. In the result, both the writ petitions are allowed. No order 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.

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2020 (III) ILR - CUT- 435

KUMARI S. PANDA, J & S.K. SAHOO, J.

W.P.(C) NO. 21858 OF 2017

JADUNATH SAHU .....Petitioner

.V.

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

(A) INTERPRETATION OF STATUTES – Provisions of statues – Whether prospective or retrospective – Held, It is the cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation – Unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. (Para 7)

(B) WORDS AND PHRASES – 'legitimate expectation' – Meaning, definition and applicability in the matter of promotion – Discussed – Held, when there is nothing to show that the decision taken by the DPC as per 2015 Rules was arbitrary, unreasonable, discriminatory, unfair, biased, gross abuse of power or in violation of principles of natural justice, the doctrine of legitimate expectation ordinarily would not have any application when the legislature has enacted a statute. (Para 7)

(C) WORDS & PHRASES – "Suitability" – Meaning of – Held, the expression "suitability" means that a person to be appointed shall be legally eligible and "eligible" should be taken to mean "fit to be chosen" (Para 7)

(D) SUITABILITY– A matter of opinion – It can not be a subject matter of judicial review. (Para 7)

(E) CONSTITUTION OF INDIA, 1950 – Art.-14 – Right to equality – Negative equality – Whether can anyone be given the benefit of negative equality? – Held, No.

> *"Law is well settled that a party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. It would not be setting a wrong right but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India cannot be pressed into service in such cases. What the concept of*

equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs at par. It is also the settled legal proposition that Article 14 of the Constitution does not envisage a negative equality. Even if in some cases, promotions have been made by dispensing with any requirements or relaxing any of the provisions of the Rules on account of some administrative exigencies in view of the special power lies with the Hon'ble Chief Justice, that does not confer any right on the petitioner." (Para 8)

Case Laws Relied on and Referred to :-

1. (1998) 4 SCC 202 : Rajasthan Public Service Commission Vs. Chanan Ram.
2. (2011) 6 SCC 725 : Deepak Agarwal Vs. State of Uttar Pradesh.
3. (2017) 3 SCC 646 : State of Tripura Vs. Nikhil Ranjan Chakraborty.
4. 2020 SCC Online SC 124 : D. Raghu Vs. R. Basaveswarudu.
5. (1993) 3 SCC 499 : India -Vs. Hindustan Development Corporation.
6. (2006) 8 SCC 381 : Ram Parvesh Singh Vs. State of Bihar.
7. (2014) 11 SCC 547: Registrar General, High Court of Madras Vs. R. Gandhi.
8. (2007) 8 SCC 533 : Valsala Kumari Devi M. Vs. Director, Higher Secondary Education.
9. A.I.R. 1996 S.C. 540 : Sneh Prabha Vs. State of U.P.
10. (1997) 1 SCC 35 : Secretary Jaipur Development Authority Vs. Daulat Mal Jain.
11. (1997) 3 SCC 321 : State of Haryana Vs. Ram Kumar Mann.
12. A.I.R. 1997 S.C. 3801 : Faridabad C.T. Scan Center Vs. D.G. Health Services.
13. A.I.R. 1999 S.C. 1347 : Jalandhar Improvement Trust Vs. Sampuran Singh.
14. A.I.R. 2003 S.C. 3983 : Union of India Vs. International Trading Co.
15. A.I.R. 2006 S.C. 1142) : Kastha Niwarak G.S.S. Maryadit, Indore Vs. President, Indore Development Authority.

For Petitioner : Mr. Sameer Kumar Das.

For Opp. Parties : Sri Jyoti Prakash Patnaik, Addl. Govt. Adv. (Nos.1 & 2)

For Opp. Parties : Mr. Biswa Bihari Mohanty, (No.4)

JUDGMENT Date of Judgment: 29.04.2020

S. K. SAHOO, J.

The petitioner Jadunath Sahu has filed this writ petition seeking for a direction to quash the proceedings of the Departmental Promotion Committee (hereafter 'DPC') held on 15.07.2016 for promotion to the post of Additional Principal Secretary and the consequential promotional notification in favour of opposite party no.4 Prasanta Hrudaya Palai vide Annexure-3 and for a further direction directing the opposite party no.2 Registrar (Judicial) of this Court to promote him (petitioner) to the post of Additional Principal Secretary from the date his junior (opposite party no.4) was promoted w.e.f. 20.07.2016 and grant all the consequential service and financial benefits from

that date and for a further direction directing the opposite parties nos.1 to 3 to re-fix his pension and other pensionary dues in such higher scale of pay and cadre pay in the promotional post of Additional Principal Secretary and to pay the differential arrears on such calculation within a stipulated period with interest @ 8% per annum.

2. The case of the petitioner, in short, is that he was having qualification of Intermediate in Arts with shorthand and typewriting and in a due process of selection, he was appointed as a Junior Stenographer in the judgeship of Cuttack district on 07.04.1982. In response to an advertisement issued by this Court for appointment of Senior Stenographer, he faced the interview and was selected and joined as Senior Stenographer on 25.11.1986. Thereafter he was promoted to the post of Personal Assistant on 10.05.1989 and while continuing in such post, he became a confirmed Government employee on 01.12.1995 and then he was promoted to the post of Secretary on 12.06.2006 and Senior Secretary on 03.11.2012.

It is the further case of the petitioner that two posts of Additional Principal Secretary fell vacant and in order to fill up such posts, file was processed and a meeting of DPC was convened on 15.07.2016 and all the four Senior Secretaries available in the feeder cadre including the petitioner and the opposite party no.4 were called to attend the DPC. After the meeting was convened, the DPC recommended the names of one Kailash Chandra Pati whose position was serial no.1 in the gradation list as well as the opposite party no.4 Prasanta Hrudaya Palai whose position was serial no.4 in that list for promotion. The DPC did not consider the case of the petitioner as well as one Sri P.C. Pradhan who were senior to the opposite party no.4 as per the gradation list and accordingly, notifications were issued on 20.07.2017 promoting Kailash Chandra Pati and the opposite party no.4 to the post of Additional Principal Secretary. The DPC found the petitioner as well as Sri P.C. Pradhan lacking in minimum educational qualification i.e. Bachelor's degree required for that post as per the High Court of Orissa (Appointment of Staff and Conditions of Service) Rules, 2015 (hereafter '2015 Rules').

It is the further case of the petitioner that he had more than thirty one years of service as on the date of holding of last DPC on 15.07.2016 and there was no adverse entry or remark entered in his service record and no adverse remark was ever communicated to him. Being the serial no.2 in the

gradation list of Senior Secretaries in the establishment of this Court till 15.07.2016, he had a legitimate expectation for promotion to the post of Additional Principal Secretary as there were two vacancies in that post. He submitted a representation to the Hon'ble Chief Justice through the Registrar (Judicial) on 25.08.2016 indicating his grievances and to consider his case for promotion and to restore his seniority from the date his junior (opposite party no.4) got the promotion.

It is the further case of the petitioner that prior to the 2015 Rules, the Orissa High Court (Appointment of Staff and Conditions of Service) Rules, 1963 (hereafter '1963 Rules') was in force and the entry qualification for appointment to the post of Junior Stenographer/Senior Stenographer was matriculate with shorthand and typewriting. The amended 2015 Rules came into force vide notification dated 25.02.2015 and as per the amended Rules, the qualification for appointment to the Steno cadre was prescribed as Bachelor's degree in any discipline with stenography. So far as the promotion to the post of Additional Principal Secretary is concerned, the minimum qualification prescribed is Bachelor's degree in any discipline from a recognised University or such other qualification equivalent thereto having good knowledge in Hindi and English and he must be a fit person to hold the post in the opinion of the Hon'ble Chief Justice and minimum experience of one year as Senior Secretary to the Hon'ble Judges. The mode of promotion was prescribed as 'by promotion from the post of Senior Secretary basing on merit with due regard to seniority and suitability'. It has been specifically stated in the new 2015 Rules as per Rule 1 under the heading of '*Explanation*' that nothing in that Rules shall adversely affect any person, who was a member of the service on the date of coming into force of these Rules.

It is the further case of the petitioner that he entered into the service of the Court's establishment prior to the coming of 2015 Rules into force and the subsequent eligibility qualification in the entry grade or for promotion to the cadre of Additional Principal Secretary cannot be made applicable to him. The petitioner highlighted the cases of Raghunath Sahoo and Akshaya Kumar Dhal having the qualification of I.A. and I.Com respectively to have been given promotion to the post of Senior Secretary vide notifications dated 31.03.2017. According to the petitioner, the decision taken by the authorities is against the basic principle of law with regard to parity as under the same set of Rules i.e. 2015 Rules, the claim of the petitioner was rejected whereas

the cases of Raghunath Sahoo and Akshaya Kumar Dhal were considered for promotion without having Bachelor's degree. The petitioner further highlighted the cases of Mahendra Kumar Routray and Bijay Kumar Sahoo, Section Officers of the Court to have been promoted to the cadre of Superintendent in the Court's establishment even though they were having Intermediate qualification to their credit. According to the petitioner, the DPC has bypassed the Rules and adopted a novel practice and procedure beyond the Rules for promotion to the post of Additional Principal Secretary from amongst the Senior Secretaries by promoting the junior over the petitioner who had an unblemished service record. The decision taken by the DPC on dated 15.07.2016 by misinterpreting 2015 Rules needs reconsideration in the light of decision taken in the DPC on dated 31.03.2017 for promotion to the post of Senior Secretary. According to the petitioner, though he has retired from Government service w.e.f. 31.05.2017 but his representations dated 25.08.2016 and 11.04.2017 vide Annexures-3 and 6 have not been considered and due to his non-promotion, he has suffered mentally and financially.

3. On behalf of the opposite party no.2 Registrar (Judicial) of this Court, counter affidavit was filed wherein a stand has been taken that the notifications dated 20.07.2016 promoting the opposite party no.4 and another to the post of Additional Principal Secretary were issued in terms of the recommendation made by the DPC held on 16.07.2016 strictly in compliance of the recruitment Rules in vogue and the action of the opposite party no.2 was legal, valid and justified. The DPC after interviewing the petitioner and giving its due consideration to the service records of the petitioner did not find him suitable on comparative merit vis-a-vis opposite party no.4 for promotion to the cadre of Additional Principal Secretary and as such recommended the case of the opposite party no.4 and another for promotion. It is stated that Rule 21 of 2015 Rules has clearly stipulated about the repeal of 1963 Rules and therefore, the provisions of the repealed Rules did not survive to be acted upon or to confer any right on anybody or to lay down the criteria for promotion or procedure for the purpose. It is stated that promotion to the higher post is based on merit with due regard to seniority as per the provisions envisaged in Rule 13 of the 2015 Rules read with criteria fixed under the Odisha Civil Services (Criteria for Promotion) Rules, 1992 and not on the basis of entries in CCRs alone. An employee having good CCRs without any adverse entry therein cannot claim automatic promotion as other eligibility criteria are required for such promotion. The case of the petitioner

is covered under the 2015 Rules and in view of Rule 21 of the said Rules, old qualification requirement for promotion cannot continue ignoring the new as prescribed in the Appendix to the 2015 Rules. An employee cannot remain immune from the new Rules relating to qualification requirement for promotion to the higher post. The DPC found the petitioner was having lack of requisite educational qualification and therefore unsuitable for promotion. The proceeding of the DPC held on 16.07.2016 was placed before the Hon'ble Chief Justice who approved the recommendations on 19.07.2016 and ordered that candidates at serial nos. 1 and 4 be promoted to the post of Additional Principal Secretary against the newly created vacancies in the Court's establishment as per the merit. It is stated that an employee coming within the zone of consideration has a right to be considered for promotion but he cannot ipso facto claim promotion to the post. The representations of the petitioner are pending awaiting the result of this writ petition. DPC after perusal of CCRs, antecedents, service records, performance of the employees in the cadre of Senior Secretary including the petitioner in the interview and considering the comparative merit and suitability of all such candidates, recommended the names of candidates at serial nos. 1 and 4 in the gradation list for promotion in accordance with the provisions of the Rules. The petitioner did not possess the minimum educational qualification as required under the 2015 Rules for which he was not found suitable for promotion. It is stated that the result of subsequent DPC held for promotion to the cadre of Senior Secretary wherein the incumbents having Intermediate qualification were given promotion to the post of Senior Secretary under the same Rules has no relevance to the case in hand and the same is not comparable with the decision taken by the DPC giving promotion to the opposite party no.4 and another to the cadre of Additional Principal Secretary which is a key post in the Court's establishment and its qualification is different from that prescribed for the post of Senior Secretary. It is stated that the promotion given in favour of the opposite party no.4 was with due approval of the Hon'ble Chief Justice. The criteria regarding the educational qualification for promotion to the post of Addl. Principal Secretary and that for promotion to the cadre of Senior Secretary, as per rules are distinctly different. For promotion to the cadre of Additional Principal Secretary, a candidate should not only possess a Bachelor's degree and have good knowledge in Hindi and English, but he should also be a fit person in the opinion of the Hon'ble Chief Justice to hold such post whereas for promotion to the post of Senior Secretary, a candidate is only required to possess a Bachelor's degree. It is further stated in the counter affidavit that the incumbents in the cadre of

Secretary were promoted to the cadre of Senior Secretary basing upon the principle of merit with due regard to seniority and suitability by the DPC whereas the opposite party no.4 and another were promoted to the cadre of Additional Principal Secretary not only after they were adjudged suitable by the DPC basing upon the principle of merit with due regard to seniority and suitability but also after they were found fit in the opinion of the Hon'ble Chief Justice to hold such post.

4. The opposite party no.4 filed his counter affidavit wherein it is stated that the post of Additional Principal Secretary is the promotional post of which post of Senior Secretary is the feeder post/grade as per the recruitment Rules in vogue. 1963 Rules came to be repealed by 2015 Rules and in the later Rules, the post of Additional Principal Secretary has been prescribed as a post to be filled up only by way of promotion and the eligibility criteria has been prescribed as Bachelor's degree or equivalent qualification and having good knowledge in Hindi and English and a person who is fit to hold the post in the opinion of the Hon'ble Chief Justice besides the experience requirement of at least one year as Senior Secretary. It is stated that while 2015 Rules was in vogue, a DPC for filing up three posts of Addl. Principal Secretary was held on 15.07.2016 and the criteria for promotion as prescribed under Rule 13(a) being merit with due regard to seniority and suitability was considered by the DPC and the cases of all the Senior Secretaries who had put in experience of more than one year was taken into account and the DPC recommended two persons namely Kailash Chandra Pati and the opposite party no.4 for promotion and placed the recommendation for approval of the Hon'ble Chief Justice in compliance of the Rules. The opposite party no.4 was comparatively found to be fit and more meritorious than the petitioner irrespective of his higher seniority position in the gradation list of Senior Secretaries prepared. It is further stated that the merit being the primary criteria for promotion but not seniority, the petitioner was adjudged as not fit for such promotion by the DPC while DPC found the opposite party no.4 as fit or suitable for such promotion against the post of Additional Principal Secretary. The petitioner lacked the requisite qualification prescribed in 2015 Rules. It is further stated that in view of Rule 21 of 2015 Rules, the contentions advanced by the petitioner basing on the explanation appended to Rule 1 of 2015 Rules is misconceived and unsustainable. Since all the provisions of 1963 Rules stood repealed specifically w.e.f. 28.02.2015, the said Rules and prescription therein stood obliterated/abrogated/ wiped out

wholly i.e. protanto repeal. It is stated that the explanation clause to Rule 1 of 2015 Rules cannot be allowed to make Rule 21 and its effect meaningless.

5. Mr. Sameer Kumar Das, learned counsel for the petitioner contended that while 1963 Rules was in vogue, the post of Additional Principal Secretary was introduced to the cadre of hierarchy of the Stenographer/Secretarial Staff in order to give them an opportunity for promotion in their service career and no additional educational qualification was attached to such post. The new cadre posts were filled up by way of promotion from the feeder cadre of Senior Secretary and the educational qualification available as prescribed to the post continued to the higher post. The Senior Secretaries who have I.A/I.Sc/I.Com qualification to their credit on acquiring required number of experience were to be given promotion to the next higher post up to the post of Principal Secretary. It is argued that the petitioner who was an Intermediate in Arts had the legitimate expectation to reach the higher post in course of his employment with selfsame qualification as he had an unblemished service records. It is argued that even though as per 2015 Rules, the minimum entry level qualification in the cadre strength of Junior Stenographer up to the Senior Principal Secretary is Bachelor's degree in any discipline with other qualifications but in view of the explanation to Rule 1 of 2015 Rules, the new additional qualification in the entry level i.e. Bachelor's degree will not affect a person already in service. In other words, according to him, the existing employees who did not possess Bachelor's degree to their credit but continued in different ranks either in the Secretarial cadre or in the Ministerial cadre can get the promotion to the next higher rank. It is contended that even though as per the gradation list, the petitioner was above the opposite party no.4 but only on the ground of lack of educational qualification, the case of the petitioner was not considered for promotion by the DPC which is quite unreasonable and illegal. The learned counsel submitted that another DPC was convened to give promotion to the post of Senior Secretary from the Secretaries and even though as per 2015 Rules, the minimum educational qualification for such higher post was Bachelor's degree but in its meeting dated 31.03.2017, the DPC recommended two Secretaries namely Sri Raghunath Sahu and Sri Akhaya Kumar Dhal, who were having educational qualification I.A./I.Com. respectively to the post of Senior Secretaries and accordingly, they were given promotion to the post of Senior Secretaries on 31.03.2017. It is argued that the petitioner has been discriminated and debarred from getting the promotion only on the ground of lack of requisite qualification and the same

violates the fundamental rights of the petitioner guaranteed under Articles 14 and 16 of the Constitution of India. While concluding his argument, the learned counsel submitted that since the petitioner has retired in the meantime even if the writ petition is allowed, the petitioner will only get some financial benefits and the opposite party no.4 will not be affected as such.

Sri Jyoti Prakash Patnaik, learned Additional Government Advocate for the State as well as Mr. Biswa Bihari Mohanty, learned counsel for the opposite party no.4 supported the decision taken by the DPC as well as the respective stand taken in their counter affidavits and contended that after the coming into force of 2015 Rules, the petitioner who was having no requisite educational qualification for the post of Additional Principal Secretary could not have been selected for such post and therefore, the decision taken by the DPC was perfectly justified and the recommendation made by the DPC was also considered by the Hon'ble Chief Justice who accepted such recommendation and therefore, there is no merit in the writ petition which should be dismissed.

6. Adverting to the contentions raised by the learned counsel for the respective parties, the following undisputed facts are borne out of the record:

(i) The petitioner was having educational qualification of Intermediate in Arts and he was holding the post of Senior Secretary since 03.11.2012;

(ii) As per the gradation list, the petitioner was senior to the opposite party no.4 when the DPC was held on 15.07.2016 to consider the case of promotion of Senior Secretaries to the post of Additional Principal Secretary;

(iii) Hon'ble Chief Justice in exercise of his power conferred under Article 229 of the Constitution of India in supersession of the 1963 Rules brought 2015 Rules, which was notified in the Official Gazette on 28.02.2015.

(iv) The minimum qualification for the post of Additional Principal Secretary was prescribed for the first time in 2015 Rules and such a post was required to be filled up by way of promotion from the feeder cadre of Senior Secretary;

(v) As per 2015 Rules, the minimum educational qualification for the post of Additional Principal Secretary is Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto;

(vi) The DPC considered the cases of persons available in the cadre of Senior Secretary for promotion and the name of the opposite party no.4 was recommended for promotion even though he was junior to the petitioner as per the gradation list;

(vii) The petitioner was not found suitable for promotion to the post of Additional Principal Secretary mainly on the ground of lack of minimum educational qualification.

7. The Orissa High Court (Appointment of Staff) Rules, 1963 and The Orissa High Court (Conditions of Service of Staff) Rules, 1963 came to be repealed by 2015 Rules. The *explanation* to Rule 1 of 2015 Rules provided that nothing in the Rules shall adversely affect any person who was a member of service on the date of coming into force of the Rules.

The *explanation* to Rule 1 of 2015 Rules which is relevant for the case is quoted herein below:

> "*Explanation*:- Nothing in these Rules shall adversely affect any person who was a member of the service on the date of coming into force of these Rules."

The legislative intent behind the *explanation* which opens with the words 'nothing in these Rules' is clear and it shows a purpose that any method of appointment, recruitment or selection process to a particular post provided in a different manner in the new Rules which a person is already holding as per the repealed Rules shall not adversely affect him. This construction is consistent with the purpose of *explanation* and it will be preferred as against any other construction.

It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. Unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. 2015 Rules nowhere either expressly or by necessary implication made to have a retrospective operation. It will have prospective effect and will not adversely affect any person who is a member of the service as on 28.02.2015 and already holding a particular post as per the repealed Rules even if for that particular post, a different method of appointment, recruitment or selection process is provided in the new Rules. For example, even if a higher educational qualification has been prescribed for a particular post as per the new Rules, the person already holding that post having lesser educational qualification appointed on the basis of the repealed Rules shall not be adversely affected. In other words, he cannot be reverted back to any other post lower in rank which matches his educational qualification. However

after the new Rules came into force, for the next promotional post, the procedure should be governed as per the new Rules and educational qualification etc. as prescribed for such higher post should be adhered to and that is how the *explanation* to Rule 1 requires to be interpreted. If the contention of the learned counsel for the petitioner that by virtue of *explanation*, the case of promotion of the petitioner to the next higher post shall also not be affected adversely on the ground of lack of minimum educational qualification for such higher post is accepted, then the repealing provision as provided in Rule 21 of 2015 Rules would be meaningless. In the said Rule, a saving clause has been provided which states that in spite of the repeal of two Rules of 1963, any order or appointment made, action taken or things done under the Rules, Regulations, instructions or Orders so repealed shall be deemed to have been made, taken or done under 2015 Rules. A saving clause is used to preserve from destruction of certain rights or privileges already existing. It saves or safeguards all the rights the party previously had, not that it gives him any new rights. In view of such saving clause as provided in Rule 21, the contention raised by the learned counsel for the petitioner that even though the petitioner is lacking educational qualification for the post of Additional Principal Secretary as per the new Rules, he is entitled to be given promotion is virtually keeping the old repealed Rules in an active condition for the purpose of promotion which is not permissible.

It is not in dispute that while 1963 Rules was in vogue, the post of Additional Principal Secretary was created on 21.11.2011 by way of up-gradation of one post of Senior Secretary as per notification issued by Government of Odisha, Home Department which has been concurred by the Finance Department. No additional educational qualification was also attached to such post then. However when 2015 Rules came into force by repealing 1963 Rules, minimum qualification, experience and specific mode of recruitment were provided for such post. Two posts in the Steno Cadre were further upgraded as Additional Principal Secretary on 26.02.2016 as per the notification issued by the Government of Odisha, Home Department which was concurred by the Finance Department. Thus any promotion to those posts thereafter would be governed under the new Rules and not under the repealed Rules.

In the case of **Rajasthan Public Service Commission -Vrs.- Chanan Ram reported in (1998) 4 SCC 202**, it is held that it is the rules

which are prevalent at the time when the consideration took place for promotion would be applicable.

In the case of **Deepak Agarwal -Vrs.- State of Uttar Pradesh reported in (2011) 6 Supreme Court Cases 725**, it is held as follows:

> "26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the 'rule in force' on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in ***Y.V. Rangaiah's case*** **[(1983) 3 Supreme Court Cases 284]** lays down any particular time frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants have been taken away by the amendment."

In the case of **State of Tripura -Vrs.- Nikhil Ranjan Chakraborty reported in (2017) 3 Supreme Court Cases 646**, it is held as follows:-

> "9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, "rules in force on the date" the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in Deepak Agarwal (supra), in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended...."

In the case of **D. Raghu -Vrs.- R. Basaveswarudu reported in 2020 SCC Online SC 124**, the Hon'ble Supreme Court held as follows:-

> "106. But the High Court was not right in directing filling-up of vacancies prior to 07.12.2002, based on the 1979 Rules, as after the 2003 Rules came into force, going by the intention of the Authority, the right to promotion would be based on the new Rules, even if the vacancies arose prior to the new Rules."

In view of the ratio laid down in the above decisions, merely because the petitioner was having qualification of Intermediate in Arts and an unblemished service record and had the expectation to reach the higher post in course of his employment with the self-same qualification, he cannot be given promotion to such post as the new Rules provided minimum qualification, inter alia, Bachelor's degree in any discipline from a recognised University.

Coming to the point of *legitimate expectation* of the petitioner as contended by the learned counsel for the petitioner, in the case of **Union of India -Vrs.- Hindustan Development Corporation reported in (1993) 3 Supreme Court Cases 499**, it is held that

> "28.....For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

In the case of **Ram Parvesh Singh -Vrs.- State of Bihar reported in (2006) 8 Supreme Court Cases 381**, the Hon'ble Supreme Court held as follows:

> "15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such.....A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'."

There is nothing to show that the decision taken by the DPC as per 2015 Rules was arbitrary, unreasonable, discriminatory, unfair, biased, gross abuse of power or in violation of principles of natural justice. The doctrine of legitimate expectation ordinarily would not have any application when the legislature has enacted a statute. Thus the plea of legitimate expectation does not appear to be of any assistance to the petitioner.

1963 Rules and 2015 Rules cannot run simultaneously and the provisions contained in the 1963 Rules would have to give way to the new Rules in the matter of method of appointment, recruitment, promotion etc. and only exception would be that the persons who were already occupying a particular post shall not be affected adversely by coming into force of the new Rules and they would continue to hold the said post even though as per new Rules, higher educational qualification has been prescribed to hold such post. That is the true spirit of the *explanation* to Rule 1 as well as the proviso to Rule 21 of 2015 Rules.

As per the 2015 Rules, the post of Additional Principal Secretary is a Group 'A' post which appears in Rule 3 as category 17 under the heading of 'Classification of Posts'. As per Rule 4, this category of post shall be filled up by way of promotion from the staff of the High Court of Orissa from the feeder post/cadre, subject to requisite qualification and experience as prescribed in Appendix-I of the Rules. Serial No.17 of Appendix 1 to the said Rules prescribes, inter alia, minimum educational qualification, experience and mode of recruitment to such post which is as follows:-

(i) Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto, having good knowledge in Hindi and English and is a fit person to hold the post in the opinion of the Hon'ble Chief Justice;

(ii) He should have at least one year experience as Senior Secretary to the Hon'ble Judges;

(iii) Such post is to be filled up by promotion from the post of Senior Secretary basing on the merit with due regard to seniority and suitability.

Therefore, a person holding the post of Senior Secretary to the Hon'ble Judges at least having one year experience as such and having Bachelor's degree in any discipline from a recognized University or such other qualification equivalent thereto and having good knowledge in Hindi

and English can be considered for the post of Additional Principal Secretary provided that according to the opinion of the Hon'ble Chief Justice, he is a fit person to hold such post. A person holding the post of Senior Secretary cannot be automatically promoted to that post basing on his seniority as per the gradation list since as per the mode of recruitment, such promotion is to be based on the merit with due regard to seniority and suitability. A Senior Secretary in the top of the gradation list may not be given automatic promotion to the post of Additional Principal Secretary, if he lacks merit or found to be not suitable to hold such post. Similarly a Senior Secretary in the top of the gradation list may not be given automatic promotion to the post of Additional Principal Secretary even though he is having minimum educational qualification and good knowledge in Hindi and English, if according to the opinion of the Hon'ble Chief Justice, he is not a fit person to hold such post.

Rule 13 of 2015 Rules states that promotions to the various posts in the High Court service shall be made by the appointing authority basing on the merit with due regard to the seniority and suitability as per the provisions specified in Column (8) of Appendix 1. In the case of **Registrar General, High Court of Madras -Vrs.- R. Gandhi reported in (2014) 11 Supreme Court Cases 547**, it is held that eligibility is a matter of fact whereas suitability is a matter of opinion. Suitability cannot be a subject matter of judicial review. In the case of **Valsala Kumari Devi M. -Vrs.- Director, Higher Secondary Education reported in (2007) 8 Supreme Court Cases 533**, it is held that the expression 'suitability' means that a person to be appointed shall be legally eligible and 'eligible' should be taken to mean 'fit to be chosen'.

Rule 13(e) of 2015 Rules states that the Hon'ble Chief Justice may, in case of a suitable and highly deserving candidate or class of candidates and for exigency, dispense with all or any of the requirements as prescribed under that Rule. Similarly Rule 20 of 2015 Rules permits the Hon'ble Chief Justice to relax or dispense with any of the provision of the Rules in case of administrative exigency for the reasons to be recorded in writing and by passing an order to that effect.

In the case in hand, even though the case of the petitioner who was in serial no.2 as per the gradation list was placed before the DPC along with other three Senior Secretaries but it was found that the petitioner was lacking

minimum educational qualification to hold the post of Additional Principal Secretary and therefore, apart from recommending the name of the person who was in serial no.1, the name of opposite party no.4 who was in serial no.4 as per the gradation list was also recommended. The person who was in serial no.3 was not recommended on the similar ground like that of the petitioner. When the recommendation of the DPC was placed before the Hon'ble Chief Justice, he also did not think it proper to relax the provision of educational qualification exercising his power under Rule 20 of 2015 Rules rather found the persons recommended by the DPC to be the fit persons to hold such post and therefore, it cannot be said that at any level, any illegality has been committed to the case of the petitioner in not recommending his name for promotion or not selecting him for such post. According to our humble view, even though seniority is one of the criteria apart from the service records but other requirements cannot be given a go-bye while considering someone to the next higher post. There is no dispute that at the level of Additional Principal Secretary, a person should have good knowledge in Hindi and English as he is supposed to deal with the Registry of the Hon'ble Supreme Court as well as other High Courts and deal with many important files and therefore, discretion has been left with the Hon'ble Chief Justice to place the fittest person in such post who was having necessary qualification and eligibility criteria and in appropriate cases, he has also got the power of relaxation as provided under Rule 20 of 2015 Rules. The DPC seems to have perused the CCR, antecedents, service records and performance of the candidates in the cadre of Senior Secretary and after taking their interview, considered the comparative merit and suitability of all the four candidates and accordingly recommended the name of person who was at serial no.1 and also of the opposite party no.4. We find no flaw in such recommendation.

8. The contention of the learned counsel for the petitioner that in some other posts, where the minimum educational qualification has been prescribed has been deviated by the DPC at a subsequent stage and promotion has been given is based on *negative equality* which is not acceptable.

Law is well settled that a party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. It would not be setting a wrong right but would be perpetuating another wrong. In such matters, there is no discrimination

involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs at par. It is also the settled legal proposition that Article 14 of the Constitution does not envisage a negative equality. Even if in some cases, promotions have been made by dispensing with any requirements or relaxing any of the provisions of the Rules on account of some administrative exigencies in view of the special power lies with the Hon'ble Chief Justice, that does not confer any right on the petitioner. (**Ref: Sneh Prabha -Vrs.- State of U.P. : A.I.R. 1996 S.C. 540**, **Secretary, Jaipur Development Authority -Vrs.- Daulat Mal Jain : (1997) 1 Supreme Court Cases 35**, **State of Haryana -Vrs.- Ram Kumar Mann : (1997) 3 Supreme Court Cases 321**, **Faridabad C.T. Scan Center -Vrs.- D.G. Health Services : A.I.R. 1997 S.C. 3801**, **Jalandhar Improvement Trust -Vrs.- Sampuran Singh : A.I.R. 1999 S.C. 1347**, **Union of India -Vrs.- International Trading Co. : A.I.R. 2003 S.C. 3983**, **Kastha Niwarak G.S.S. Maryadit, Indore -Vrs.- President, Indore Development Authority : A.I.R. 2006 S.C. 1142**).

The post of Additional Principal Secretary was created vide Govt. of Odisha, Home Department letter no. 48045 dated 21.11.2011. Two posts were further upgraded vide Govt. of Odisha, Home Department letter no. 7733 dated 26.02.2016. Thus the total cadre strength became three. It seems that prior to the promotion to the post of Additional Principal Secretary in the case in hand, four persons namely, Purna Chandra Chhatoi, Tulasi Prasad Raiguru, Shyam Sundar Dey and Bibhuti Bhusan Pati were promoted to the post of Additional Principal Secretary as per the Orissa High Court (Appointment of Staff) Rules, 1963 and the Orissa High Court (Conditions of Service of Staff) Rules, 1963 at different point of time. Except Purna Chandra Chhatoi, all the three others were having Bachelor's degree. After 2015 Rules came into force, apart from the opposite party no.4 who was having qualification of B.Com., LL.B., the other person promoted in this case was Kailash Chandra Pati who was having qualification of B.A., LL.B. Therefore, after 2015 Rules came into force, there is no deviation to the requirement of minimum educational qualification as has been prescribed in such Rules for the said post.

9. In view of the foregoing discussions, we are of the humble view that the proceedings of DPC held on 15.07.2016 for promotion to the post of

Additional Principal Secretary and the promotion notification in favour of opposite party no.4 vide Annexure-3 was quite legal, valid and justified. We are also of the view that the petitioner was rightly not promoted to the post of Additional Principal Secretary in view of lack of eligibility criteria prescribed for such post as per 2015 Rules and therefore, he is not entitled to get any service and financial benefits attached to that post. Accordingly, the writ petition being devoid of merits stands dismissed.

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2020 (III) ILR - CUT- 452

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

W.P.(C) NOS. 16851, 16877 AND 16879 OF 2020

SURENDRA BEHERA .....Petitioner

.V.

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

W.P.(C) NO. 16877 OF 2020

ARIKHITA DAS .....Petitioner

.V.

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

W.P.(C) NO. 16879 OF 2020

NILAMANI MISHRA .....Petitioner

.V.

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

LIMITATION ACT, 1963 – Section 5 – Condonation of delay – Sufficient cause – Meaning of – Held, the expression 'sufficient cause' implied by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which sub-serves the ends of justice that being the life purpose for the existence of the institution of courts – It is common knowledge that the court has been making a justifiably liberal approach in matters instituted in the court. (Para 11)

Case Laws Relied on and Referred to :-

1. (2015) I SCC (L&S) 191 : Uttar Pradesh and Ors. Vs. Arvind Kumar Srivastav & Ors.
2. AIR 1966 SC 1962: B.N. Nagarajan & Ors. Vs. State of Mysore & Ors.
3. AIR 1975 SC 538 : Amrit Lal Berry Vs. Collector of Central Excise.
4. AIR 1988 SC 686 : K.I. Shephard & Ors Etc. Etc. Vs. Union of India & Ors.
5. (2013) 1 SCC 353 :Tukaram Kanha Joshi & Ors. Vs. Maharastra Industrial Development Corporation & Ors.
6. (2007) 1 SCC (L&S) 500 : U.P. Jal Nigam & Ors. Vs. Jaswant Singh & Anr.
7. (1997) 6 SCC 538 : Jagdish Lal Vs. State of Haryana.
8. AIR 2014 SC 1141 : Chennai Metropolitan Water Supply & Sewerage Board Vs. T.T. Murali Babu.
9. AIR 2014 SC 746 : Biswaraj & Anr. Vs. Spl. L.A.
10. 2010 (2) SCC (L&S) 649 :Bhakra Beas Management Board Vs. Krishna Kumar Vij & Anr.
11. (2009) 6 SCC 791 : Basanti Prasad Vs. Bihar School Examination Board & Ors.
12. AIR 1967 SC 1450: Moon Mills Ltd. Vs. Industrial Court.
13. AIR 1969 SC 329 : Maharashtra SRTC Vs. Balwant Regular Motor Service.
14. (1986) 4 SCC 566 : State of M.P. & Ors. Vs. Nandlal Jaiswal & Ors.
15. AIR 1987 SC 1353: Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji and Ors.

W.P.(C) NO. 16851 OF 2020

For the Petitioner : M/s. Nirmal Ranjan Routray J. Pradhan, T.K. Choudhury & S.K. Mohanty.

For the Opp Parties : Dhanoj Kumar Sahoo & Paresh Kumar Sahoo.

W.P.(C) NO. 16877 OF 2020

For the Petitioner : M/s. Nirmal Ranjan Routray J. Pradhan, T.K. Choudhury & S.K. Mohanty.

For the Opp Parties : Dhanoj Kumar Sahoo.

W.P.(C) NO. 16879 OF 2020

For the Petitioner : M/s. Nirmal Ranjan Routray J. Pradhan, T.K. Choudhury & S.K. Mohanty.

For the Opp Parties : Dhanoj Kumar Sahoo & Paresh Kumar Sahoo. & S.S. Kashyap

JUDGMENT Date of Judgment: 18.11.2020

S. PANDA, J.

By means of these writ petitions, the petitioners assail the common order dated 06.05.2020 passed by the Central Administrative Tribunal,

Cuttack Bench, Cuttack in O.A. No. 189 of 2019 & M.A. No. 248 of 2019, O.A. No. 195 of 2019 & M.A. No. 259 of 2019 and O.A. No. 334 of 2019 & M.A. No. 403 of 2019, wherein the learned Tribunal dismissed the Original Applications on limitation without going into the merits of the case.

2. Since common question of fact and law are involved in all these writ petitions, the same are heard together and disposed of by this common judgment.

3. The records reveal the factual matrix to the extent that the petitioners were initially engaged as Casual Labourers in the year 1969-70 in the Construction wings of East Coast Railway Organization. In the year 1978-79 they were regularized in Group 'D' posts under Khurda Road Division (Open Link). While continuing as such, in the year 1980 they were promoted as Store Issuers and on 05.02.1985 they were further given ad hoc promotion to the post of Junior Clerk. They had also appeared in the suitability test for the post of Store Issuer and declared suitable on 21.12.1987, while working as Ad hoc Junior Clerks. Thereafter, they participated in the selection for promotion to the post of Junior Clerks/Typists against the limited Departmental quota which was to be filled up by promotion from amongst suitable persons holding Class-IV posts like Store Issuers and Record Sorters, who had completed three years of service in S.E. Railway Zone. They appeared in the written examination and viva-voce test and succeeded in both the examinations. Their names were empanelled as Junior Clerks/Junior Typists on 26.04.1990. On 07.06.1990 the panel of selected candidates was published as per the recommendation of the Selection Board with the approval of the competent authority in respect of both the Construction and Open Line Organizations. Thereafter they were given officiating promotion as Senior Clerks on ad hoc basis against the existing vacancies on 06.02.1992. After completion of five years of service and as they were found efficient and sincere, on 29.05.1997 their names were recommended for further ad hoc promotion. Accordingly, they were given promotion to the next higher post, i.e. Head Clerk on ad hoc basis, which was approved by CPM (C)/BBSR and CAD/BBSR vide order dated 02.06.1997 with effect from 06.02.1997. Subsequently, while the petitioners were so continuing, the Chief Personnel Officer, South Eastern Railway, Garden Reach without any sanction of rules, issued a circular on 13.12.1999, in which it was

directed that more than one ad hoc promotion may not be made. Accordingly on 13.11.2001, the Deputy Chief Personnel Officer (Con.) S.E. Railway, Bhubanesar issued a letter in which it was directed that all second or more ad hoc promotion granted to the staff in violation of the instructions should be recalled from 01.12.2001. Thereafter, the order dated 15.10.2001 was passed by the Deputy Chief Personnel Officer (Con.), Bhubanesar by reverting the petitioners from the post of ad hoc Head Clerks to the post of Senior Clerks.

4. The present petitioners challenged the said order dated 15.10.2001 in O.A Nos. 509 and 603 of 2001 before the Central Administrative Tribunal, Cuttack Bench. The Tribunal vide order dated 21.03.2002 set aside the order dated 15.10.2001 passed by the Deputy Chief Personnel Officer (Con.), Bhubaneswar. The Union of India challenged the said order dated 21.03.2002 passed in O.A. Nos. 509 and 603 of 2001 before this Court in O.J.C. No. 5477 of 2002 and 5459 of 2002. This Court vide judgment dated 07.03.2006 dismissed the writ petitions and affirmed the order passed by the Tribunal.

5. After such order was passed by this Court, the opposite party-Railway Administration vide order dated 26.06.2008 restored the petitioners to the post of Head Clerk on Ad hoc measure with effect from 15.10.2001 on notional basis instead of implementing the order of the Tribunal, which was confirmed by this Court. Accordingly, another round of litigation cropped up and the same was settled in W.P.(C) No. 22363 of 2017. This Court vide order dated 23.03.2018 quashed the orders passed by the Tribunal and directed the Railways to grant actual benefit instead of notional benefit in the post of Head Clerk. After such direction was given by this Court, the authority extended the benefit of differential arrear salary in favour of certain persons and not paid the same to the other similarly placed employees who were reverted and restored to their posts after the order was passed in earlier writ petitions.

6. Learned counsel for the petitioners submits that in view of the above peculiar facts and circumstances, the present petitioners were constrained to move to the Tribunal in O.A. Nos. 189 of 2019, 195 of 2019 and 334 of 2019 for extension of consequential benefit, in which the impugned order was passed on limitation without considering the order passed earlier by the Tribunal, which was confirmed by this Court vide

judgment dated 07.03.2006 in O.J.C. No. 5477 of 2002 and 5459 of 2002. Therefore, in terms of such direction of this Court, the petitioners are entitled to get all benefits. Such fact has been lost sight of by the Tribunal. The Tribunal without going into the merits of the case, dismissed the claim of the petitioners on the ground of limitation. Thus, the impugned order dated 06.05.2020 needs to be quashed. In support of his contention, he relied on the decision of State of ***Uttar Pradesh and Others-Vrs-Arvind Kumar Srivastav & Others***, reported in (2015) I SCC (L&S) 191, wherein it has been held that:-

> *"Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently."*

The petitioners have also relied on the decision of ***B.N. Nagarajan & others vrs. State of Mysore and others***, reported in ***AIR 1966 SC 1962***; ***Amrit Lal Berry Vrs. Collector of Central Excise*** reported in ***AIR 1975 SC 538*** and K.***I. Shephard & Ors Etc. Etc. Vrs. Union of India & Ors***, reported in AIR ***1988 SC 686***.

In the case of ***B.N. Nagarajan (supra)***, the Hon'ble Apex Court extended the benefit to the similarly placed employees, who have not approached the court. At the last paragraph, the Hon'ble Apex Court observed that:-

> *"We may mention that some of the appellants have not prosecuted their appeals but there is no reason why they should not have the benefit of this judgment, and exercising our powers under Art 142 of the Constitution, we direct that in order to do complete justice they should also have the benefit of the judgment given by us"*

The decision of ***Tukaram Kanha Joshi & Others –vrs-Maharastra Industrial Development Corporation 7 Others,*** reported in ***(2013) 1 SCC 353*** was also been relied, wherein it has been observed that

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

7. Per contra, learned counsel for the Railways supported the order of the Tribunal and submitted that since the petitioners have approached the Tribunal in the year 2019, the Original Applications were dismissed rightly on the ground of delay. Therefore, the impugned order need not be interfered with. The opposite party-Railway, however relied on the decisions with regard to delay in approaching the Tribunal and accordingly cited the decisions in the case of ***State of Karnataka & others vs. S.M. Kortrayya and others***. In the counter affidavit, the opposite party-Railways also cited the decisions in the case of ***U.P. Jal Nigam & Ors. V. Jaswant Singh & Another, reported in (2007) 1 SCC (L&S) 500*** and submitted that when a person is not vigilant of his right and acquiesces with situation, his case cannot be heard after a couple of years on the ground that the same relief should be granted to him as was granted to a person similarly situated who was vigilant about his rights. The respondents have also relied on the decision of ***Jagdish Lal v State of Haryana,*** reported in ***(1997) 6 SCC 538***, ***Chennai Metropolitan Water Supply & Sewerage Board Vs. T.T. Murali Babu***, reported in ***AIR 2014 SC 1141***, ***Biswaraj & another Vs. Spl. L.A.,*** reported in ***AIR 2014 SC 746***, ***Bhakra Beas Management Board Vs. Krishna Kumar Vij & another***, reported in ***2010 (2) SCC (L&S), 649***.

8. We have heard learned counsel for the parties and perused the documents available on record. The very admitted fact in this case is that the petitioners had approached the Central Administrative Tribunal in O.A. No. 509 and 603 of 2001. The Tribunal vide order dated 21.03.2002 set aside the order dated 15.10.2001 and directed that all the applicants are to be treated as regular 'PCR' staffs of Construction Organization for all purposes and consequential relief need be given to them within a period of three months hence. Such order of the Tribunal was affirmed by this Court. Hence, all the affected persons including the petitioners are entitled to get the consequential relief accordingly as per the directions. Such fact has been lost sight of by the Tribunal while passing the impugned order. Thus, the decisions cited on behalf of the ***Railways, i.e. State of Karnataka V. U.P. Jal Nigam and Arbind Kumar Srivastava (supra) etc***.

wherein it was held that a person not vigilant of his right and acquiesces with situation, his case cannot be heard after a couple of years on the ground that the same relief should be granted to him as was granted to a person similarly situated who was vigilant about his rights, cannot be applicable to the present case on the facts and circumstances of the present case. The present petitioners have approached the Court earlier and the Court granted them relief also which was not implemented. In the second round of litigation this court has also observed as follows:-

> *"However, the authorities in a misconception and without applying their mind granted the actual financial benefit in respect of other batch of applicants, whose original applications were rejected by the Tribunal, but granted only notional benefit to the present petitioners, whose original applications were allowed by the Tribunal and confirmed by this Court".*

In the said writ petition, this Court has also directed the Railways to extend the actual benefit in favour of the petitioners as has been extended to similarly situated persons.

9. During the course of argument, the opposite parties cited the decision of the Apex Court in the case of ***Union of India & Others v. Tarsem Singh*** to the effect that the belated service related claim will have to be rejected on the ground of delay and latches or limitation. In the said case also restriction has been imposed with regard to grant of relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser considering the fact that the same has been filed after 16 years.

This Court in the case of ***Dr. Karunakar Sahoo v. State of odisha and another (W.P.(C) Nos. 20651 of 2016 and batch decided on 27.06.2017)*** observed as follows:-

> *"xxx xxx xxx the State Authorities have challenged the order whereby and where under the Tribunal has directed to count the ad hoc service of the applicants from their initial date of ad hoc appointment for placement in the sr. scale / career advancement and ante date, accordingly they have not challenged the part of the order restricting the financial benefit only for the period of three years relying upon the judgment rendered in the case of Tarsem Singh (supra) which has not been disputed by the learned Additional Government Advocate, rather he has fairly submitted that the State is not aggrieved with that part of the order which has been decided by the Hon'ble Apex Court in its judgment rendered in the case of Union of India and others Vrs. Tarsem Singh (supra),*

even in these cases the stand of the State is that the Tribunal has not erred in passing the order regarding arrears relying upon the judgment rendered in the case of Tarsem Singh, which itself suggests that this issue has not been assailed by the State in W.P.(C) No.17123 of 2016. Further it is evident from the order passed by this court in W.P.(C) No.17123 of 2016 that there is no finding to this effect.

In the instant case, when there is no delay on the part of the petitioners as observed in the above paragraphs, the question of application of the case of ***Tarsem Singh (supra)*** does not arise. Release of consequential service benefits arising out of the self same/common order of the Tribunal dated 21.03.2002 in favour of certain persons and denial of the same in respect of the petitioners, is nothing but mere discrimination and harassment, in the guise of delay approach, which at all not to be attributed to the petitioners.

10. The Apex Court, in the case of ***Vetindia Pharmaceuticals Limited v. State of Uttar Pradesh and Another (Civil Appeal No. 3647 of 2020 disposed of on 06.11.2020)*** at paragraph-14 observed that:-

"That brings us to the question of delay. There is no doubt that the High Court in its discretionary jurisdiction may decline to exercise the discretionary writ jurisdiction on ground of delay in approaching the court. But it is only a rule of discretion by exercise of self-restraint evolved by the court in exercise of the discretionary equitable jurisdiction and not a mandatory requirement that every delayed petition must be dismissed on the ground of delay. The Limitation Act stricto sensu does not apply to the writ jurisdiction. The discretion vested in the court under Article 226 of the Constitution therefore has to be a judicious exercise of the discretion after considering all pros and cons of the matter, including the nature of the dispute, the explanation for the delay, whether any third-party rights have intervened etc. The jurisdiction under Article 226 being equitable in nature, questions of proportionality in considering whether the impugned order merits interference or not in exercise of the discretionary jurisdiction will also arise."

The Hon'ble Apex Court, observed the aforesaid aspect by relying on the decisions in the case of ***Basanti Prasad vs. Bihar School Examination Board and others, (2009) 6 SCC 791, after referring to Moon Mills Ltd. vs. Industrial Court, AIR 1967 SC 1450, Maharashtra SRTC vs. Balwant Regular Motor Service, AIR 1969 SC 329 and State of M.P. and Others vs. Nandlal Jaiswal and others, (1986) 4 SCC 566***.

11. The Apex Court in the case of **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others** reported in **AIR 1987 SC 1353** held that the legislature has conferred the power to condone the delay by enacting Section 5 of the Indian Limitation Act in order to enable the courts to do substantial justice to the parties by disposing of matters on 'merits'. The expression 'sufficient cause' implied by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which sub-serves the ends of justice that being the life purpose for the existence of the institution of courts. It is common knowledge that the Court has been making a justifiably liberal approach in matters instituted in the Court. But the message does not appear to have percolated down to all the other courts in the hierarchy.

12. Be that, as it may, to our opinion, the Tribunal should not have dealt with the question of delay, had the Tribunal gone into the root of the dispute, wherein the self same Tribunal had directed for extension of consequential benefits to all the applicants of the Original Applications, including the petitioners and the same has been affirmed by this Court. However, due to the misconception order dated 26.06.2008 of the Railways, which has been interfered with by this Court in the earlier writ petitions, the dispute continued till 23.03.2018 and the benefits are not extended. Thus, if at all there is any delay in execution of the order of the Tribunal, the same cannot be attributed to the petitioners.

13. Admittedly the petitioners are the senior citizens and have retired long since. The authorities should not have forced them to be dragged into unnecessary litigations again and again, since the dispute has already been adjudicated by the Tribunal as well as by this Court.

14. The aforesaid discussions/observations/ analysis, therefore, lead us to hold that the impugned order dated 06.05.2020 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 189 of 2019 & M.A. No. 248 of 2019, O.A. No. 195 of 2019 & M.A. No. 259 of 2019 and O.A. No. 334 of 2019 & M.A. No. 403 of 2019, is not sustainable in the eye of law and accordingly the same is quashed. The opposite party-Railways are directed to extend all the financial benefits/differential arrear salary in favour of the petitioners in terms of the direction given in earlier Writ Petitions, within a period of two months hence. All the writ petitions are accordingly disposed of.

2020 (III) ILR - CUT- 461

S.K.MISHRA, J.

W.P.(C) NO. 4114 OF 2014

PRABHANJAN MOHAPATRA & ORS. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Contractual matter – Writ petition challenging the subsequent enhancement of price of flats/houses beyond the price limit earlier quoted in the brochures – Plea of violation of the Art.14 of the constitution raised – Fixing of the price is an executive policy – Interference by the Court – Held, pricing policy is an executive policy – The executive has a wide discretion in this regard and is only answerable provided there is any statutory control over its policy of price fixation – The experts alone can work out of mechanism of price determination; court can certainly not be expected to decide without the assistance of the experts – Therefore, ordinarily it is not the function of the court to sit in judgment over such matters of economic policy unless it is patent that there is hostile discrimination against a class.

> *"In that view of the matter, this Court is of the opinion that the issue being one of contract that too a contract which has not been concluded by valid acceptance and the pricing policy being an executive policy, the Court should refrain exercising its jurisdiction under Article 226 of the Constitution of India of the judicial review."*

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 1400 : Tarsem Singh Vs. Sukhminder Singh.
2. 60(1985) CLT 514 : Sri Sri Narayan Gosain represented by Prafulla Kumar Nayak & Ors Vs. the Collector, Cuttack & Ors.
3. 2005(2) C.C.C. 696 (A.P.) : B. Rajamani Vs. Mrs. Azhar Sultana & Ors.
4. (1980) 2 SCC 129 : Premji Bhai Parmar & Os. Vs. Delhi Development Authority & Ors.
5. 1990 Punjab and Haryana 41 : Baldev Singh Dhanij & Ors. Vs. Chandigarh Housing Board, Chandigarh.
6. AIR 1989 SC 1076 : Bareilly Development Authority and Anr. Vs. Ajai Pal Silngh & Ors.
7. 82(1996) CLT 907 : Satrughna Nayak & Ors. Vs. State of Orissa & Ors.

For Petitioners : M/s. Soumya Mishra, Mohanty, B.S.Panigrahi, S.K.Sahu, D.Priyanka & J.K.Mohapatra.

For Opp Party no.1 : Addl. Govt. Adv.

For Opp Party nos.2 & 3 : M/s.Prasanta Ku. Mohanty &
Manoj Kumar Panda.

JUDGMENT Date of Judgment: 09.11.2020

S.K.MISHRA, J.

This writ petition for quashing the demand notice vide Annexures-14 and 15 series issued by the Berhampur Development Authority(hereinafter referred to as the BDA for brevity) and the resolution dated 18.4.2013 have been made under Articles 226 and 227 of the Constitution of India, 1950.

2. In course of hearing Mr.R.K.Mohanty, learned Senior counsel appearing for the petitioners, submitted that though the petitioners have already deposited the requisite amount as demanded by the BDA, the BDA is not providing houses under Housing Project, Vivek Vihar Stage-II and now the BDA is demanding more than ten times of the actual amount and the rate as fixed in the brochure. Learned counsel for the petitioner submitted that the first phase work was taken up and completed successfully. In the year 2008 the BDA published another scheme in the name and style of 'Vivek Vihar Stage-II Housing Project' near Ambapua Level Crossing. As per the Scheme the BDA offered seven categories of house i.e. EWS, LIG, MIG-I, HIG (S)-I, HIG(S)-II HIG-(D) and subsequently three more categories were added to the Scheme as per the advertisement as per annexure-1. Learned counsel for the petitioners submitted that the petitioners are lower middle group of the society and for their residential abode they wanted a house within the BDA area. When they came to know about such advertisement, they enquired about the matter and came to know that such advertisement was published by the BDA and intended for purchase of the same and obtained copy of the brochure, which is annexed as Annexure-2 to the writ petition. Mr. Mohanty, learned Senior counsel, submitted that as per the brochure the BDA has fixed the following:-

(i) for MIG-I category, the plot size has been fixed 1500 sqft (30*50) out of which 960 sqft. Is the built up area and the cost was Rs.7.5 lacs for plot and building.

(ii) and for MIG-II category the plot size has been fixed 1500 sqft. Out of which 1019 sqft. is the built up area and the cost of the plot and building was fixed Rs.8,00,000/-,

(iii) for HIG-I category, the plot size is fixed 2400 sqft out of which 1407 sqft. Is the built up area and the cost of the plot and house was fixed Rs.11.65 lacs, and

(iv) for HIG-II category, the plot size has been fixed 2400 sqft. Out of which 1462 sqft is the built up area and the cost of the plot and house was fixed Rs.11.95 lacs.

Learned Senior counsel for the petitioners submitted that clause-2 of the brochure speaks about regarding the scheme details. Similarly clauses-3,4,5 and 6 of the brochure speaks about the details for allotment of houses through lottery, categories of houses to be constructed, mode of payment for outright purchase and mode of payment for installment category and clause-8 of the brochure speaks about the mode of allotment of the houses to the intending buyers.

3. Learned Senior counsel for the petitioners submitted that on 28.12.2012 the BDA had intimated that due to non-participation of the contractors in the Tender Process and non-availability of the solid concrete bricks, the project could not be taken up. All on a sudden the petitioners received demand notices from the BDA where the BDA have demanded ten times the price fixed in the brochure initially only for the land, though in the brochure the price has been fixed for land and building. Learned counsel for the petitioners submitted that the petitioners have filed their representations before the BDA ventilating their grievances as per annexure-16 series. Learned counsel for the petitioners submitted that under the RTI Act, the BDA supplied information on 13.1.2014 that a per the decision taken by the Valuation Committee, the price of the categories of the houses are enhanced. Mr. Mohanty, learned counsel, submits that the authorities have taken decision unanimously by overlooking the previous aspects of the matter and overlooking the bench mark valuation of the locality.

4. On the other hand, Mr. P.K.Mohanty, learned Senior Counsel appearing for the BDA, submitted that admittedly the BDA had conceptualized a group housing scheme comprising of independent houses in the name and style of Vivek Vihar Phase-II at Ambapua within Berhampur City. The petitioners are some of the applicants for allotment of different category of houses in the said housing scheme. Mr. Mohanty, learned Senior Counsel, submitted that the BDA had published tender notice inviting applications from eligible contractors for construction of the housing complex in question, but there was no response from the contractors. In such

circumstance the authorities had decided not to construct any houses and to transfer the plots of different sizes in favour of the intending buyers who express the explicit intention to purchase the lands of different sizes at the price fixed by the authority. Mr. Mohanty, further submitted that the stipulations made in the brochure make it manifest that the cost of the house so fixed at that time was provisionally and tentative. Inevitably the cost of the house may increase depending upon various factors including the rise of the cost of the land, cost of construction, the expenditure incurred in providing various infrastructural facilities. On account of high rate of inflation, the BDA could not have constructed or delivered some of the proposed houses at the price stated in the brochure published eight years back to the applicants, even though some of the houses had been constructed through the contractors within a reasonable period. Mr. Mohanty, learned Senior Counsel, further submitted that in Clause-18 of the brochure, it is explicitly provided that any additional cost arising out of special infrastructural development and escalation shall be paid by the allottee before execution of the lease cum sale deed in their favour and in case the allottees fail to pay the dues, the allotment shall be liable for cancellation. Mr. Mohanty submitted that since the construction was delayed, it had been decided to workout an alternative scheme and bring an end to the impasse. Accordingly, a meeting had been convened and in the said meeting it was decided to close the process of construction of the proposed houses and provide only plots to the applicants of different categories, i.e. MIG-I, MIG-II in favour of 67 applicants and HIG(s) and HIG (D) in favour of 63 applicants at the price recommended by the valuation committee. Mr. Mohanty, learned Senior Counsel, submitted that after the decision was taken by the valuation committee, the matter was placed before the Government in H & UD Department for approval of the revised rate. On receipt of the approval from the Government, notice had been issued to the applicants to state their willingness for depositing the enhanced rate fixed after deducting/adjusting the earlier deposit made by the applicants. The petitioners have neither filed their willingness nor have deposited the enhanced cost fixed. Mr. Mohanty, submitted that the BDA had tried their best for expeditious completion of the housing scheme for which tender notice had been floated inviting response from the eligible contractors and there was no response from the contractors. It is submitted that the BDA have no intention to have any profit or financial gain for revising the cost of the houses and or the land. Mr. Mohanty, learned Senior Counsel, further submitted that law is settled that the Courts may not interfere in the matter of administrative decisions, unless the action of the

Government or body corporate is arbitrary, suffers from discrimination, unreasonable or the police adopted has no nexus with the object its seek to attain. Policy decision taken by the State or its instrumentalities, specifically in matters within the domain of complex accounting is beyond the purview of judicial review, unless the same is found to be grossly arbitrary, unreasonable or in contravention of any statutory provisions or infringes the fundamental rights of citizens. Mr. Mohanty, lastly submitted that the decision taken by the BDA being reasonable do not warrant any interference by this Hon'ble Court in exercise of the jurisdiction under Articles 226 and 227 of the Constitution of India.

5. In essence the case of the petitioners is that once a price has been fixed by the BDA and brochures were issued inviting applications for allotment of the Flats/Houses in favour of the petitioners, any later action on the part of the said authority to enhance the price of the houses so allotted is arbitrary and hence is violative of Article 14 of the Constitution of India.

6. On the contrary, the argument of Sri P.K.Mohanty, learned Senior counsel, appearing for the BDA is that the issuance of brochure inviting applications for intending purchasers of completed houses over the develop area is in fact not an offer but is an invitation for offer. The petitioners having made applications by depositing the requisite sums are only offers which have not been accepted validly by the BDA by issuing the letter of allotment in favour of the petitioners. So there is no completed contracts in this case between the petitioners on one hand and the BDA on the other hand.

Alternatively, Mr. Mohanty, learned Senior Counsel, argues that pricing policy is an executive policy and as such if the authority was set up for making available dwelling units at a reasonable price to persons belonging to different income groups, it would not be precluded from devising its own price formula to different income groups.

7. Secondly, the prices charged by the BDA within the realm of the executive policy is not open to judicial review under Article 226 of the Constitution of India unless it is shown that such a revision of price, keeping in view the facts peculiar to the particular case, the action of the BDA is unreasonable, arbitrary and does not appeal to commonsense.

8. In course of hearing, both the counsels relied upon different reported cases. In the case of ***Saubhagya Ranjan Kanungo Vrs. Smt. Prafulata***

Mohapatra; 2007(Supp.-1) OLR-811, this Court has held that Section 10 of the Contract Act postulates that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, which are not expressly declared to be void and as such a transaction to constitute a contract must be preceded by offer of an proposal by one party and acceptance of the same by the other party. Analysing the scope of this provision it was observed in the cases of ***Tarsem Singh V. Sukhminder Singh***; AIR 1998 SC 1400, and ***Sri Sri Narayan Gosain represented by Prafulla Kumar Nayak and others V. the Collector, Cuttack and others***; 60(1985) CLT 514 that a valid contract cannot be constituted by the act of one party and that there must be a valid offer and valid acceptance by the parties. In the case of ***B. Rajamani v. Mrs. Azhar Sultana & others***; 2005(2) C.C.C. 696 (A.P.), after analyzing the provision of Sections 7,8 and 9 of the Contract Act, it was said that if a party to the contract makes an offer and the same is accepted in an absolutely unqualified manner by the other party then the contract becomes a valid and complete contract.

xxx xxx xxx

A cumulative reading of the above noted cases along with the Sections 7 to 10 of the Contract Act would explain that a written contract containing signatures of both the parties is not *sine qua non* to constitute a valid and executable contract. All that is essential is that there should be a valid offer, unqualified acceptance and agreement of the parties to abide by the terms and conditions and perform their respective part of contract.

9. In this case, though there is an invitation for offers by issuing brochure-Annexure-2 by the BDA and the offers were made by the petitioners vide Annexure-3 series, there is no unconditional acceptance of the offers by the Development Authority. So there appears to be no concluded contract between the petitioners and the BDA.

10. The second reported is that in the case of ***Premji Bhai Parmar and others Vrs. Delhi Development Authority and others***; (1980) 2 Supreme Court Cases 129, the Hon'ble Supreme Court has held that the Development Authority is covered by Article 12 and while determining the price of flats constructed by it, it acts purely in its executive capacity. But after the State or its agents have entered into the field of ordinary contract, no question arises of violation of Article 14 or of any other constitutional provision. In

absence of any special statutory power or obligation on the State in the contractual field apart from the contract, the petitioners are bound by the terms and conditions of the contract. The camouflage of Article 14 cannot conceal the real purpose motivating the petitions, namely, to get back a part of the purchase price of flats paid by the petitioners with wide open eyes after flats have been securely obtained. Those who contract with open eyes must accept the burdens of the contract along with its benefits. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. The jurisdiction under Article 32 is not intended to facilitate avoidance of obligations voluntarily incurred.

It was further held that pricing policy is an executive policy. The executive has a wide discretion in this regard and is only answerable provided there is any statutory control over its policy of price fixation. The experts alone can work out of mechanics of price determination; Court can certainly not be expected to decide without the assistance of the experts. Therefore, ordinarily it is not the function of the Court to sit in judgment over such matters of economic policy unless it is patent that there is hostile discrimination against a class. The 3rd reported case is the case of ***Baldev Singh Dhanij and others Vs. Chandigarh Housing Board, Chandigarh***; 1990 Punjab and Haryana 41.

11. Thus, the considered opinion of this Court having carefully examined the brochure i.e. Annexure-2 and the paper publication i.e. Annexure-1 that the applications were invited from the residents of the Berhampur for allotment of houses and the price reflected in the paper publication under Annexure-2 the brochure are tentative which may increase in the future. In this case at hand, in response to such invitation for application or in other words invitation for offer was responded by the petitioners with the offer to pay money as indicated in the notice and brochure with upfront deposit of Rs.20,000/- and for some cases, the entire consideration amount. Hence, there is concluded contract in this case as there was no letter of allotment on behalf of the BDA after deposit of the money.

12. Additionally, pricing policy is an executive policy and unless there is a pleading of unreasonableness and arbitrariness on the part of the development authority, it is not open for judicial review under Article 226 of the Constitution of India. A careful examination of the writ petition reveals

that only at paragraph 32, the petitioners claims that the action of the opposite parties in demanding a higher amount than the price specified in the brochure is absolutely arbitrary and whimsical. However, there is no reasoning on the basis of which pleading is raised in this case. It is also apparent from the pleadings and materials available on record, that is the annexures and other documents filed, that though the BDA had made an endeavour to deliver possession, to the allottees, within thirteen months from the date of allotment, it could not be achieved because nobody came forward to undertake the construction works, by responding to the tender floated by it. In such circumstances the authorities had decided not to construct any houses and to transfer the plots of different sizes in favour of the intending buyers who express the explicit intention to purchase the lands of different sizes at the price fixed by them. So there is a good reason for non-completion of the project in the stipulated time.

13. Moreover, in the case of ***Bareilly Development Authority and another Vs. Ajai Pal Silngh and others***; AIR 1989 SC 1076, it was held that the price mentioned in the brochures is only tentative. This view has been followed by this Court in the case of ***Satrughna Nayak and others Vs. State of Orissa and others***; 82(1996) CLT 907 and in the case of ***Smt. Kaberi Banerjee Vs. Orissa State Housing Board and another***; OJC No.1216 of 1998 dated 20.11.2000. The aforesaid judgments of the Hon'ble Supreme Court as well as this Court lays down in very unambiguous and certain terms that the price fixed in the brochure are tentative which is subject to change.

14. In this case, this is more so because Annexure-1 and Annexuire-2 itself reveal the cost of the unit of houses were tentative and which were subject to increase depending upon different factors like change of increase construction materials, labour cost, rise in the price of lands etc.

15. In that view of the matter, this Court is of the opinion that the issue being one of contract that too a contract which has not been concluded by valid acceptance and the pricing policy being an executive policy, the Court should refrain exercising its jurisdiction under Article 226 of the Constitution of India of the judicial review. However, the money paid to be returned to the petitioners as early as possible.

16. The writ petition is accordingly dismissed.

2020 (III) ILR - CUT- 469

Dr. B.R. SARANGI, J.

W.P.(C) NO. 8158,11863 OF 2019 AND 3029 OF 2020

BIMALENDU PRADHAN .....Petitioner

.V.

STATE OF ODISHA AND ANR. .....Opp. Parties

W.P.(C) No. 11863 of 2019
HI-TECH ESTATE & PROMOTERS (P) LTD. .....Petitioner

.V.

ASIS PANDA & ANR. .....Opp. Parties

W.P.(C) No. 3029 OF 2020
M/S. VIPUL LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Prayer with regard to formation/function of Real Estate Regulatory Tribunal – Prayer of the petitioners considered – Directions issued. (Para 24)

Case Laws Relied on and Referred to :-

1. AIR 1932 PC 165 : Nagendra Nath Dey Vs. Suresh Chandra Dey.
2. (2004) 5 SCC 1 : Tirupati Balaji Developers (P) Ltd. Vs. State of Bihar.
3. AIR 1980 SC 962 : V.C. Shukla Vs. State Through C.B.I.
4. (2003) 8 SCC 50 : State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh.
5. (2005) 6 SCC 81 : Bolin Chetia Vs. Jagdish Bhuyan.
6. (2006) 13 SCC 295 : Kamla Devi Vs. Kushal Kanwar.
7. (2010) 9 SCC 642 : James Joseph Vs. State of Kerala.

W.P.(C) No. 8158 of 2019
For Petitioner : Mr. Mohit Agarwal.
For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Adv.

W.P.(C) No. 11863 of 2019
For Petitioner : M/s. Debashis Nanda and M.Dash.
For Opp. Parties : M/s. Ajit Kumar Ray & R.N. Das. & Mr. P.K. Muduli, Addl. Govt. Adv.

W.P.(C) No. 3029 OF 2020
For Petitioner : M/s. S. Mohapatra, P.K. Chand, P. Behera and B.P. Das.
For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Adv. & Mr. Mohit Agarwal.

JUDGMENT Date of Judgment : 01.07.2020

Dr. B.R. SARANGI, J.

Bimalendu Pradhan, complainant before Real Estate Regulatory Authority, Bhubaneswar, has filed W.P.(C) No. 8158 of 2019 seeking following relief:-

"1. Direct the Opposite Party No.2- Odisha Sales Tax Tribunal to discharge its statutory functions under the Real Estate (Regulation and Development) Act, 2016 till the effective functioning of Odisha Real Estate Appellate Tribunal as per Section 45 of Real Estate (Regulation and Development Act, 2016.

2. Direct the Opp. Party No.1 to establish the office of the Odisha Real Estate Appellate Tribunal, and appoint its Judicial and Administrative Members within a period of one month."

W.P.(C) No. 11863 of 2019 has been filed by a private limited company, which is a builder and promoter of real estate, seeking following relief:-

"It is therefore, prayed that this Hon'ble Court be pleased to admit the writ petition, issue notice to the Opp.Parties and after hearing the parties further be pleased to stay the Execution case No. 20/2019 pending before the Real Estate Regulatory Authority till admission of the appeal bearing No. 1 of 2019 pending before the Real Estate Appellate Tribunal Cuttack and for which act of kindness petitioner shall be as in duty bound every pray."

Similarly, W.P.(C) No. 3029 of 2020 has been filed by a builder and promoter of real estate with the following relief:-

"It is therefore humbly prayed that, this Hon'ble Court may kindly be graciously be pleased to admit the writ application, issue notice to the opposite parties, and after hearing the parties further be pleased to quash the notices dt. 02/07/2019 as at Annexure-4 series."

2. The factual matrix of the case in W.P.(C) No. 8158 of 2019 is that the petitioner had filed a complaint case before the Real Estate Regulatory Authority, Bhubaneswar (in short "RERA") being Complaint Case No.55/2018 against a real estate builder, namely, M/s. Vipul Limited, Bhubaneswar alleging violations of several provisions of the Real Estate (Regulation and Development) Act, 2016 (in short "the Act") and, as such, the possession of the flat booked by him was not provided even after lapse of considerable time, as specified in the agreement. After hearing, the RERA by order dated 12.06.2018 allowed the complaint of the petitioner and issued several directions to the builder. Challenging the said order, the builder, M/s. Vipul Limited, Bhubaneswar preferred statutory appeal before the appellate tribunal, i.e., the Odisha Sales Tax Tribunal vide Appeal Case No. 7 (RE)/2018. But the said appeal could not be taken up for hearing, as because the designated tribunal suo motu refused to take up appeal matters or register

fresh appeal cases on the pretext that the Chairperson of the regular Real Estate Appellate Tribunal has been appointed.

2.1 Similarly, the fact in W.P.(C) No. 11863 of 2019 is that the opposite party no.1-Asis Panda filed a complaint before the RERA with a prayer to refund the amount deposited by him, along with the compensation claimed to the tune of Rs.28,73,600/- with interest @ 18% per annum on the deposited amount of Rs.18,23,600/-. The said complaint was registered as Complaint Case No. 110 of 2018. Pursuant to notice, the builder- present petitioner- filed objection raising question of limitation and maintainability of the complaint petition and contended that the private limited company is ready to give possession of the flat to the complainant-opposite party no.1. But the RERA allowed the complaint case on 30.11.2018 and directed the petitioner to refund the payment of Rs.18,23,600.00 along with interest. Against that order the petitioner already preferred an appeal before the Real Estate Appellate Tribunal, which has been registered as Appeal No. 01/2019, but the same could not be taken up because of non-functional of the tribunal and no effective order could be passed. Consequentially, the complainant filed Execution Case No. 20 of 2019 before the RERA for execution of the order passed by the very same authority.

2.3 So far as the fact in W.P.(C) No. 3029 of 2020 is concerned, the petitioner is a real estate company from whom the opposite parties no. 3 and 4 seek for allotment of flats. As the same could not be done, opposite parties no. 3 and 4 filed complaint case, being Complaint Case No. 163/2018, before the RERA, alleging non-compliance of the provisions of the Act, 2016 and consequentially claimed for allotment of flat and payment of interest for delay in completion of the project. On consideration of the same, the RERA allowed such complaint case, vide order dated 27.02.2019, against which though appeal lies to the appellate tribunal, but due to non-functioning of the same, the petitioner filed W.P.(C) No. 10139 of 2019, which was dismissed on 19.06.2019 on the ground that statutory remedy have been provided under the Act, 2016. Against the said order the petitioner filed W.A. No. 302 of 2019, which is pending. But in the meantime, the petitioner has already preferred statutory appeal before the Real Estate Appellate Tribunal. As the appellate tribunal is not functioning, immense difficulties have been caused for adjudication of the matter in proper perspective.

3. Taking the facts in all the three writ petitions into account, the sum total of the grievance made by the petitioners in their respective writ petitions is that due to non-functioning of the Real Estate Appellate Tribunal, they are facing difficulties, for which they have approached this Court by filing these writ applications. In other words, though the writ petitions have been filed with different cause of actions, but essence is the non-functioning of the Tribunal. Since in all the three writ petitions the petitioners have sought for similar nature of relief, they have been heard together and are disposed of by this common judgment.

4. Mr. Mohit Agarwal, Mr. Debasis Nanda and Mr. S. Mohapatra, learned counsel appearing for the respective petitioners in the above noted three writ petitions argued unequivocally and contended that since the Real Estate Appellate Tribunal is not functioning, in view of the remedy available under the statute, the benefits could not be availed by the petitioners, as a consequence of which they have been deprived of their statutory rights, therefore, seek for interference of this Court.

5. Mr. P.K. Muduli, learned Addl. Government Advocate contended that in the meantime Chairperson of the tribunal and two other Members have already been appointed. Though the tribunal has been constituted by appointing the Chairperson and two Members, but it could not be able to function as the financial autonomy has not been given to it. It is further contended that the proposal for creation of different posts in the tribunal have not been done and, as such, the discussion in the high level committee meeting has already been held to that extent and proposal for giving financial autonomy with separate heads of account and engagement of staff for effective function of the tribunal is under active consideration by the government. It is further contended that all effective and possible steps have been taken by the government to make the tribunal functional. But because of intervening of the Covid-19 pandemic, there is some delay in implementation thereof. Therefore, some time may be granted to make all endeavor to see that the appellate tribunal can function effectively.

6. This Court heard Mr. M. Agarwal, Mr. D. Nanda and Mr. S. Mohapatra, learned counsel appearing for the respective petitioners in the above noted three writ petitions; and Mr. P.K. Muduli, learned Addl. Government Advocate and Mr. A.K. Ray, learned counsel for the opposite parties; and perused the record. In view of the development taken place

during pendency of the writ petition, instead of awaiting for counter affidavit to be filed by the opposite parties in each of the writ petitions, on the basis of the instructions submitted by learned counsel appearing for the State, as well as the affidavit and additional affidavit filed in W.P.(C) No. 11863 of 2019, and with the consent of the learned counsel for the parties, these writ petitions are being disposed of finally at the stage of admission.

7. Before adverting into the merits of the case, it is essential to have a glimpse over the provisions of law governing the field for establishment of the Real Estate Appellate Tribunal. Needless to mention, by an Act of Parliament to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, direction or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith, an Act has been enacted called "The Real Estate (Regulation and Development) Act, 2016".

8. The relevant provisions required for just and proper adjudication of the case, in hand, are as follows:-

> *"**2.** In this Act, unless the context otherwise requires,*
>
> *(a) "adjudicating officer" means the adjudicating officer appointed under sub-section (1) of Section 71;*
>
> *xxx xxx xxx*
>
> *(f) "Appellate Tribunal" means the Real Estate Appellate Tribunal established under section 43.*
>
> *xxx xxx xxx*
>
> *(i) "Authority" means a person registered as an architect under the provisions of the Architects Act, 1972.*
>
> *xxx xxx xxx*
>
> *(zo)"regulation" means the regulations made by the Authority under this Act.*
>
> *(zp)"rule" means the rules made under this Act by the appropriate Government.*

xxx *xxx* *xxx*

20. *(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this Act:*

Provided that the appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority:

Provided further that, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be:

Provided also that until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under this Act:

Provided also that after the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

xxx *xxx* *xxx*

43. *(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal.*

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.

(3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative to Technical Member.

(4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal:

Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal Functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:

Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

xxx xxx xxx

***45.** The Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member, to be appointed by the appropriate Government.*

Explanation.—For the purposes of this Chapter,—

(i) "Judicial Member" means a Member of the Appellate Tribunal appointed as such under clause (b) of sub-section (1) of section 46;

(ii) "Technical or Administrative Member" means a Member of the Appellate Tribunal appointed as such under clause (c) of sub-section (1) of section 46.

***46.** (1) A person shall not be qualified for appointment as the Chairperson or a Member of the Appellate Tribunal unless he,—*

(a) in the case of Chairperson, is or has been a Judge of a High Court; and

(b) in the case of a Judicial Member he has held a judicial office in the territory of India for at least fifteen years or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post, or has been an advocate for at least twenty years with experience in dealing with real estate matters; and

(c) in the case of a Technical or Administrative Member, he is a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at least twenty years in the field or who has held the post in the Central Government, or a State Government equivalent to the post of Additional Secretary to the Government of India or an equivalent post in the Central Government or an equivalent post in the State Government.

(2) The Chairperson of the Appellate Tribunal shall be appointed by the appropriate Government in consultation with the Chief Justice of High Court or his nominee.

(3) The judicial Members and Technical or Administrative Members of the Appellate Tribunal shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department handling Housing and the Law Secretary and in such manner as may be prescribed.

***47.** (1) The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office, as such for a term not exceeding five years from the date on which he enters upon his office, but shall not be eligible for re-appointment:*

Provided that in case a person, who is or has been a Judge of a High Court, has been appointed as Chairperson of the Tribunal, he shall not hold office after he has attained the age of sixty-seven years:

Provided further that no Judicial Member or Technical or Administrative Member shall hold office after he has attained the age of sixty-five years.

(2) Before appointing any person as Chairperson or Member, the appropriate Government shall satisfy itself that the person does not have any such financial or other interest, as is likely to affect prejudicially his functions as such member.

xxx xxx xxx

***51.** (1) The appropriate Government shall provide the Appellate Tribunal with such officers and employees as it may deem fit.*

(2) The officers and employees of the Appellate Tribunal shall discharge their functions under the general superintendence of its Chairperson.

(3) The salary and allowances payable to, and the other terms and conditions of service of, the officers and employees of the Appellate Tribunal shall be such as may be prescribed.

xxx xxx xxx

***54.** The Chairperson shall have powers of general superintendence and direction in the conduct of the affairs of Appellate Tribunal and he shall, in addition to presiding over the meetings of the Appellate Tribunal exercise and discharge such administrative powers and functions of the Appellate Tribunal as may be prescribed.*

xxx xxx xxx

***71.** (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been*

a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections.

xxx *xxx* *xxx*

75. *(1) The appropriate Government shall constitute a fund to be called the 'Real Estate Regulatory Fund' and there shall be credited thereto,—*

(a) all Government grants received by the Authority;

(b) the fees received under this Act;

(c) the interest accrued on the amounts referred to in clauses (a) to (b).

(2) The Fund shall be applied for meeting—

(a) the salaries and allowances payable to the Chairperson and other Members, the adjudicating officer and the administrative expenses including the salaries and allowances payable to be officers and other employees of the Authority and the Appellate Tribunal;

(b) the other expenses of the Authority in connection with the discharge of its functions and for the purposes of this Act.

(3) The Fund shall be administered by a committee of such Members of the Authority as may be determined by the Chairperson.

(4) The committee appointed under sub-section (3) shall spend monies out of the Fund for carrying out the objects for which the Fund has been constituted.

76. *(1) All sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in the Union territories, shall be credited to the Consolidated Fund of India.*

(2) All sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in a State, shall be credited to such account as the State Government may specify."

9. On perusal of the above mentioned provisions, it would be evident that an adjudicating officer is to adjudicate compensation under sections 12, 14, 18 and 19 in view of the provisions contained under sub-section (1) of Section 71 and such authority is being appointed in consultation with the appropriate government, as per the provisions contained therein. Similarly, the authority, which has been defined under Section 2(i), is the Real Estate Regulatory Authority and it shall be appointed by the appropriate government within a period of one year from the date of coming into force of the Act and to perform the functions assigned to it under the Act. Likewise, Section 2(f) deals with Appellate Tribunal, which is to be established by the appropriate government within a period of one year from the date of coming into force of the Act, in view of the provisions contained under sub-section (1) of Section 43 of the Act itself. As per the provisions contained under Section 45, the appellate tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a judicial member and other shall be a Technical or Administrative Member to be appointed by the appropriate government. As per sub-section (1)(a) of Section 46, a person shall not be qualified for appointment as the Chairperson or a Member of the appellate tribunal, unless he is or has been a Judge of a High Court and in case of Judicial Member, he must have held a judicial office for at least fifteen years or must be a member of the Indian Legal Service and must have held the post of Additional Secretary of that service or any equivalent post, or must be an advocate for at least twenty years with experience in dealing with real estate matters. So far as Technical or Administrative Member is concerned, he must be a person well-versed in the field of urban development, housing, real estate and development, infrastructure, economics, planning, law, commerce,

accountancy, industry, management, public affairs or administration and possesses experience of at least twenty years in the field or must have held the post in the Central Government, or a State government equivalent to the post of Additional Secretary to the Government of India or an equivalent post in the Central Government or an equivalent post in the State Government. Section 51 stipulates that the appropriate government shall provide the appellate tribunal with such officers and employees, as it may deem fit, and the said employees shall discharge their functions under the general superintendence of its Chairperson and salary and allowances payable to and the other terms and conditions of service of the officers and employees of the appellate tribunal shall be such as may be prescribed. Similarly, administrative power of the Chairperson has been provided under Section 54 of the Act itself. Section 75 empowers that the appropriate government shall constitute a fund to be called the "Real Estate Regulatory Fund" and all government grants received by the authority, the fees received under the Act and the interest accrued on the amounts received from government grants and fees received under the Act. Sub-section (2) of Section 75 specifically provides that the salaries and allowances shall be payable to the Chairperson and other Members, the adjudicating officer and the administrative expenses including the salaries and allowances payable to the officers and other employees of the Authority and the Appellate Tribunal. Sub-section (3) of Section 75 provides that fund shall be administered by a committee of such Members of the Authority as may be determined by the Chairperson. Sub-section (2) of Section 76 provides that all sums realized, by way of penalties, imposed by the Appellate Tribunal or the Authority, in a State, shall be credited to such account as the State Government may specify.

10. In pursuance of Section 84 of the Real Estate (Regulation and Development) Act, 2016, the State Government made the Rules called "Odisha Real Estate (Regulation and Development) Rules, 2017" (hereinafter referred to "Rules, 2017"). Chapter-VII deals with Real Estate Appellate Tribunal. Rule-32 of the Rules, 2017 deals with categories of officers and employees of the appellate tribunal, which reads as follows:-

> *"The nature and categories of officers and employees of the Tribunal shall be recommended by the Tribunal for consideration of the Government which shall be approved with or without modifications, as the case may be.*
>
> Rule-35 of the Rules, 2017 reads as under:-

"35. Administrative powers of the Chairperson of the Appellate Tribunal – (1) The Chairperson of the Appellate Tribunal shall exercise the following administrative powers namely:-

(a) Officiating against sanctioned posts.

(b) Authorization of tours to be undertaken by any Member, officer or employee within India.

(c) Matters in relation to reimbursement of medical claims.

(d) Matters in relation to grant or rejection of leaves.

(e) Nominations for attending seminars, conferences and training courses in India.

(f) Permission for invitation of guests to carry out training course.

(g) Matters pertaining to staff welfare expenses.

(h) Sanction or scrapping or write-off of capital assets which due to normal wear and tear have become unserviceable or are considered beyond economical repairs.

(i) All matters relating to disciplinary action against any Member, officer or employee.

2. The Chairperson of the Appellate Tribunal shall also exercise such other powers that may be required for the efficient functioning of the Appellate Tribunal and enforcement of the provisions of the Act and the rules and regulations made thereunder."

11. Needless to say that in order to give effect to the purpose of the Act, 2016, Rules, 2017 have been framed and more specifically the powers and functions of the Appellate Tribunal have been elaborately discussed in the Rules itself. Therefore, Real Estate Regulatory Authority and Real Estate Appellate Tribunal are two separate establishments and they have been regulated by the Act, 2016 and Rules framed thereunder. In the Real Estate Appellate Tribunal, the Chairperson, being the Judge of a High Court, has been vested with power to have superintendence of the officers and employees of the Appellate Tribunal in due discharge of their function and their salary and allowances payable and other terms and conditions of service as prescribed under the Rules and more particularly the Chairperson shall have powers of general superintendence and direction in conducting the affairs of Appellate Tribunal and in addition to presiding over the meetings of the Appellate Tribunal, exercise and discharge such administrative powers and functions of the appellate tribunal as may be prescribed. Therefore, the statute has given independent authority on Real Estate Appellate Tribunal to

function independently. Thereby, the staff of the tribunal, its management, its maintenance, its superintendence so also its salary and allowances are to be paid by the tribunal under the superintendence and administrative control of the Chairperson. In view of the provisions contained under sub-section (1) of Section 75, if the appropriate government has constituted funds called "Real Estate Regulatory Fund", on the basis of the government grants, fees received and interest accrued on the amounts received from the government grants and fees received under the Act, the fund is to be applied for meeting the salaries and allowances payable to the Chairperson and other Members, the adjudicating officer and the administrative expenses including the salaries and allowances payable to the officers and other employees of the authority and the appellate tribunal and, as such, the said fund shall be administered by a committee of such members of the authority as may be determined by the Chairperson. But fact remains, since the Real Estate Appellate Tribunal is an independent body from that of Real Estate Regulatory Authority, it has to function independently with the statutory duties assigned to it, thereby, financial autonomy be given to both the independent authorities from out of the same fund, namely, Real Estate Regulatory Fund. From out of Real Estate Regulatory Fund, independent allocation of funds be made to two separate authorities, namely, RERA and Real Estate Appellate Tribunal to manage their respective institutions in proper perspective to achieve the objectives of the Act, 2016 and the Rules framed thereunder, as the employees of respective institutions are to be paid salaries, allowances and administrative expenses, as due admissible to them, by the respective controlling authority independently. Therefore, the manner in which the State Government proposed to proceed, that is to say, that the funds allocated to Real Estate Regulatory Authority will manage the affairs of the Real Estate Appellate Tribunal cannot have any justification to that extent. Because of constitution of both the forums under the provisions of the Act, 2016, as the appeal lies to the Real Estate Appellate Tribunal against the order passed by the Adjudicating Officer and RERA, both are subordinate to Real Estate Appellate Tribunal. As such, budgetary provisions be made from out of the Real Estate Regulatory Fund and the same be allocated in favour of RERA and Real Estate Appellate Tribunal separately for smooth functioning of both the institutions independently.

12. The legislature has enacted the Act, 2016 and Rules framed thereunder to allow Real Estate Regulatory Authority and Real Estate Appellate Tribunal to act independently in order to achieve the object but not

to frustrate the purpose by any means. In view of the provisions contained under Section 44(1) of the Act itself, that the appropriate government or the competent authority or any person aggrieved by any direction or order or decision of the authority or the adjudicating officer may prefer an "appeal" to the appellate tribunal. As per sub-section (2) of Section 44, appeal should be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the authority or the adjudicating officer is received by the appropriate government or the competent authority or the aggrieved person along with accompanied fees.

13. In ***Nagendra Nath Dey v. Suresh Chandra Dey,*** AIR 1932 PC 165 it was held, an 'appeal' is an application by a party to an appellate Court asking it to set aside or revise a decision of a subordinate Court.

14. Similar view has also been taken in ***Tirupati Balaji Developers (P) Ltd. V. State of Bihar***, (2004) 5 SCC 1.

15. In ***Akalu Ahir v. Ramdeo Ram***, AIR 1973 SC 2145 the apex Court held, the 'appeal' is a creature of statute and there is no inherent right of appeal.

16. In ***V.C. Shukla v. State Through C.B.I.,*** AIR 1980 SC 962 the apex Court held that an 'appeal', in substance, is in the nature of a judicial examination of a decision by a higher Court of a decision of an inferior Court, to rectify any possible error in the order under appeal.

17. In ***State of Gujarat v. Salimbhai Abdulgaffar Shaikh***, (2003) 8 SCC 50 the apex Court held that the 'appeal' is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court.

18. In ***Bolin Chetia v. Jagdish Bhuyan***, (2005) 6 SCC 81 the apex Court held, in its natural and ordinary meaning the word 'appeal' means a remedy by which a cause determined by an inferior forum is subjected before a superior forum for the purpose of testing the correctness of the decision given by the inferior forum.

19. In ***Kamla Devi v. Kushal Kanwar***, (2006) 13 SCC 295 the apex Court held, an 'appeal' is the right of entering a superior court invoking its aid and interposition to redress an error of the Court below. The central idea

behind filing of an appeal revolves round the right as contra-distinguished from the procedure laid down therefore.

20. In ***James Joseph v. State of Kerala***, (2010) 9 SCC 642 the apex Court held, an 'appeal' is a proceeding where a higher forum reconsiders the decision of a lower forum, on questions of fact and questions of law, with jurisdiction to confirm, reverse, modify the decision or remand the matter to the lower forum for fresh decision in terms of its directions.

21. Therefore, if any order passed by the adjudicating officer or by the authority, the same is appealable before Real Estate Appellate Tribunal, which has got right to see its correctness and validity and make a judicial examination of the same and if necessary rectify any possible error in the order under appeal. This being the requirement of law to be discharged by the Real Estate Appellate Tribunal in appeal, it can be said that the RERA and Real Estate Appellate Tribunal are two separate and independent authorities to function independently in accordance with law. Therefore, in view of such position, the financial autonomy be given to Real Estate Appellate Tribunal for its smooth management from out of the Real Estate Regulatory Fund as per the budgetary provision to be placed by respective forums to make the expenditure to be incurred for such establishment every year in order to achieve the ultimate objective of the Act and Rules framed thereunder.

22. On perusal of the order-sheets of the above mentioned three writ petitions, it appears that on 26.04.2019 in W.P.(C) No. 8158 of 2019 this Court passed the following order:-

> *"List this matter three months after. In the meantime, learned State Counsel is directed to obtain instruction as to the effective functioning of the Appellate Tribunal as well as the competent authority therein and file the same before this Court by way of affidavit on the next date."*

On 11.07.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

> *"Heard Shri D. Nanda, learned counsel for the petitioner.*
>
> *This Court finds, it has become a regular feature alleging that in spite of appointment of the appellate authority under the Real Estate (Regulation and Development) Act, 2016, the court is not functioning in the particular case. There is an allegation that in spite of appeal being filed along with an application for*

interim protection and registered even, but for non-functioning of the Court, the petitioner is unable to move the interim application. It is also submitted that the Executing Authority is to decide the matter first.

Considering the grievance of the petitioner and repeated mentioning in this Court that the appellate authority is not functioning rendering the system remediless, this Court directs the petitioner to serve an extra copy of the brief on Shri S.N. Mishra, learned Additional Standing Counsel by tomorrow (12th of July, 2019), who is directed to obtain instruction regarding nonfunctioning of the Appellate Authority under the Real Estate (Regulation and Development) Act, 2016 by Monday (15th of July, 2019). It is further directed that there shall be stay of further proceeding in Execution Case No.20/2019 till 16th of July, 2019.

List this matter on Tuesday (16th of July, 2019)."

On 16.07.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

"Put up this matter tomorrow (17.07.2019) on the request of the learned counsel for the petitioner.

Interim order passed earlier shall continue till the next date."

On 17.07.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

"Learned Addl. Standing Counsel by producing instruction from H & UD Department, Govt. of Orissa submits that for the disclosures therein, it may take some months time for functioning of the appellate forum and the appellate forum can only be made functional after the full infrastructures is provided to it. Shri Behera, learned Standing Counsel is unable to submit to the Court as to what time is required for providing the full infrastructures along with detailed manpower for actual functioning of the appellate forum. He wants some time to obtain such instruction. Matter stands adjourned to 18.7.2019.

Instruction in the light of observation be obtained specifically as to what much time will be required to make the appellate forum operational. This Court since finds the appellate forum remains non-functional, for State Govt. not making available the appellate forum to undertake its actual exercise and for the parties suffer on account of closure of the proceeding before the Original authority, in preferring appeal and stay, this Court observes, the parties may file appeal by sending the appeal memo and other petitions through Regd. Post with A.D. for the time being, all the appeals shall be sent to the office of the Joint Secretary, H & UD Department, Govt. of Orissa who will be custodian of the appeal memo. This direction is given keeping in view the parties aggrieved does not suffer for no fault of them as the appeal goes time barred. Till the appeals are taken up along with the

interim application fled therein, execution proceeding, if any, involved therein shall remain stayed.

Place the matter tomorrow (18.07.2019).

Free copy of this order be given to Shri Behera, learned Addl. Standing Counsel for communication along with forwarding with a copy to the Executing Authority under the Real Estate (Regulation and Development) Act, 2016 by our Registry."

On 18.07.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

"Heard.

Learned Advocate General appearing for the State submits that the selection process of the members of the appellate authority is under process and in view of the long list of applicants, the selection may also take some time and there may be also some time consumed for giving effect to the functioning of the appellate forum. Learned Advocate General however, seeks some time to take concrete information within what period the State Govt. will be in a position to make the appellate forum operationalised. The matter stands adjourned to 29.07.2019 for further consideration.

Interim order passed earlier shall continue till the next date.

Affidavit filed in Court today be kept on record.

Copy of the order be handed over to Shri Behera, learned counsel appearing for the State-opp. parties."

On 29.07.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

"'VAKALATNAMA' filed on behalf of the opposite party no.1 in Court today be kept on record.

Heard Shri D. Nanda, learned counsel for the petitioner, Shri A. Parija, learned Advocate General of Odisha being assisted by Shri B. Behera, learned Additional Standing Counsel for the State-opposite parties and Shri A.K. Roy, learned counsel for the opposite party no.1.

Shri Parija, learned Advocate General by producing a communication along with the Office order before this Court submits that there is already appointment of the Secretary in the Odisha Real Estate Appellate Tribunal. Shri Parija, learned Advocate General further submitted that there is already appointment of Secretary and the Secretary has already started the Office and therefore, there is no difficulty

in receiving the appeals through the Secretary of the Odisha Real Estate Appellate Tribunal. So far as the functioning of the appellate authority is concerned, Shri Parija, learned Advocate General submitted that it may take at least four to six weeks time at the minimum for constitution of the Appellate authority and thus requested this Court for granting at least six weeks time for making the appellate authority functional.

Considering the submission of Shri Parija, learned Advocate General and going through the Office order, this Court observes, since the Secretary Odisha Real Estate Appellate Tribunal is already appointed and started it's Office, it will be open to the parties to submit Appeal before the Secretary, Odisha Real Estate Appellate Tribunal. For the direction to the parties to file appeal before the Secretary, Odisha Real Estate Appellate Tribunal henceforth, the interim direction by this Court for submitting the appeal before the Joint Secretary, H & UD Department, Government of Odisha stands modified accordingly. The interim order passed by this Court earlier staying the execution proceeding in Execution Case no.20/2019 as well as all other execution cases shall continue till the next date.

List this matter on 13th of September, 2019.

Free copy of this order be handed over to Shri B. Behera, learned Additional Standing Counsel for necessary compliance.

On 13.09.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

"List this matter on 30.09.2019.

Interim order passed earlier shall continue till the next date."

On 30.09.2019 in W.P.(C) No. 11863 of 2019, this Court passed the following order:-

"It is submitted by Sri S.N. Mishra, learned Additional Government Advocate that there is some improvement facilitating early functioning of the Real Estate Regulatory Appellate Tribunal.

However, considering that the Appellate Forum still remains non-functional and creating immense inconvenience to the litigants, this Court as a matter of last chance adjourns this matter to 15.10.2019. Interim order passed earlier shall continue till the next date."

An additional affidavit has been filed by Sri Sushanta Kumar Mishra, who was working as Joint Secretary to Government, Housing and Urban Development Department on 04.11.2019, which reads as follows:

"2. That, this deponent has earlier filed a status report on dtd. 17.07.2019 as per the direction of this Hon'ble Court and the present status report, by way of an affidavit, is being filed to supplement the earlier affidavit filed by this deponent.

3. That, it is humbly submitted that the Odisha Real Estate Appellate Tribunal (OREAT) has already been established vide Notification No.233/date 02.02.2019. The Government has appointed Hon,ble Shri Justice Subash Chandra Parija (Retired Judge), High Court of Orissa as Chairperson of OREAT vide Notification No.241/date 02.02.2019. In pursuance of such notification, Hon'ble Justice Sri Parija assumed office of the Chairperson on dated 06.02.2019. Subsequently, as per recommendation of the Selection Committee headed by Hon'ble Chief Justice of Orissa High Court, Government has appointed two Members of OREAT vide Notification No.1650 dated 05.09.2019. In pursuance of the above notification, Sri Malay Chatterjee assumed office of the Technical/Administrative Member of OREAT on 11.09.2019. Similarly Sri Ishan Kumar Das assumed the office of Judicial Member, OREAT on 12.09.2019.

4. That, it is humbly submitted that in order to make the Tribunal fully functional, Government has already sanctioned the support staffs and Home Department has been requested vide letter no.1704, 1706, 1708 date 12.09.2019, letter no.2018 date 23.10.2019 & UOI No.316 dated 25.10.2019 of H&UD Department for posting of staff to OREAT. It is humbly submitted that Home Department is taking necessary steps to appoint the staffs at the earliest.

5. That, it is humbly submitted that a space measuring 6626 sq.ft. has been allotted by General Administration & Public Grievance Department at Seventh Floor of A1 Block of Toshali Bhawan, Satya Nagar, Bhubaneswar for establishment of the permanent office of OREAT. It is humbly submitted that Infrastructure Development Corporation of Odisha (IDCO) has been engaged to take up the interior work at Toshali Bhawan. Subsequently, IDCO has submitted a detailed plan and estimate for the renovation and internal work for an amount of Rs.6,09,46,500/-. It is humbly8 submitted that the work may take some more time to complete.

6. That, it is humbly submitted that in compliance of the orders of the Hon'ble High Court of Orissa, Secretary of Odisha Real Estate Regulatory Authority (ORERA) has been designated as the Secretary of OREAT. He has been receiving the appeals preferred by the appellants as per kind directions of the Hon'ble Court.

7. That, however, in pursuance to the order passed by this Hon'ble Court, the Housing & Urban Development Department, Odisha, Bhubaneswar is trying sincerely to provide a temporary accommodation for the office of the OREAT till the permanent office building of the Tribunal is prepared. It is humbly submitted that proposal for establishing the temporary office either at the State Guest House, Bhubeneswar or at 4th Floor of Fortune Towers, Bhubaneswar is under active consideration and the same will be finalized very soon. It is humbly submitted that the said Tribunal will be made fully functional as soon as the proposed temporary site is finalized and after posting of the support staffs by Home Department."

On 04.02.2020 in W.P.(C) No. 3029 of 2020, this Court passed the following order:-

> *"Sri Mohit Agarwal, learned counsel has entered appearance on behalf of the opposite party nos. 3 and 4 by filing Vakalatnama in Court today and he prays for some time to file counter affidavit in this case. The Vakalatnama filed be kept on record.*
>
> *Put up this matter on 19.02.2020.*
>
> *Counter affidavit, if any, shall be filed in the meantime.*
>
> *In the meantime, further proceedings in Execution Case no. 22 of 2019 as well as suo-motu C.C. No. 113 of 2019 arising out of the order dated 27.02.2019 passed in C.C. No. 163 of 2018 pending before the Real State Regulatory Authority, Bhubaneswar shall remain stayed."*

On 20.02.2020 in W.P.(C) No. 3029 of 2020, this Court passed the following order:-

> *"List this matter on 28.02.2020 along with the records of W.P.(C) N o. 11863 of 2019."*

On 28.02.2020 in W.P.(C) No. 3029 of 2020, this Court passed the following order:-

> *"As requested by Mr. Rath, learned Additional Standing Counsel, list this matter on 3.3.2020 along with the connected records.*
>
> *In the meantime, Mr. Rath is directed to obtain instruction in the matter.*
>
> *Interim order passed earlier shall continue till the next date."*

This Court also passed the order on 28.02.2020 in W.P.(C) No. 11863 of 2019 to the following effect:-

> *"List this matter on 03.03.2020.*
>
> *Interim order passed earlier shall continue till the next date."*

On 03.03.2020 this Court passed order in W.P.(C) No. 3029 of 2020 to the following effect:-

> *"Mr. Parija, learned Advocate General appearing for the State prays for short adjournment to file an affidavit in the matter.*

List this matter on 13.03.2020.

Interim order granted earlier will continue till the next date."

On 03.03.2020 this Court also passed order in W.P.(C) No. 11863 of 2019 to the following effect:-

"List this matter on 13.03.2020.

Interim order passed earlier shall continue till the next date."

On 12.03.2020 this Court passed order in W.P.(C) No. 8158 of 2019 to the following effect:-

"Heard learned counsel for the parties.

List this matter tomorrow(13.03.2020)."

On 12.03.2020 an additional affidavit has been filed by Sri Sushanta Kumar Mishra, who was working as Joint Secretary to Government, Housing and Urban Development Department, which reads as follows:-

"2. That, earlier a status report was filed by way of an affidavit dtd.04.11.2019 as per the direction of this Hon'ble Court and the present status report, by way of an affidavit, is being filed to supplement the earlier affidavit filed on behalf of the Principal Secretary, H&U.D Department.

3. That, it is humbly submitted that the Odisha Real Estate Appellate Tribunal (OREAT) has already been established vide Notification No.233/date 02.02.2019. The Government has appointed Hon'ble Shri Justice Subash Chandra Parija (Retired Judge), High Court of Orissa as Chairperson of OREAT vide Notification No.241/date 02.02.2019. In pursuance of such notification, Hon'ble Justice Sri Parija assumed office of the Chairperson on dated 06.02.2019. Subsequently, as per recommendation of the Selection Committee headed by Hon'ble Chief Justice of Orissa High Court, government has appointed two Members of OREAT vide Notification No.1650 dated 05.09.2019. In pursuance of the above notification, Sri Malay Chatterjee assumed office of the Technical/Administrative Member of OREAT on 11.09.2019. Similarly Sri Ishan Kumar Das assumed the office of Judicial Member, OREAT on 12.09.2019.

4. That, it is humbly submitted that in order to make the Tribunal fully functional, Government in Finance Department has created 17 posts on 19.08.2019 and allowed OREAT to engage up to 10 number of retired Group-D personnel in addition to the above posts. Copy of details of the 27 posts is enclosed herewith and marked as ***Annexure-A*** *for kind perusal of the Hon'ble Court.*

5. That, it is humbly submitted that subsequently Home Department was requested vide letter no.1704, 1706, 1708 date 12.09.2019, Letter no.2018 date 23.10.2019 & UOI No.316 dated 25.10.2019 of H&UD Department for posting of staff to OREAT. Home Department regretted appointment/deputation of staff vide their letter no.51322, date 20.11.2019 & 52033, date 25.11.2019 citing the ground of acute shortage of staff and requested H&UD Department to explore alternatives. Copies of the communications made with Home Department and their replies are enclosed herewith and marked as ***Annexure-B, C, D, E, F, G, H*** ***respectively*** *for kind perusal of the Hon'ble Court.*

6. That, it is humbly submitted that consequent upon the reply of Home Department, H&UD Department moved Finance Department on 22.12.2019 to allow to engage retired Government employees. Government in Finance Department concurred to such proposal on 23.12.2019. That, the approval was communicated to the learned Tribunal vide H&UD Department Letter no.1, date 01.01.2020 and request was made vide Letter no.4, date 01.01.2020, to initiate the process of engagement of staff to make the Tribunal functional. Copy of letters of H&UD Department communicated to OREAT is enclosed herewith and marked as ***Annexure-I &J*** ***respectively*** *for kind perusal of the Hon'ble Court.*

7. That, it is humbly submitted that the learned Tribunal further requested H&UD Department to move to Government for creation of 8 more posts in three different categories for smooth functioning of the learned Tribunal. Proposal of the learned Tribunal was submitted to Finance Department on 01.01.2020 and Finance Department accorded their concurrence on 20.01.2020 for creation of 5 posts and allowed OREAT to engage 3 Date Entry Operators (DEO) through outsourcing. That, the matter of creation of additional posts was communicated to the learned Tribunal vide Letter no.150, dtd. 24.01.2020 with a request to engage the support staff as per admissibility. Copy of Letter no.150 of H&UD Department communicated to OREAT is enclosed wherewith and marked as ***Annexure-K*** *for kind perusal of the Hon'ble Court.*

8. That, it is humbly submitted that Government has created 22 posts for the learned Tribunal and allowed them to engage 10 retired group-D employees and 3 DEOs on outsourcing basis. This has brought the total no. of all categories of staff created for the Tribunal to 35.

9. That, it is humbly submitted that when the matter stood thus, the learned Tribunal submitted a proposal for creation of 31 additional posts on 20.01.2020 vide their letter no.7, dt.20.01.2020. The proposal was submitted to Finance Department for consideration. Finance Department, in their turn, returned the file on 03.03.2020 with a request to submit status of creation of posts for similar Tribunals in other states for considering the proposal. H&UD Department requested the Tribunal to provide information on posts created for Tribunals in other states vide letter no.358 dt.24.02.2020. Copies of Letter of the Tribunal and the letter of H&UD Department are enclosed herewith and marked as ***Annexure-L & M*** *respectively for kind perusal of the Hon'ble Court.*

10. That, it is humbly submitted that the learned Tribunal has also submitted a proposal to enhance the consolidated remuneration prescribed by Finance Department for engagement of retired employees to various posts on the grounds that competent and experienced retired High court/Sub-ordinate court staffs would not join the Tribunal at the rates of remuneration prescribed by Finance Department. The proposal has also been submitted to Finance Department for consideration.

11. That, it is humbly submitted that incompliance of orders of this Hon'ble Court, a High level meeting under the Chairmanship of Chief Secretary was held on date 06.03.2020. The meeting was attended by Principal Secretary, Finance Department, Principal Secretary, Law Department, Principal Secretary, H&UD Department, Registrar, OREAT and other officials associated with the subject. The status of creation of post for Real Estate Appellate Tribunals of 3 states i.e. Tamil Nadu, Bihar & Madhya Pradesh were examined. It was found that government of Tamil Nadu has created 12 posts, Government of Bihar has created 18 posts and Government of Madhya Pradesh has created 49 posts for their respective Tribunals. After detailed deliberation on matters relating to operationalization of Odisha Real Estate Appellate Tribunal, it was decided that the Principal Secretary, Law Department shall co-ordinate with the Tribunal and shall suggest the requirement of creation of any other posts subject to a maximum of 37 posts. He will have the flexibility of interchanging the already approved posts with the posts which might be considered more relevant. He will also suggest the mode of their engagement. Accordingly, Finance Department will accord approval to the fresh proposal to be submitted by the learned Tribunal. Further, in order to ensure immediate functioning of the Tribunal, Principal Secretary, GA&PG Department shall place on deputation, 15 employees of the erstwhile OAT to OREAT immediately. The proposal of the Tribunal shall be submitted to Finance Department immediately after its receipt. Copy of the proceedings of the meeting is enclosed herewith and marked as ***Annexure-N*** *for kind perusal of the Hon'ble Court.*

12. That, it is humbly submitted that a space, measuring 6626 sq.ft. has been allotted by General Administration & Public Grievance Department at Seventh Floor of A1 Block of Toshali Bhawan, Satya Nagar, Bhubaneswar for establishment of the permanent office of OREAT. Infrastructure Development Corporation of Odisha (IDCO) has been engaged in consultation with Chairperson, OREAT to take up the interior work at Toshali Bhawan. Subsequently, IDCO submitted a detailed plan and estimate for the renovation and internal work for an amount of Rs.6,09,46,500/-. Government had given the Administrative approval to the estimate submitted by IDCO on 29.11.2019. Subsequently, IDCO submitted a revised estimate amounting to Rs.4,59,68,500/- on 07.01.2020, which has also been accorded with administrative approval by the Government on dated 11.02.2020. However, for functioning of the Tribunal during the interim period i.e. till the work of the permanent office is completed by IDCO, an office space measuring about 6158 sqft. At 4th floor of Fortune Towers, Bhubaneswar has also been provided for functioning of the Tribunal. In order to

accommodate the Tribunal, office of the Odisha Urban Infrastructure Development Fund (OUIDF) has been shifted. This is a fully furnished accommodation with necessary logistics for functioning of the Tribunal. However, IDCO has been requested to do additional furnishing, if any, in consultation with the Tribunal for specific requirement of the Tribunal. It is learnt that IDCO has also completed the additional furnishing."

The matter was listed on 13.03.2020, on which date this Court in W.P.(C) No. 8158 of 2019 passed the following order:-

"Heard Mr. M. Agarwal, learned counsel for the petitioner and Mr. A.K Parija, learned Advocate General representing the State opposite parties.

Mr. Parija, learned Advocate General relying on the additional affidavit which he has filed in Court today in W.P.(C) No.11863 of 2019 submits that the Orissa Real Estate Appellate Tribunal (OREAT) has already been established and the Chairman and other members have also been appointed. He further submits that the space measuring about 6626 sq.ft. has already been allocated at 7th Floor of Block A1, Toshali Bhawan, Bhubaneswar for establishment of permanent office of OREAT. However, for functioning of the Tribunal during the interim period i.e. till the work of the permanent office is completed by IDCO, space measuring about 6158 sq.ft. at 4th Floor in Fortune Towers, Bhubaneswar has also been provided.

With regard to posting of the staff, he submits that in order to ensure immediate functioning of the Tribunal, Principal Secretary GA & PG Department shall place on deputation 15 employees of the erstwhile OAT to OREAT immediately. In this background, Mr. Parija prays for short adjournment of the matter.

List this matter on 23.03.2020.

The opposite party No.1-State is directed to expedite deputation of the staff for immediate functioning of the Tribunal.

A free copy of this order be handed over to learned Advocate General of the State.

This Court on 13.03.2020 passed order in W.P.(C) No. 11863 of 2019 to the following effect:-

"Additional affidavit filed in Court today is taken on record.

Heard learned counsel for the petitioner and Mr. A.K. Parija, learned Advocate General representing the State.

In view of the above additional affidavit, list this matter on 23.03.2020 along with W.P.(C) No. 8158 of 2019.

Interim order granted earlier will continue till the next date."

This Court on 13.03.2020 passed order in W.P.(C) No. 3029 of 2019 to the following effect:-

> *"Heard learned counsel for the parties including Mr. A.K. Parija, learned Advocate General.*
>
> *List this matter on 23.03.2020.*
>
> *Interim order granted earlier will continue till the next date."*

23. In the meantime, three months have lapsed, but the Real Estate Appellate Tribunal has not functioned, which is causing immense difficulties to the litigants. It is pertinent to mention here that a high level committee meeting was held on 06.03.2020 with regard to various requirements to be fulfilled to make the Real Estate Appellate Tribunal functional and for creation of different posts in the appellate tribunal on restructure and with regard to delay in taking steps for absorption of staff in the appellate tribunal from the erstwhile Odisha Administrative Tribunal. So far as giving permission to engage outsourced housekeeping/maintenance agency and security agency for maintenance of the temporary office at present and permanent office latter on is concerned, the same is still pending for consideration before the government since 06.05.2020. Further, the request of the tribunal dated 30.03.2020 for purchase and supply of office stationary, law books and provide logistic support service for starting of the tribunal at the earliest is also pending and, as such, request for grant of advance money for initial purchase of office stationary articles, law books and journals and office contingency expenses to avoid delay is also pending with the government since 07.05.2020. Above all, the proposal for giving financial autonomy to the Appellate Tribunal is pending with the government since 20.01.2020. Though reminder has already been issued on 05.05.2020, but no effective steps have been taken till date. It clearly indicates the apathetic attitude of the State Government in not allowing the statutory Appellate Tribunal to function in accordance with law, which itself amounts to causing obstruction in course of administration of justice.

24. In the aforesaid premises, this Court is of the considered view that the grievance of the writ petitioners would be meted out in the event Real Estate Appellate Tribunal would be made full functional with the financial autonomy and heads of account by allocating funds from the Real Estate Regulatory Fund as per the budget independently. Keeping all the above

aspects in view, this Court deems it just and proper to issue following directions:-

(1) The State Government is directed to give financial autonomy to the Odisha Real Estate Appellate Tribunal by allocating funds from the Real Estate Regulatory Fund on every year by making suitable budgetary provision along with separate heads of account for smooth management of the said forum, so that it will not cause prejudice to any authority, as the RERA and Real Estate Appellate Tribunal are two separate independent bodies and discharging their duties as per the provisions contained under the Act, 2016 and Rules framed thereunder.

(2) The nineteen employees of the erstwhile Odisha Administrative Tribunal, whose services have been deployed for functioning of the Real Estate Appellate Tribunal, should be absorbed in the said cadre as and when the proposal will be submitted by the Tribunal and their salary and financial benefits should be paid from the funds to be allocated in favour of the Real Estate Appellate Tribunal with separate heads of account.

(3) As per the discussions held on 06.03.2020 in the high level committee meeting that there will be creation of different permanent posts in the Real Estate Appellate Tribunal on restructuring of staffing pattern, as agreed, be done.

(4) The temporary site allotted in favour of Real Estate Appellate Tribunal to be made ready pending finalization of renovation of the work at the permanent site.

(5) The renovation work in permanent site should be expedited and completed within a reasonable time

The State-opposite party shall make all endeavour to ensure compliance of each of the directions given above within a period of fifteen days from the date of communication/production of authenticated/certified copy of this judgment so as to enable Real Estate Appellate Tribunal to function smoothly as early as possible in the interest of litigants, as its Chairperson and Members have been appointed long since, failing which it will be construed as contempt of this Court and suo motu contempt proceedings will be initiated against the opposite parties.

25. Before parting with, it is made clear that so far as the interim orders dated 11.07.2019 passed in W.P.(C) No.11863 of 2019 and dated 04.02.2020 passed in W.P.(C) No.3029 of 2020 are concerned, the same are allowed to continue till the State Real Estate Appellate Tribunal starts functioning and appeal is being take up in the said forum. Needless to say, the Odisha Real Estate Appellate Tribunal shall not be influenced by the interim orders passed by this Court while considering the appeal.

26. The writ petitions are accordingly allowed. However, there shall be no order to costs.

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2020 (III) ILR - CUT- 495

S.PUJAHARI, J.

CRLMC NOS. 329 & 367 OF 2019

RAM GOPAL KHEMKA & ANR. .....Petitioners

.V.

STATE OF ORISSA & ANR. .....Opp.Parties

CRLMC NO.367 OF 2019

SUNITA KHEMKA @ DEVI & ANR. .....Petitioners

.V.

STATE OF ORISSA & ANR. .....Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of cognizance taken by the magistrate – Offence U/s.498-A/302/376 (f) (n)/201 of IPC – Offences are triable by the Court of Session – Order of cognizance challenged on the ground that no reason have been assigned while taking cognizance of the offences – Legality of the order of cognizance assessed – Held, the statute never mandates that the court has to record the reasons for the same – It is only in the circumstances when the court on receipt of police report under section 173(1) of Cr.P.C decides to proceed in the matter contrary to the allegation made by the informant which is likely to aggrieve the informant, it is required to give notice to the informant and also pass speaking order – The same has also caused no prejudiced to the petitioners, in as much as cases against the petitioner are triable by the court of Sessions and the Magistrate has to commit their case and the Session Court, therefore, has also to scrutinize the materials on record afresh before taking a decision to ask the accused persons/ petitioners in this case to face the trial for such offence.

Case Laws Relied on and Referred to :-

1. 1968 AIR 117 (SC) : Abhinandan Jha and Ors Vs. Dinesh Mishra,
2. AIR 1963 S.C. 765 : Ajit Kumar Polit Vs. State of West Bengal.
3. AIR 1977 S.C. 2401 : Tula Ram Vs. Kishore Singh.
4. 1960 AIR 862 (SC) : R.P. Kapur Vs. The State of Punjab.

For Petitioners : Himansu Mishra, A.K Mishra, Dr.A.K Tripathy, R.Dash & Avinash Khemka
For Opp.Parties : M/s. D.K.Mishra, J.Pal, B.R.Behera, N.A.Kulraj & A.Pal

ORDER Date of Order :13.10 2020

S.PUJAHARI, J.

Both these matters having arisen out of the same case, i.e., G.R. Case No.21 of 2018 on the file of the learned S.D.J.M., Rairangpur corresponding to Rairangpur Town P.S. Case No.6 dated 15.01.2018, have been heard together and are being disposed of by this common order.

2. Facts relevant for disposal of both the CRLMCs are as follows:-

The only daughter of one Dillip Kumar Agarwal, the Informant in this case, (hereinafter referred to as the „deceased") was given in marriage to Avinash Khemka (petitioner no.2 in CRLMC No.329 of 2019) on 28.04.2015. The deceased, who was blessed with a male child, however, sustained burn injuries on 12.01.2018 morning hour in her in-laws" house at Rairangpur in the district of Mayurbhanj and, as such, taken to Rairangpur Sub-Divisional Hospital for treatment. The doctor there immediately finding the deceased, a married woman, to have sustained burn injuries of 100% considered it to be MLC, as revealed from the record, intimated the police in Rairangpur Town Police Station. The S.I. of Police, namely, Sangita Dash on receipt of such information rushed to the hospital and got the statement of the deceased videographed immediately in her mobile phone wherein the deceased stated to have disclosed that she burnt herself. The doctor finding the condition of the deceased to be serious, referred to the deceased to the District Headquarters Hospital, Mayurbhanj for better treatment. However, the father-in-law of the deceased and other family members took her to Tata Main Hospital at Jamshedpur. The Informant getting the news that his daughter to have sustained burn injuries from the father-in-law of the deceased, rushed towards Rairangpur. However, on his way to Rairangpur, came to know that the deceased has been shifted to Tata Main Hospital. Accordingly, he rushed to the Tata Main Hospital wherein he found his daughter to have sustained 90% burn injury and in critical condition. Therefrom the father of the deceased came back to Rairangpur and lodged a written report at Rairangpur Town Police Station on 13.01.2018 at about 5 A.M. In the said report, it has been alleged that four months after the marriage of her deceased daughter, she was meted with cruelty by her husband, both parents-in-law and also her unmarried sister-in-law and she

was even not allowed to talk privately over phone with any members of her parents‟ side, so also not allowed to visit her parents‟ home and only in one occasion she was allowed to visit the house of the informant in the company of her in-law members and stayed there for two to three days and returned. One day, i.e., three to four days before the last „Diwali‟, the father-in-law of the deceased had also made an attempt to kill the deceased by pushing her from the staircase, for which she had sustained injury on her head and admitted in Tata Hospital. The father-in-law of the deceased had also on many occasions sexually assaulted the deceased, sending his other family members, i.e., his son, wife and daughter outside and also extended threat to her not to disclose the same. Though the aforesaid matter was with the knowledge of the husband of the deceased, but he made no effort to rescue her, rather stated that he was not the father of the child of the deceased, for which the deceased was depressed. Furthermore, lastly on 08.01.2018, the father-in-law sent his wife, son and daughter to Hyderabad for eye check-up of his daughter – Payal Khemka (petitioner no.2 in CRLMC No.367 of 2019) and in their absence, he sexually assaulted the deceased. However, soon after return of the husband when the deceased disclosed about such incident, her husband instead of redressal of her such grievance, threatened to kill her and her child on disclosure of the said incident before anyone. The deceased having no alternative, intimated the said fact to her brother – Bibek Agarwal and sister-in-law (Bhauja) – Renu Agarwal through WhatsApp messages. Thereafter, on 12.01.2018 at 8 a.m. to 8.30 a.m., the Informant got a message from the father-in-law of the deceased that his daughter sustained burn injuries. Getting the said news, the informant and his wife started their journey for Rairangpur, but on their way, they came to know that the deceased had been shifted to Tata Main Hospital for treatment. Then, the informant along with his wife proceeded to Tata Main Hospital where they found their daughter to have sustained 90% burn injuries, where she disclosed with difficulty that as she disclosed the aforesaid misdeeds of her father-in-law through WhatsApp messages to her sister-in-law (Bhauja) and also her brother, they (accused persons) poured kerosene on her body and set her ablaze and their daughter was in critical condition in Tata Main Hospital. So also, it was alleged by the Informant that evidence had been wiped out by the accused persons by cleaning the incident spot to save themselves. Basing on the said written report, a case was registered vide Rairangpur Town P.S. Case No.6 dated 13.01.2018 under Sections 498-A/307/376(2)(f)/376(2)(n)/ 506/201/ 34 of IPC against the petitioners and investigation was taken up. Subsequently, when the deceased succumbed to the injuries in the Tata Main

Hospital while undergoing treatment, the police arrested the father-in-law of the deceased, namely, Ram Gopal Khemka (petitioner no.1 in CRLMC No.329 of 2019) and forwarded him to Court for alleged commission of offence under Sections 498-A/376(F)/376(2)(f)(n)/ 506/201 read with Section 34 of I.P.C. However, subsequent to the same, the husband of the deceased, namely, Avinash Khemka (petitioner no.2 in CRLMC No.329 of 2019) taking note of the alleged dying declaration of the deceased stated to have been made before the S.I. of Police at Rairangpur Hospital, was forwarded to the Court under Sections 498-A/306/34 of IPC and continued with investigation.

3. On completion of investigation, charge-sheet no.18 dated 14.03.2018 nomenclating it to be 'preliminary' was filed against both the aforesaid petitioners in CRLMCNo.329 of 2019 indicating the commission of offence by Ram Gopal Khemka, father-in-law of the deceased under Sections 376(2)(f)/498-A/306/201 read with Section 34 of IPC and his son – Avinash Khemka, the husband of the deceased under Sections 498-A/306/201 read with Section 34 of IPC keeping the investigation open under Section 173(8) of Cr.P.C. pending arrest of the mother-in-law and the sister-in-law of the deceased who were absconding. The learned S.D.J.M., Rairangpur on receipt of such charge-sheet, perusing the materials on record, vide the order dated 17.03.2018 passed in the aforesaid G.R. Case while taking cognizance disagreed with the Investigating Officer"s opinion that it was a case of 306 of IPC as stated in the charge-sheet, but held it to be a case under Sections 498-A/302/376(f)(n)/201 read with Section 34 of IPC and, accordingly, held the offence under Sections 498-A/302/376(F)(n)/201 read with Section 34 of IPC prima-facie available against Ram Gopal Khemka and under Sections 498-A/302/201 read with Section 34 of IPC against petitioner no.2 – Avinash Khemka. In the same G.R. Case, pursuant to the charge-sheet No.64 dated 31.08.2018 being nomenclated as "Final Charge-sheet", the learned S.D.J.M. vide the order dated 20.09.2018 has held that prima-facie the offences under Sections 498-A, 302, 201/34 of IPC are there against both the petitioners in CRLMC No.367 of 2019. The accused petitioners have, as such, invoked the jurisdiction of this Court under Section 482 of Cr.P.C. in both the CRLMCs for quashing of the aforesaid orders of cognizance passed respectively against them.

4. I have heard the learned counsel appearing for the petitioners, learned counsel for the opposite party No.2-Informant and the learned Standing

counsel for the opposite party No.1-State. Also perused the F.I.R., charge-sheets and other relevant papers in the lower Court record made available to this Court, so also the Forensic Laboratory report on the contents of WhatsApp those were there in different mobile handsets seized and sent for Forensic examination which was produced by the parties when the case was taken up for further hearing for some clarifications from the parties, after the order was reserved.

5. It is the contention of the learned counsel for the petitioners that the materials produced by the Investigating Officer, even at their face value, being not capable of making out any prima-facie case for the offences taken cognizance of, the impugned orders are not sustainable either in fact or in law. However, learned counsel appearing for the petitioner is more critical of the cognizance of the offence under Section 376(2)(f)(n) of IPC, inasmuch as according to him, there was no credible materials on record to make out such a case in the absence of any specific allegation with regard to the exact time and place of sexual assault, which is requirement while giving notice to them or the charge allegedly by the father-in-law. It is submitted that the trial Court in absence of any such credible statement of the deceased made to Renu Agarwal through WhatsApp or otherwise the learned S.D.J.M. could not have placing reliance on some vague statement of Renu Agarwal proceeded against the petitioner – Ram Gopal Khemka for offence under Section 376(2)(f) of I.P.C., more particularly when no hard copy of such WhatsApp message was filed with the charge-sheet nor the mobile handset containing the soft copy of the same was produced before the S.D.J.M. at the time of filing of the charge-sheet substantiating the same. In this regard, he has drawn notice of this Court to the rejection of the copy application of the petitioners seeking for supply of hard copy of WhatsApp chart, if any, and also the Compact Disc (C.D.) containing the dying declaration which has been rejected on 10.01.2019 indicating the reasons that the WhatsApp messages were not available in the record and the C.D. was in a sealed cover. It is further contended that even if in the Forensic report collected in the meanwhile, some charts between the deceased stated to have been made with her sisterin-law, i.e., Bhauja and brother – Bibek Kumar Agarwal have been retrieved from the handsets stated to have been used by Renu Agarwal and Bibek Agarwal, the aforesaid evidence is not credible and is also no evidence in the absence of any evidence that those WhatsApp charts retrieved were actually received from the deceased or sent to the deceased. Admittedly, no WhatsApp chart was found in the mobile handset of the deceased or retrieved

in the Forensic examination of the said handset with which Renu Agarwal and Bibek Kumar Agarwal stated to be in communication through WahtsApp. Therefore, there is no material to corroborate the evidence of Renu Agarwal and Bibek Kumar Agarwal that the deceased had made some WhatsApp charts indicative of threat to her life or sexual assault on her. Furthermore, the statement of Renu Agarwal that the deceased had made WhatsApp chart with her which were retrieved from her mobile handset is also not worthy of credence, inasmuch as from the mobile handset of Renu Agarwal, the Forensic Laboratory found a video message to have been sent on 26.01.2018, i.e., after the death of the deceased. In such premises, it is submitted that the Court should not have taken cognizance of the offence under Section 376(2)(f)(n) of IPC. He has also questioned the cognizance taken of the offence under Section 302 of IPC in absence of any material indicating a homicidal death and also in presence of material collected during investigation disclosing a case of self-immolation as the deceased stated before the S.I. of Police in the hospital that she herself poured kerosene on her body to immolate her, disagreeing with the police report that it is a case under Section 306 of IPC that too without assigning any reasons for such disagreement with the opinion formed by the police in the report under Section 173(1) of Cr.P.C. indicating it to be a case under Section 306 of I.P.C.. Therefore, there being absolutely no material to proceed against the accused persons in any of the offences much less for the offence under Section 376(2)(f) of IPC against accused – Ram Gopal Khemka and also under Section 302 of IPC against all, the continuance of the proceeding against the petitioners shall be an abuse of the process of the Court and, as such, the cognizance taken vide the impugned orders and the consequential proceedings are liable to be quashed, is the submission of the learned counsel for the petitioners.

6. Per contra, the learned counsel for the State submits that the proceeding before the Court below being at its threshold, the learned S.D.J.M. at this stage was not supposed to make any threadbare analysis of the materials on record, and the impugned orders having been passed by him on taking a prima-facie view of the materials placed by the Investigating Officer, no interference is called for by this Court under Section 482 of Cr.P.C.

7. The learned counsel for the opposite party no.2 has echoed the submission advanced on behalf of the State, and further submitted that there

is material to indicate that the WhatsApp message was sent by the deceased to her sister-in-law – Renu Agarwal, brother – Bibek Kumar Agarwal which is indicative of the fact that the deceased was subjected to sexual assault by her father-in-law. The Investigating Officer in this case has also seized the mobile phone of the deceased and her husband, so also mobile phone of Renu Agarwal as well as the brother of the deceased, namely, Bibek Kumar Agarwal. No doubt, from the mobile phone of the deceased, all the charts between her with her sisterin-law as well as her husband and her brother were deleted, so also from the mobile handset of her husband all the charts with the deceased were deleted, but from the mobile handsets of the sisterin-law and brother of the deceased, screenshot of the contents of some chart with the deceased were taken and seized during the seizure of their phones and submitted to the Court by the I.O., as revealed from the materials on record. Therefore, the statements of Renu Agarwal and the brother of the deceased with regard to the deceased making disclosure before them about the sexual assault made on her by the father-in-law through WhatsApp messages / WhatsApp charts, cannot be said to be vague one and without any substance. The accused-petitioner – Ram Gopal Khemka also confessed the same before the police. Furthermore, it is also submitted that there is ample material with regard to the torture on the deceased, as revealed from the statement of the witnesses and also the death of the deceased sustaining burn injuries. The WhatsApp message also indicates that the deceased was expecting the threat to life on disclosure of such sexual assault. There are other materials on record disclosing the commission of the offence, for which cognizance has been taken and, as such, cognizance taken of offences cannot be said to be without any substance. Furthermore, in the meanwhile the Forensic Report also obtained and the WhatsApp charts which were there in the mobile handset of Renu Agarwal and Bibek Agarwal with the deceased were retrieved, but no charts could be retrieved from the mobile handset of the deceased and her husband as those were deleted. The said charts support the order of cognizance. However, the Court while taking cognizance of the offence under Section 302 of IPC, even if charge-sheet was not filed for the said offence, but disclosed it to be a case under Section 306 of IPC though have not bereft of jurisdiction for the same, but the Court ought to have assigned the reasons and could not have proceeded without assigning the reasons for the same. But, there being sufficient materials disclosing prima-facie the commission of the offences, for which cognizance has been taken, this Court should not interfere with the same in exercise of the power under

Section 482 of Cr.P.C., is the submission of the learned counsel for the opposite party no.2-Informnat.

8. Perused the materials available in the L.C.R., so also the Forensic report filed. The materials available on record indicate that the deceased sustaining burn injuries in her in-laws' house admitted in the Sub-Divisional Hospital, Rairangpur, and smell of kerosene then was emitting out from her body. The doctor finding it to be of Medico legal case intimated to the local police. The S.I. of Police then rushed to the hospital and stated to have videographed the statement of the deceased in her mobile phone. Thereafter, the deceased was shifted to Tata Main Hospital where she succumbed to the injuries sustained while undergoing treatment. The father of the deceased lodged the report making the allegation, as stated in the F.I.R. before the death of the deceased. The Case Diary also reveals that on the very date of information at about 5.30 a.m., the hard copy of the screenshot of WahtsApp messages stated to be containing the WhatsApp messages between the deceased and her husband forwarded to Renu Agarwal by the deceased were also seized by the police on production by the informant and seizure list was prepared in presence of the witnesses. The statement of the witnesses, such as, father and mother of the deceased and her other relations including Renu Agarwal and Bibek Agarwal which indicates that the deceased was subjected to cruelty and also her father-in-law sexually assaulted her and threat was extended to kill her. So also, the F.I.R. and statement of the informant disclose that the deceased made dying declaration before him in the hospital that she was burnt by her in-laws for disclosure of the aforesaid misdeeds. The mobile handsets of Renu Agarwal as well as Bibek Agarwal were also seized by the police on 03.02.2018 along with the hard copy of the screenshots of WhatsApp messages of them with the deceased, as revealed from the seizure list. So also, the mobile handsets used by the deceased and her husband were seized from the possession of the husband of the deceased, as revealed from the seizure list. However, those mobile handsets did not find any WhatsApp charts / messages between the deceased with Renu Agarwal as well as Bibek Agarwal, so also the husband of the deceased and all charts were deleted. Furthermore, in this case, postmortem report has also been received indicating the deceased died of hemorrhaganic shock arising out of burn injuries sustained. The confessional statement of the accused – Ram Gopal Khemka made before the police indicates that he committed rape on the deceased. The other statements of the witnesses also recorded till the filing of the Charge-sheet No.18 nomenclating the same to be the preliminary

charge-sheet against the petitioners in CRLMC No.329 of 2019. The said charge-sheet filed revealed that the hardcopy of screenshots seized was part of the record though the mobile handsets seized were kept in the Police Station. The mobile handset of the I.O. and the extract where she stated to have captured the videograph statement of the deceased, was not produced along with the record. But, strangely enough, though the seizure lists are available, but the hard copy of the screenshots seized as part of the record, as revealed from the charge-sheet, is not part of the record submitted to this Court. Subsequently, the charge-sheet nomenclating the same to be final charge-sheet, was filed against all four accused persons. However, the Court on filing of the preliminary charge-sheet passed the order as stated earlier, so also the subsequent order on filing the same. In the meanwhile the mobile handsets of the deceased and her husband as well as Renu Agarwal and Bibek Kumar Agarwal seized have been examined by the Forensic Laboratory, so also the extract in the C.D. and the contents of the mobile handset of the I.O. in which the statement of the deceased was videographed, have been seized. From such examination it is found that there were communications between the deceased preceding two days of the date of incident with her sister-in-law – Renu Agarwal, who happens to be the wife of the first cousin and also the cousin brother – Bibek Agarwal with the contents which suggests that she was subjected to sexual assault by her father-in-law and also the deceased apprehending threat to her life from the in-laws on disclosure of the same. Some charts were also advised to be deleted. The charts from the mobile handset of the deceased to these two mobile handsets and also her husband, however, have been deleted, so also a video chart on 26.01.2018 after death of the deceased which was received from the said handset of the deceased was again sent by Renu Agarwal to mobile handset of the deceased then not seized. The said video contents could not be read. In the aforesaid factual backdrop and the settled position of law, the contention advanced by the parties regarding sustainability of both the impugned orders of cognizance and the proceeding against the petitioners has to be addressed.

9. Before addressing the contention of the parties, it would be apposite to mention that opinion formed by the police on conclusion of an investigation taken up on registration of an F.I.R. under Section 154 of Cr.P.C. while filing the report under Section 173(1) of Cr.P.C. before the jurisdictional Magistrate is not binding to him, is well settled in law in a line of decisions of the Apex Court. The oft-quoted decision in this regard is in the case of ***Abhinandan Jha and others vrs. Dinesh Mishra,*** reported in

1968 AIR 117 (SC). The law laid down in the said case has been followed in many subsequent decisions by the Apex Court. In the case of ***Abhinandan Jha (supra)*** it has been held that different options are available to the Magistrate empowered under Section 190 of Cr.P.C. when a report is laid before him under Section 173(1) of Cr.P.C. In the said case it has also been held that the Magistrate on receipt of such report has to consider the said report and judiciously take a decision whether or not to take cognizance of the offence, irrespective of the fact whether police has filed charge-sheet or final report. The learned Magistrate also then can direct further investigation, if not convinced that the investigation has been done properly. Therefore, even if charge-sheet is filed against some persons forming an opinion that offences have been committed by them, it is open to the Magistrate to say that there is no sufficient evidence to justify an accused being put on trial. On the other hand, if the Magistrate agrees with such report in the charge-sheet submitted and proceed further, then it can be said that he has taken cognizance of the offence. Such a wide power has been provided to the Magistrate under Section 190 of Cr.P.C. to secure that no offence go unpunished, even if persons aggrieved in a case individually are unwilling and unable to prosecute and the police wantonly or bonafidely failed to submit a report stating out the facts constituting the offence. So also, the same empowers the Magistrate to protect the innocents who are challaned by the police without any material indicating the commission of an offence.

10. Though Section 190 of Cr.P.C. empowers the Magistrate for taking cognizance, but in the case of ***Ajit Kumar Polit vrs. State of West Bengal,*** reported in AIR 1963 S.C. 765, the Apex Court have held that the word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means to become aware of and when used with reference to a court or Judge to take notice of judicially. The legal position is further explained in the case of ***Tula Ram vrs. Kishore Singh,*** reported in AIR 1977 S.C. 2401, wherein the Apex Court have held that "there is no special charm or any magical formula in the expression. "Taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to take further action. Thus, what Section 190 contemplates is that the Magistrate takes "cognizance" once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations". Therefore, "taking cognizance" implies application of judicial mind for the purpose of finding out whether an offence has been committed

or not and the same is a judicial process and not a clerical one. The Magistrate, therefore, has to apply its mind when a police report is filed under Section 173(1) of Cr.P.C. whether or not prima-facie the same discloses the commission of offences and if so, what offences are stated to have been prima-facie made from the record and to proceed against accused, against whom incriminating materials have been collected indicating their involvement irrespective of the fact that whether they are challaned by the police or not or the opinion formed by the police. For the aforesaid, the Magistrate is not required to weigh the materials placed meticulously nor it is required to examine the veracity or reliability of the incriminating materials / evidence collected appreciating the same. It is only when the evidences are adduced by the witnesses and the documents are proved, its veracity can be tested.

11. In such factual backdrop and also the settled position of law with regard to taking of cognizance, it is to be seen whether the cognizance taken in this case by the S.D.J.M. for proceeding in the matter and also against the accused persons for the offences they alleged to have committed, on receipt of the police report, was justified or not. It is the contention of Mr. H.S. Mishra, the learned counsel appearing for the petitioners that absolutely there is no credible material in this case to proceed with the same, inasmuch as the evidence that is produced, are absurd and also unreliable one, rather evidence adduced discloses that the deceased for the reasons known to her committed suicide by burning herself, as revealed from the statement videographed by the Investigating Officer. To substantiate the same, Mr. Mishra has drawn notice of this Court to the facts, as stated earlier and, as such, he has submitted to invoke the jurisdiction of this Court under Section 482 of Cr.P.C., as otherwise continuance of the proceeding shall be an abuse of the process of the Court/law. The same has been controverted by the learned counsel for the State as well as the learned counsel for the opposite party no.2-informant to be without any substance in view of the materials available on record.

12. To address the contention of the learned counsel for the parties regarding invoking the jurisdiction of this Court under Section 482 of Cr.P.C. to quash the order of cognizance and the consequential proceeding against the accused persons, it would be apposite to mention here that the inherent power as envisaged in Section 482 of Cr.P.C. to quash the proceeding is an exception, rather than a rule and the case of quashing at the initial state must

have to be made in the rarest and rare case so as not to scuttle the prosecution at the threshold. The Apex Court dealing with such inherent power under Section 482 of Cr.P.C. which corresponds to Section 561A of the old Code to quash the proceeding against the accused, in the case of ***R.P. Kapur vrs. The State of Punjab,*** reported in 1960 AIR 862 (SC), have held as follows:-

> "xxxxx xxxxx It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the a11egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court

> under s. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide: In Re: Shripad G. Chandavarkar (1), Jagat Ohandra Mozumdar v. Queen Empress (2), Dr. Shanker Singh v. The State of Punjab (3), Nripendra Bhusan Ray v. Govind Bandhu Majumdar(4) and Ramanathan Chettiyar v. K. Sivarama Subrahmanya Ayyar (5).) xxxxx"
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> [Underlining are made by me]

13. The aforesaid proposition of law has been followed in line of decisions thereafter rendered by the Apex Court while sitting in appeal against the order passed under Section 482 of Cr.P.C. by different High Courts for quashing of cognizance/proceeding. Keeping the aforesaid law in mind, when the case in question is addressed, it appears to this Court that the submission of Mr. Mishra, learned counsel for the petitioners that absolutely there is no material indicating the commission of the offences, appears to be without any substance as the same is contrary to the materials produced with the charge-sheet by the I.O. before the learned S.D.J.M. The materials on record, particularly the evidence of the relations of the deceased, i.e., parents of the deceased, sister-in-law – Renu Agarwal as well as her brother – Bibek Agarwal prima-facie disclose the commission of the offences, which the learned Magistrate has taken note of, bereft of the confessional statement of accused-petitioner – Ram Gopal Khemka, which is legally impermissible to be taken into consideration with regard to sexual assault made by him on the deceased, made while in the custody of the police. The learned S.D.J.M., therefore, relying on such evidence/statement of the relations of the deceased having taken cognizance and decided to proceed against the accused persons in this case, it cannot be said that in absence of the screenshots of the WhatsApp messages, such an order taking cognizance of the S.D.J.M. is without any substance. The hard copy of screenshots of WhatsApp messages seized indicating a communication between the deceased and her husband which was forwarded to Renu Agarwal by the deceased, was seized soon after the F.I.R. and seizure list was prepared, as revealed from the case diary. The same also stated to have been submitted to the Court and from part of the record. So also, the hard copy of the screenshots of WhatsApp messages from the mobile handset of Renu Agarwal and also Bibek Agarwal indicating their communication of them with the deceased in the immediate two preceding days of the alleged incident, which is the indicative of such a sexual assault on her and suggesting communication of the same to her husband was seized along with the seizure of the mobile handset as revealed from the seizure list dated 03.02.2018. But, conspicuously though the seizure lists are available, but the hard copies of such screenshots are not there in the photocopy of the

L.C.R. submitted by the Court below to this Court, even if the charge-sheet submitted disclosed the same were part of record. The copy application which indicates that no such charts were available in record was filed on 10.01.2019, i.e., subsequent to the cognizance taken. The bonafide of entry of non-availability of the same on the record by the Dealing Assistant concerned is doubtful, inasmuch as it is visible to the naked eye at the first instance, in such rejection of copy application of the petitioners, it is written that such documents cannot be supplied, but later on entry has been made in the limited available space above the same that those documents are not available in the record and contents of the dying declaration videographed by the I.O. in her mobile handset later on extracted in computer disc is in a sealed envelope, though such compact disc by then was already sent to the Forensic Laboratory, as revealed from the forwarding letter dated 05.07.2018. As such, definitely it cannot be said that there was no hard copy of screenshots of the WhatsApp messages seized in this case at the time of filing of charge-sheet before the learned Magistrate. From the aforesaid, it can very well be said that some unforeseen hands are meddling with the record in this case. Otherwise also, the statement of the relations of the deceased primafacie discloses commission of the offence of torture and other offences including sexual assault and also murder of the deceased. No doubt, contrary evidence is stated to have been collected by the I.O., i.e, the statement of the deceased soon after the alleged incident indicating of the suicide, as such, chargesheet under Section 306 of IPC, but the hard copy of the transcript of that dying declaration videographed was not there nor soft copy was there with the chargesheet then before the learned S.D.J.M.. Only the statement of the witnesses present while recording the same was there. The learned S.D.J.M. looking into such materials on record when decided to proceed under Section 376(2)(f)(n) of IPC against accused – Ram Gopal Khemka and Sections 498-A/302/201 read with Section 34 of IPC against all the accused persons, it cannot be said that the cognizance taken by the learned S.D.J.M. and proceeding for the aforesaid offences to be based on surmises and conjectures, so also a mechanical one. Otherwise also, in the meanwhile the Forensic examination of the mobile handset, which was there in the Police Station and sent later as well as the extract of the statement of the deceased indicates that there was communications. In this case, it appears that except the statement of accused – Ram Gopal Khemka confessing guilt before the police, the other evidence is legally admissible. Veracity of such version can only be tested by the trial court not by the Magistrate who is simply taking cognizance in a case triable by the Court of Session and to commit the case

for trial. There were ample legally admissible materials before the learned S.D.J.M. to take cognizance of the offences suspected to have been committed and also the involvement of the accused persons in commission of such offences. The entire contention of Mr. H.S. Mishra, learned counsel for the petitioners is to appreciate the credibility of such version of the witnesses scrutinizing the materials available on record and interfere with the order of cognizance. It is never the case of Mr. Mishra that those evidences of the relations are legally inadmissible and does not disclose the commission of any offence. His whole contention is to scrutinize the credibility of such versions and the materials to come to a conclusion that no case was made out to proceed against the petitioners. However, the learned S.D.J.M. at this stage being not required to scrutinize the evidence in detail but to take a prima-facie view taking note of the evidences/materials collected which are legally admissible, to proceed further in the matter and not to make a detailed documentation and appreciation of the same, the order of the learned S.D.J.M., as such, cannot be said to be bad on the grounds stated by the learned counsel for the petitioners. This Court also while exercising the power under Section 482 of Cr.P.C. to examine the correctness of the cognizance taken and the proceeding against the accused persons cannot make a critical appreciation of such evidence which are legally admissible with regard to its reliability in view of the law laid down in the case of ***R.P. Kapur (supra).*** Otherwise also, any detailed appreciation and comment on the same by this Court on such evidence and rendering a finding is likely to prejudice the case of the petitioners in the trial Court which is the Court subordinate of this Court in the different subsequent stages of this case, more particularly when the case is going to be committed to the Court of Sessions which then have also to take a judicious decision at the stage of Sections 227 and 228 of Cr.P.C. A contention has been advanced on behalf of the petitioners that non-supply of copy has caused prejudice to the petitioners in view of the mandate of Section 207 of Cr.P.C. and, as such, order of cognizance is liable to be quashed, appears to this Court to be farfetched one and a proceeding cannot be quashed on that ground, more so when the same is not required to be supplied at that stage.

14. So far as the contention of the learned counsel for the petitioners that without assigning any reason since the cognizance has been taken for commission of offence under Section 302 of IPC differing with the opinion of the police, such cognizance cannot be sustained on that ground also appears to be fallacious notwithstanding the concession of the learned

counsel for the opposite party no.2- informant. The statute never mandates that the Court has to record the reasons for the same. It is only in the circumstance when the Court on receipt of police report under Section 173(1) of Cr.P.C. decides to proceed in the matter contrary to the allegation made by the informant which is likely to aggrieve the informant, it is required to give notice to the informant and also pass a speaking order. Here in this case, the aforesaid decision of the S.D.J.M. to proceed under Section 302 of IPC is no way affects the informant. The same has also caused no prejudice to the petitioners, inasmuch as cases against the petitioners are triable by the Court of Sessions and the Magistrate has to commit their case and the Sessions Court, therefore, has also to scrutinize the materials on record afresh before aking a decision to ask the accused persons / petitioners in this case to face the trial for such offence. The trial Court concerned then has to make an independent assessment of the same taking note of the contention advanced by the accusedpetitioners sent up to the Court of Session for trial by the learned S.D.J.M., Rairangpur. The trial Court concerned has no binding tie with such order of the learned S.D.J.M. taking a prima-facie view regarding commission of any particular offence by any of the accused as it has to independently deal with the evidence / incriminating materials placed after hearing the prosecution and the accused on the same and then take a judicious decision while dealing with the question of framing of charge.

15. Accordingly, both the CRLMCs filed challenging the impugned order of cognizance, so also the prosecution being devoid of merit stand dismissed. The parties may utilize the copy of this order as per the High Court‟s Notice No.4587 dated 25.03.2020.

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2020 (III) ILR - CUT- 510

BISWANATH RATH, J.

W.P.(C) NO. 21947 OF 2020

RUNA MAJHI .....Petitioner

.V.

THE STATE OF ODISHA (HEALTH AND FAMILY WELFARE DEPT.) & ORS. .....Opp. Parties

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971 – Sections 3, 4, 5 read with Rule 05 of the Medical Termination of Pregnancy Rules, 2003 – Application for termination of pregnancy of rape victim, who is a mentally & physically disabled person – Victim carrying for four months – Report of medical experts considered – Held, this court declining termination of pregnancy for the complication involved therein and obliged to observe that, the pregnancy is forced one and contrary to choice of victim – Several directives were issued for all round welfare of victim including grant of ex-gratia.

Case Laws Relied on and Referred to :-

1. 2016 (14) SCC 382 : X Vs. Union of India.
2. (2009) 9 SCC 1 : (2009) 3 SCC : Suchita Srivastava Vs. Chandigarh Admn.
3. (2018) 11 SCC 572 : Z Vs. State of Bihar.
4. (2018) 14 SCC 75 : A.Vs. Union of India.
5. (2018) 14 SCC 289 : Mamata Vs. Union of India.
6. 2018) 13 SCC 339 : Sarmishtha Chakraborty Vs. Union of India.
7. Mrs. X Vs. Union of India : (2017) 3 SCC 458
8. 2016 (14) SCC 382 : X Vs. Union of India.
9. (2018) 11 SCC 572 : Z Vs. State of Bihar.

For Petitioner : M/s. S.Ch. Puspalaka, A.K. Tarai, T. Priyadarshini, T. Barik

For Opp. Party : Mr. B.R. Behera, Addl. Standing Counsel

For Opp. Party no.7 (victim) : Notice dispensed with.

JUDGMENT Date of Hearing :14.09.2020 : Date of Judgment : 23.09.2020

BISWANATH RATH, J.

This Writ Petition involves an application at the instance of a desperate mother seeking permission for terminating the pregnancy of an unmarried, physically handicapped and mentally retarded daughter a rape victim under the provisions of The Medical Termination of Pregnancy Act, 1971 (hereinafter in short be mentioned as "the Act, 1971), The Medical Termination of Pregnancy Rules, 2003, (hereinafter in short be mentioned as "the Rules, 2003") and The Medical Termination of Pregnancy Regulations, 2003 (hereinafter in short be mentioned as "the Regulations, 2003").

2. Background involved in this case is that mother of victim claims her major unmarried daughter is not only physically handicapped but also mentally retarded and finding unnatural behavior in her such as untimely vomiting, on close scrutiny and soliciting came to know that she has been raped by accused Sili Majhi and she might be conceived for the said reason.

On questioning the accused the mother was threatened to her life with dire consequences. On advise of the village gentries petitioner the mother of the victim reported the matter to the local Police Station and a F.I.R. was accordingly registered in Kujanga Police Station on 13.08.2020 vide Kujanga P.S. Case No.200 of 2020 against the accused person U/s.376(2)(1)/294/506 of I.P.C. Thereafter Police placed the victim before the Medical Officer on 13.08.2020 and as per the report of the Medical Officer vide Annexure-2, it appears, the Doctor in his report on 13.08.2020 not only reported that the victim is a physically handicapped and mentally retarded person but she was also carrying for 16 weeks i.e. almost four months. It was also reported there that there was no detection of recent sexual intercourse. Finding the victim physically handicapped and unable to take care of herself and unmarried besides also mentally retarded, being the mother of the victim with an intention to avoid humiliation in the society, further health hazard to the above victim and as a matter of welfare of the victim girl and baby to take birth by way of this Writ Petition requested this Court for permission for termination of pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971 (herein after in short be mentioned as "the Act, 1971") and any other relief as deemed fit and proper.

3. With the above background of the case Sri S.C. Puspalaka, learned counsel for the petitioner taking this Court to the provisions at Sections 3, 4 & 5 of the Act, 1971, Rule 5 of the Rules, 2003 and the provisions at the Regulation, 2003 and further taking this Court to the citations in the case of ***X v. Union of India*** as reported in **2016 (14) SCC 382** attempted to satisfy a deserving case for termination of pregnancy. Further taking this Court to the F.I.R at Annexure-1 and the medical report at Annexure-2, the report dated 5.09.2020, the report dated 9.09.2020 at Annexure-A/4 and the last reports dated 12.09.2020 vide Annexure-C/4 series, more specifically for the contents therein reading along with the provisions quoted hereinabove, Sri S.C. Puspalaka, learned counsel for the petitioner while urging this Court's interference in the matter also requested that looking to the peculiar circumstance involved herein for granting necessary direction to the competent authority as deem fit and proper and also for granting appropriate relief not only to the victim but also to all such who have also become victim in the process.

4. This matter was earlier listed on 4.09.2020. On which date this Court while issuing notice on being satisfied with the prima facie case involved

therein directed the State-opposite parties for urgent counter / instruction and posted the matter to 7.09.2020. Hearing of the matter being undertaken Sri B.R. Behera, learned Additional Standing Counsel along with Sri S. Ghose, learned Additional Standing Counsel brought to the notice of this Court to a further report/ opinion of the Committee formed in terms of regulation 3 of the Regulations, 2003. Taking this Court to the document filed by way of a memo dated 8.09.2020, also taking this Court again to the provisions at Sections 3, 4 & 5 of the Act, 1971 and regulation 3 of the Regulations, 2003 along with the form being prescribed therein and also the previous report appended at Annexure-2 to the Writ Petition, Sri Behera, learned Additional Standing Counsel admitted that for the report vide Annexire-2 the victim girl has been shown to be mentally retarded not only that she was already carrying for four months though at some places it is mentioned as 16 weeks. However, in the premises that the report at Annexure-2 being prepared on examination of the victim on 13.08.2020 and the 2nd report being prepared on 5.09.2020 Sri Behera demonstrated that there appears some doubt with regard to the period of pregnancy by then. A further report being filed in the proceeding dated 8.09.2020 Sri B.R. Behera, learned Additional Standing Counsel taking this Court to the subsequent report dated 5.09.2020 appended through the memo dated 8.09.2020 involving opinion of two Doctors in terms of the provisions in the Act, 1971 suggested, this report confirmed the pregnancy involving the victim and the health condition of mother carrying the pregnancy and the Committee of Doctors opined pregnancy period as 24 weeks more specifically mentioning the pregnancy period is 24 weeks 3 days. However, looking to the gap between the previous report dated 13.08.2020 and the subsequent report dated 5.09.2020 hardly in between 23 days, Sri Behera, learned Additional Standing Counsel submitted that 2nd report in comparison with 1st report creates a doubt on the opinion of the two Doctors finding pregnancy period 24 weeks 3 days and taking this Court to the dates of reporting Sri Behera, learned Additional Standing Counsel contended that as it appears, the pregnancy period involving the report dated 5.09.2020 appearing to be 16 weeks or 4 months + 3 weeks and 2 days making it to 19 weeks and some days. Sri Behera, learned Additional Standing Counsel fairly suggested for another report to arrive at just conclusion. To which Sri Puspalaka, learned counsel for the petitioner had no objection. Being satisfied with the submissions of Sri Behera**,** learned Additional Standing Counsel and finding abnormal gap in between both the reports and also finding the report of the 2nd Committee is not in conformity with the Form-I prescribed therein this Court by its order dated 8.09.2020 directed for reexamination of the

victim involving the conditions therein and also to give a further report focusing on the questions regarding the actual position of the Foetus, the health condition of the pregnant lady as to whether continuance of her pregnancy would involve injury to her physical and mental health as well as the Foetus and also as to whether the pregnant lady is capable of delivering a perfect child along with other requirements in terms of Form-I. For the materials establishing through Annexure-2 that victim is suffering from mental retardness, this Court also in the same order directed, the Doctor Committee while further examining the victim shall also take aid of Psychiatric expert from S.C.B Medical College & Hospital, if necessary, and to submit the report before this Court by 10th of September, 2020. During course of further hearing, as per the direction of this Court report of the further Committee being submitted is taken into account. On going through the further report dated 9.09.2020 of both the Committee as well as the Psychiatric Specialist this Court finds, there is clear opinion suggesting no possibility of termination of pregnancy as termination will endanger the life of mother with further observation by the Psychiatric Specialist that mother, the pregnant lady for her mental condition cannot take care of child to take birth and she is also completely dependant. Sri Behera, learned Additional Standing Counsel accordingly submitted for denial of termination of pregnancy and passing order as deemed fit.

5. Relying on the further report Sri S.C. Puspalaka, learned counsel for the petitioner submitted that for the report of the Committee of Doctors opining no possibility of Termination suitable direction may be made protecting the life of both mother carrying the child and child in womb and looking to the Doctors' opinion that the victim shall be dependant for her mental condition, care of the mother i.e. the petitioner herein should also be taken. It is, involving this, Sri Puspalaka, learned counsel for the petitioner taking this Court to the further affidavit of the petitioner more particularly taking this Court to the paragraphs 4 & 7 therein submitted that petitioner has a disastrous financial condition and petitioner cannot take care of both victim and her child involved unless she is provided with appropriate financial and medical support.

6. Taking into account the totality involved herein, this Court finds, there remains no dispute that the victim is not only physically handicapped but also mentally retarded and unmarried one and completely a dependant one. Further, victim is also a victim of rape and sufferer of an unwanted

pregnancy. Since the application is filed by the mother of the victim, for which at every stage Doctor knowing fully well the mental condition of the victim took consent of the mother but however, for the period of pregnancy involved there while submitting the 2nd report on 5.09.2020, 3rd report dated 9.09.2020 Doctors team clearly suggesting no scope for termination of pregnancy. There is a 4th report dated 12.09.2020 specifically attending to the health condition of the child in womb and also suggesting that the child in womb is growing with all active parts intact and there is no danger in the Foetus growth in womb. On perusal of report on Foetus, this Court finds, the report suggests as follows:-

> "Her Hematology and serological investigation reports are within normal limits.
>
> Ultrasound report revealed a single live fetus at 24 weeks (+/-) 2 weeks of gestation with no gross congenital anomaly. The fetal parts including brain, spine, heart, limbs, facial structure, kidneys, urinary bladder and stomach appear normal at present."

7. Considering the facts involving the case, conditions of the victim through the reports indicated hereinabove this Court observes, it is relevant to take care of certain provisions of The Act, 1971 as well as the Regulation, 2003, which reads as follows:

> **Section-3:-"When pregnancies may be terminated by registered medical practitioners**.-
>
> (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
>
> (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
>
> (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-
>
> (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [4] [mentally ill person], shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

4. Place where pregnancy may be terminated.-No termination of pregnancy shall be made in accordance with this Act at any place other than,-

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

5. Sections 3 and 4 when not to apply.-

(1) The provisions of Sec.4, and so much of the provisions of sub-section (2 of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by the registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Regulation 3 of the Medical Termination of Pregnancy Regulations, 2003:

3. Form of certifying opinion or opinions. – (1) Where one registered medical practitioner forms or not less than two registered medical practitioners form such opinion as is referred to in sub-section (2) of section 3 or 5, he or she shall certify such opinion in Form I.

(2) Every registered medical practitioner who terminates any pregnancy shall, within three hours from the termination of the pregnancy certify such termination in Form I."

8. On reading of the provisions quoted hereinabove this Court finds, for the provisions at Sub-section (2)(b) of Section 3 of the Act, 1971 termination of pregnancy can be allowed, if the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks but subject to however under the opinion of the two registered Medical practitioners on the issues prescribed therein and also taking care of the provisions at the Explanation 'I' therein. The provision at Section 4(a) quoted hereinabove has a clear permission for pregnancy of a women even attaining the age of 18 years, if mentally ill, shall be terminated with the consent of her guardian in writing.

Now coming to the ***Statement of Objects and Reasons*** of the Act, 1971, this Court here finds the provisions at clause '3' of the ***Statement of Objects and Reasons*** of the Act, 1971:

"3. There is thus avoidable wastage of the mother's health, strength and sometimes, life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure – when there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds – such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and (3) eugenic grounds – where there is substantial risk that the child, if born, would suffer from deformities and diseases."

The statutory provision taken note hereinabove, makes it clear that the Parliamentarians in their wisdom and after taking into consideration many aspects have constructively under subject item 'I' of the clause '3' of the

Statement of Objects and Reasons kept a space for termination of pregnancy in case of mental health of a women. Similarly under the item therein have also kept space for termination of pregnancy on humanitarian grounds, when pregnancy arises from sex crime like rape or intercourse with a lunatic woman. However, reading the whole provisions this Court finds, when the pregnancy exceeds 20 weeks the termination is wholly dependant on the opinion of the Committee of Doctors.

9. It is, in this context of the matter on perusal of the report dated 5.09.2020, this Court noticed, the report was strictly not in terms of Form-I of Clause-3 of the Regulation, 2003 and accordingly directed for further report on its listing on 11.09.2020. On 11.09.2020, pursuant to the direction of this Court dtd.08.09.2020 a further report dtd.09.09.2020 was submitted by a team of Doctors with involvement of Psychiatric Specialist vide Annexure-A/4, where the two Doctors examined the victim in terms of request U/R.3 Form I, which reads as follows:-

> "Patient is having ongoing pregnancy of 24 weeks duration with the existing medical neurological and psychiatric-morbidities Termination of Preg. at this stage may result in life threatening complications, even with the best available treatment.
>
> Under such condition, Pregnancy may be allowed to continue with Antenatal Care at higher centre and confinement to be planned at a tertiary care centre."

From all the above, this Court taking into account the restrictions in the Act, 1971 and suggestions of the Doctors finds, termination of pregnancy of the victim will put the life of the victim in danger. However, there was nothing available on the life of child in womb. It further reveals, the Director-cum-Medical Superintendent, Mental Health Institute, S.C.B M.C.H, Cuttack, in his report vide Annexure-B/4 dated 09.09.2020 suggested as follows:-

> "With reference to the subject mentioned above, the patient Ms.Sasmita Majhi, 22 years, HF, D/o.Babuli Majhi, At-Fatepur, Po/Ps-Kujanga, Dist.-Jagatsinghpur (OPD Regd. No.-11171/ 09.09.2020) was observed & evaluated on OPD basis on 09.09.2020. She was found to have Profound Intellectual Impairment (Profound Mental Retardation). The patient was already old diagnosed case of severe mental retardation as per disability certificate issued in 2010. The condition is of such a nature that she cannot take care of herself & is totally dependent."

This report clearly suggested that victim was already an old diagnosed case of severe mental retardation and is totally dependant. However, since

above reports did not disclose anything on the condition of child in womb despite being asked, this Court by order dtd.11.09.2020 directed the team of Doctors to report on the health condition of the child so as to arrive at just conclusion. During final hearing on his appearance, Sri Behera, learned Additional Standing Counsel produced a report dated 12.09.2020 vide Annexure-C/4 series particularly involving the health condition of the child and the report suggests as follows:-

> "Her Hematology and serological investigation reports are within normal limits.
>
> Ultrasound report revealed a single live fetus at 24 weeks (+/-) 2 weeks of gestation with no gross congenital anomaly. The fetal parts including brain, spine, heart, limbs, facial structure, kidneys, urinary bladder and stomach appear normal at present.
>
> The patient needs regular antenatal checkup, treatment and delivery in a tertiary care Centre preferably at S.C.B, M.C.H, Cuttack."

10. It is at this stage, this Court taking into account the additional affidavit of the petitioner dated 13.09.02020 finds, the mother being the guardian of victim a mentally retarded, physically handicapped and pregnant on rape taking this Court to her financial condition expresses her inability to take up such a higher responsibility but however agrees to take such responsibility provided there is direction on financial assistance, medical assistance aspect as well as extension of co-operation of the S.C.B, Medical College & Hospital, the C.D.M.O and the District Administration to both victim mother and child to take birth at least till the S.C.B, Medical College & Hospital gives a clearance for shifting of victim and her child to the petitioner's residence besides the District Administration also taking care of the petitioner.

11. Before passing any observation this Court looking to the pregnancy of the victim as an outcome of rape finds, since the victim was produced for Medical examination on 13.08.2020, had there been proper care taking resort to the provisions of the Act, 1971 since it was hardly 16 weeks by then, the unwanted pregnancy could have been avoided. For the negligence of the Public Authority, may not be intentional and carelessness, the victim so also the child to come are to suffer immensely including mental torture and also social stigma throughout their life.

12. Looking to the law of land on refusal of termination of unwanted pregnancy dispute, this Court finds, the Hon'ble apex Court in the case of ***Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570 at page 13** has directed as follows**:**

> **20.** In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter also referred to as "the MTP Act") which reads as follows:
>
> "3. *When pregnancies may be terminated by registered medical practitioners.*—(1) Notwithstanding anything contained in the Penal Code, 1860, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—
>
> (*a*) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
>
> (*b*) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that—
>
> (*i*) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
>
> (*ii*) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> *Explanation 1*.—Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.
>
> *Explanation 2*.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.
>
> (3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.
>
> (4)(*a*) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

(*b*) Save as otherwise provided in clause (*a*), no pregnancy shall be terminated except with the consent of the pregnant woman."

A plain reading of the above quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met.

21. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified "right to abortion" and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of the abovementioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a "continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health" [as per Section 3(2)(*i*)] or when "there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped" [as per Section 3(2)(*ii*)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

24. The Explanations to Section 3 have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(*b*) of the MTP Act, 1971.

26. The exceptions to this rule of consent have been laid down in Section 3(4)(*a*) of the Act. Section 3(4)(*a*) lays down that when the pregnant woman is below eighteen years of age or is a "mentally ill" person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is "immediately necessary to save the life of the pregnant woman". Clearly, none of these exceptions are applicable to the present case.

56. With regard to the facts that led to the present proceeding, the question of whether or not the victim was capable of consenting to the sexual activity that resulted in her pregnancy will be addressed in the criminal proceedings before a trial court. An FIR has already been filed in the said matter and two security guards from Nari Niketan are being investigated for their role in the alleged rape.

57. The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her "best interests" would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her "best interests".

58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

59. Lastly, we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.

60. The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

Similarly in the Hon'ble Apex Court in the case of ***Z v. State of Bihar*, (2018) 11 SCC 572** held as follows:

> **47.** In the case at hand, we have noted, termination of pregnancy could have been risky to the life of the appellant as per the report of the Medical Board at AIIMS which was constituted as per the direction of this Court on 3-5-2017 [*Z* v. *State of Bihar*, (2017) 14 SCC 525 : (2017) 14 SCC 526 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 917] . This situation could have been avoided had the decision been taken at the appropriate time by the Government Hospital at Patna. For the negligence and carelessness of the hospital, the appellant has been constrained to suffer. The mental torture on certain occasions has more grievous impact than the physical torture.
>
> **56.** In the instant case, it is luminescent that the appellant has suffered grave injury to her mental health. The said injury is in continuance. It is a sad thing that despite the prompt attempt made by this Court to get her examined so that she need not undergo the anguish of bearing a child because she is a victim of rape, it could not be so done as the medical report clearly stated that there was risk to the life of the victim. Therefore, we are inclined to think that the continuance of the injury creates a dent in the mind and the appellant is compelled to suffer the same. One may have courage or cultivate courage to face a situation, but the shock of rape is bound to chain and enslave her with the trauma she has faced and cataclysm that she has to go through. Her condition cannot be reversed. The situation as is unredeemable. But a pregnant one, she has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind. What is needed is promptitude.
>
> **57.** This Court had earlier directed that she should be paid compensation under the Victims Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure. She has been paid Rs 3,00,000 as she has been a victim of rape. It may be clearly stated that grant of compensation for the negligence and the suffering for which the authorities of the State are responsible is different as it comes within the public law remedy and it has a different compartment. Keeping in view the mental injury that the victim has to suffer, we are disposed to think that the appellant should get a sum of Rs 10,00,000 (Rupees ten lakhs only) as compensation from the State and the same shall be kept in a fixed deposit in her name so that she may enjoy the interest. We have so directed as we want that money to be properly kept and appropriately utilised. It may also be required for child's future. That apart, it is directed that the child to be born shall be given proper treatment and nutrition by the State and if any medical aid is necessary, it shall also be provided. If there will be any future grievance, liberty is granted to the appellant to approach the High Court under Article 226 of the Constitution of India after the birth of the child.

13. Sri Puspalak, learned counsel for the petitioner, during course of hearing relied on decision such as ***A. Vrs. Union of India*** : (2018) 14 SCC 75, ***Mamata vrs. Union of India :*** *(2018) 14 SCC 289*, ***Sarmishtha Chakraborty vrs. Union of India :*** 2018) 13 SCC 339, ***Mrs. X vrs. Union of India :*** (2017) 3 SCC 458 & ***X vrs. Union of India :*** 2016 (14) SCC 382.

This Court considering all these decisions finds, the cases involving the above decisions had the medical support for termination, which is not the situation in the case at hand, as such none of these cases comes to rescue of the petitioner.

14. Taking into account the factual position stated hereinabove and settled legal position, this Court while declining termination of pregnancy for the complications involved herein is obliged to observe that the pregnancy on the victim is forced one and it being contrary to her choice. The victim has been forced not only to carry an unwanted pregnancy but is also forced to give birth to the child against her will. No doubt she will carry a stigma and humiliation for the rest part of life for the offspring born as a result of ghastly recurrence of rape committed on her along with stigma and humiliation on the child and in case it is a female child, looking to the complex society, it is still worse. Situation involved here compelled this Court to give a comprehensive thought to give absolute protection not only to the victim but also to the child to give birth so also to support the mother of the victim a wife of a poor labourer, who has come forwarded to take care of the victim. This Court also observes, in the event the mother faces any difficulty, may redress on such aspect to the District Administration, who shall be duty bound to take care of the request as far as practicable.

15. Looking to the factual background, this Court finds, the F.I.R. involved here was registered on 13.8.2020. First Doctor report came on 13.8.2020. Since both the Investigating Agencies and Doctors were undertaking an exercise under the Act, 1971, nothing prevented the Public Authority at least to ask the mother of victim for involvement of mental condition of the victim and pregnancy of an unmarried victim of rape, regarding their option for termination as there was nearly 16 weeks of an unwanted pregnancy at the relevant time, taking into account that the petitioner is not only financially unsound but also belongs to a rustic area and being not aware of complication in the matter of termination after twelve weeks. It appears, there is no proper co-ordination between the I.I.C., the C.D.M.O, the District Legal Services Authority, the POCSO Authority and the Magistrates involved in such disputes. Even there is also some loss of time at the hand of village gentries.

Before concluding, this Court likes to reproduce the observation of the Hon'ble apex Court in para-61 in the case of ***Z v. State of Bihar*****,** as reported in (2018) 11 SCC 572.

> "The legislative intention of the 1971 Act and the decision in *Suchita Srivastava* prominentaly emphasize on personal autonomy of a pregnant woman to terminate the pregnancy in terms of Section 3 of the Act. Recently, Parliament has passed the Mental Healthcare Act, 2017 which has received the assent of the President on 7-4-2017. The said Act shall come into force on the date of notification in the Official Gazette by the Central Government or on the date of completion of the period of nine months from 7-4-2017. We are referring to the same only to highlight the legislative concern in this regard. It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman are not hindered. The fundamental consent relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of consent by a guardian in the case of major should not be over-emphasised."

16. Thus while declining the relief of termination of pregnancy under the compelling reasons and granting relief, vide paragraph-17(I) and issuing necessary direction to the State Government as a matter of future guideline involving case of this nature vide paragraph-17(II), this Court directs the Chief Secretary, who in turn shall bring the judgment to the notice of the Secretary to Government in Health Department, Secretary to Government in Women & Child Care Department, Secretary to Government in Home Department, Chairperson of the State Women Commission, Director, Medical Education and Technology and Superintendents of all the three Premier Medical College & Hospital of the State for their cooperation and coordination in the effective implementation of General Directions herein above.

Similarly, the Registry of this Court is also directed to supply copy of this judgment to all the District Judges, who in turn shall bring the same to the notice of the Sessions Court(s) dealing with sexual offences, the Presiding Officer, POCSO Court, the Principal Magistrate of Juvenile Justice Board under its jurisdiction. Registry shall also supply a copy of this judgment to the Member Secretary of State Legal Services Authority for bringing it to the notice of the Chairman and the Secretary of District Legal Services Authority for their doing the needful.

17. It is, in the above circumstances, this Court segregates its conclusion in two segments, which are as follows:-

(I) <u>SPECIFIC DIRECTION INVOLVING THE CASE AT HAND :</u>

(A) Considering that the victim is suffering on account of rape committed on her and the suffering for which the authorities of the State are responsible, this Court directs the

State of Odisha to pay as an immediate measure, by way of exgratia grant, a sum of Rs.5,00,000/- (Rupees Five lakh) within seven days of receipt of copy of the judgment, to the victim to be kept in long term Fixed Deposit in any Nationalized Bank in the name of victim to be renewed from time to time with operation of such account by the mother of the victim. Annual interest on such Fixed Deposit will be credited to the passbook so maintained with authorization to the mother of the victim herein, to utilize the same towards her daughter's expenditure till survival of the victim, whereafter the child will be entitled to this amount.

(B) Similarly a further sum of Rs.3,00,000/- (Rupees Three lakh) in case of male child and in the event the victim gives birth to a girl child then looking to the suffering of the girl child throughout her life, for the peculiar circumstance involved herein, a sum of Rs.5,00,000/- (Rupees Five lakh) to at least make sure that the girl child does not suffer throughout her life, amount as appropriate, shall also be released by way of ex-gratia grant in favour of child within at least ten days of such birth. Here also the amount will be kept in Fixed Deposit in any nationalized Bank by opening a Savings Bank Account in the name of the child. This Account will also be run in the name of minor child to be operated by the maternal Grandmother with scope for renewal of the Fixed Deposit from time to time at least till the child becomes major. Interest so yielded through the F.D. shall be accounted to the SB Account Passbook in the name of minor and to be operated by maternal grandmother only and utilized for the purpose of meeting expenditure on child. The child will ultimately be the owner of such amount once he/she becomes major.

(C) Amount granted by way of ex gratia under Item Nos.1 and 2 shall however be in addition to grant of any payment to the victim and the child on application of The Victim Compensation Scheme under the provisions of Section 357-A of the Code of Criminal Procedure decided by trial Court or any other authority competent to do so.

(D) Considering the mental condition of the victim and financial condition of the family, utmost care of the victim is to be taken in continuation of her pregnancy. The best medical facility be made available so as to ensure proper care and supervision during the period of pregnancy as well as postnatal care with the supervision of Doctors in the S.C.B Medical College & Hospital, Cuttack with assistance of team of Doctors at the District Medical Level. Keeping in view the report dated 12.09.2020 the delivery of the victim shall take place only in the S.C.B. Medical College & Hospital, Cuttack.

(E) Looking to the mental retardness along with physical handicapness in the victim, there may be periodical check up of the victim by a Psychiatric Expert and other related doctors required on requisition of the CDMO. The Superintendent, SCB Medical College and Hospital, Cuttack will ensure such assistance.

(F) The entire transport, medical and medicinal expenses including accommodation of the victim and her mother, if necessary during treatment, shall be the responsibility of the District Administration.

(G) The entire education of the child will be the responsibility of the State.

(H) In the event any grievance arises involving providing any other assistance to the victim and/or the child, it shall be open to the petitioner to first approach the Collector of the District on the basis of direction herein and in case of failure in responding to the genuine asking, it will be open to the victim's mother and child on attaining his/her majority to approach the High Court of Orissa in filing appropriate application.

(I) Looking to the condition of victim, this Court also observes, the child to be born shall be given proper treatment and nutrition by the State and if any medical aid is necessary it shall also be provided to him/her by the State at least till the child is sufficiently grown up.

(J) Looking to the family of the victim runs on the sole income of the husband of the petitioner being a labourer, to see that the petitioner while maintaining her family will also be able to look after the victim and in future the child to take birth, this Court directs the District Collector to depute a competent officer to the residence of the petitioner to assess the capacity of subsistence in her and based on detailed assessment of their survivability, the Collector shall take decision on providing further assistance through any of the Central Scheme available for the purpose, if any, by completing the entire exercise within four weeks from the date of judgment.

(K) To protect the future of child and to see there is no mismanagement of fund provided both to the victim and the child by direction of this Court, this Court further directs that the Secretary, District Legal Services Authority shall have supervision on the spending by the mother against the account involving both the victim as well as the child so long as the victim survives and the child becomes major. The Secretary is also authorized, in the event he finds any irregularity in the spending of funds or mismanagement of funds involved by the mother, the petitioner herein, involving both the accounts, may seek leave of the High Court for any other mode of operation.

II) <u>General Directions</u> :

i). Once an incident of rape; be it on minor, minor and mentally retarded, minor and physically handicapped, unmarried major, married major, mentally retarded major and physically handicapped major is made to Police within eight weeks period, the Police and the C.D.M.O will take consent of the guardian-mother in case of minor, minor and mentally retarded, minor and physically handicapped as to whether they are interested to continue with pregnancy or interested in termination? In case of major and physically handicapped, consent of such victim and in case major but mentally retarded, consent of mother of such victim shall be taken within same time as to whether the victim should continue with pregnancy or interested in termination. This Court here clarifies, in case there is no interest shown for

continuing with pregnancy, immediately after the 1st report of Committee the local Chief District Medical Officer should undertake the exercise of termination but in terms of the Medical Termination of Pregnancy Act, 1971. In case interest for termination is not shown then Police authority along with Chief District Medical Officer is to take care of both mother and child in womb involving pre-birth care and post-birth care for at least till a period of one year after birth takes place. Further in case of unmarried major and married major, procedure indicated hereinabove shall also be followed but however with consent of major girl. In case of termination of pregnancy, the C.D.M.O shall take DNA sample of child to ensure its handing over to Investigating Agency, so as to be forwarded to the concerned Court for requirement, if any, there in the criminal trial.

ii. To maintain secrecy of her pregnancy and termination, the State will ensure, if necessary, to handover such mother to remain in custody of Woman Rehabilitation Centre until her delivery and convalescence.

iii. In case victim and her mother wish to live in their own residence, they may do so but will be provided all medical help by the State Authority at the cost of the State.

iv. In required cases, the State will also permit the girl's mother to either live with her or regular visit to give moral and emotional support and all medical support will be extended by the State through such Institution.

v. In case of involvement of child through physically handicapped and/or mentally retarded woman subject to medical assessment that such mother is unable to take care of the child born provided there is no elder member coming forward to take care of such child, keeping in view the welfare of the child he or she may be taken care under the Juvenile Justice care mechanism involving agency engaged for such purpose and for about at least 12 months such child will not be given in adoption. This is, however, if there is nobody in the family to take care of such child in course of time.

vi. In the entire process, all concerned will ensure that secrecy of pregnancy, anonymity of the petitioner and the child to be born is maintained.

vii. In cases it shall equally be the responsibility of the applicant society to ensure that the child does not know about his/her mother and of course about the incident.

viii. There should be immediate grant of exgratia-cum-compensation subject to further grant of victim compensation involving the criminal trial.

ix. Considering such incidence occurring for failure of Law and Order Authority in case of requirement of high level treatment of rape victim or the child born in such process, the victim and/or the child will be provided the highest level of treatment at the cost of the State including the attendants journey, accommodation and fooding cost, if any.

x. Report of the Doctor or team of Doctor, as the case may be, obtained with all promptitude and any delay at the level of State Authority shall lead to fixation of accountability and responsibility against all such involved.

xi. When a pregnant mother is required for examination by a Medical Board for the purpose of termination, it must include apart from Obstetrics and Gynecology also (i) Paediatrics, (ii) Psychiatry/Psyochology, (iii) Radiology/Sonography, (iv) from field of Medicine with inclusion of tests involving foetus also Mental Health Care Act, 2017.

xii. Constitution and establishment as expeditiously as possible Medical Boards under the provisions of MTP Act, 1971, in each Districts to fasten examination and effective action involving such cases.

xii. District Level Committees to ensure that there are sufficient approved places in terms of Section 4(b) of the MTP Act, 1971 in each districts of the State of Odisha. Chief District Medical Officers involved undertake periodic instruction of such approved places following rule 6 of the MTP Rules, 2003 and take immediate measure to remove difficulties if any. State in its appropriate Departments will have the obligation to co-operate in such matters.

xiii. If a woman reports with a pregnancy resulting from an assault, she is to be given the report of undergoing an abortion and protocols for the Medical Termination of Pregnancy Act are to be followed. Further with preservation of products of conception (POC) be sent to proper custody as evidence and other required purpose under the direction of the Court of competent authority including DNA Test, if any.

xiv. There should also be strict following of User Handbook on Protection of Children from Sexual Offences Act, 2012.

18. This Court for the nature of the case involved herein and the assistance of both the learned counsel does not fail to record its appreciation of assistance to this Court by Sri Subash Chandra Puspalaka, learned counsel for the petitioner and also Sri Bidesh Ranjan Behera, learned Additional Standing Counsel for the State and also appreciate the commitment of Sri Jyoti Prakash Pattnaik, learned Additional Government Advocate in his short appearance during course of hearing that looking to the amount of suffering of the victim, State is prepared to be abided by any direction given by this Court.

19. The Writ Petition succeeds in part, but however no cost.

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2020 (III) ILR - CUT- 530

S.K. SAHOO, J & B.P. ROUTRAY, J.

JCRLA NO. 19 OF 2005

DUTIA PUTEL .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence under section 302 of IPC – Murder – Conviction based on circumstantial evidence – Principle of last seen theory – Accused was last seen with the deceased – Nobody was present except the accused – This fact also corroborated by the ocular witnesses – Extra judicial confession as well as discovery of weapon of offence suggest that, accused was the real culprit – No sufficient explanation by the accused with regard to how deceased sustained those injuries or died a homicidal death inside the house where both of them were living together – Section 106 of the Evidence Act interpreted – Held, section 106 does not shift the burden of proof in a criminal trial, which always upon the prosecution – It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge & which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation as additional link which complete the chain and there is no escape from the conclusion that it is the appellant and appellant alone, who has committed the crime.

"Therefore, from the evidence on record, we are of the view that the appellant was very much present in his house when the occurrence took place. The dead body of the deceased was found inside the house and she had sustained neck injury possible by knife which was her cause of death. The appellant's blood stained wearing apparels were also stained with human blood and the appellant made the extra judicial confession before the witnesses to have committed the murder of the deceased. The weapon of offence i.e. the knife was also recovered by the investigating officer from a cow shed as per seizure list Ext.8/2 at the instance of the appellant. All the circumstances, which have been established by the prosecution, according to our view, form a complete chain and there is no escape from the conclusion that it is the appellant and appellant alone, who has committed the crime." *(Para 10)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1984 S.C. 1622 : Sharad Birdhichand Sarda Vs State of Maharashtra.
2. (2007) 1 SCC (Criminal) 732 : Vikramjeet Singh Vs.State of Punjab.
3. A.I.R. 2007 S.C. 144 : State of Rajasthan Vs. Kasiram.

For Appellant : Miss A.K. Dei.

For Respondent : Mr. Dillip Kumar Mishra (Addl. Govt. Adv).

JUDGMENT Date of Hearing and Judgment: 29.02.2020

BY THE BENCH :

The appellant Dutia Putel has preferred this appeal as he has been found guilty under section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life by the learned Additional Sessions Judge, Titilagarh in Sessions Case No.69(B)/25 of 2003 vide judgment and order dated 22.12.2004 for committing uxoricide on 25.02.2003 at about 02.30 p.m. in village Malpada.

2. The prosecution case, as per the first information report lodged by Dhaneswar Chhatria (P.W.4) before the officer in charge of Bangomunda police station on 25.02.2003 is that on that day while Yajna was going on in his village Malpada, at about 2.30 p.m. hearing the hullah of Budhabari Putel (hereinafter 'the deceased'), wife of the appellant from the side of her house, the informant along with others rushed to the house of the appellant and found the deceased lying with bleeding injuries and the appellant was standing at the door. The appellant being confronted by the villagers confessed that he had committed murder of the deceased and thereafter he tried to run away from the spot holding a knife. It is the further prosecution

case as per the first information report that the appellant was chased by the villagers and was caught hold off by them. At that point of time, the blood stained knife was not with him and on being confronted, the appellant told that he had thrown the knife on the way. Thereafter the appellant was brought to the village and it was found that the deceased was lying dead with cut injuries on her neck.

On the basis of such first information report, Bangomunda P.S. Case No.12 of 2003 under section 302 of the Indian Penal Code was registered against the appellant.

3. P.W.15 Kirati Chandra Mishra, S.I. of Police and officer in charge of Bangomunda Police Station, on receipt of the written report, registered the case and took up investigation. During investigation, he visited the spot, examined the witnesses, conducted inquest over the dead body and prepared the inquest report (Ext.1/5), sent the dead body for post mortem examination to Community Health Centre, Kantabanjhi, seized the blood stained earth and sample earth from the spot and also effected some seizures. The appellant was taken into custody and while in police custody, he confessed his guilt and also disclosed to point out the place where he had thrown the knife and accordingly, he led P.W.15 and others to a cow-shed and gave recovery of the blood stained knife, which was seized under the seizure list (Ext.8/2). The appellant was then sent to the Medical Officer of Bangomunda C.H.C. where his nail clippings were collected and the requisition was also made for collection of his blood sample. The wearing apparels of the appellant were seized and the dead body was sent for post mortem examination and the seized knife was also sent to the Medical Officer, C.H.C., Kantabanji for examination and to give opinion regarding possibility of injuries on the deceased by such weapon. The incriminating seized articles were sent for chemical analysis and the chemical analysis report (Ext.18) was received and on completion of investigation, charge sheet was submitted against the appellant under section 302 of the Indian Penal Code.

4. After commitment of the case to the Court of Session, charge was framed against the appellant under section 302 of the Indian Penal Code on 15.12.2003 by the learned trial Court to which the appellant pleaded not guilty and claimed for trial and accordingly, the sessions trial procedure was resorted to establish his guilt.

5. During course of trial, the prosecution examined as many as fifteen witnesses.

P.W.1 Jamu Putel is the brother of the deceased. He stated about the previous dispute between the appellant and the deceased. He stated to have reached at the spot getting news of the murder of the deceased and found the dead body lying with bleeding injuries. He is a witness to the inquest report.

P.W.2 Harishankar Jal was the Havildar attached to Bangomunda police station. He is a witness to the seizure of nail clippings and hand wash of the appellant under seizure list Ext.2 and blood of the appellant under seizure list Ext.3.

P.W.3 Pramod Kumar Patra was the constable attached to Bangomunda police station who is a witness to the seizure of wearing apparels of the deceased under seizure list Ext.4.

P.W.4 Dhaneswar Chhatria stated about the presence of the appellant near his house with a knife and his wearing apparels being stained with blood. He further stated about the extra judicial confession made by the deceased at the spot.

P.W.5 Gopinath Putel stated about the presence of the appellant on the village road with a knife in front of his house and he was having blood stains on his wearing apparels and body. He further stated about the extra judicial confession made by the deceased at the spot.

P.W.6 Trilochan Bhoi is a witness to the seizure of wearing apparels of the deceased and also seizure of nail clippings and hand wash of the appellant.

P.W.7 Budu Putel is a witness who not only stated about the presence of the appellant inside his house with a knife and having blood stains on his wearing apparels and body but also stated about the extra judicial confession made by the appellant. He is a witness to the inquest report and also seizure of knife at the instance of the appellant.

P.W.8 Nareswar Sagria is a witness who stated about his presence at Prahari Mandap at about 3.00 p.m. and hearing hullah from the side of the appellant's house, he along with others came there and saw the appellant

running away holding a knife. The appellant was chased and caught hold off by the villagers and brought to the village where he confessed to have committed murder of his wife and requested the villagers not to assault him.

P.W.9 Akhila Putel did not support the prosecution case for which he was declared hostile by the prosecution.

P.W.10 Dr. Gourisankar Panda was attached to C.H.C., Kantabanji who conducted post mortem examination over the dead body of the deceased and noticed injuries as per his report Ext.9. He also gave opinion about the query made by the investigating officer relating to possibility of injuries sustained by the deceased with the knife as per his report Ext.10. He also collected sample of blood from the appellant as per his report Ext.11.

P.W.11 Chamaru Barge was the constable attached to Bangomunda police station who escorted the dead body to Kantabanji C.H.C. for post mortem examination and after the post mortem examination, he brought the wearing apparels of the deceased to the police station and produced for seizure by the I.O.

P.W.12 Dharanidhar Putel was the A.S.I. of Police attached to Bangomunda police station who stated about the seizure of nail clippings of the appellant and the seizure of hand wash of the appellant in sealed condition as per seizure list Ext.2 and also the seizure of blood sample of the appellant and command certificate no.17 in his presence in sealed condition as per seizure list Ext.3.

P.W.13 Mayadhar Bari was the Home guard of Bangomunda police station and he is a witness to the seizure as per seizure list Ext.3.

P.W.14 Dr. Asit Kumar Mohanty was attached to C.H.C., Bangomunda as Medical Officer who collected the nail clippings and hand wash of the appellant on police requisition on 25.02.2003 and kept them in two separate vials and sealed them in presence of the witnesses and sent them to the O.I.C., Bangomunda police station as per his report marked as Ext.14.

P.W.15 Kirati Chandra Mishra was the O.I.C. of Bangomunda police station who is the investigating officer of the case.

The prosecution also exhibited eighteen documents. Ext.1 is the inquest report, Ext.2 is the seizure list of nail clippings and hand wash of the

appellant, Ext.3 is the seizure list of blood bottle, Ext.4 is the seizure list of command certificate, Ext.5 is the first information report, Ext.6 is the seizure list of seized pant and ganjee, Ext.7 is the seizure list of seized blood stained earth, sample earth and shawl, Ext.8/2 is the seizure list of knife, Ext.9 is the post mortem examination report, Ext.10 is the report of P.W.10 on examination of M.O.VIII, Ext.11 is the blood collection report of the appellant by P.W.10, Exts.12 and 13 are the command certificates, Ext.14 is the report of collection of nail clippings and hand wash of appellant by P.W.14, Ext.15 is the spot map, Ext.16 is the dead body challan, Ext.17 is the copy of the forwarding letter of material objects to S.F.S.L. and Ext.18 is the chemical analysis report.

The prosecution also proved ten material objects. M.O.I is the full pant, M.O.II is the ganjee, M.O.III is the shawl, M.O.IV is the saree, M.O.V is the saya, M.O.VI is the blouse, M.O.VII is the broken bangles, M.O.VIII is the knife, M.O.IX is the nylon core seat of cot and M.O.X is the loin cloth of deceased.

6. The defence plea of the appellant was that the deceased was having illicit affair with one Suresh Sagaria who was visiting the deceased in the absence of the appellant in his house. It is further pleaded that on account of yajna in the village, he had brought the deceased to the village who was staying at her father's place. On the date of occurrence at about 3.00 p.m. while he was taking feast, he heard hullah in the village and came to his house and found the deceased lying dead with bleeding injuries.

Neither any witness has been examined in support of defence plea nor has any document been exhibited by the defence.

7. The learned trial Court even though held that there are no eye witnesses to the occurrence, but basing on the circumstantial evidence, particularly the extra judicial confession of the appellant before P.Ws.4, 5, 7 and 8 and also the evidence relating to the leading to discovery of the knife at the instance of the appellant found him guilty under section 302 of the Indian Penal Code.

8. Miss A.K. Dei, learned counsel appearing for the appellant contended that since there is no direct evidence in the case and the circumstantial evidence appearing on the record is not clinching, it cannot be said that the prosecution has successfully established the charge under section 302 of the

Indian Penal Code against the appellant. She placed reliance on a decision of the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda -Vrs.-. State of Maharashtra reported in A.I.R. 1984 S.C. 1622**.

Mr. D.K. Mishra, learned Additional Government Advocate, on the other hand submitted that the circumstantial evidence is clinching and it forms a complete chain and there is no escape from the conclusion that it is the appellant, who has committed the murder of the deceased. He further submitted that presence of the appellant inside the house at the relevant point of time with knife, seizure of blood stained wearing apparels from the possession of the appellant, extra judicial confession made by the appellant before the villagers and leading to discovery of the weapon of offence, i.e. knife so also the chemical examination report finding forms the complete chain and therefore, there is no illegality or infirmity in the impugned judgment.

9. Adverting to the contentions raised by the learned counsel for the respective parties, there is no dispute that there is no direct evidence as to who committed the murder of the deceased and how and the prosecution case hinges on circumstantial evidence. It is well established rule of criminal justice that fouler the crime, the higher should be the degree of proof. A moral opinion howsoever strong or genuine cannot be a substitute for legal proof. When a case is based on circumstantial evidence, a very careful, cautious and meticulous scrutinisation of the evidence is necessary and it is the duty of the Court to see that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature and all the links in the chain of events must be established clearly beyond reasonable doubt and established circumstances should be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. Whether the chain of events is complete or not would depend on the facts of each case emanating from the evidence. The Court should not allow suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed away by emotional consideration.

In the case in hand, the conviction of the appellant is based mainly on the acceptability or otherwise of the evidence of the four witnesses to the extra judicial confession, presence of the appellant with knife at the spot as well as recovery of the weapon of offence at the instance of the appellant.

It is a settled principle of criminal jurisprudence that extra judicial confession is a weak piece of evidence and requires appreciation with a great deal of care and caution. Extra judicial confession must be established to be true and made voluntarily and that to in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra judicial confession can be accepted, if it passes the test of credibility and inspires confidence. The Court should find out whether there are other cogent circumstances on record to support it. If an extra judicial confession is surrounded by suspicious circumstances or comes from the mouth of the witnesses who appear to be biased or inimical to the accused or in respect of whom it is brought out which may tend to indicate that they may have a motive of attributing an untruthful statement to the accused, needless to say that its credibility becomes doubtful and consequently it loses its importance.

P.W.4 Dhaneswar Chhatria stated that on the date of occurrence, he heard hullah from the house of the appellant and went there and found the appellant holding a knife. His wearing apparels were stained with blood and he was standing near the door of his house. The appellant told that he had committed murder of his wife. This witness is the informant in the case and he has further stated that the police conducted inquest over the dead body in his presence and he has put his signature on the inquest report. He has also stated about the seizure of the wearing apparels of the appellant, which were stained with blood as per seizure list vide Ext.6. In the cross-examination, P.W.4 has however stated that the appellant was present on the village danda, which was at a distance of fifty cubits away from his house and out of fear, he himself left the place. According to P.W.4, he was the ward member of the village at the relevant point of time.

The learned counsel for the appellant contended that since in the chief examination, P.W.4 has stated that he saw the appellant at his door step but in the cross-examination, he has stated to have noticed him in the village danda at a distance of fifty cubits and has not stated about anything relating to the extra judicial confession, the evidence should not be accepted.

The learned counsel for the State, on the other hand, submitted that no questions have been put relating to the extra judicial confession in the cross-examination and therefore, it cannot be said that whatever has been stated in that respect in the chief examination has been demolished in the cross-examination.

After analysing the evidence of P.W.4 carefully, we are of the view that the presence of the appellant either near the door or at a few distances away from his house as stated by P.W.4 by itself cannot be a ground to discard the entire evidence. There is no animosity between P.W.4 and the appellant to implicate him falsely rather his evidence inspires confidence and has remained unchallenged.

10. Coming to the evidence of P.W.5 Gopinath Putel, he has stated that he noticed the appellant standing with a knife on the village danda in front of his house and there was blood stain on his hands, pant, ganjee and other parts of the body and there he disclosed "Mo Shtri ku mu mari deichi". This witness has further stated about seizure of the wearing apparels of the appellant under seizure list Ext.6/2 as well as seizure of blood stained earth and sample earth. In the cross-examination, however he has stated that he found the appellant near the Yajna Mandap where he was standing with knife and being surrounded by about two hundred people and that he had not gone to the house of the appellant and he cannot say what happened then.

Relying on the statement made by P.W.5 in the cross-examination, the learned counsel for the appellant contended that this witness cannot be said to be a witness to the extra judicial confession part.

The learned counsel for the State on the other hand submitted that even if the witness has been declared hostile by the Addl. Special Public Prosecutor, but his evidence relating to the extra judicial confession has remained unchallenged.

However, we find that since P.W.5 has stated that he had seen the appellant near the Yajna Mandap where he was surrounded by about two hundred people and he himself had not gone to the house of the appellant and also cannot say what happened thereafter, the version of this witness that near the house of the appellant, an extra judicial confession was made by the appellant cannot be accepted.

11. Coming to the evidence of P.W.7 as well as P.W.8, we find that both of them not only stated about the extra judicial confession of the appellant, but also about holding of the inquest over the dead body by the investigating officer in their presence. Nothing has been elicited in the cross-examination to discard their evidence.

Both the witnesses have stated as to how they found the appellant came out of his house and was holding a knife, which was stained with blood and his hands were also stained with blood and there was blood stain on his face, pant and ganjee and the appellant also disclosed to have committed murder of the deceased. Therefore, from the evidence of at least P.W.7 and P.W.8, it appears that at the relevant time, the appellant was present inside the house, which was closed and there was nobody else and when he came out of his house, he was having blood stain on the different parts of the body including his wearing apparels and he was holding a knife which was also stained with blood. The appellant disclosed before the villagers to have committed the murder of the deceased and ran away from the spot. The dead body of the deceased was lying inside the house with bleeding injuries on her neck. Thus it is established that the dead body of the deceased was found inside the house of the appellant and the appellant was present inside the house and he was standing at the door holding the knife with stains of blood on his body and wearing apparels. The burden of proof lies on the appellant in view of section 106 of the Evidence Act to explain as to how the deceased sustained those injuries and how she died.

Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving such fact is upon him. This section is an exception to section 101 of the Evidence Act which lays down the general rule that in a criminal case, the burden of proof is on the prosecution. Section 106 certainly not intended to relieve the prosecution of its burden of proof. It is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are especially within the knowledge of the accused & which he could prove without difficulty or inconvenience. The word 'especially' stresses the facts that are pre-eminently or exceptionally within his knowledge (**Ref:- A.I.R. 1956 S.C. 404, Shambhu Nath -Vrs.- State of Ajmer**).

In the case of **Vikramjeet Singh -Vrs.- State of Punjab reported in (2007) 1 Supreme Court Cases (Criminal) 732**, it is held as follows:

> "14. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule i.e., where burden of proof may be imposed upon the accused by reason of a statute.

> 15. It may be that in a situation of this nature where the Court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt."

In the case of **State of Rajasthan -Vrs.- Kasiram reported in A.I.R. 2007 S.C. 144**, it is held as follows:

> "23. The provisions of section 106 of the Evidence Act itself are unambiguous & categoric in laying down that when any fact is especially within the knowledge of a person, the burden of the proving that fact is upon him. Thus if a person is last seen with the deceased, he must offer an explanation as to how he parted company. He must furnish an explanation which appears to the Court to be probable & satisfactory. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden case upon his by section 106 of the Evidence Act. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provide an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge & which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as additional link which completes the chain."

The appellant has failed to offer any explanation as to how the deceased died a homicidal death inside the house where both of them were living together. Nothing has been stated in that respect in the accused statement, rather a plea has been taken that the deceased was having illicit relationship with one Suresh Sagadia and that the appellant was absent at the relevant point of time and came to his house on hearing hullah and found that the deceased was lying dead. When all the relevant witnesses, particularly, the witnesses to the extra judicial confession have stated about the presence of the appellant at his house at the relevant point of time, the plea taken by the appellant that he was absent at the house cannot be accepted. The explanation offered by the appellant appears to be neither probable nor satisfactory.

The investigating officer has categorically stated that after the appellant was arrested from the occurrence village, while he was in police custody, he not only confessed his guilt, but also stated that he can point out

the weapon of offence and accordingly he led the police party and also the villagers to a cow shed of one Gajin Putel from where the blood stained knife was recovered under seizure list Ext.8/2. This knife was sent to the Medical Officer for examination and P.W.10, who has conducted the post mortem examination, not only noticed injury on the neck of the deceased and opined that the cause of death was on account of hemorrhage due to cut injury in the neck involving left carotid vessels and shock, but he has also stated on a query made by the investigating officer that the injury sustained by the deceased is possible with the weapon (M.O.8).

The wearing apparels of the appellant were seized and those were also sent for chemical examination and the chemical examination report indicates that human blood of group 'O' was noticed on the same. The seized knife was also containing human blood even though no group was detected.

Therefore, from the evidence on record, we are of the view that the appellant was very much present in his house when the occurrence took place. The dead body of the deceased was found inside the house and she had sustained neck injury possible by knife which was her cause of death. The appellant's blood stained wearing apparels were also stained with human blood and the appellant made the extra judicial confession before the witnesses to have committed the murder of the deceased. The weapon of offence i.e. the knife was also recovered by the investigating officer from a cow shed as per seizure list Ext.8/2 at the instance of the appellant. All the circumstances, which have been established by the prosecution, according to our view, form a complete chain and there is no escape from the conclusion that it is the appellant and appellant alone, who has committed the crime.

Therefore, we find no infirmity or illegality in the impugned judgment. Accordingly, we uphold the conviction of the appellant under section 302 of the Indian Penal Code and sentence of imprisonment of life as awarded by the learned trial Court. Accordingly, the JCRLA stands dismissed.

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2020 (III) ILR - CUT-542

K.R.MOHAPATRA, J.

W.P.(C) NO. 24789 OF 2020
I.A. NO.11476 OF 2020

SUBRAT BHOI & ANR. .....Petitioners

.V.

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

LEGAL MAXIM – Principles of the doctrine of 'sub silentio' – Meaning thereof and the scope of applicability – Writ petition (PIL) filed and order passed on a particular issue by some persons – Subsequent writ petition filed by other persons on the same issue pleaded that a particular point has not been considered in the earlier writ petition and as such the order passed therein does not have any binding effect on the petitioners in view of the doctrine of sub silentio – Principles thereof – Discussed.

"Mr. Rath, learned counsel for the petitioners submitted that the office order dated 31.08.2020 (Annexure-2) issued by the Special Relief Commissioner prohibiting 'other large congregation' as per Clause-2(iv) of the said office order was not taken into consideration by the Division Bench. As such, the findings given by the Division Bench is not binding on the petitioners in view of principles of sub silentio. Hon'ble Supreme Court in Ajit Kumar Rath (supra) and Synthetics and Chemicals Ltd. (supra) on the principles of binding effect of an order, held as follows:- In Ajit Kumar Rath (supra), it is held as follows:- "32. Learned counsel for the respondents has referred to the judgment of the Orissa High Court passed in identical situation and relating to the same service on 12th March, 1985, by which the seniority was denied to certain promoted officers over those appointed by direct recruitment, on the ground that ad hoc promotion was contrary to rules. It is contended that a Special Leave Petition against that judgment was dismissed by this Court on 28.3.1998. A copy of the order by which the Special Leave Petition was dismissed has been placed on record which indicates that no reasons were given for dismissing the petition. This order, therefore, would not constitute a binding precedent. Moreover, the judgment of the Orissa High Court was delivered on 12th March, 1985, that is to say, many years earlier than the decision rendered by the Constitution Bench in the 1990 case of Direct Recruit Class-II Engg. Officers Association (supra). On the basis of the Constitution Bench decision as also the other decisions of this Court, the efficacy of the judgment passed by the Orissa High Court has altogether vanished and there was no occasion for the Tribunal to have relied upon that judgment in preference to the Constitution Bench decision while writing the Review judgment." In Synthetics and Chemicals Ltd. (supra), Hon'ble Supreme Court on the principles of sub-silentio held as

follows:- "41. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gumam Kaur, [1989] 1 SCC 101. The Bench held that, 'prece- dents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was ob- served, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law." The office order dated 31.08.2020 under Annexure-2 refers to 'other large congregation' which does not include a 'public hearing'. Further, it is made clear in the said order under Annexure-2 that the subject to other provisions in the said order, the activities not specifically prohibited/regulated /restricted in the said order are allowed subject to adherence to safety and health protocols and SOPs/guidelines issued by the appropriate authorities. On the other hand, office memorandum dated 14.09.2020 (Annexure-C to the IA) has been issued by the concerned Ministry, specifically on the subject of conducting 'public hearing' during pandemic of COVID-19. The said office memorandum under Annexure-C also restricts the congregation with a ceiling of one hundred persons. To meet with a situation where the number of participants are more than such ceiling, provision has been made under Clause-3(ii) of the said office memorandum, which prescribes that if the number of participants are more than such (100 persons) ceiling, more than one public hearing shall be conducted by staggering the time and/or dates. Thus, the restrictions imposed by the Special Relief Commissioner in his office order dated 31.08.2020 under Annexure-2 cannot be said to include a 'public hearing', if conducted as per the guidelines given under office

memorandum under Annexure-C to the IA. In that view of the matter, the principles of sub silentio is not applicable to the case in hand.

(Paras 7.1.to 7.3)

Case Laws Relied on and Referred to :-

1. (1999) 9 SCC 596 : Ajit Kumar Rath Vs. State of Orissa & Ors.
2. (1991) 4 SCC 139 : State of U.P. and Anr. Vs. Synthetics and Chemicals Ltd. and Anr.
3. (1977) 1 SCC 1 : Jai Singh Vs. Union of India & Ors.
4. (2013) 6 SCC 47 : Orissa Mining Corporation Limited Vs. Ministry of Environment and Forests & Ors.
5. (1977) 1 SCC 1 : Jai Singh Vs. Union of India & Ors.

For Petitioners : M/s. Partha Sarathi Nayak, Prafulla Kumar Rath, S.S.Mohapatra, S.Hota & R.Behera.

For Opp. Parties: Mr.Pravat Kumar Muduli, Addl. Govt Adv.
Mr.Surya Prasad Mishra, Sr. Adv.
M/s.Mr. Prasanta Kumar Nayak.

JUDGMENT Date of Judgment on 09.10.2020

K.R.MOHAPATRA, J.

As per the direction made by this Court on 30.09.2020, this matter is taken up today for further orders in IA No.11476 of 2020 filed by opposite party No.4-M/s Vedanta Ltd., Jharsuguda (for short, 'the Company') for recalling of order dated 29.09.2020 passed by this Court in IA No.11105 of 2020.

2. This writ petition has been filed assailing the notice/advertisement dated 27.08.2000 under Annexure-1 published by opposite party No.3-Member Secretary, State Pollution Control Board, Odisha, Bhubaneswar (for short, 'SPCB') for a public hearing for the purpose of expansion of Aluminium Smelter Capacity from 16 LTPA to 18 LTPA, Captive Power Plant (CPP) capacity of 1215 megawatt by adding 2 LTPA Smelter Plant at village Bhurkamunda of opposite party No.4-Company in the district of Jharsuguda, to obtain environmental clearance from the Ministry of Environment, Forest and Climate Change, Government of India, New Delhi (for short, 'MoEF'). The said notice was issued in terms of the Government of India notification No.SO.1533(E) dated 14.09.2006 of MoEF. It specified that the persons who desires to

give view and objections etc. relevant to the project may do so in writing within thirty days from the date of publication of the said notice addressing the same to the Member Secretary, State Pollution Control Board (OP No.3) through registered post. Besides that, persons interested to submit their views relevant to the proposed project in writing or orally may also do so during the publichearing to be conducted on 30.09.2020 at 11.00 AM at Government UP School Kurebaga, Dalki in the district of Jharsuguda. It is further clarified in the said notice that the public hearing should be conducted strictly observing the guidelines of COVID-19 on social distancing and also COVID-19 SOP issued by the Government. The persons interested toparticipate in the said public hearing were requested to go through the Environment Impact Assessment (EIA)/Environment Management Plan (EMP) of the said Project available at the offices mentioned in the said notice under Annexure-1.

2.1 The matter was listed on 29.09.2020 foradmission. Taking into consideration the submissions of learned counsel for the petitioners to the effect that notice/advertisement dated 27.08.2020 under Annexure-1 is in violation of order No.5039/R&D(DM) dated 31.08.2020 (Annexure-2) issued by the Special Relief Commissioner, Government of Odisha, Bhubaneswar preventing 'other large congregation' as per Clause-2(iv) of the said order, this Court issued notice in the matter and passed the following interim order in IA No.11105 of 2020.

> *"Heard.*
>
> *As an interim measure, it is directed that the public hearing pursuant to advertisement dated 27.08.2020 issued by the State Pollution Control Board, Odisha, scheduled to be held on 30.09.2020 at 11.00 A.M. at Government U.P. School, Dalki, Kurebaga in the district of Jharsuguda shall not be held till next date.*
>
> *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."*

Thereafter, IA No.11476 of 2020 has been filed by opposite party No.4-Company to recall the said interim order dated 29.09.2020, which was taken up on 30.09.2020 and following direction was issued.

"xxx xxx xxx

14. In partial modification to the order dated 29.09.2020 passed in IA No.11105 of 2020, it is directed that the public hearing pursuant to advertisement dated 27.08.2020 under Annexure-1 issued by the State Pollution Control Board, Odisha may continue, but no final decision shall be taken till the next date. Petitioners, if so advised may participate in the public hearing.

14.1 On consent of learned counsel for the petitioners and opposite party No.4, put up this matter tomorrow (01.10.2020)."

3. In course of argument, it appeared that the consideration of aforesaid two Interlocutory Applications would require hearing of the matter on merit. As such, on consent of learned counsel for the petitioner, opposite party No.4 as well as Additional Government Advocate for opposite party Nos.1 and 2, the matter is taken up for admission and final hearing.

4. Mr. Prafulla Kumar Rath, learned counsel appearing in the matter on consent of Mr.Partha Sarathi Nayak, learned counsel for the petitioners, submitted that the petitioners are villagers of Brundamal, Badamal which is one of the villages likely to be affected in the event of proposed expansion of opposite party No.4-Company is granted. In that regard, the petitioners along with other-co-villagers have made a representation on 21.09.2020 (Annexure-5) to opposite party No.3-Member Secretary, SPCB to postpone the public hearing till the pandemic of COVID-19 normalizes. The petitioners also made representation dated 21.09.2020 to opposite party No.2-Collector, Jharsuguda under Annexure-6 in that regard, but to no effect. Hence, this writ petition is filed to defer /postpone the date of public hearing pursuant to notice under Annexure-1.

4.1 Mr.Rath, learned counsel appearing on behalf of the petitioners further elaborating his submission, placed reliance on Clause-2 (iv) of Order No.5039/R & D(DM) dated 31.08.2020 (Annexure-2). For ready reference, Clause-2 of notification dated 31.08.2020 reads as follows:-

"2. Regulation of activities in areas outside the Containment Zones

The following establishments/activities will continue to remain closed till 30th September, 2020 throughout the State:

i. Religious places/places of worship forpublic;

ii. International air travel of passengers,except as permitted by MHA;

iii. Cinema halls, swimming pools, entertainment complexes, theaters, auditoriums, assembly halls and similar places;

However, open air theaters and similar places will be permitted to open with effect from 21st September, 2020.

iv. Social, political, sports, entertainment, academic, cultural, religious functions and other large congregations;

v. Schools, colleges, universities, other educational/training/coaching institutions, anganwadis, etc. will remain closed for the purpose of teaching till end of Puja vacations in the month of October 2020.

However, the followings will be permitted:

a. Conduct of examinations, evaluation and other administrative activities;

b. Online/distance learning shall continue to be permitted and shall be encouraged;

c. School & Mass Education Department/Higher Education Department may permit upto 50% of teaching and non-teaching staff to be called to the schools at a time for online teaching/tele-counselling and related work, in areas outside the Containment Zones only with effect from 21st September, 2020 as per Standard Operating Procedure (SOA) to be issued by the Ministry of Health & Family Welfare (MoHFW);

d. Skill or Entrepreneurship training will be permitted in National Skill Training Institutes, Industrial Training Institutes (it is), Short term training centres registered with National Skill Development Corporation or State Skill Development Missions or other Ministries of Government of India or State Governments;

National Institute for Entrepreneurship and Small Business Development (NIESBUD), Indian Institute of Entrepreneurship (IIE) and their training providers will also be permitted.

These will be permitted with effect from 21st September, 2020 for which SOP will be issued by MoHFW. Skill Development & Technical Education Department will issue necessary order/guideline in this regard.

e. Higher Education Institutions only for research scholars (Ph.D.) and postgraduate students of technical and professional programmes requiring laboratory/experimental works. These will be permitted by the Department of Higher Education (DHE) in consultation with MHA, based on the assessment of the situation, and keeping in view incidence of COVID-19 in the States/UTs.

Subject to other provisions of this order, activities that are not specifically prohibited/regulated/restricted above are allowed subject to adherence to safety and health protocols and SOPs/guidelines issued by appropriate authorities."

Since the place where public hearing is scheduled to be held is not within the containment zone regulation of activities in that area should be guided by Clause-2 of the order under Annexure-2. He accordingly submitted that the establishment/activities more fully described in Sub-clause (i) to (v) of the said Clause-2 would continue to remain closed till 30th September, 2020 throughout the State. Sub-clause (iv) ofClause-2 specifically provides that social, political, sports, entertainment, academic, cultural, religious functions and other large congregations has been directed to remain suspended till 30th September, 2020 throughout the State. As villagers of five revenue villages are likely to congregate in the public hearing, there will be large congregation, which is strictly prohibited under Clause-2(iv) of Order under Annexure-2.

4.2 He further submitted that public hearing is not an empty formality. It has to be conducted in strict adherence to the guidelines issued from time to time to achieve the purpose for which it is so conducted. Although public hearing was held at the scheduled place on 30.09.2020 pursuant to the direction of this Court dated 30.09.2020 in IA No.11476 of 2020 only 90 persons of the five revenue villages were present. The same cannot at all considered to be an effective public hearing for the purpose of which it is being conducted, more particularly when the population of the five revenue villages likely to participate in the public hearing is more than ten thousand. He further submitted that the petitioners were not made parties in W.P.(C)(PIL) No.24669 of 2020, which was disposed of on 28.09.2020. The order issued by the Special Relief Commissioner, Government of Odisha, Bhubaneswaron 31.08.2020 (Annexure-2) was not discussed in the order dated 28.09.2020 while disposing of W.P.(C) (PIL) No.24669 of 2020. The said order was also not within the knowledge of the petitioners. As such, the order passed by the Hon'ble Division Bench in W.P.(C) (PIL) No.24669 of 2020 does not have any binding effect on the petitioners in view of the doctrine of *sub silentio*. In support of his submission, Mr.Rath relied upon

the case law decided by the Hon'ble Supreme Court in the case of ***Ajit Kumar Rath Vs. State of Orissa and others***, reported in (1999) 9 SCC 596 and ***State of U.P. and another Vs. Synthetics and Chemicals Ltd. and another*****,** reported in (1991) 4 SCC 139. Participation of only 90 villagers out of more than ten thousand population of five revenue villages itself shows that there was no proper representation in the Grama Sabha/public hearing. Although, the petitioners were given opportunity to participate in the public hearing, due to the interim order passed on the previous day, i.e., 29.09.2020 they were indisposed and could not participate in the said public meeting due to lack of unpreparedness. In continuation to his submission, Mr.Rath contended that Mr.Mishra, learned Senior Advocate, during the course of hearing of IA No.11476 of 2020, submitted that if necessary more than one public hearing can be held, which is recorded by this Court in order dated 30.09.2020 in its order at the concluding lines of para-9.

4.3 He further submitted that the opposite party No.4 has also filed W.A. No.574 of 2020 assailing the order dated 29.09.2020 passed in IA No.11105 of 2020. As such, two parallel proceedings against the self-same order is not maintainable. In support of his case he relied upon the case law in the case of ***Jai Singh Vs. Union of India and others*****, reporte**d in (1977) 1 SCC 1.

4.4 He, therefore, submitted that there is no impediment for this Court to grant liberty to the petitioner to submit their written objection and consideration of the same by another public hearing. The petitioners undertake to submit their objection(s) within a stipulated date, if they are given such liberty.

5. Mr.S.P.Mishra, learned Senior Advocate appearing for opposite party No.4-Company, on the other hand, reiterated his submissions made on 30.09.2020. It is his submission that self-same advertisement/notice was under challenge in W.P.(C) (PIL) No.24669 of 2020 filed by one NGO, namely, *Anchalik Parvesh Surakhya Sangh, Jharsuguda*. The Hon'ble Division Bench of this Court, considering all relevant aspects as well as the office memorandum dated 14.09.2020(Annexure-C to the IA) issued by the MoEF and Climate Change Assessment Division, Government of India, held as under:-

> *"5. We have heard learned counsel for the parties, gone through the impugned Notice under Annexure-1 and given our thoughtful consideration on the matter.*

6. In the impugned Notice dated 27.08.2020 (Annexure1) it has been clearly mentioned that persons, who desire to submit their views, comments, objections etc. relevant to the project, may do so in writing within 30 days from the date of publication of the notice addressing the same to the Member Secretary, State Pollution Control Board, Odisha through Registered Post. Besides this, persons interested to submit their views relevant to the proposed project in writing or orally, may also do so during the public hearing to be conducted on 30.09.2020 at 11.00 A.M. at Govt. Upper Primary School, Kurebaga. Public hearing shall be conducted strictly observing guidelines contained in Covid-19 on Social Distancing and also COVID-19 SOP issued by the Government. We do not find any merit in the argument that the State Pollution Control Board has deliberately fixed the public hearing during pandemic of COVID-19. From the above Notice, it appears that the authority has given liberty to the public to file their objections/suggestions/views not only on the date of public hearing fixed but also in writing to the opposite party No.5, within 30 days from the date of Notice. The authority has thus not confined the submission of objection to the public hearing only on the date and time fixed, but it has given liberty to the general public to file their objections/suggestion in writing any time during the period of thirty days. Therefore, the stand taken by the petitioner cannot be accepted that the date fixed for public hearing will frustrate the purpose, as the local people may not participate in the meeting.

7. The further stand of the petitioner that due to pandemic situation offices are functioning with half of employees and therefore, it may not be possible on the part of the people to collect the documents from the offices. The said assertion also cannot be accepted for the reason that in the impugned notice it has also clearly mentioned that persons desirous of participating in the public hearing may go through the Environmental Impact Assessment (EIA)Environmental Management Plan (EMP) of the said project which will be available at the offices as mentioned in the notice and the same can also be downloaded from the given website free cost.

8. Again, the impugned notice has been issued on 27.08.2020 inviting objections within 30 days and fixing 30.09.2020 as the date of open public hearing, but the petitioner has filed this writ petition much belatedly on 24.09.2020 and further before completion of 30 days period or holding of such public hearing with an apprehension that public may not participate in the meeting, which cannot be wellfounded. It is open for the petitioner as well as all the interested public at large to give their objections/suggestions/views not only at the time of public hearing but at any time within 30 days from the date of said notice in writing.

9. In view of the above, we do not see any reason to accept the stands taken by the petitioner and to interfere in the matter. The writ petition lacks merit and is accordingly dismissed."

It is his submission that Sub-clause (ii) and (iii) of office memorandum dated 14.09.2020 (Annexure-C to the IA) are relevant for the instant purpose, which reads as follows:-

> *"(ii) If the number of participants is more than such ceiling, more than one Public Hearing shall be conducted by staggering the time and/or dates;*
>
> *(iii) Use of virtual platform/online facilities may also be employed in addition to the physical Public Hearing process;"*

He therefore submitted that public hearing has been allowed to be held with a ceiling of one hundred persons in the saidpublic hearing following the guidelines and protocol of COVID-19. If the number of participants would be more than such ceiling, more than one public hearing could be conducted by staggering the time and/or dates. But the participants in the public hearing in question, as submitted by learned counsel for the petitioners, was only 90. This Court has also given the liberty to the petitioners to participate in the said public hearing, if so advised. But for the reasons best known to the petitioners they neither filed their written statement/objection within thirty days of the said advertisement/notice under Annexure-1 nor they have participated in the public hearing, although liberty was granted by this Court. It clearly shows that the petitioners want to frustrate the public hearing and to drag the matter. The petitioners in the instant writ petition can only agitate their individual grievances and not the grievance of the public at large, as it is not a Public Interest Litigation. Moreover, Public Interest Litigation assailing the self-same advertisement/notice has already been dismissed by this Hon'ble Court. Non-consideration of the office order issued by the Special Relief Commissioner, Government of Odisha restricting 'other large congregation', as stipulated in Clause-2(iv) of the said order is not applicable to public hearing inview of the office memorandum issued by the Government of India in the Ministry of Environment, Forest and Climate Change Impact Assessment Division, New Delhi, as the same was issued by the concerned Department specifically dealing with the subject 'public hearing'. Since the petitioners have been given ample opportunity to participate in the public hearing in question no further opportunity as sought for should be given. In that view of the matter, he prayed for dismissal of the writ petition.

6. Mr.Muduli, learned AGA heavily relied upon the order passed in W.P.(C)(PIL) No.24669 of 2020 dismissed on 28.09.2020. He submitted that

ample opportunity was given to the petitioners and the averments made in the instant writ petition clearly establishes that the petitioners had the knowledge of the notice/advertisement issued under Annexure-1, but for the reasons best known to them, they neither filed any written objection within thirty days, as stipulated in the said notice under Annexure-1 nor participated in the public hearing in spite of liberty given by this Court in order dated 30.09.2020. He further submitted that the date of public hearing should neither be changed nor extended as sought for by the petitioners, at the subsequent stages of granting environmental clearance, if any, would bedelayed. Although the impugned notice/advertisement was issued on 27.08.2020, they approached this Court belatedly only on 25.09.2020. The Hon'ble Division Bench has also taken note of approaching the Court belatedly by the petitioner in W.P.(C)(PIL) No.24669 of 2020 and deprecated the same. In that view of the matter, the instant writ petition also merits no consideration and the same is liable to be dismissed.

7. Upon hearing learned counsel for the parties and on perusal of the order passed in W.P.(C)(PIL) No.24669 of 2020, it appears that the self-same notice/advertisement issued by opposite party No.3-State Pollution Control Board, Odisha, Bhubaneswar for public hearing has been challenged in both the writ petitions, i.e., W.P.(C)(PIL) No.24669 of 2020 as well as in the instant writ petition. The Division Bench, on a threadbare discussion of the contentions raised as well as taking note of the office memorandum issued on 14.09.2020 (Annexure-C to the IA filed for vacation of interim order dated 29.09.2020), dismissed the earlier writ petition.

7.1 Mr. Rath, learned counsel for the petitioners submitted that the office order dated 31.08.2020 (Annexure-2) issued by the Special Relief Commissioner prohibiting 'other large congregation' as per Clause-2(iv) of the said office orderwas not taken into consideration by the Division Bench. As such, the findings given by the Division Bench is not binding on the petitioners in view of principles of *sub silentio*. Hon'ble Supreme Court in *Ajit Kumar Rath (supra)* and *Synthetics and Chemicals Ltd. (supra)* on the principles of binding effect of an order, held as follows:-

7.2 In ***Ajit Kumar Rath (supra),*** it is held as follows:-

> *"32. Learned counsel for the respondents has referred to the judgment of the Orissa High Court passed in identical situation and relating to the same service on*

12th March, 1985, by which the seniority was denied to certain promoted officers over those appointed by direct recruitment, on the ground that ad hoc promotion was contrary to rules. It is contended that a Special Leave Petition against that judgment was dismissed by this Court on 28.3.1998. A copy of the order by which the Special Leave Petition was dismissed has been placed on record which indicates that no reasons were given for dismissing the petition. This order, therefore, would not constitute a binding precedent. Moreover, the judgment of the Orissa High Court was delivered on 12th March, 1985, that is to say, many years earlier than the decision rendered by the Constitution Bench in the 1990 case of Direct Recruit Class-II Engg. Officers Association (supra). On the basis of the Constitution Bench decision as also the other decisions of this Court, the efficacy of the judgment passed by the Orissa High Court has altogether vanished and there was no occasion for the Tribunal to have relied upon that judgment in preference to the Constitution Bench decision while writing the Review judgment."

7.3 In ***Synthetics and Chemicals Ltd. (supra),*** Hon'ble Supreme Court on the principles of *sub-silentio* held as follows:-

"41. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words cansuch conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gumam Kaur, [1989] 1 SCC 101. The Bench held that, 'prece- dents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was ob- served, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

The office order dated 31.08.2020 under Annexure-2 refers to 'other large congregation' which does not include a 'public hearing'. Further, it is made clear in the said order under Annexure-2 that the subject to other provisions in the said order, the activities not specifically prohibited/regulated/restricted in the said order are allowed subject to adherence to safety and health protocols and SOPs/guidelines issued by the appropriate authorities. On the other hand, office memorandum dated 14.09.2020 (Annexure-C to the IA) has been issued by the concerned Ministry, specifically on the subject of conducting 'public hearing' during pandemic of COVID-19. The said office memorandum under Annexure-C also restricts the congregation with a ceiling of one hundred persons. To meet with a situation where the number of participants are more than such ceiling, provision has been made under Clause-3(ii) of the said office memorandum, which prescribes that if the number of participants are more than such (100 persons) ceiling, more than one public hearing shall be conducted by staggering the time and/or dates. Thus, the restrictions imposed by the Special Relief Commissioner in his office order dated 31.08.2020 under Annexure-2 cannot be said to include a 'public hearing', if conducted as per the guidelines given under office memorandum under Annexure-C to the IA. In that view of the matter, the principles of *sub silentio* is not applicable to the case in hand.

8. Bare perusal of the writ petition as well as the representations annexed to it as Annexures-5 and 6, which are identical in nature, only suggests that the representationists therein pray for keeping the public hearing scheduled to be held on 30.09.2020 in abeyance till COVID- 19 situation is normalized. The representations do not throw any light as to how the petitioners will be affected if the proposed expansion of opposite party No.4-Company is permitted. The case law decided by the Hon'ble Supreme Court in ***Orissa Mining Corporation Limited Vs. Ministry of Environment and Forests and others*****, reported in (2013) 6 SCC 47**, as relied upon by learned counsel for the petitioners has no application to the instant case, as in the said case law the issue was with regard to environmental clearance for diversion of forest land for alumina refinery project (ARP)/bauxite mining project (BMP). The issue of nonconsideration of religious rights, i.e., customary rights of worship in the mountains, especially a hilltop known as Niyam-Raja by the Scheduled Tribe communities and other tribal forest dwellers were involved. But in the instant case, the same are certainly not in issue.

9. Further argument has been raised by Mr.Rath, learned counsel for the petitioners that two parallel proceedings assailing the self-same interim order dated 29.02020, one by filing I.A. No.11476 of 2020 for recall of the said order and another by filing Writ Appeal bearing WA No.576 of 2020 is not maintainable. In support of his case, the case law in ***Jai Singh Vs. Union of India and others*****, reported in (1977) 1 SCC 1**, wherein the Hon'ble Supreme Court held/observed as follows:-

> *"4. The High Court dismissed the writ petition on the ground that it involved determination of disputed questions of fact. It was also observed that the High Court should not in exercise of its extraordinary jurisdiction grant relief to the appellant when he had an alternative remedy. After hearing Mr. Sobhagmal Jain on behalf of the appellant, we see no cogent ground to take a view different from that taken by the High Court. There cannot, in our opinion, be any doubt on the point that the extent of purity of the gypsum won by the appellant is a question of fact. It has also been brought to our notice that after the dismissal of the writ petition by the High Court, the appellant has filed a suit, in which he has agitated the same question which is the subject matter of the writ petition. In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time."*

9.1 He, therefore, submitted that two parallel proceedings are not maintainable in the eye of law. The arguments advanced by Mr.Rath is not sustainable in view of the fact that Mr.Mishra, learned Senior Advocate appearing on behalf of opposite party No.4 very fairly submitted that although he had filed the I.A. No.11476 of 2020 seeking recall of interim order dated 29.09.2020 passed in IA No.11105 of2020, but in view of the fact that this Bench was not supposed to sit on 30.09.2020, opposite party No.4 also filed W.A. No.576 of 2020 and moved the Hon'ble the Chief Justice to take up the matter. However, pursuant to the direction of Hon'ble the Chief Justice, the matter, i.e., the IA No. No.11476 of 2020, was taken up by a special list on 30.09.2020. He also fairly submitted that he has not moved the WA No.576 of 2020 in view of the fact that the instant IA for recalling of interim order dated 29.09.2020 passed in IA No.11105 of 2020 was taken up.

10. Mr.Rath, learned counsel for the petitioners submitted that only 90 persons have participated in the public hearing held on 30.09.2020 pursuant to order dated 30.09.2020 passed in IA No.11476 of 2020, which cannot be said to be a substantial representation of villagers of five revenue villages having population of more than ten thousand and there was no effective

'public hearing' at all. However, there is no material available before this Court to test the veracity of the same. If that be so, then petitioners may make a representation to the opposite party No.2-Collector, Jharsuguda within a period of three days hence, i.e., by 12.10.2020, who shall consider the same and pass necessary orders thereon in consultation with the stakeholders, if necessary, by taking steps to hold another 'public hearing' pursuant to notice under Annexure-1.

11. With the aforesaid observation, the writ petition as well as IA No.11105 of 2020 and IA No.11476 of 2020 are disposed of.

11.1 An 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.

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2020 (III) ILR - CUT- 556

S.K. PANIGRAHI, J.

CRLA NO. 335 OF 2016

SANJAY KUMAR BEHERA ……..Appellant

.V.

STATE OF ORISSA ……..Respondent

A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 50 – Conditions under which search of a person shall be conducted – Right of an accused person – Discussed.

(B) CRIMINAL TRIAL – Offence under the NDPS Act – Value of Independent witness – Discussed. (Para 35)

(C) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42,50 and 55 – Offences under the Act – Non-compliances of the mandatory provisions of the Act – Effect on the prosecution case – Discussed.

Case Laws Relied on and Referred to :-

1. AIR 1994SC 1872 : State of Punjab Vs. Balbir Singh.
2. (1994) 3 SCC 299 : 1994 SCC (Cri) 634 : State of Punjab Vs. Balbir Singh.

3. (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887: Karnail Singh v. State of Haryana
3. (2013) 2 scc 502 : Kishan Chand Vs. State of Haryana.
4. (2011) 8 SCC 130 : (2011) 3 SCC (Cri) 366: Rajinder Singh Vs. State of Haryana.
5. (2003) 12 SCC 291 : State of Gujarat Vs. Ismail U Haji Patel.
6. (2011) 11 SCC 559 : (2011) 3 SCC (Cri) 407: State of Rajasthan Vs. Tara Singh.
7. (2018) 4 SCC 334 : Union of India Vs. Jarooparam.
8. (2001) 1 SCC 35 : Bhola Ram Kushwaha Vs. State of M.P.
8. (2006) 12 SCC 321 : Ritesh Chakarvarti Vs. State of M.P.

For the Appellant : Mr. S.K. Patra & Sanjib Kumar Swain.
For the Respondent : Mr. Sk. Zafarullah, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 08.06.2020 : Date of Judgment: 17.07.2020

S.K. PANIGRAHI, J.

1. The present criminal appeal has been preferred against the order dated 04.05.2016 passed by the Court of the learned Additional Sessions-cum-Special Judge, Angul in Special Case Number 20 of 2014 arising out of Handapa P.S Case Number 14/24.1.2014.

2. The prosecution story hinges on the fact that on 24.01.2014 the informant-Police Officer named Mahendra Dehury (P.W.8), the erstwhile S.I. of Police, Handapa P.S on receipt of some confidential information with respect to alleged transport of contraband ganja by an unknown person in a Honda Shine motorcycle bearing Registration Number OR-05-K-3718 which was heading from Patrapada towards Handapa. He entered the said fact in the Station Diary vide Entry Number 474 dated 24.01.2014 and commanded A.S.I. of Police, P.N. Sahu, Home Guard Laxman Sahu, Home Guard Kamadev Naik, Home Guard Duryodhan Dehury and Home Guard Krupasindhu Pradhan to verify the said information. Accordingly, they proceeded to the spot immediately on 24.1.2014. Around 9.00 A.M. while the police surveillance party were waiting near "Jharana Nala", they found one person coming on a motorcycle and proceeding towards Handapa and the registration number of the motorcycle bearing same registration number i.e. OR-05-K-3718 and 2 plastic bags were found loaded on the same. The above person was detained with the motorcycle near the aforesaid "Jharana Nala". On being asked, the accused gave his identity as Sanjay Kumar Behera son of Dasarathi Behera of village Laxmipriyapur and admitted to be carrying two bags weighing nearly 50 Kgs. On being asked he stated that on the request of some unknown person, he was carrying the aforesaid load of ganja so as to deliver the same at Handapa to a certain person. Then the S.I.-Sri Dehury

telephonically informed the P.W.11, I.I.C, Handapa P.S. regarding detention of the said accused along with the suspected contraband. He then guarded the accused along with the contraband bags as well as the motorcycle and sent a requisition to the Sub-Divisional Magistrate, Athamalik for deputation of one Executive Magistrate to remain present at the search site. Then he arranged two independent witnesses, namely, Saheb Behera (P.W.1) and Madan Naik (P.W.4) after securing their willingness for the same, he then requested one Kalindi Sahu (P.W. 3) of Handapa Chhak to weigh the contents of the suspected bags and also arranged for materials for sealing of the same. Around 12.00 A.M. the Executive Magistrate one Prabodh Kumar Rout (P.W. 10) who was Addl. Tahasildar, Kishorenagar, arrived at the spot and in the presence of the Executive Magistrate, the official witnesses as well as the two independent witnesses, the loaded bags were unloaded from the motorcycle and on verification, it was found that the first bag contained 21 smaller polythene packets of suspected contraband goods and on measurement of the same, the total weight came to 20 Kgs. and 100gms. The second bag was found to contain 30 numbers of smaller polythene packets and on the measurement of the same, the weight came to be 28 Kgs. and 700gms. Then the ganja bags along with the motorcycle were seized from the conscious and exclusive possession of the accused in the presence of the Executive Magistrate. The S.I., Shri Dehury drew 25 gms. of ganja in duplicate from the first bag which was marked as Exhibit-A and another 25 gms. of ganja in duplicate from the second bag and the bulk ganja bag was marked as Exhibit-B. The sample packets were marked as Exhibits-A/1, A/2, B/1 and B/2. The specimen seal impression of Sri Dehury was used in sealing the bulk ganja bag and sample packets of the entire process of search and sampling was done in the presence of the accused, the witnesses and the Executive Magistrate. A seizure list was prepared seizing the weighing scale and the device which were forwarded to the custody of the weighman Kalandi Sahu. The brass seal was handed over to the custody of the Executive Magistrate under zimanama. Then he drew up a plain paper FIR and presented the same to Handapa P.S. and handed over the sealed contraband articles, the accused and the motorcycle. The I.I.C, Handapa P.S. (P.W.11) then took up the investigation, visited the spot, examined the witnesses, prepared the spot map and produced the seized contraband articles, sample packets and the accused before the Special Judge, Angul who directed for drawal of sample by the S.D.J.M, Angul. Later on the sample packets were sealed and sent to the S.F.S.L, Rasulgarh on the next day. The relevant Station Diary entry, dispatch register and malkhana register were also seized.

Subsequently, upon transfer of the erstwhile I.I.C, Handapa P.S., the charge of the investigation was handed over to one Smrutiprava Pradhan, (P.W.12), who is SI, Handapa PS, who caused seizure of the detailed report and intimation report in connection with the case. The chemical examination report was received with reference to the Handapa P.S. Case No.14/24.01.2014 which revealed that the contents of the said packets were the fruiting and flowering tops of ganja. On conclusion of the investigation, the said Smrutiprava Pradhan, S.I. submitted the charge sheet leading to the trial.

3. The trial commenced before the court of the learned Special Judge, Angul on 26.09.2014 and on 09.01.2015 charges were framed against the accused under Section 20(b)(ii)(C) of the NDPS Act. The accused in his statement under Section 313 of the Cr.P.C refuted the charges and claimed that he has been falsely implicated in the present case. In order to prove the charges, the prosecution relied on the evidence of 12 witnesses, out of whom P.W. 1-Saheb Beher and P.W. 4-Madan Naik were independent witnesses to the search and seizure operation. P.W.2-Rasananda Biswal is stated to be a witness to seizure. P.W. 3 is the weighman Kalandi Sahu. Thus, P.W.1 to P.W.4, are all independent witnesses and P.W.5 to P.W.12 are also independent witnesses. P.W. 5 is one police constable- Ashok Kumar Sahu, in whose presence, the detailed report and intimation report were seized by the Investigating Police Officer. P.W. 6 is P.N. Sahu who is a witness to the search and seizure. P.W. 7 is one Sashibhushan Dehury who is an A.S.I. of police and a witness to seizure of station diary, malkhana register etc. P.W.8 is the informant-Mahendra Dehury, who also led and conducted the raid. P.W.9 is one Sukant Kumar Dash who is a stenographer in the office of S.P., Angul who produced the intimation report and the detailed report before the Investigating Police Officer. P.W. 10 is the Executive Magistrate, P.K. Rout. P.W.11 is the erstwhile I.I.C., Ramesh Chandra Dash of Handapa P.S. who initially took charge of the investigation of the case. P.W.12-Smrutiprava Pradhan S.I. of police Handapa P.S, subsequently took over the investigation and filed the charge sheet in the instant case. Besides oral evidence, the prosecution has also relied on Exhibits-1 to 29 in support of its case as well as M.Os. I to VI.

4. Mr. S.K. Patra, learned counsel appearing for the accused-Appellant submitted that in the instant case, there was complete go by to the compliance of statutory requirements of law which assumed greater proportion in non-

corroboration in the testimony of independent witnesses for which aforesaid charge is not proved against the accused. Hence, the accused should be given the benefit of doubt and be acquitted. Further, he also submitted that there was no compliance of the provisions of Sections 42, 50 and 55 of the NDPS Act which is evident from the inconsistent and conflicting testimony of the official witnesses.

5. On the contrary, the learned Special Public Prosecutor, Sk. Zafarulla submitted that the charge against the accused has been proved in the testimony of official witnesses which was further fortified in the testimony of the Executive Magistrate and production of material objects. Therefore, the charge against the accused has been proved beyond reasonable doubt.

6. The learned counsel for the Appellant herein has taken this Court through the evidence on record and made multi pronged legal submissions to defend his case. The first contention made by the counsel for the Appellant is that the compliance of the mandatory provisions of Sections 42, 50 and 55 of the NDPS Act have not been made in the present case. It is settled law that non-compliance of these essential provisions go to the root of the matter and would cast serious aspersions and doubts on the veracity of the prosecution case and that the same might result in vitiating the trial.

7. Learned counsel for the Appellant further submitted that there was no evidence on record to show that the information was communicated to the superior officer as mandated under the Act even after an elapse of 72 hours from the date and time of entry of the station diary on 24.01.2014. In the instant case, the prosecution has not been able to produce the Station Diary book in the court during the course of the trial which clearly indicates suppressing behaviour. He further submitted that the prosecution has also not examined the messenger who carried the information report to the superior officer that is the Superintendent of Police, Angul and S.D.P.O, Athamalik. He further contended that in the instant case, the mandatory provision of Section 42 of the Act has not been duly complied with by P.W. 10 which casts a serious doubt on the veracity of the prosecution case. It is further submitted that as per the version of the prosecution, P.W.-8 went to the spot and apprehended the accused person, but admittedly, at that point of time, the accused was not served any notice or verbally informed about his statutory right to be searched in the presence of gazetted officer. P.W.8 in his cross-

xamination in Para-8 of his deposition has specifically stated that "there is no reference in Exhibit-13 regarding the Constitutional right of the accused to be searched in presence of an Executive Magistrate. The Executive Magistrate, (PW-10) Pramod Kumar Rout stated "in my presence accused was not asked to be searched before Magistrate". The P.W.- 10 has also not affirmed in his Examination-in-Chief that prior to the search, the accused was informed of his statutory right to be searched in the presence of a gazetted officer. He submitted that the law is clear that an officer acting on prior information and exercising his powers under Sections 41 (1) and 42 of the Act must comply with the provision of Section 50 of the said Act before search of the accused person is made. Further, the accused should be informed of his statutory right to be searched in the presence of a Gazetted Officer/Executive Magistrate. However, in the instant case prior to the search and seizure, admittedly, as borne out from the evidence on record and the depositions of P.W.8 and P.W.10 clear that the statutory rights were not explained to the accused and therefore, there is a brazen violation of the mandatory provision of Section 50 of the Act. To support the said proposition of law, the learned counsel heavily relied on ***State of Punjab vs. Balbir Singh*[1]**. He further submitted that the independent witnesses i.e. P.W.1 and P.W.4 have turned hostile and not corroborated the prosecution case, which is an important fact that the Trial court ought to have taken notice of the said fact, as they are said to be the witnesses to the search of the accused and seizure of the contraband goods. He further submitted that the safe custody of the seized articles was also shrouded in mystery in the light of the evidence of P.W.11-Ramesh Chandra Das (I.O.) who has stated in Para-20 of his evidence that Mahendra Dehury (P.W.8) was in-charge of the Malkhana register on the date of the incident but he had not taken charge of the said register on 24.01.2014. The seal used for sealing the contraband goods has also not been produced before the Trial Court during the trial and therefore, the safe custody of the seized articles also sparks suspicion. He further submitted that the prosecution is legally bound to prove the safe and untampered custody of the contraband articles in question from the point of seizure till the time it reaches to the laboratory for [1]AIR 1994 SC 1872 its examination. The prosecution, however, has miserably failed to prove the same and also failed to examine the constable who carried the sample to S.F.S.L, Bhubaneswar, nor is there any evidence on record regarding the custody of the sample packet in question on the night of 24.01.2014 since the samples in question were handed over to the

1. AIR 1994SC 1872

constable. Admittedly, on 25.01.2014 at 7.10 A.M. by the Investigating Officer to deposit the same at S.F.S.L, Bhubaneswar. He further submitted that as per the evidence of the Investigating Officer, the sample of the seized contraband was kept in the malkhana, which is rightly reflected in the Station Diary vide Entry No.474 dated 24.01.2014. However, no such entry could be shown from the records of the case despite the fact that the requirement of entry of contraband being deposited in the malkhana for safe custody and a corresponding entry in the register to that effect is a mandatory requirement. The noncompliance of the same throws the story of prosecution out of gear. He further pointed out that non-entry of the deposit of contraband in the malkhana register creates great deal of suspicion regarding the origin of the sample sent to S.F.S.L., Bhubaneswar for testing. He further submitted that the learned Special Court never directed the S.D.J.M, Angul to draw sample rather, directed the S.D.J.M., Angul to send the sample as revealed from the prayer made by the Investigating Officer vide Exhibit-18 and the order of the Special Court exhibited as Exhibit-20. However, the Investigating Officer has deposed to the contrary and has stated that as per the direction of the Special Court, the S.D.J.M., Angul had drawn a sample. The said sample packets were received along with a forwarding report. He has further reiterated that the said witness has been examined as P.W.6 in this case but, he has not stated anything about receipt of such sample packet or any forwarding report to that effect. He further submits that a bare perusal of the Chemical Examination Report exhibited as Exhibit-26, it reveals that the chemical examiner has received a parcel consisting of one cloth packet, which was sealed with the impression of the seal corresponding to the seal impression forwarded. However, there is no evidence on record, to suggest that the said sample packets were covered with a cloth packet.

8. Heard learned counsel for the parties. For better appreciation of the submissions, it is imperative that the evidence of witnesses must be gone into in some detail. P.W.1-Saheb Behera is said to be an eyewitness who has been examined by the prosecution with regard to the search of the accused for the contraband goods as well as the seizure of the said goods which were found in the motorcycle. The said witness has turned completely hostile and has denied every fact attributed to him by the prosecution. The prosecution states that he was an independent witness brought to the crime spot to observe the search and seizure operation. Therefore, this witness brought by the prosecution has been presented as an independent witness. Under the Act, such an independent witness is an important safeguard against arbitrariness or

even a possible misadvanterous fabrication on the part of the prosecution. This witness has denied his physical presence at the spot which undermines the strict compliance of Section 50 of the Act. He further states that his signatures have been merely obtained by the prosecution, hence the question of compliance of Section 42 was also not supported or corroborated by this witness since this witness has completely turned hostile which could be the only reliable evidence having the propensity to support the prosecution case. Therefore, from the facts of the case, it emerges that this witness has merely identified his signatures which were put on different exhibits (Exhibits-1 to 6).

9. P.W.2-Rasananda Biswal is a hostile witness who has again completely denied the version of prosecution. He has only admitted the facts about his signatures that have been obtained on various documents and were marked as Exhibit-1/1, Exhibit-2/2 and Exhibit-3/1, Exhibit-4/1, Exhibit-5/1 and Exhibit-6/1. When this witness was cross-examined by the defence, he has clarified that he was working as a labourer in the said locality and when he had visited the police station to serve tea to the officers present in the police station, he was asked to put his signatures on certain papers and being scared of police personnel, he put his signatures on the documents which were shown to him but he was completely unaware of the contents of the papers which were never read over and explained to him. P.W. 3-Kalandi Sahu has been presented by the prosecution as a witness to the seizure operation. This witness has also turned hostile and has denied the entire prosecution version.

10. P.W. 4-Madan Naik is allegedly an eyewitness to the search and seizure operation conducted by the prosecution. This witness has also turned hostile and has denied the entire prosecution case in its entirety. However, he has admitted his signatures at Exhibit-1/3, Exhibit-2/3, Exhibit-3/3, Exhibit-4/3, Exhibit-5/3, and Exhibit- 6/3.

11. P.W. 5-Ashok Kumar Sahu is a Havildar attached to the District Police Office, Angul. He has stated that Smrutiprava Pradhan S.I. of police of Handapa P.S. had caused production of intimation report, detailed detection report in his presence and in the presence of one Srikanta Kumar Dash, constable on being produced by stenographer, Sukanta Kumar Dash. He has further stated that a seizure list was prepared in his presence by the S.I. which is marked as Exhibit-8 and Exhibit-8/1, which are his signatures.

12. P.W. 6-Panchunath Sahu working as A.S.I at Handapa P.S. He is a formal witness and was a member of the raiding party conducting the operation. In his Examination-in-Chief, he has given a testimony which is consistent with the prosecution version. However, in his cross-examination he states that the accused was searched within half an hour of his detention. He further states that the independent witnesses had arrived before unloading of seizure bags. He further admits that he has not told the name of the accompanying police officers who were members of the raiding party during his examination earlier. Another inconsistent aspect is that he has named the raiding party members during his Examination-in-Chief. However in his cross16 examination, he names one Kamadev Behera, who has not been named as the member of the raiding party.

13. P.W. 7-Shashibhushan Dehury was working as A.S.I at Handapa P.S on 24.1.2014. He is a formal witness. In his Examination-in- Chief, this witness who is a seizure witness, testifies that a seizure list was prepared in his presence which has been marked as Exhibit-9 and Exhibit-9/1 whereupon his signatures are present. He states that on the said day at about 11.00 A.M., P.W.-11 caused seizure of the Station Diary book of the police station, one dispatch register and the malkhana register of the police station in his presence. He also states that he is a witness to the requisition sent for the deputation of an Executive Magistrate. In his cross-examination, this witness states that the dispatch register extract was only one page long and with regard to the other documents, he states that he does not remember about the number of pages.

14. P.W.8-Mahendra Dehury on 24.01.2014 was working as S.I. Handapa P.S. This witness was leading the raiding party which allegedly conducted the raid and seizure operation on the said day. In his Examination-in-Chief, he has more or less outlined the prosecution version as put forth in the FIR. However, this witness during the cross-examination has admitted some facts which do have a material bearing on the aspects of statutory compliances which will be dealt with later. He states that he was not present when the I.I.C. made station diary entry upon receipt of confidential information. He further states that the I.I.C. did not instruct him the exact place where he was supposed to go. He also admitted that he did not inform the matter or sought prior sanction from the Superintendent of Police and S.D.P.O., Angul. He further admits that there is no reference either in the FIR or in his statement recorded under Section 161 of the Cr.P.C. as to whom he

had deputed for bringing the weighman Kalindi Sahu along with the weighing balance. He further admits that there is no reference in Exhibit-13 with regard to the right of the accused to be searched in the presence of an Executive Magistrate or whether the fact that the same was made known to the accused before his search. Another aspect which is amply clear from his deposition that the contraband goods were being transported in polythene packets and there is no mention of cloth bags.

15. P.W.9-Sukanta Kumar Dash was working as Stenographer on 24.01.2014 in the Police Department. He has admitted his signature on Exhibit-8/2 in the seizure list. He further states that the seizure of the intimation report was caused by one Smrutiprava Pradhan, S.I. Handapa PS. It is worthwhile to mention here that the aforesaid Smrutiprava Pradhan has not been examined as a witness who otherwise seems to be a material witness to establish the prosecution's case.

16. P.W.10-Prabodh Kumar Rout (Executive Magistrate) on 24.01.2014 was working as Addl. Tahasildar, in the office of the Tahasildar, Kishorenagar. In his Examination-in-Chief, he states that he received one letter from the office of the Sub-Divisional Magistrate, Athamallik vide Letter No.184 dated 24.01.2014 to remain present at the time of raid and seizure of contraband goods and the said letter has been marked as Exhibit-14. He states that he proceeded to the spot at Jharana Nala where the accused was present and holding two loaded polythene packets. He has further described that out of the first polythene packet, there were 21 small packets looking yellow colour and in the second polythene packet, there were 30 such packets. He states that the samples were drawn in his presence and were seized by P.W.8. He states that about 3 to 4 independent witnesses were present at the time of search and seizure whose names he could not recall. In his cross-examination, he states a material aspect which goes to the root of the matter with regard to statutory compliance. He, admittedly, states that the accused was not asked in his presence, if he intended to be searched before a Magistrate. He further stated that one polythene packet was spread on the ground near the bridge Jharana Nala and the said polythene packets were opened up and measured. The colour of two polythene packets was described to be creamy white on the outside and were yellow coloured inside the pockets.

17. P.W.11-I.O.-Ramesh Chandra Das was working as the then Inspector-in-charge (I.I.C.) of Handapa P.S. This witness is the Investigating Officer (I.O.) who in his Examination-in-Chief has outlined the prosecution's version

and has stated that upon his transfer from Handapa P.S. he handed over charge of the investigation of this case to Smrutiprava Pradhan (P.W.12) of Handapa P.S. In his cross-examination, he has not made it clear and becomes unambiguous as to who was in-charge of the Malkhana on the said date. He makes a categoric admission that "re-sealing" of the seized contraband was done for which he had not secured the signatures of the Executive Magistrate or the witnesses at the time of re-sealing and depositing the exhibits in the malkhana. This aspect of the matter has been verified by the trial court and was being seriously noted. He further states that there is no corresponding entry in the malkahana register to indicate that the sealed exhibits received from the court, were deposited in the malkhana but there is a corresponding Station Diary entry made to that effect. He further denies that the accused was not informed of his rights to be searched in the presence of an Executive Magistrate or the said rights were not made aware to the accused.

18. P.W.12-Smrutiprava Pradhan took charge from P.W.11 as the Investigating Officer in the present case. She has supported the prosecution's version to the extent of her participation in the case. This witness after completing investigation on 19.07.2014 submitted the charge sheet. In her cross-examination, she admits that she was not aware of this fact because the seizure of the dispatch register or the receipt register of the S.P. Office everything took place prior to her taking charge. She further admits that even a carbon copy of the requisition sent by her predecessor to the office of the S.P. was not available.

19. Now, in so far as the first limb of the submission made by the counsel for the Appellant is concerned, the thrust of the argument was squarely on the issue of non-compliance of the statutory requirements of law the same must be viewed at the backdrop of the non-corroboration in the testimony of the independent witnesses. The submission made at the bar is that there was no substantial compliance of the provisions of the Act in so far as Sections 42, 50 and 55 are concerned.

20. The second limb of submission made by the learned counsel for the Appellant is that all the independent witnesses in the instant case have turned hostile. The collective outcome of their deposition is that the signatures were lent by them under coercion by the prosecution and inside the Handapa Police Station. They have even denied their presence at the seizure spot. Therefore, they have categorically stated that they have nothing to do insofar

as the prosecution version is concerned. However, the only element for support to the prosecution version is that their admission to the signatures on the exhibits which are shown as evidences. However, while doing so, they have clarified that they had put their signatures under threat or coercion by the prosecution and that they did not know about the contents thereof.

21. In the instant case, there are two types of witnesses present, namely, P.W.1 to P.W.4 are independent witnesses who have turned hostile and have not supported the prosecution case at all. On the other hand, they have clarified that the signatures which they have been put on the exhibits have been taken threat and coercion by the prosecution. The other categories of witnesses are P.W. 5 to P.W. 12, who are formal witnesses, who have colluded with each other to make out a false case against the petitioner. Another submission made is that since the official witnesses can be said to be interested witnesses in this type of cases, the Act requires that the testimony must be scrutinized properly especially at the backdrop of the requirement of independent witnesses. But those independent witnesses have denied the prosecution version in entirety.

22. The next submission made with regard to the material contradictions, improvements and embellishments that are found in the version of the prosecution witnesses (P.W.5 to P.W. 12). It is stated that there are material contradictions with regard to the manner in which the accused was apprehended. The evidence of P.W.8, who is the informant in the instant case, has stated in his deposition that *"we saw one person riding Honda motorcycle bearing Regd. No. OR-05-K-3718 and the motorcycle was loaded with two numbers of bags. The rider and on being asked to disclose his name as Sanjay Kumar Behera"*. On the contrary, the evidence of P.W.6 Panchunath Sahu who has categorically stated that *"we chased the motorcycle and apprehended that person while was trying to escape"*. It is clear from the perusal of the depositions made by the aforesaid witnesses that the manner in which the accused was apprehended casts serious doubts as to how and where the accused was actually apprehended and the manner thereof. It is to be noted here that these embellishments or material contradictions in the prosecution's case are being gone into in great detail, given the fact that the independent witnesses who are important safety valve under the scheme of the Act have denied the prosecution's version in unison. Also given the fact that these independent witnesses (P.W.1 to P.W.4) have categorically stated that either the signatures were obtained by the police inside the police station under threat or coercion. They might have merely

been asked to put the signatures on some documents inside the Police Station by the said raiding police party. It is in this backdrop, the court will be constrained to look at all sorts of contradictions and embellishments which are found in the instant case. In so far as P.W.3 the weighman is concerned, he has not supported the prosecution case too. The deposition of this witness is material and has an important bearing on the fact that the contraband articles were neither seized in his presence nor has the measurement of weight of the same been done on the spot. He has disowned the preparation of documents and expressions. However, he has admitted his signatures on Exhibits-1/2, 2/2, 3/2, 4/2, 5/2 and 6/2. He has further denied the prosecution's version which stated that the spring balance and the weighing device used by him were released in his zima.

23. In so far as the P.W.10, the Executive Magistrate is concerned he has not supported the facts stated by the versions of P.W.6 and the P.W.8 to the extent that the P.W.6 has stated that "personal search of the accused was taken in presence of executed magistrate" and the P.W.8, the informant, has stated that "we searched the person of the accused in the presence of the Magistrate". The fact that both these witnesses seem to suggest that the accused was informed of his rights to be searched in the presence of a gazetted officer or Executive Magistrate. However, this witness has categorically stated in his evidence that the members of the raiding party have not informed the accused in his presence about his right to be searched in the presence of a gazetted officer or Executive Magistrate which ought to have been done as the same was a statutory requirement under the Act.

24. In the instant case, the admitted and consistent version of the prosecution is that the contraband goods were loaded on a motorcycle which has been seized. The prosecution has neither led evidence nor made any investigation with regard to the fact as to who was the owner of the motorcycle. This aspect assumes greater importance because the Hon'ble Supreme Court while dealing with the connotation of "person" as mentioned under Section 50 of the Act has held that in cases where contraband goods have been transported using a vehicle not only does the question of search of the person assume importance but also a mandatory enquiry must be done with regard to the vehicle in question which was transporting the contraband goods. On this account also the prosecution has failed miserably in so far as investigation of this aspect is concerned. This sort of an approach shows a callous and casual approach on the part of the prosecution.

25. Another important aspect of the matter has been brought to the notice of this Court is that under Section 55 of the Act a solemn duty has been cast upon the Officer-in-Charge of the Police Station to receive and keep the seized contraband goods in safe custody. There is a need for affixing a seal package so as to ensure that all samples obtained are not changed and non-compliance with the same is a serious and vital infraction of the stipulations contained under the said provision. In the instant case P.W.11-Ramesh Chandra Das who is the investigating officer has stated in his evidence that *"as S.I. Mahendra Dehury was in charge of Malkhana on the date of the incident… I have not taken over the charge of the Malkhana Register on 24.1.2014"*. This ambiguous and incoherent statement on such a vital issue on the part of the witness casts a serious shadow on the question of the safe custody of the seized articles. Thus, the question of keeping the allegedly seized ganja by the I.I.C after making a Malkhana Entry No.8/2014 is completely doubtful as this witness seems to suggest at one point, during the cross-examination, the S.I. was in-charge of the malkhana as well as the Malkhana Register. Another critical and suspicious aspect of the matter is that P.W.11 has also admittedly stated that the samples had been opened at some stage and that a "re-sealing" of the same had been done. This witness has neither explained as to why opening of the samples, already deposited in the malkhana, was necessary. This dubious fact has vital bearing on sanctity of the samples in question. The aforesaid Entry No.8/2014 is painfully silent on this aspect and a closer examination of the issue screams and shouts for judicial attention. It is for this very reason why the Act has provided various inbuilt safeguards and mechanisms to protect the rights of the accused at various stages starting from the search of the accused which has been dealt with and taking care of under Section 50 of the Act, seizure of the contraband goods which has been provided under Section 42 of the Act which strictly postulates the manner in which the same has to be done and Section 55 of the Act which provides for stringent and mandatory safe keeping of the contraband goods seized. Apart from the inbuilt failsafe mechanisms and safeguards under the Act the Hon'ble Supreme Court of India in a series of judicial decisions has interpreted and clarified with great clarity that the aforesaid provisions are not merely procedural requirements but these are substantive provisions which affect the right of the accused. Especially, at the backdrop of this, otherwise skewed Act where there is a reverse burden of proof which is contradistinct from other Acts under the umbrella of criminal law.

26. A shocking aspect of the matter also comes to the fore when the cross-examination of P.W.11 is perused. The prosecution's case is that the sealed contraband goods and the polythene packets containing them were sealed in a cloth cover and marked as M.O.- VI. It has been said that it is this cloth bag which was sent to the forensic laboratory for testing. The fact that cloth packets containing the contraband goods were received is evident from the report of the laboratory. The witness is forced to state that the clothes packet has been destroyed by white ants inside the malkhana. This sort of distortions not only casts a serious doubt regarding the contents of the originally seized contraband articles and sent to the forensic laboratory, but also tells rather a sordid and troubling tale of the horrendous manner in which the "safe keeping" of the seized articles were done.

27. The fact that no command certificate has been issued in the instant case also casts a shadow of doubt with regard to the fact as to whether the P.W.6 and one Laxman Sahu, Home Guard (who has not been examined by the prosecution) had indeed taken the sealed packets and 4 paper envelopes allegedly drawn as samples for causing production in the court of the learned Special Judge, Angul. Furthermore, admittedly, the empty packets were not sent to court along with the seized property. The handling of the seized goods leaves much to be desired even at an anterior stage i.e. when the samples drawn by the S.D.M., Athamallik (Executive Magistrate) were allegedly brought to the police station and deposited in the malkhana for which there is no corresponding entry in the Malkhana Register which has also been admitted by P.W. 11 in his cross-examination. In fact, the said witness tries to unsuccessfully explain the said lapse by stating that an entry therefore has been made in the station diary.

28. The right of an accused under the scheme of the present Act has been explained in the case of ***State of Punjab v. Balbir Singh***[2] where then Hon'ble Apex Court while dealing with a matter arising out of the NDPS Act has relied on American jurisprudence as held as under:

> *"19. The author Lewis Mayers in his book titled "Shall We Amend the 5th Amendment" p. 228 stated as under:*
>
> *"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the year has swung to the right.*

2. (1994) 3 SCC 299 :1994 SCC (Cri) 634

Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny'. As the century has unfolded the danger has increased.

Conspiracies to defeat the law have in recent decades become more widely and powerfully organized and have been able to use modern advances in communication and movement to make detection more difficult. Law breaking tends to increase. During the same period an increasing awareness of the potentialities of abuse of power by lawenforcement officials have resulted, in both the judicial and the legislative spheres, in a tendency to tighten restrictions on such officials, and to safeguard even more jealously the rights of the accused, the subject, and the witness. It is not too much to say that at mid-century we confront a real dilemma in law enforcement.

20. In Miranda v. Arizona [384 US 436 : 16 L Ed 2d 694 (1966)] the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

"At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold equirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."

It was further observed thus:

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest."

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory."

These rights which popularly came to known as the Miranda rights which dealt with the right of the accused, have since been jealously guarded under the American legal system. In fact, the Hon'ble Supreme Court of

India have also reiterated the sanctity and the need to protect the rights of the accused, especially in matters under the Act in question where a reverse burden of proof has been provided.

29. The Hon'ble Supreme while dealing with the issue of importance and significance of statutory compliance nder Section 50 of the Act has held that the same is an issue which goes to the root of the matter and that there is a indefeasible right vested in the accused insofar as the issue of intimating the accused of his right is concerned. In the case of ***State of Punjab v. Balbir Singh***[3], the Hon'ble Supreme Court has held as follows:

> *"16. One another important question that arises for consideration is whether failure to comply with the conditions laid down in Section 50 of the NDPS Act by the empowered or authorised officer while conducting the search, affects the prosecution case. The said provision (Section 50) lays down that any officer duly authorised* 3(1994) 3 SCC 299 : 1994 SCC (Cri) 634 *under Section 42, who is about to search any person under the provisions of Sections 41, 42 and 43, shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate and if such requisition is made by the person to be searched, the authorised officer concerned can detain him until he can produce him before such Gazetted Officer or the Magistrate. After such production, the Gazetted Officer or the Magistrate, if sees no reasonable ground for search, may discharge the person. But otherwise he shall direct that the search be made. To avoid humiliation to females, it is also provided that no female shall be searched by anyone except a female.*
>
> *The words "if the person to be searched so desires"* are important. *One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised officer informing him. The language is clear and the provision implicitly makes it obligatory on the authorised officer to inform the person to be searched of his right."* (emphasis supplied)

3. (1994) 3 SCC 299 :1994 SCC (Cri) 634

30. A constitution bench of the Hon'ble Supreme Court in the case of ***Karnail Singh v. State of Haryana***[4] has dealt with the legislative background of the present enactment. The Statement of Objects and Reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well-organised gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national Governments, this comprehensive law was enacted by Parliament enabling exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded, consolidating and amending the then existing laws. However, while doing so the Hon'ble Apex Court has employed a word of caution that since under the enactment there is a reversed burden of proof the courts need to have that aspect at the back of their mind while dealing with evidence in such cases.

31. In the case of ***Kishan Chand v. State of Haryana***[5], the Hon'ble Supreme Court has again cautioned the courts and advised them to act meticulously while dealing with evidence in such matters. The Hon'ble court has held:

> *"16. We are unable to contribute to this interpretation and approach of the trial court and the High Court in relation to the provisions of sub-sections (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit of any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance with these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite* 5(2013) 2 SCC 502 *compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance."*

32. The Hon'ble Supreme Court has also held that compliance of Section 42 of the Act is so cardinal in the matter that a total compliance of that one in the case of ***Rajinder Singh v. State of Haryana***[6], has held that:

4 (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887, **5**. (2013) 2 SCC 502
6 (2011) 8 SCC 130 : (2011) 3 SCC (Cri) 366

"11. It is therefore clear that the total non-compliance with the provisions sub-sections (1) and (2) of Section 42 is impermissible but delayed compliance with a satisfactory explanation for the delay can, however, be countenanced. We have gone through the evidence of PW 6 Kuldip Singh. He clearly admitted in his crossexamination that he had not prepared any record about the secret information received by him in writing and had not sent any such information to the higher authorities. Likewise, PW 5 DSP Charanjit Singh did not utter a single word about the receipt of any written information from his junior officer, Inspector Kuldip Singh. It is, therefore, clear that there has been complete non-compliance with the provisions of Section 42(2) of the Act which vitiates the conviction."

33. The Hon'ble Supreme Court has emphasised that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had been dispatched or received in the laboratory is a matter of great importance and a non-compliance thereof could also result in the trial being vitiated. In the case of ***State of Gujarat v. Ismail U Haji Patel***[7] the Hon'ble Supreme Court has held as follows:

"5. We find that there was really no material brought on record to show as to where the seized articles were kept. The High Court after analysing the evidence on record came to hold that the identity of the articles sent for analysis was not established and it was not established that the articles seized were in fact sent for chemical examination. In view of the judgment of this Court in Valsala v. State of Kerala [1993 Supp (3) SCC 665 : 1993 SCC (Cri) 1082] the view of the High Court is in order. It is not the delay in sending the samples which is material. What has to be established is that the seized articles were in proper custody, in proper form and the samples sent to the Chemical Analyst related to the seized articles.

6. Further, there was nothing brought on record to show as to under whose directions the samples were sent for chemical examination. The High Court relied on Section 55 of the Act to hold that the absence of such information also vitiates the proceedings. Section 55 of the Act provides that the officer in charge of the police station has to take charge of and keep in safe custody the seized articles pending orders of the Magistrate. Since there is no material to show that there was any order of the Magistrate as to where the seized articles were to be kept, and there was no material to show that there was safe custody as is required under Section 55 of the Act, the view of the High Court is in order. Judgment of the High Court does not warrant any interference in our hands and the appeal is dismissed."

34. The issue of safe custody of contraband goods assumes significant and seminal importance which has been appropriately dealt in ***State of Rajasthan v. Tara Singh***[8] where the Hon'ble Supreme Court has succinctly put as under:

7. (2003) 12 SCC 291 **8.** (2011) 11 SCC 559 : (2011) 3 SCC (Cri) 407

> *"6. We must emphasise that in a prosecution relating to the Act the question as to how and where the samples had been stored or as to when they had been dispatched or received in the laboratory is a matter of great importance on account of the huge penalty involved in these matters. The High Court was, therefore, in our view, fully justified in holding that the sanctity of the samples had been compromised which cast a doubt on the prosecution story. We, accordingly, feel that the judgment of the High Court on the second aspect calls for no interference. The appeal is, accordingly, dismissed. The respondent is on bail. His bail bonds stand discharged."*

35. The Hon'ble Supreme Court in a catena of judgments has held that in cases of prosecution under the Act in question where most of the witnesses are formal in nature, the testimony of the independent witnesses must be used as a barometer and be looked at carefully in order to ascertain the trustworthiness of the prosecution case as well as the evidence given by the formal/official witnesses. The reason behind giving credence to the evidence of the independent witnesses in such cases is due to the fact that it is commonly found that the search and seizure operations are normally conducted at isolated places where no other witnesses are likely to be found. In such situations the evidence of the independent witnesses who are common persons which give a quick peek into the trustworthiness of the prosecution's case. It has also been held that in cases where the independent witnesses have turned hostile, as in the present case where PW1 to P.W. 4 have turned hostile, the evidence of all the other official/formal witnesses must be looked at with greater scrutiny due to the fact that once the independent witnesses turned hostile the prosecution's case comes under a cloud of suspicion. Furthermore, not only have the independent witnesses turned hostile but have rather gone on to state that they have given the signatures on the documents shown to them under threat and coercion. In this context it gives an impression that the prosecution has browbeaten such independent witnesses into giving their signatures. What is more telling is the fact that the independent witnesses have corroborated each other's version that the prosecution has obtained their signatures under threat and coercion. Therefore, in all such cases, normally, courts have inclined in favour of acquittal if it is coupled with other material inconsistencies and non-compliance as provided under the Act. In some of the landmark judgments where the Hon'ble Supreme Court has dealt with such situations are ***Union of India v. Jarooparam***[9]***, Bhola Ram Kushwaha v. State of M.P***[10]***., and in the case of Ritesh Chakarvarti v. State of M.P.***[11]

9. (2018) 4 SCC 334 **10.** (2001) 1 SCC 35 **11**. (2006) 12 SCC 321

36. The leaned Trial Court has failed to appreciate the submissions made before it and also failed to appreciate the legal position in such cases which require a great degree of scrutiny to be made. The court below has mostly relied on the evidence of the PW8, PW 10, and PW 11 which have been reiterated the prosecution's case and have justified in their Examination-in-Chief stating that necessary statutory compliances have been made during the search and seizure stage. The trial court ought to have taken note of the other facts and circumstances of the case which have the quality of a deafening silence and point unerringly at another probability. It is settled law that in cases where the legislation provides for stringent and harsh punishments, when there is a possibility that another view may be possible, where a benefit of doubt might accrue to the accused, in such case it is imperative that those should be examined with extra care and caution. It is therefore held that the trial court below has proceeded on a single track and merely relied upon the evidence of the witnesses aforesaid in order to reach a quick conclusion and render a guilty verdict.

In the light of the aforesaid discussions, submissions made, perusal of evidence, this Court is of the view that keeping in mind the material irregularities conducted during the search and seizure operation and inconsistencies in the prosecution's case go deep to the root of the matter and have caused non-compliance of the statutory safeguards as provided under Sections 42, 50 and 55 of the Act. Resultantly, the instant appeal is allowed.

Accordingly, the conviction and sentence of the appellant vide judgment dated 4.05.2016 passed by the learned Addl. Session Judgecum-Special Judge, Angul in Special Case No. 20 of 2014 is hereby set aside. The appellant-Sanjay Kumar Behera be set at liberty forthwith, if his detention is not required in any other case. L.C.R be returned forthwith.

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