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N O M I N A L I N D E X

ACTS

Acts & No.

TOPICAL INDEX

SUBJECT INDEX

Arbitrator by High Court in exercise of power under Section 11 of the Act, 1996 – Plea of jurisdiction of District Judge raised – Held, the High Court of Orissa does not exercise the original civil jurisdiction – Sub-Section (2) of Section 2 of the Orissa Civil Courts Act, 1984 provides that the court of the District Judge shall be the principal court of original civil jurisdiction in the district and the explanation provides that for the purpose of this sub-section the expression 'District Judge' shall not include an Additional District Judge – Thus, for the State of Odisha, the District Judge is the 'Court' within the definition of the aforesaid Section and has the jurisdiction under Sub-Section (5) of Section 29A of the Act to extend the period of passing of the arbitral award.

Liladitya Deb -V- Tara Ranjan Pattanaik And Anr.
W.P.(C) NO.19068 OF 2019
2021 (II) ILR-Cut…… 585

BAIL – Interim application seeking bail in criminal appeal – Heard by division bench – Difference of opinion regarding grant of bail – Matter referred to third judge – Appreciation of evidence and principles for grant of bail in criminal appeal – Materials available examined in detail – Held, in view of the materials available on record, the nature of evidence adduced by the four eye witnesses to the occurrence relating to the involvement of the appellant no.1 in the assault of the deceased, the fact that the appellant no.1 was on bail during trial and there is no material that he mis-utilized the liberty while on bail and since this criminal appeal is of the year 2017 and older appeals are pending before this Court for hearing and there is no chance of early hearing of the appeal in the near future and the appellant no.1 is a permanent resident of village Padamari Harijan Sahi, P.S. Pattapur in the district of Ganjam and in absence of any criminal antecedents against him on record, the appellant should be released on bail.

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Fixation of price of land or building by the Development Authority – Judicial review – Whether permissible – Held, No – Reasons indicated.

Dr. Kari Benu Gopal Patro -V- State of Odisha & Ors.
WRIT APPEAL NO. 821 OF 2020

2021 (II) ILR-Cut…… 498

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order black listing of the Petitioner Contractor – Plea that the impugned action of blacklisting of the Petitioner was pre-determined – Government had already ordered blacklisting of the Petitioner and had asked the Engineer-in-Chief to take immediate action "for blacklisting the contractor" even before a show cause notice (SCN) was issued – Effect of such action – Held, the order black listing the Petitioner does not satisfy the requirements of law and in particular the bare necessity that an order blacklisting a contractor has to spell out the reasons in clear and unmistakable terms; must state that it has been passed after eliciting a reply from the contractor; spell out the reasons why the plea of the contractor was found unacceptable – In that sense, the impugned order is an unreasoned, non-speaking one – Order set aside.

M/s. Panda Infraproject Ltd.-V- State of Odisha and Ors.
W.P.(C) NO. 26408 OF 2017
2021 (II) ILR-Cut…… 468

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Writ petition – Tender matter – Incentives – Early completion of contract work – Grant of incentive as per OPWD Code, VOL-1, Paragraph-3.5.5 (V) Note-III – Delay in communication about the completion – No fault of petitioner, rather the concerned Executive Engineer had delayed the report of completion of the work – Action of the Authority challenged – Held, petitioner is entitled to get the incentive as per law.

Jay Ram Pujahari –V- State of Odisha and Ors.

W.P.(C) NO. 30637 OF 2020

2021 (II) ILR-Cut…… 465

CONTEMPT OF COURTS ACT, 1971 – Section 12 – Law of Contempt – Principles – Discussed.

Manohar Sahoo -V- B.K. Pattnaik, Principal Secy. to Govt. of Odisha, DEPTT. of water Resources & Ors.

CONTC (CPC) NO. 270 OF 2000

2021 (II) ILR-Cut…… 550

CRIMINAL PROCEDURE CODE,1973 – Section 389 – Provision under – Suspension of sentence and bail – Principles and satisfaction of essential ingredients – Held, Section 389 of the Code of Criminal Procedure deals with suspension of execution of sentence pending the appeal and release of the appellant on bail – There is a distinction between bail and suspension of sentence – One of the essential ingredients of section 389 of Cr.P.C. is the requirement for the Appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed – If

direct evidence, the case of the prosecution need not fail only because motive for the commission of the crime was not proved – The requirement is of course that the direct evidence should not be of a doubtful nature.

Anwar Khan -V- State of Odisha.

CRLA NO. 542 OF 2014
2021 (II) ILR-Cut…… 484

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Appeal – Plea that there are discrepancies in the testimony of the eye witnesses – Three eye witnesses – Their statements are consistent in broad aspect of the identity of the accused with the weapon – The deceased disclosing that he had been attacked by the Appellant – Held, each of the witnesses i.e. PWs 1,3 and 8 speak of the deceased disclosing that he had been attacked by the deceased – The accused running away from the crime scene with the Bhujali has been witnessed by each of them as it happened – Therefore, the plea that it cannot be termed as eye witnesses but only as post-occurrence witnesses can not be accepted – The precise manner of describing them is that they are witnesses to the events soon after the assault of the deceased and direct eye witnesses to the Appellant running away from the scene of crime with the murder weapon – The minor inconsistencies in the testimonies of PWs 1, 3 and 8, if any, are natural and do not in any manner impinge on their credibility.

Anwar Khan -V- State of Odisha.

CRLA NO. 542 OF 2014
2021 (II) ILR-Cut…… 484

CRIMINAL TRIAL – Offence of triple murder – Conviction – Plea of right to private defence of life and property – Burden of proof on the question of criminal liability – Principles discussed.

CRIMINAL TRIAL – Offence of triple murder – Conviction – Appeal – Plea that the prosecution must explain the injuries on the accused persons – Scope of acceptance of such plea – Held, the plea may not be accepted in all cases – Principles – Explained.

HINDU MARRIAGE ACT, 1955 – Section 13 - B (1) and (2) – Mutual divorce – Joint application filed by both parties – Application filed to waive the waiting period – Application rejected – Writ petition challenging such rejection period – Plea considered – Held, the waiver application can be filed one week after the first motion giving reasons for the prayer for waiver, if the required conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court.

INDIAN PENAL CODE, 1860 – Section 100 and 103 – Right to private defence of body and property – Applicability of both the rights – Principles – Explained in detail.

Dwaru Patra (Dead) and Ors. -V- State of Odisha.
CRIMINAL APPEAL NO.122 OF 1998
2021 (II) ILR-Cut…… 523

INDIAN PENAL CODE, 1860 – Section 498-A – Offence under – Conviction and sentence for one year – Appeal – Case was of the year 1993 – The accused was in custody for about six months – The accused is now 63 years old and has already suffered half of the sentence period – Plea that the appeal may be allowed treating the sentence as period under gone is accepted.

Dhuleswar @ Dhula Mohapatra -V- State of Orissa.
CRA NO.11 OF 1999
2021 (II) ILR-Cut…… 565

THE INCOME TAX ACT, 1961 – Section 143(3) r/w section 144-B – Order of Assessment passed – Demand raised – No notice-cum–draft assessment issued to the Assessee – Impugned demand notice challenged on the ground of non-grant of opportunity of hearing to the petitioner – Held, the impugned assessment order is not only in considerable variation of the figures for the earlier AYs but is also prejudicial to the interests of the assessee – In other words, the requirement of Section 144-B (1) (xvi) of the ITA Act for triggering the procedure of first preparing a draft assessment order and providing it to the Petitioner for its response stands attracted in this case – Order set aside as well as the consequential demand notice/order and grants liberty to the Dept. to pass a fresh assessment after giving personal hearing/opportunity to the petitioner.

involvement in the criminal case as well as for some other charges – Plea of the delinquent was that since the criminal proceeding is pending, the departmental proceeding should be stayed – Principles and the law when both criminal and departmental proceeding pending – Discussed.

Damodar Das -V- Union of India & Ors.

W.P.(C) NO. 22946 & 16373 OF 2015
2021 (II) ILR-Cut…… 539

SERVICE LAW – Pensionary Benefits – Entitlement – Petitioner was born on 01.01.1960 and joined in the service on dated 17.10.1988 – Superannuated from service on 31.12.2019 – Petitioner was allowed previous increment on 01.01.2019 – Next increment was due on 01.01.2020 – But he was denied such incremental benefit as he was no more in the service – Representation filed claiming such benefits – Representation rejected – Action of the authority challenged – Held, the petitioner having rendered service from 01.01.2019 to 31.12.2019 for a period of 12 months and his increment having due on 01.01.2020 is entitled to get the notional increment for the year i.e. from 01.01.2019 to 31.12.2019 for the purpose of pensionary benefits only.

Arun Kumar Biswal -V- State of Odisha & Anr.
W.P.(C) NO. 17715 OF 2020

2021 (II) ILR-Cut…… 556

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2021 (II) ILR - CUT- 465

Dr. S. MURALIDHAR, C.J & K.R.MOHAPATRA, J.

W.P.(C) NO. 30637 OF 2020

JAY RAM PUJAHARI .....Petitioner

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

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Writ petition – Tender matter – Incentives – Early completion of contract work – Grant of incentive as per OPWD Code, VOL-1, Paragraph-3.5.5 (V) Note-III – Delay in communication about the completion – No fault of petitioner, rather the concerned Executive Engineer had delayed the report of completion of the work – Action of the Authority challenged – Held, petitioner is entitled to get the incentive as per law.

Case Law Relied on and Referred to :-

1. 2017 (I) ILR-CUT-381 : Prafulla Kumar Pradhan Vs. State of Odisha.

For Petitioner : M/s. Prabodha Ch. Nayak.
For Opp. Parties: Mr. P.K.Muduli, Addl. Govt. Adv.

ORDER Date of Order : 18.03.2021

BY THE BENCH

Heard Mr. Prabodha Chandra Nayak, learned counsel for the Petitioner and Mr. Prabhat Kumar Muduli, learned Additional Government Advocate for the State-Opposite Parties.

2. The Petitioner in this writ petition seeks to assail the order dated 20th August, 2020 (Annexure-1) passed by the Commissioner-cum-Secretary, Government of Odisha, Works Department, Bhubaneswar, whereby he rejected the representation of the Petitioner for grant of incentive for timely completion of work as per the condition in the DTCN as well as provisions of OPWD Code.

3. The averments in the writ petition reveal that the Petitioner being a Special Class Contractor was awarded with the work "*Construction of HL Bridge over Raxapali Nallah at 71/500 Km on Sambalpur-Sonepur Road SH-15 under CRF*" (for short the 'Project'). The Petitioner completed the Project on 21st December, 2016, i.e., much prior to the stipulated date of completion

and intimated the same to the authorities claiming incentive for timely completion of Project. Due to inaction of authorities in granting incentive to the Petitioner, he submitted a representation dated 14th January, 2019 before the Commissioner-cum-Secretary, Government of Odisha, Works Department, Bhubaneswar-Opposite Party No.1, which was not paid any heed. Consequently, the Petitioner filed W.P.(C) No.7796 of 2019, which was disposed of vide order dated 26th August, 2019 directing the Opposite Party No.1 to consider and dispose of his representation within a period of four months from the date of receipt of a copy of the said order. Accordingly, the Opposite Party No.1 passed the impugned order dated 20th August, 2020 (Annexure-1), relevant portion of which is reproduced hereunder:-

> *"**And whereas**, the proposal of payment of incentive has been duly examined with reference to the extant OPWD Codal Provision & the same was regretted by the Works Department after taking Govt. approval on the ground that the concerned Executive Engineer has not reported the actual date of Completion of the project as soon as possible through Fax or E-mail so that the report is received within 7 days of Completion by the concerned SE, CE and Administrative Department as per provision of Para 3.5.5.(v) Note-III of OPWD Code, Vol-I;*
>
> ***Therefore**, taking into account the above facts and circumstances, the representation of the petitioner has no merit for consideration and the same is disposed of accordingly being devoid of merit."*
>
> Assailing the same, this writ petition has been filed.

4. Mr. Nayak, learned counsel for the Petitioner submitted, although the Project was completed on 21st December, 2016, but the Executive Engineer R&B Division, Sonepur-Opposite Party No.5 intimated the completion of the Project to the Chief Engineer, (DPI & Roads), Odisha, Bhubaneswar, vide his letter No.193 dated 28th January, 2017. As it was not communicated within the seven days as stipulated in Paragraph-3.5.5 (v) Note-III of the OPWD Code Vol-I, request of the Petitioner for grant of incentive was turned down.

4.1 Mr. Nayak, learned counsel for the Petitioner further submitted that the Petitioner has no contribution for delay in communicating the completion of Project to the authority for grant of incentive. For the laches of Opposite Party No.5, the Petitioner should not be made to suffer. In support of his contentions, he relied upon the ratio in ***Prafulla Kumar Pradhan v. State of Odisha,*** 2017 (I) ILR-CUT-381, wherein this Court held as follows:

> *"11. In the order passed on 30.05.2016, opposite party no.2 has resorted to a clause in the OPWD Code which provided that it is the obligation of the Executive Engineer to report about the completion of work within seven days thereof and since the Executive Engineer failed to do so, the petitioner would not be entitled to grant of incentive. It is surprising that for no fault of the petitioner, he has to suffer even though he has completed the work much prior to the stipulated date of completion and has already been paid the final bill, within ten days of completion of the work. The petitioner cannot be made to suffer for no fault on his part, especially when all the authorities have themselves accepted that the work was completed much prior to the date of completion.*
>
> *12. In our view, in the facts of this case, the petitioner would be entitled to the incentive for early completion of work as provided for under clause-6.21 of the tender call notice. The order dated 30.05.2016 is thus quashed. Opposite party no.2-Engineer-in-Chief, Public Health, Odisha is directed to pass a fresh order in accordance with law giving the petitioner benefit of clause-6.21 of the tender call notice within two months from the date of filing of the certified copy of this order."*

He, therefore, submitted that the Petitioner is entitled to the incentive for early completion of the Project, which has been refused for no justifiable reason. He prays for setting aside the order passed under Annexure-1 and to release the incentive for early completion of the Project work.

5. Mr. Muduli, learned Additional Government Advocate relying upon Paragraph-3.5.5 (v) of the OPWD Code Vol-I submitted that it is mandatory under the aforesaid provision on the part of the concerned Executive Engineer to report the actual date of completion of the Project as soon as possible through fax or email so that the report can be received within seven days of such completion by the Superintending Engineer, Chief Engineer or the concerned Department, as the case may be. In the instant case, no intimation of successful completion of the Project was intimated within seven days. Although the Executive Engineer reported that the Project work was completed on 21st December, 2016, but the report of the Executive Engineer, R&B Division, Sonepur was received only vide letter dated 28th January, 2017, *i.e.*, beyond seven days, which is a mandatory requirement as per Paragraph-3.5.5 (v) of the OPWD Code Vol-I. Thus, the Commissioner-cum-Secretary of the Works Department (OP No.1) has committed no error in refusing the claim of the Petitioner for grant of incentive. He, therefore, prayed for dismissal of the writ petition.

6. Heard learned counsel for the parties and perused the materials placed before this Court. Paragraph-3.5.5 (v) of OPWD Code Vol-I reads as follows:-

"For availing incentive clause in any project which is completed before the stipulated date of completion, subject to other stipulations, it is mandatory on the part of the concerned Executive Engineer to report the actual date of completion of the project as soon as possible through fax or e-mail so that the report is received within 7 days of such completion by the concerned SE., C.E. and the Administrative Department."

Thus, timely intimation of completion of the project by the concerned Executive Engineer is a mandatory requirement under the aforesaid provision in order to avail incentive by the Contractor for early completion of the Project. The report in that regard has to be intimated within a period of seven days from the date of completion of the Project. Admittedly, the intimation was not sent by the Executive Engineer within the stipulated period of seven days. There is also no allegation that the Petitioner had contributed to such delay in intimation. In view of the ratio in ***Prafulla Kumar Pradhan (supra),*** the Petitioner cannot be faulted with for the delay in communication of the completion report by the Executive Engineer. The Petitioner cannot be made to suffer for no fault on his part, particularly when the authorities have accepted the fact that the Project was completed prior to the stipulated date.

7. In that view of the matter, we have no hesitation to set aside the order dated 20th August, 2020 (Annexure-1) passed by the Commissioner-cum-Secretary, Works Department, Government of Odisha, Bhubaneswar (OP No.1) in refusing the claim of the Petitioner for grant of incentive.

8. Accordingly, the writ petition is allowed. The Petitioner shall be paid the incentive for early completion of the Project in accordance with law, as expeditiously as possible preferably within a period of two months from the date of production of certified copy of this order.

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2021 (II) ILR - CUT- 468

Dr. S. MURALIDHAR,C.J & B. P. ROUTRAY, J.

W.P.(C) NO. 26408 OF 2017

M/S. PANDA INFRAPROJECT LTD. .....Petitioner

.v.

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

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order black listing of the Petitioner Contractor – Plea that the impugned action of blacklisting of the Petitioner was pre-determined – Government had already ordered blacklisting of the Petitioner and had asked the Engineer-in-Chief to take immediate action "for blacklisting the contractor" even before a show cause notice (SCN) was issued – Effect of such action – Held, the order black listing the Petitioner does not satisfy the requirements of law and in particular the bare necessity that an order blacklisting a contractor has to spell out the reasons in clear and unmistakable terms; must state that it has been passed after eliciting a reply from the contractor; spell out the reasons why the plea of the contractor was found unacceptable – In that sense, the impugned order is an unreasoned, non-speaking one – Order set aside. (Para 19 & 25)

Case Laws Relied on and Referred to :-

1. (2014) 14 SCC 731 : Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited.
2. (1975)1SCC 70 : Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal.
3. (1989) 1 SCC 229 : Raghunath Thakur Vs. State of Bihar.
4. 2019 (17) SCALE 758 : M/s. Daffodills Pharmaceuticals Ltd. Vs. State of U.P.

For Petitioner : Mr. M. Kanungo, Sr.Adv.
For Opp. Parties : Mr. D.K. Mohanty, A.G.A.

ORDER Date of Order : 23.03.2021

BY THE BENCH

1. The challenge in the present petition by the Petitioner, who is admittedly a Super-Class Contractor is to an order dated 12th December, 2017 passed by the Chief Engineer (DPI & Roads), Odisha banning the Petitioner "from participating or bidding for any work to be undertaken by Government of Odisha" and also banning it from "transacting business with Government of Odisha either directly in the name of propriety bidder or indirectly under different name or title".

2. The background to the present petition is that the Petitioner, who is a contractor involved in the construction of rail over bridge (ROB) along with bridge over ROB at-L.C. No-188- SPL- 3E at-RD-433/23.25 km. of Howrah-Chennai Railway Line at RD-1/200 km from N.H.-203 (Bomikhal Square) connected to RD-1/30 km. to Janapath Via-Maharshi College, Saheed Nagar. It is stated that there was an accident where ten meters slab collapsed during

the concreting of the said ROB at Level Crossing No.188 SPL-3E, Bhubaneswar resulting the death of one person and injuries to some others.

3. As a result of this incident, a Committee was formed by the Works Department, Government of Odisha to enquire into and submit a detailed report. That report was submitted on 26th September, 2017. The said inquiry report is stated to have placed the responsibility for incident on the Petitioner.

4. By letter dated 10th October, 2017, the Under Secretary to Government of Odisha, Works Department addressed the communication to the Chief Engineer (DPI & Roads) stating that on the basis of the afore mentioned report submitted by the Committee on 22nd September, 2017 the "Government orders have been obtained for blacklisting M/s. Panda Infra Projects (India) Pvt. Ltd., Bhubaneswar, the contractor for intentional violation of important conditions of contract, leading to injuries and loss of life. You are therefore requested to take immediate necessary action may be processed for blacklisting the contractor M/s. Panda Infra Projects (India) Pvt. Ltd., Bhubaneswar, following the procedure as per OPWD Code."

5. As a result of the above direction, a show cause notice (SCN) was issued by the Chief Engineer to the Petitioner on 18th October, 2017 asking the Petitioner to show cause why it should not be blacklisted.

6. On 1st November, 2017, the Petitioner submitted a detailed reply to the SCN notice inter alia pointing out that the contract was a P1 contract, wherein items of work executed, their quantity and rates are specified in the contract it self. The work had to be executed by the contractor "as per detail Design, Drawing and Specifications determined, approved and provided by the Department and also as per the direction of Engineer-in-Charge of the site." It was further stated that before casting of the Span from P19 to P20 the arrangement of the Petitioner for "shuttering and centering, staging, safety arrangements were inspected by the Departmental Engineers and the reinforcement were measured" and after which the Petitioner was allowed to "lay concrete which were also executed in presence of the Departmental Engineers". It was also stated that "all our material permanent as well as temporary" had satisfied the requisite specifications that have been accepted by the Engineer-in-Charge and they were permitted to go ahead to the concreting under the direct supervision of Departmental Engineers "after they were satisfied all our arrangements." The Department was accordingly asked to withdraw the SCN.

7. Thereafter the impugned order was passed on 12th December, 2017, blacklisting the Petitioner "with immediate effect" as per codal provisions for "intentional violation of the condition of contract leading to injuries and loss of life." The registration of the Petitioner as a Super Class Contractor also stood suspended.

8. This Court has heard the submission of Mr. Milan Kanungo, learned Senior Counsel for the Petitioner and Mr. D.K. Mohanty, learned Additional Government Advocate.

9. Mr. Kanungo submits that the entire action leading to the blacklisting of the Petitioner was pre-determined. Admittedly the SCN itself was issued under the direction of the Under Secretary to the Government contained in the letter dated 10th October, 2017 to the Chief Engineer. He points out that there was no mention made of this letter in the SCN. Also the fact that the enquiry report dated 26th September, 2017 submitted by the Committee had placed the responsibility for the mishap on the Petitioner, which led to the impugned action, was not mentioned in the SCN. In other words, the real reasons that led to the issuing of the SCN were not mentioned therein.

10. Secondly, it is pointed out by Mr. Kanungo that in the impugned order there was no reference to the fact that a SCN was issued to the Petitioner on 18th October, 2017 to which the Petitioner had replied on 1st November, 2017. The impugned order also did not deal with the any of the Petitioner‟s submission. It simply reiterated the allegation in the SCN that the Petitioner had intentionally violated the condition of the contract leading to injuries and loss of life.

11. Lastly, it is submitted by Mr. Kanungo that there cannot be an order for permanent blacklisting and this is contrary to the law explained in several judgments including ***Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited (2014) 14 SCC 731*** and the recent judgment dated 6th November, 2020 of the Supreme Court of Indiain Civil Appeal No. 3647 of 2020 (***Vetindia Pharmaceuticals Limited v. State of Uttar Pradesh)***. Mr. Kanungo also places reliance on the judgments in ***Erusian Equipment & Chemicals Ltd. v. State of West Bengal (1975)1SCC 70, Raghunath Thakur v. State of Bihar (1989) 1 SCC 229*** and a judgment of this Court in ***W.P.(Civil) No.20554 of 2017 (M/s.Gupta Sports v. State of Odisha).***

12. Mr. D.K.Mohanty, learned counsel appearing for the Opposite Parties is unable to dispute that the impugned order makes no reference to a SCN having been issued to the Petitioner to which the Petitioner replied on 1st November, 2020. The counter affidavit terms the Petitioner's contention that the scaffolding, centering and shuttering had been inspected and approved by the official of the Engineering Department as "an intelligent plea to shirk responsibility".

13. Reference is made in the counter affidavit to Clause 115.3 of the MORT&H specification for Road and Bridges (5th revision) under which the sole responsibility for adequacy and safety of the method adopted by the contractor shall rest on the contractor irrespective of any approval by the Engineer. Reference is also made to Sub-section 1503.1 of Section 1500 of MORT&H specification (4th revision) which inter alia states that "notwithstanding any approval or review of drawings and design by the Engineer, the contractor shall be entirely responsible for the adequacy and safety for framework".

14. What the counter affidavit is silent on is the fact that the entire action was triggered by the report submitted on 26th September, 2017 by the Committee. The counter affidavit is also unable to deny that it is only pursuant to the direction issued on 10th October, 2017 by the Works Department to the Chief Engineer (DPI & Roads), that the impugned SCN was issued. The counter affidavit also does not dispute the fact that in the SCN issued to the Petitioner no reference is made to the above letter dated 10th October, 2017 or the report dated 26th September, 2017 of the Committee.

15. In the rejoinder affidavit the Petitioner points out how the design for Pb19 & Pb20 was changed and the Petitioner was allowed to complete all the balance fifteen spans from the period September, 2017 to March, 2018; that even after the S CN was issued to it, the Petitioner completed all seventy five spans of the approach roads both on the Saheed Nagar side and the Rasulgarh side by 31st March, 2018 i.e., within the time granted by the Department.

16. At this stage, it requires to be noted that pursuant to an order passed by this Court on 26th November, 2018 permitting the Petitioner to approach the Chief Engineer with a representation, the Petitioner on 11th December, 2018 submitted a twelve page representation reiterating that it had not

violated any terms and conditions of the contract. It is stated that even before the Committee, which enquired into the incident, the Petitioner was not given a chance to put forth its defence.

17. Although this Court on 26th November, 2018 had directed that a fresh decision should be taken within two months of the making of the representation, that direction appears not to have been complied with.

18. It must also be mentioned that the Court has been provided with a copy of the report of the Disciplinary enquiry of a three- member Committee which examined the conduct of three of the Department officers involved in the project. It does not appear to have held any of the three officials guilty of dereliction of duty.

19. The Court finds that the manner in which the Opposite Parties have proceeded against the Petitioner, on the face of it bears out the principal ground of challenge viz., that the impugned action of blacklisting the Petitioner was pre-determined. A perusal of the letter dated 10th October, 2017 written by the Under Secretary in the Works Department to the Chief Engineer shows that the Government had already ordered blacklisting of the Petitioner and asked the Engineer-in-Chief to take immediate action "for blacklisting the contractor" even before a SCN was issued to the Petitioner.

20. There is merit in the contention of Mr. Kanungo that the issuing of a SCN to the Petitioner thereafter and eliciting a reply thereto, was an empty formality which was not going to change the decision already taken to blacklist the Petitioner. This also explains why the SCN makes no reference to the letter dated 10t October, 2017 or to the report of the Committee, which led to issuance of that letter. It is also surprising that the impugned order makes no reference to the fact that an SCN was issued to the Petitioner or to the detailed reply thereto by the Petitioner.

21. Indeed, there is no answer to the contention of the Petitioner that despite issuance of the SCN containing serious allegations of violations by the Petitioner of the terms and conditions of the contract, the Petitioner was asked to execute the balance work, on a revised design, which the Petitioner admittedly completed to the satisfaction of the Department by 31st March, 2018.

22. This casts serious doubts on whether the Engineer-in-Chief, who passed the impugned order, applied his mind to the defence taken by the Petitioner in its reply denying violation of any of the terms and conditions of the contract. The impugned order does not discuss any of the defences of the Petitioner and why the Engineer-in-Chief did not find them to be acceptable. All of this renders the impugned order arbitrary, unreasonable and violative of Article 14 of the Constitution.

23. In Erusian Equipment (supra), the Supreme Court observed as under:

> "15.....The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The black lists are instruments of coercion.
> .....
> 20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into awful 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."

24. It was reiterated in Raghunath Thakur (supra),

> "4.....(I)t is an implied principle of the rule of law that any order having civil consequences should be passed only after following the principles of natural justice. It has to be realized that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order."

25. In the considered view of the Court, the impugned order of blacklisting the Petitioner does not satisfy the requirements of law and in particular the bare necessity that an order blacklisting a contractor has to spell out the reasons in clear and unmistakable terms; must state that it has been passed after eliciting a reply from the contractor; spell out the reasons why the plea of the contractor was found unacceptable. In that sense, the impugned order is an unreasoned, non-speaking one.

26. The other serious problem with the impugned order is that it makes the blacklisting permanent, which is legally untenable as explained in ***Kulja Industries Limited*** (supra) by the Supreme Court as under:

> "24. Suffice it to say that „debarment" is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the „debarment" is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor."

27. The above legal position was reiterated in ***Vetindia Pharmaceuticals Limited*** (supra) as under:

> "An order of blacklisting operates to the prejudice of a commercial person not only in praesenti but also puts a taint which attaches for beyond any may well spell the death knell of the organization/instruction for all times to come described as a civil death. The repercussions on the appellant were clearly spelt out by it in the representations as also in the writ petition, including the consequences under the Rajasthan tender, where it stood debarred expressly because of the present impugned order. The possibility always remains that if a proper show cause notice had been given and the reply furnished would have been considered in accordance with law, even if the respondents decided to blacklist the appellant, entirely different considerations may have prevailed in tier minds especially with regard to the duration."

28. A reference in the above decision was also made to an earlier decision in ***M/s. Daffodills Pharmaceuticals Ltd. v. State of U.P. 2019 (17) SCALE 758*** where in an order of black listing a contractor for a period beyond three years up to a maximum of five years was considered disproportionate.

29. For the aforementioned reasons, this Court finds the impugned order blacklisting the Petitioner to be unsustainable in law and it is hereby set aside.

30. This petition is allowed in the above terms.

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2021 (II) ILR - CUT- 475

Dr. S. MURALIDHAR, C.J & B. P. ROUTRAY, J.

STREV NO. 29 OF 2010

M/S. UTKAL MOULDERS
KUARMUNDA, DIST. SUNDARGARH .....Petitioner

.V.

STATE OF ORISSA .....Opp. Party

CENTRAL SALES TAX ACT, 1956 read with Orissa Sales Tax Act, 1947 – Section 2 (h) read with Section 24(1) of OST Act – The question formulated as to whether "the petitioner having separately charged freight in the sale bill whether the Tribunal is legally correct in holding that it is part of sale price and the petitioner is not entitled to claim deduction of fright? – Held, No – The question framed is answered in negative that is in favour of the petitioner/assessee and against the Department by holding that the Tribunal was incorrect in holding that the freight shown in the sale bill separately is part of the sale price – The petitioner is entitled to claim deduction of the freight charges from the taxable sales turnover.

Case Laws Relied on and Referred to :-

1. (2000) 117 STC 413 (SC) : State of Karnataka and another Vs. Bangalore Soft Drinks Pvt. Ltd.
2. (1983) 53 STC 322 (Orissa) : Shree Rani Sati Mining Traders Vs. Sales Tax Officer.
3. (1975) 35 STC 84 (Orissa) : Orient Paper Mills Ltd. Vs. State of Orissa.
4. (1996) 100 STC 411 : Greaves Chitram Ltd. Vs. State of Tamil Nadu.
5. (1993) 88 STC 151 (SC) : Ramco Cement Distribution Co. Pvt. Ltd. Vs. State of Tamil Nadu.
6. (1984) 57 STC 81 (Karnataka) : The State of Karnataka Vs. Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd.
7. (1988) 71 STC 277 (SC) : Commissioner of Sales Tax, U.P. Vs. Rai Bharat Das and Bros.
8. (1997) 107 STC 2019 (SC) : Black Diamond Beverages Vs. Commercial Tax Officer, Central Section Assessment Wing, Calcutta.
9. (1974) 33 STC 536 (MP) : Commissioner of Sales Tax Vs. Gill and Company Ltd.
10. (1979) 43 STC 13 (SC) : Hindustan Sugar Mills Vs. State of Rajasthan.

For Petitioner : Mr. Siddhartha Ray
For Opp. Party : Mr. S.S. Padhy, Additional Standing Counsel.

JUDGMENT Date of Judgment : 30.03.2021

Dr. S. MURALIDHAR, C.J.

1. By an order dated 22nd September 2015, this Court formulated the following substantial question of law for consideration in the present petition:

> *"The Petitioner having separately charged freight in the sale bill whether the Tribunal is legally correct in holding that it is part of sale price and the Petitioner is not entitled to claim deduction of freight?"*

2. The background facts are that the Petitioner is a manufacturer of cast iron goods and is also engaged in the trading of iron and steel goods. The

Petitioner is a registered dealer under the Orissa Sales Tax Act, 1947 (OST Act) and the Central Sales Tax Act, 1956 (CST Act).

3. The Department of Telecommunications (DoT), Maharashtra Telecom Circle, Mumbai floated a tender on 30th April 1998, for supply of "cast iron socket-Socket 'B'." Clause 9 of the Bid Document stipulated the bid price. Clause 9.1 required the bidder to quote a basic unit price and other component prices individually in terms of the Schedule given in Section (iii). Clause 9.2 (i) provided that the bidder should quote the excise duty, sales tax, insurance, freight and other taxes paid or payable item wise. Clause 9.2 (ii) stipulated that the bidder had to quote the price as per the price schedule given in Section (iii) Part 3 for all the items given in the schedule of requirements. Clause 9.3 provided that the price quoted by the bidder would remain fixed during the entire period of the contract and should not be subjected to variation of any account.

4. Section (iii) Part-3 specified the separate items which were to be quoted by the bidder as under:

(1) Basic Unit price
(2) Excise Duty
(3) Sales Tax
(4) Freight
(5) Any other levy
(6) Unit price inclusive of all levies and charges
(7) Discount
(8) Total dues accounted price

5. It is stated that in its bid, the Petitioner specifically gave the break up price quoted by it for supply of Socket-B in the following manner:

Basic Unit Price exclusive of all levies and charges but inclusive of packing, forwarding and insurance	: Rs.261.70/-
Excise @ 15 %	: Rs.39.26/-
Sales Tax @ 4 %	: Rs.12.04/-
Freight	: Rs.45.00/-
Unit Price inclusive of all levies and charges	: Rs.358.00/-

6. The above quote was per unit of the C.I. Socket-B. The total quotation was for 50,000 Nos. aggregating to Rs.1,79,00,000/-.

7. The Petitioner's bid was accepted. The DoT visited the Petitioner's factory, inspected the goods and earmarked them. In terms of the conditions attached to the bid, the sale was complete at that stage.

8. The Petitioner then raised its invoices by showing separately the freight, excise duty and C.S.T. components in accordance with Section (iii) Part-3 of the tender conditions.

9. On 24th April 1999, an inspection report was submitted by the STO, Investigation Unit, Rourkela alleging that the Petitioner had evaded tax during 1999-2000 on freight charges of Rs.1,49,576/- on the total freight collection of Rs.37,39,393/-. On this basis, the assessment proceedings were initiated under Rule 12 (5) of the CST (Orissa) Rules. The Petitioner offered an explanation that the goods had been delivered ex factory to the common carriers. The claim of deduction on account of outward freight, separately charged in the sales bills, was allowable as a deduction in view of the definition of sale price contained under Section 2 (h) of the CST Act.

10. However, the STO rejected the Petitioner's explanation and raised an additional demand of Rs.1,36,956/- by the impugned assessment order (Annexure 4). Aggrieved by the said order, the Petitioner filed an appeal which came to be dismissed by the Assistant Commissioner of Commercial Taxes, Sundargarh Range, Rourkela by an order dated 11th April, 2002. It was held in the said order that the contract in question clearly mentioned that the prices were inclusive of excise duty, sales tax, freight, packing and also "FOR destination". Thus, it was held that it was a contract of sale where the cost of freight was a part of the sale prices and the purchaser i.e. the DoT had not undertaken any obligation to pay freight incurred by the selling dealer. Therefore, the selling dealer i.e. the Petitioner would not be entitled to any deduction towards freight despite showing it separately in the sale invoice.

11. Thereafter, the Petitioner went before the Orissa Sales Tax Tribunal, Cuttack (the Tribunal) with S.A.35 (C) of 2002-03 against the above order. By an order dated 5th October 2009, the Tribunal dismissed the appeal holding that the transportation charges, even though shown separately in the bill, was includible in the sale price. It was held therein that in the instant

case the place of sale was the consignee's place and hence, transportation cost incurred was the inward transportation cost of the Petitioner, but not outward transportation cost to be reimbursed by the DoT.

12. Mr. S. Ray, learned counsel for the Petitioner submitted that the definition of sale price under Section 2 (h) of the CST Act made it clear that the sale price excluded the cost of freight of delivery where such cost was separately charged. He further referred to the clauses in the contract which made it clear that the sale was completed inside the Petitioner's factory, once it was inspected by the DoT and the goods to be sold were earmarked for purchase. He pointed out that the Petitioner had transported the goods to the site of the DoT at the latter's behest, after the sale was complete. Accordingly, the freight was charged separately and could not be included in the sale price. In support of his contention that even when the freight is shown as a uniform per unit price, it would still be not includible in the sale price. Mr. S. Ray relied on the decision of the Supreme Court in ***State of Karnataka and another v. Bangalore Soft Drinks Pvt. Ltd. (2000) 117 STC 413 (SC)***. He also placed reliance on the decisions in ***Shree Rani Sati Mining Traders v. Sales Tax Officer (1983) 53 STC 322 (Orissa); Orient Paper Mills Ltd. v. State of Orissa (1975) 35 STC 84 (Orissa); Greaves Chitram Ltd. v. State of Tamil Nadu (1996) 100 STC 411; Ramco Cement Distribution Co. Pvt. Ltd. v. State of Tamil Nadu (1993) 88 STC 151 (SC); The State of Karnataka v. Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. (1984) 57 STC 81 (Karnataka); Commissioner of Sales Tax, U.P. v. Rai Bharat Das and Bros. (1988) 71 STC 277 (SC); Black Diamond Beverages v. Commercial Tax Officer, Central Section Assessment Wing, Calcutta (1997) 107 STC 2019 (SC); Commissioner of Sales Tax v. Gill and Company Ltd. (1974) 33 STC 536 (MP)*** and ***Hindustan Sugar Mills v. State of Rajasthan (1979) 43 STC 13 (SC).***

13. On the other hand, Mr. S.S. Padhy, learned Additional Standing Counsel for the Opposite Party-Department, referred to certain passages in the impugned order of the Tribunal which held that in the present case the sale was complete when the delivery took place at the site of the DoT. He referred to the observations of the Tribunal that it was highly unlikely that irrespective of the distance of the site of the purchaser, the freight charge would be the same and therefore, the freight charge was actually a part of the sale price itself. He drew attention to the clauses of the bid documents which according to him required the delivery be made at the purchaser's site.

14. The above submissions have been considered. The Clauses relevant for the purposes of the issue that arises for consideration as far as the bid price is concerned are Clause 9.1 to 9.5 which read as under:

> *"**9. BID PRICES:***
>
> *9.1 The Bidder shall give the total composite price inclusive of all levies & taxes, packing, forwarding, freight and insurance. The basic unit price and other component price need to be individually shown indicting the goods it proposes to supply under the contract as per price schedule given in Section III. Prices of incidental services, if any, should be quoted. The offer shall be firm in Indian Rupees. No foreign exchange will be made available by the Purchaser.*
>
> *9.2 Prices indicated on the Price Schedule shall be entered in the following manner:*
>
> *(i) The price of the goods shall be quoted inclusive of all levies, taxes and suitable required packing for safe and easy transportation. Excise Duty, Sales Tax, Insurance, freight and other taxes already paid or payable shall also be quoted separately, item wise.*
>
> *(ii) The Supplier shall quote as per price schedule given in Section III Part III for all the items given in schedule of requirement.*
>
> *9.3 The prices quoted by the Bidder shall remain fixed during the entire period of contract and shall not be subject to variation on any account. A bid submitted with an adjustable price quotation will be treated as non-responsive and rejected.*
>
> *9.4 The unit prices quoted by the Bidder shall be in sufficient detail to enable the Purchaser to arrive at prices of goods/equipment/system offered.*
>
> *9.5 Unless otherwise stated the rates shall be quoted on F.O.R. DESTINATION in the States of Maharashtra and Goa in fully packed condition (where packing is prescribed in the Technical Specification) and duly marked."*

15. From the above Clauses, it is plain that the bidder was required to separately indicate the components of excise duty, sales tax, insurance and freight. The rate was to be quoted on FOR Destination in the States of Maharashtra and Goa.

16. Clause 9.7 which is also important reads as under:

> *"9.7 The price approved by the department for procurement will be inclusive of levies & taxes, packing, forwarding, freight and insurance as mentioned in Para 9.1 above. Break-up in various heads like Excise Duty, Sales Tax, Insurance, Freight and other taxes paid/payable required under clause 9.2(i) is for*

information of the Purchaser and any change in these shall have no effect on price during the scheduled period of delivery."

17. It is also plain from Clause 21.2 that the 'unit price' was the determining factor. As far as the delivery is concerned, Clause 6.1 of Section VI of the General (Commercial) conditions of contract reads as thus:

"6.1 Delivery of the goods and documents shall be made by the Supplier in accordance with the terms specified by the Purchaser in its Schedule of Requirements and Special Conditions of Contract and the goods shall remain at the risk of the Supplier until delivery has been completed. The delivery of the items/goods shall be to the ultimate consignee as given in the purchase order."

18. The above clause therefore makes it clear that the delivery had to take place as per the conditions indicated in the purchase order (PO). Looking at the PO as far as the present case is concerned, Clause 4 (a) reads as thus:

"04. Delivery

(a) The delivery shall be deemed to have been completed on the day material has been offered for inspection to concerned OA as per the practice in vogue over several years in respect of supplies being made to CGMTS, Calcutta."

19. The above Clause makes it clear that once the material is offered for inspection, the delivery shall be "deemed to have been completed" on that very date. This is a critical factor in understanding the stage at which the delivery of goods took place in order to complete the sale.

20. In the considered view of the Court, this essential factor appears to have been lost sight of by the STO, the appellate authority as well as the Tribunal.

21. Mr. S.S. Padhy, learned Additional Standing Counsel for the Opposite Party-Department placed heavy reliance on the following observations of the Tribunal in the impugned order:

"The Unit price mentioned in the order itself is composite in nature without any break ups. Although the Bid documents submitted by the appellant in case of Mumbai order contained basic unit price, excise duty, Sales Tax, freight any other levy or charges and unit price inclusive of all levies and charges as Rs.261.70, Rs.39.26, Rs.12.04, Rs.45/-, Nil, and Rs.358.00 respectively. The insurance charges are borne by the appellant till the goods are received by the consignee. The appellant was responsible for all kinds of losses i.e. loss due to theft, damage,

shortages till before receipt of entire quantity of stores in good condition by the consignee. As would seen from the terms and conditions of the purchase order placed on the appellant the purchasers are not concerned about how much freight is incurred by the appellant in making goods available at the designated places and so also not concerned about any losses in theft, any loss or damage effected to the goods in between the place of origin and the place of receipt. No rate specification for the cost of goods, the central excise, sales Tax and freight cost in the purchase order where the rate given as fixed and final including all expenses. The division of the composite price under different Heads like Unit cost, excise and sales Tax and transportation in the Bid documents submitted by the appellant himself is a self act having no impact or influence on the purchaser at all who only make payment at the rate of unit price. The study of the terms and conditions of the purchase order leads to an unambiguous conclusion that the transport cost is not a post sales service done at the behest of the purchaser to be reimbursed from him as per the actual cost incurred."

22. In the considered view of the Court, the discussion by the Tribunal, and the conclusion reached by it, overlooks the actual applicable clauses of the contract. In fact the Tribunal does not actually discuss Clause 6.1 read with Clause 4 (a) of the PO which would indicate what the intention of the parties was when they entered into the contract of sale and purchase as to the exact place of delivery of the goods in question. The definition of sale in Section 2(h) of the CST Act had to be understood in the context of the clauses of the contract. Here, once the sale was complete at the site of the inspection of the goods, which is the factory of the Petitioner, then the freight charge for further transportation of the goods to the purchaser's site would obviously not form part of the sale price. Therefore, it was being separately shown in the invoice.

23. Section 2(h) of the CST Act reads thus:

"sale price" means the amount payable to a dealer as consideration for the sale of any goods, less an sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery of the cost of installation in cases where such cost is separately charged."

24. Having perused the sample of the invoices raised in the present case, which is not disputed by the DoT, it is seen that the Petitioner had indicated separately the freight charge of Rs.45/- . The Tribunal committed a serious error in understanding the freight charge to be same freight charge irrespective of the distance between the factory of the Petitioner and the

destination of the Purchaser. The crucial factor, which was missed, was that the rate was an uniform rate of Rs.45 "per piece" as this was for a supply of 50000 units. In almost identical facts, the Supreme Court in ***State of Karnataka v. Bangalore Soft Drinks Pvt. Ltd.*** (*supra*) held that despite there being a uniform rate per unit as freight charge that still would not be included in the sale price. The following observations in the said decision are relevant:

> *"No doubt, it is true that the revision petitioner has charged freight charges uniformly irrespective of the distance. For this the revision petitioner contended that it has charged uniform rate of Rs.4 per crate with a view to maintain a uniform price of their product throughout their territory of operation and charging of such equalized price is a common trade practice. The petitioner in support of his contention placed reliance on a decision of this Court in the case of Premier Breweries Ltd. v. State of Karnataka reported in [1984] 56 STC 14. In this decision, this Court has approved the charging of uniform rate of freight charges irrespective of distance of transportation. Therefore, the revision petitioner with a view to see that his products should be available for sale at all places at a uniform price, has charged the freight charges at uniform rate."*

25. In the considered view of the Court, since the Tribunal made a factual error as regards the place of delivery in terms of the Clauses of the Contract in the present case, it made a further error in distinguishing the above decision as not applicable to the facts. On the other hand, this Court finds that the said decision is squarely applicable to the fact in the present case.

26. The Tribunal also appears to have erred in not correctly applying the ratio of the decision in ***Hindustan Sugar Mills v. State of Rajasthan*** (supra). There again it was explained in detail by the Supreme Court what the purport of the definition of sale under Section 2 (p) of the Rajasthan Sales Tax Act, 1954, which corresponds Section 2(h) of the CST Act. The Supreme Court explained that the definition was in two parts as under:

> *"The first part says that 'sale price' means the amount payable to a dealer as consideration for the sale of any goods. Here, the concept of real price or actual price retainable by the dealer is irrelevant. The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration retainable by the dealer."*

27. Thereafter, the Supreme Court proceeded to delineate the sample scenarios.

28. In the considered view of the Court, the legal position, as explained in ***Hindustan Sugar Mills and others v. State of Rajasthan and others*** (supra) and the ***State of Karnataka and another v. Bangalore Soft Drinks Pvt. Ltd.*** (supra) supports the case of the Petitioner is that in the instant case the freight charges are not includable in the sale price, which is amenable and therefore, has to be excluded while calculating the taxable turn over for the purposes of the OST Act.

29. For the aforementioned reasons, the question framed is answered in negative that is in favour of the Petitioner-assessee and against the Department by holding that the Tribunal was incorrect in holding that the freight shown in the sale bill separately is part of the sale price. It is held that the Petitioner is entitled to claim deduction of the freight charges from the taxable sales turnover.

30. The revision petition is accordingly disposed of.

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2021 (II) ILR - CUT- 484

Dr. S. MURALIDHAR, C.J *&* S.K. PANIGRAHI, J.

CRLA NO. 542 OF 2014

ANWAR KHAN .....Appellant

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Appeal – Plea that there are discrepancies in the testimony of the eye witnesses – Three eye witnesses – Their statements are consistent in broad aspect of the identity of the accused with the weapon – The deceased disclosing that he had been attacked by the Appellant – Held, each of the witnesses i.e. PWs 1,3 and 8 speak of the deceased disclosing that he had been attacked by the deceased – The accused running away from the crime scene with the Bhujali has been witnessed by each of them as it happened – Therefore, the plea that it cannot be termed as eye witnesses but only as post-occurrence witnesses can not be accepted – The precise manner of describing them is that they are witnesses to the events soon after the assault of the deceased and direct eye witnesses to the

Appellant running away from the scene of crime with the murder weapon – The minor inconsistencies in the testimonies of PWs 1, 3 and 8, if any, are natural and do not in any manner impinge on their credibility. (14 to 16)

(B) CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code, 1860 – Conviction – Appeal – Plea that the prosecution has failed to prove the motive – The conviction not based on circumstantial evidence – Effect of – Held, the settled legal position in this regard is that while in a case based on circumstantial evidence, motive for the crime may form an important link in the chain of circumstances, in a case based on direct evidence, the case of the prosecution need not fail only because motive for the commission of the crime was not proved – The requirement is of course that the direct evidence should not be of a doubtful nature. (Para 17)

Case Laws Relied on and Referred to :-

1. (2010) 12 SCC 324 : State of U.P. Vs. Krishna Master.
2. (2012) 8 SCC 21 : Rai Sandeep @ Deepu Vs. Govt. of NCT of Delhi.
3. (2007) 11 SCC 195 : Yogesh Singh Vs.. Mahabeer Singh.

For Appellant : Smt. Bharati Dash
For Respondent : Smt. Saswata Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 02.07.2021

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against the judgment dated 28th August, 2014 passed by the Additional Sessions Judge, Baripada, Mayurbhanj in S.T. No.20/133 of 2012 convicting the Appellant for the offence under Section 302 of the Indian Penal Code (IPC) and sentencing him to imprisonment for life as well as to pay fine of Rs.1000/- and in default of payment of fine to undergo R.I. for three further months.

2. The case of the prosecution is that a complaint was lodged at Baripada Town Police Station by one Sabjad Khan on 19th April, 2012 at about 7.30 am stating that he had received information from one Sk. Ajim that his younger brother Manwar (deceased) had been assaulted by his middle younger brother (Anwar Khan, the present Appellant) by means of a 'Bhujali' in the night of 18th April, 2012 at about 11.30 pm near T.B. Hospital Chhak. As a result, Manwar had been admitted to the hospital and had subsequently expired.

3. Thereafter, the complainant (Sabjad Khan) informed the father of the deceased and had gone to the hospital. There he found the dead body of Manwar lying in the verandah. It was further alleged that previously the accused had assaulted the informant by means of a 'Khura' for which an FIR had been lodged.

4. The Investigating Officer (I.O.) registered the above complaint as Baripada Town P.S. Case No.129 of 2012 under Sections 302/506 IPC. Based on the investigation, a charge was framed against the present Appellant under Section 302 IPC.

5. There were three eyewitnesses in this case i.e. PWs 1, 3 and 8. PW-1 (Sm. Anisuddin) stated that the deceased is the younger brother of the accused Appellant. At the time of the occurrence, PW-1was present in his house. His shop was attached to his residential house. PW-1 heard the cry of "marigali, maridela". Thereupon, he and his Bhanja Sk. Sirajun came out of their house and saw the deceased lying in the verandah of his house with bleeding injuries. The deceased requested them to take him to the hospital in order to save his life. The Appellant who was present there, on seeing them, ran away from the spot holding a Bhujali. PW-1 chased the Appellant up to a little distance and then returned to the spot of the crime. The deceased disclosed to PW-1 and his Bhanja(nephew) that the Appellant had assaulted him severely and that he would not survive. Sk. Shera and Sk. Raj took the deceased to the hospital and subsequently, they came to know about the death of the deceased in the hospital.

6. The next eyewitness i.e. PW-3 (Sk.Shera) had stated that on hearing the cries "Bachao, anchao" he came out of his house. He also mentioned that his brother PW-1 and Sk. Raj came to the spot with him. On seeing them, the accused Appellant ran away from the spot holding a Bhujali in his hand. He also stated that the deceased had disclosed before them that the Appellant had assaulted him mercilessly. The deceased requested them to take him to the hospital to save his life. Then they informed the matter to the police and the police asked them to take the deceased to the hospital immediately. Thereafter, PW-3 and Sk. Raj took the deceased to the hospital in a motorcycle and the deceased died one hour after his admission to the hospital.

7. The third eyewitness PW-8 (Sk. Sirajun) has stated that he was watching T.V. in the house of Sk. Anisuddin on the date of occurrence. He

heard the cry "Morigoli, Morigoli, Bachao, Bachao". Accompanied by PWs 1 and 3 and went to the spot. Seeing them, the Appellant ran away from the spot holding a Bhujali in his hand. PW-8 and PW-1 chased the Appellant up to a short distance and thereafter returned to the scene of crime. The deceased disclosed before them that the Appellant had assaulted him.

8. The trial Court, after a careful analysis of the evidence of PWs 1, 3 and 8, found their testimonies to be corroborating each other on material particulars.

9. The trial Court has further found that PW-10 (Dr. Netrananda Mohanty) has also corroborated the evidence of PWs 1, 3 and 8. He conducted the post-mortem of the body of the deceased and found 10 incised wounds of different sizes situated over the dorsal aspect of left forearm, middle of left arm, left scapula, 6 inch below the left scapula, medial border of angle of right scapula, another injury 5 inch below the said angle of right scapula, 7^{th} thoracic vertebra, 10^{th} thoracic vertebra, another injury 2 inch below the 10^{th} thoracic vertebra and another injury adjacent to the said 10^{th} thoracic vertebra. PW-10 also found one penetrating wound of size 2.5 cm. x 1.5 cm x right pleural cavity-posterior to right axila. PW-10 also confirmed that all the injuries were ante mortem in nature and might have been caused by a sharp cutting weapon. He confirmed that the upper lobe of right lung was lacerated, the right pleural cavity was full of blood. The other internal organs including liver, spleen kidney were intact but looked pale. Injury No.vii was a penetrating wound of size 2.5 cm x 1.5 cm x right pleural cavity-posterior to right axial. This was sufficient in the ordinary course of nature to cause the death of a person. The cause of death was opined to be hemorrhage and shock due to the injury to vital organs like lungs. The time since death was estimated as within 24 hours from the time of the post-mortem examination.

10. The trial Court proceeded to accept the evidence of the three eyewitnesses to be reliable and free of internal contradictions. Accordingly, the trial Court proceeded to convict the Appellant and sentenced him as mentioned hereinbefore.

11. The principal contention of Ms. Bharati Dash, learned counsel for the Appellant, is that there are inconsistencies in the testimonies of the so-called eyewitnesses i.e. PWs 1, 3 and 8 which render their evidence unreliable. She contends that they are in fact post-occurrence witnesses and not eyewitnesses per se.

12. The testimonies of PWs 1, 3 and 8 have been carefully examined by this Court. It appears that on the material aspects viz., the deceased crying out in pain that he had been attacked, the accused being found at the scene of crime when they reached there, his running away from the spot with a 'Bhujali' on seeing the eyewitnesses there is a complete corroboration of one eye-witness by the other. While none of them might have seen the actual assault of the deceased by the Appellant with the sharp edged weapon (Bhujali), the fact remains that each of them saw the accused at the spot with the weapon. Each of the witness i.e. PWs 1,3 and 8 speak of the deceased disclosing that he had been attacked by the deceased. The accused running away from the crime scene with the Bhujali has been witnessed by each of them as it happened. Therefore, it is not possible to accept the plea of learned counsel for the Appellant, that PWs 1, 3 and 8 cannot be termed as eye witnesses but only as post-occurrence witnesses. The precise manner of describing them is that they are witnesses to the events soon after the assault of the deceased and direct eye witnesses to the Appellant running away from the scene of crime with the murder weapon.

13. The minor inconsistencies in the testimonies of PWs 1, 3 and 8, if any, are natural and do not in any manner impinge on their credibility. The legal position in this regard may be recapitulated at this juncture.

14. To begin with the Supreme Court has in ***State of U.P. v. Krishna Master (2010) 12 SCC 324*** explained in the following paras, what the approach of a Court evaluating oral testimony has to be:

> "15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.
>
> 17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to

> normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."

15. In ***Rai Sandeep @ Deepu v. Govt. of NCT of Delhi (2012) 8 SCC 21***, the Supreme Court explained who could be said to be a 'sterling' witness as under:

> "In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

16. When the depositions of PWs 1, 3 and 8 are subject to the above tests, this Court finds that they are consistent in the broad aspects of the identity of the Appellant, his immediate conduct after the assault and most importantly, the disclosure of the deceased about the Appellant having assaulted him with the sharp edged weapon. As already discussed, barring some minor inconsistencies, the evidence of PS 1, 3 and 8 are consistent on the material aspects of the crime. They have withstood the cross-examination by the defence at the trial. As soon as they heard the shout of the deceased, they reached at the spot from where each of them saw the Appellant, who was identified by the deceased to them as the assailant, run away with the assault weapon. The Court is unable to find anything inconsistent in their testimonies so as to render them unreliable or lacking in credibility.

17. The next submission on behalf of the Appellant is that the prosecution failed to prove the motive for the crime. The settled legal position in this regard is that while in a case based on circumstantial evidence, motive for the crime may form an important link in the chain of circumstances, in a case based on direct evidence, the case of the prosecution need not fail only because motive for the commission of the crime was not proved. The requirement is of course that the direct evidence should not be of a doubtful nature. In ***Yogesh Singh v. Mahabeer Singh (2007) 11 SCC 195***, the Supreme Court explained the legal position thus:

> "It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of the witnesses as to commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. (*Hari Shanker v. State of U.P. (1996) 9 SCC 40*, *Bikau Pandey v. State of Bihar (2003) 12 SCC 616*, *State of U.P. v. Kishanpal, (2008) 16 SCC 73, Abu Thakir v. State of T.N., (2010) 5 SCC 91* and *Bipin Kumar Mondal v. State of W.B., (2010) 12 SCC 91*)."

18. The evidence of the aforementioned three witnesses PWs 1,3, and 8 is fully corroborated by the medical evidence of PW-10. The nature of the fatal bodily injuries as explained by PW-10 is consistent with the testimonies of the three witnesses. The conclusion reached by the trial Court that the evidence when viewed as a whole unmistakably points to the guilt of the present Appellant, and none else, therefore merits acceptance. No grounds

have been made out for interference with the impugned judgment of the trial Court.

19. It must be noted at this stage that on 16th March, 2021 this Court had enlarged the Appellant on interim bail for a period of four months, after noting that he had completed nine years in jail custody. As a result of the dismissal of the present appeal, the Appellant who has been enlarged on interim bail pursuant to the above order, is directed to surrender before the trial Court forthwith notwithstanding that the interim bail is for a period of four months from the date of his release pursuant to the above order dated 16th March, 2021. If the Appellant fails to surrender on or before 16th July, 2021 before the trial Court then it will be open to the concerned Investigating Officer to take steps to have the Appellant apprehended forthwith.

20. The appeal is dismissed in the above terms.

21. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 491

Dr. S. MURALIDHAR, C.J & SAVITRI RATHO, J.

W.P.(C) NO. 19402 OF 2021

ORISSA STEVEDORES LTD. .....Petitioner

.V.

UNION OF INDIA AND ORS. .....Opp. Parties

THE INCOME TAX ACT, 1961 – Section 143(3) r/w section 144-B – Order of Assessment passed – Demand raised – No notice-cum–draft assessment issued to the Assessee – Impugned demand notice challenged on the ground of non-grant of opportunity of hearing to the petitioner – Held, the impugned assessment order is not only in considerable variation of the figures for the earlier AYs but is also

prejudicial to the interests of the assessee – In other words, the requirement of Section 144-B (1) (xvi) of the ITA Act for triggering the procedure of first preparing a draft assessment order and providing it to the Petitioner for its response stands attracted in this case – Order set aside as well as the consequential demand notice/order and grants liberty to the Dept. to pass a fresh assessment after giving personal hearing/opportunity to the petitioner.

For Petitioner : Mr. Sanjay Kumar Acharya
For Opp. Parties : Mr. Tushar Ku. Satpathy (No.2-Revenue Deptt)

ORDER Date of Order : 08.07. 2021

Dr. S. MURALIDHAR,C.J.

1. The matter is taken up by video conferencing mode.

2. The challenge in the present writ petition is to an assessment order dated 14th June, 2021 passed by the National Faceless Assessment Centre (NFAC) under Section 143 (3) read with Section 144-B of the Income Tax Act, 1961 (IT Act) raising a demand of Rs.735.16 crores on the Petitioner for the Assessment Year (AY) 2018-2019.

3. The principal ground of challenge is that the above order is violative of the principles of natural justice. No opportunity of hearing was given to the Petitioner apart from two letters issued to it by the Department on 23rd September, 2019 and 14th October, 2020 seeking clarifications. Mr. S. K. Acharya, learned counsel for the Petitioner submits that in terms of Section 143 (3) of the IT Act read with Section 144 B thereof, it was mandatory for the Department to have first prepared a draft assessment order and provided a copy thereof to the Petitioner, giving the Petitioner an opportunity of responding thereto, before passing the final assessment order.

4. Reliance has been placed on two judgments of the Delhi High Court dated 27th May, 2021 in W.P.(C) No. 5552 of 2021 (***YCD Industries v. National Faceless Assessment Centre, Delhi***) and in W.P.(C) No. 5491 of 2021 (***M/s. Lokesh Constructions P. Ltd. v. The Assistant Commissioner of Income Tax***). In both the aforementioned judgments of the Delhi High Court, similar assessment orders by the NFAC were challenged and were set aside by the High court on identical ground viz., that no show cause notice-cum-draft assessment order in terms of Section 144-B of the IT Act was issued to

the Petitioner prior to passing the final assessment order and no notice under Section 156 and Section 274 read with Section 270A of the IT Act was issued either.

5. Learned counsel for the Department, however, sought to distinguish the said judgments by submitting that the requirement of preparing a draft assessment order under Section 144-B of the I.T. Act would arise only when the Department proposes to make any variation which is prejudicial to the assessee.

6. In the present case, the Petitioner has placed on record in a tabular form the details of the returned income and demand beginning from AY 2013-14 up to AY 2017-18. According to Mr. Acharya, this shows that when compared with those figures, the assessed taxable income and demand for AY 2018-19 were unreasonably and shockingly high. For e.g., the assessed income for the AY 2016-17 was Rs.66.07 crores and the demand was Rs.1.09 crore. For the AY 2017-18 the assessed income was Rs.58.13 crores and the demand was Rs.4.94 crores. However, in terms of the impugned assessment order for AY 2018-19 as determined by the NFAC, the returned income is a loss of Rs.3.55 crores, the assessed income is Rs.1531.89 crores (an increase of over Rs. 1475 crores over the earlier AY) and the demand is Rs.735.16 crores (an increase of over Rs. 730 crores over the earlier AY).

7. The above figures, which are not disputed, substantiate the contention of the Petitioner that the figures of the taxable income and demand for AY 2018-19 in the impugned assessment order of the NFAC are disproportionately high. The impugned assessment order is not only in considerable variation of the figures for the earlier AYs but is also prejudicial to the interests of the assessee. In other words, the requirement of Section 144-B (1) (xvi) of the ITA Act for triggering the procedure of first preparing a draft assessment order and providing it to the Petitioner for its response stands attracted in this case.

8. Consequently, this Court sets aside the impugned assessment order dated 14th June, 2021 of the NFAC as well as all consequential demand notices/orders and grants liberty to the Department to pass a fresh assessment order for the AY in question in accordance with law. The Department shall give the Petitioner a personal hearing on a date and at a time which shall be communicated to the Petitioner sufficiently in advance. It is needless to say

that the Petitioner assessee will cooperate in the fresh assessments proceedings and urnish the relevant documents and information available with it relevant to the proceedings.

9. The writ petition is disposed of in the above terms.

10. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No. 4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 494

Dr. S. MURALIDHAR, C.J.

ARBP NO. 25 OF 2020

JOHNSON LIFTS PVT. LTD. ……..Petitioner

.V.

THE CHIEF ENGINEER, CENTRAL PUBLIC WORKS DEPARTMENT & ORS. ……..Opp Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 11(6) – Appointment of Arbitrator – Tender matter – Show cause notice to the Contractor as to why compensation shall not be imposed for not completing the work within time for the reasons within its control – Contractor raised the dispute and wanted to resolve the dispute through Arbitration – The question arose as to whether the dispute which comes within the purview of "Excepted Matter" as per clause 2 of the Agreement prescribing imposition of compensation for non completion of work within the time stipulated for the reasons within its control can be arbitrable? – Held, not arbitrable.

Case Laws Relied on and Referred to :-

1. (2020) 3 SCC 222 :M/s. Mitra Guha Builders (India) Company Vs. Oil and Natural Gas Corporation Ltd.
2. (1987) 2 SCC 160 : State of Karnataka Vs. Shree Rameshwara Rice Mills Thirthahalli

3. 2009 (2) SCC 337 : Bharat Sanchar Nigam Ltd .Vs. Motorola India Ltd.
4. (1989) 1 SCC 657 : Vishwanath Sood Vs. Union of India.
5. (1999) 4 SCC 491 : Food Corporation of India v. Sreekanth Transport.

For Petitioner : Mr. P. Dash
For Opp Parties : Mr. P. K. Parhi, ASGI

ORDER Date of Order : 05.07.2021

Dr. S. MURALIDHAR, C.J.

1. This matter is taken up by video conferencing mode.

2. This is an application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner and the Opposite Parties, arising out of an Agreement dated 18th May, 2013.

3. The background facts are that the Petitioner is a Company incorporated under the Companies Act, 1956. It had entered into an agreement with the Central Public Works Department (CPWD) at Bhubaneswar on 18th May, 2013 for installation of lifts in hostels, faculty quarters and a guest house being constructed by the I.I.T. Bhubaneswar.

4. According to the Petitioner, a completion certificate came to be issued on 21st December 2016, following which the Petitioner requested the Opposite Parties to release the pending payments that had been withheld. According to the Petitioner, it wrote a letter dated 4th January, 2019 to the Opposite Parties seeking release of the balance payment of Rs.47 lakhs together with the security deposit of Rs.7,37,290/-.

5. The Petitioner states that the CPWD issued it a show cause notice (SCN) dated 18th September, 2019 alleging that the work entrusted to the Petitioner could not be completed within the stipulated time for reasons within its control and, therefore, it is liable to pay compensation. It was called upon to explain why compensation should not be imposed under Clause 2 of the Agreement for delayed completion of the work. After the Petitioner replied to the SCN on 26th September 2019, the CPWD passed an order dated 27th November, 2019 computing the compensation payable by the Petitioner as Rs.29,70,000/- together with interest @ 1.5% per each month of delay.

6. The Petitioner disputed the above demand and by a letter dated 14th July, 2020 invoked the arbitration clause in Clause 25 (ii) of the agreement for adjudication of the disputes that had arisen. Questioning the mode of appointment of the Arbitrator under Clause 25 (ii), which gives the discretion in that regard to the Chief Engineer, or Additional Director General or Director General of the CPWD, the Petitioner has filed the present petition seeking the appointment of an independent Arbitrator.

7. In response to the notice issued in the present petition, a reply has been filed by the CPWD where *inter alia* it is pointed out that the levy of compensation under Clause 2 of the Contract is an "excepted matter" and is not arbitrable. Reliance is placed on a three judge Bench judgment of the Supreme Court in ***M/s. Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Ltd (2020) 3 SCC 222***. The remainder of the reply is a denial of the merits of the Petitioner's claims.

8. The Court has heard the submissions of Mr. P. Dash, learned counsel for the Petitioner and Mr. P. K. Parhi, learned Assistant Solicitor General of India appearing for the Opposite Parties.

9. Mr. Das, relies on the decisions of the Supreme Court in ***State of Karnataka v. Shree Rameshwara Rice Mills Thirthahalli (1987) 2 SCC 160*** and ***Bharat Sanchar Nigam Ltd v. Motorola India Ltd, 2009 (2) SCC 337*** to contend that whether a certain claim falls within the category of "excepted matter" should also be left to the decision of the Arbitrator and the right to seek appointment of an Arbitrator cannot be defeated on that ground.

10. On the other hand, Mr. Parhi places reliance on the decisions in ***Vishwanath Sood v. Union of India (1989) 1 SCC 657***, ***Food Corporation of India v. Sreekanth Transport (1999) 4 SCC 491*** and ***M/s. Mitra Guha Builders*** (*supra*) to urge that the claim of the Petitioner as regards the computation of compensation is an "excepted matter" and is not arbitrable.

11. The Court has considered the above submissions. The relevant clause in ***M/s. Mitra Guha Builders*** (*supra*) was Clause 2. Its relevant portion reads as under:

> "xxx In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to ½ % per week as the Superintending Engineer (whose decision in writing shall be final) may decide on

> the said contract value if the whole work for every week that the due quantity of works remains incomplete provided always that the entire amount of compensation to be paid under the provisions of the clause shall not exceed ten per cent (10%) of the tendered cost of the work as shown in the tender."

12. The Supreme Court also referred to the relevant portion in Clause 25 of the Agreement, which is the arbitration clause, and which again emphasized that "the decision of the Superintending Engineer regarding the quantum of reduction as well as his justification in respect of reduced rates for sub-standard work, which may be decided to be accepted, will be final and would not be open to arbitration."

13. The Supreme Court then compared the above clauses with similar clauses in ***Vishwanath Sood*** (supra) and ***Food Corporation of India*** (supra) to conclude that the decision of the Superintending Engineering in levying compensation is final and the same is an "excepted matter". The correctness of his decision cannot be called in question in the arbitration proceedings and the remedy if any, will arise in the ordinary course of law.

14. In the present case, the clause in question is more or less similar to the Clause 2 in ***M/s. Mitra Guha Builders*** and the ***ONGC*** case. The inevitable conclusion is that the decision of the Opposite Party as regards compensation payable by the Petitioner is not arbitrable. The Court is therefore unable to agree with the learned counsel for the Petitioner that the decision whether the claim concerning the compensation amount is arbitrable or not should be left to the Arbitrator.

15. Further, the Court notes that the decisions in ***Shree Rameshwara Rice Mills Thirthahalli*** (supra) as well as ***Bharat Sanchar Nigam Ltd*** (supra) were by smaller benches of the Supreme Court whereas the decision in ***M/s. Mitra Guha Builders*** (supra) is a later one and by a three judge Bench and which is, therefore, binding.

16. In that view of the matter, the Court is unable to accept the plea of the Petitioner for the appointment of an Arbitrator to adjudicate the disputes that have arisen between the parties in the manner prescribed hereinbefore.

17. The arbitration petition is accordingly dismissed, but in the circumstances, with no order as to costs.

18. It is clarified that the dismissal of the present petition would not preclude the Petitioner from availing other remedies that may be available to it for redressal of the disputes it has with the Opposite Parties in accordance with law.

19. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 498

Dr. S. MURALIDHAR, C.J & SAVITRI RATHO, J.

WRIT APPEAL NO. 821 OF 2020

Dr. KARI BENU GOPAL PATRO …. …Appellant

.V.

STATE OF ODISHA & ORS. ……..Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Fixation of price of land or building by the Development Authority – Judicial review – Whether permissible – Held, No – Reasons indicated.

"In our considered opinion, none of these grounds have any merit so as to warrant interference with the impugned order. The learned single judge has correctly held that the reason for not proceeding with the construction was neither unreasonable nor arbitrary and the reasons were bonafide. It cannot be disputed that price of construction as well as the price of the land will escalate with the passage of time. Therefore no fault could be found with the BDA for dropping the construction of the houses and instead offering the plot only, albeit at a higher price. A writ court exercising jurisdiction under Article – 226 of the Constitution neither has the expertise nor the jurisdiction to decide what should be the correct price of a plot of land or house. The contention that applicants in other categories were allotted houses which is discriminatory, in our view does not have any merit as those applicants are not similarly situated as the appellant and the BDA in its counter affidavit and further affidavit has given the circumstances of allotment of those houses and plots and the details of the applicants who had been allotted houses and plots after making payment of the revised cost in 2013."

(Para 21)

Case Laws Relied on and Referred to :-

1. 2007 (Supp.-1) OLR 811 : Saubhagya Ranjan Kanungo Vs. Smt. Prafulata Mohapatra.
2. AIR 1998 SC 1400 : Tarsem Singh Vs. Sukhminder Singh.
3. (1985) CLT 514 : Sri Narayan Gosain represented by Prafulla Kumar Nayak Vs. The Collector, Cuttack 60.
4. 2005 (2) C.C.C. 696 (A.P.) : B. Rajamani Vs. Mrs. Azhar Sultana.
5. AIR 1989 SC 1076 : Bareilly Development Authority Vs. Ajai Pal Singh.
6. 82 (1996) CLT 907 : Satrughna Nayak Vs. State of Orissa.
7. (1980) 2 SCC129 : Premji Bhai Parmar Vs. Delhi Development Authority.
8. 2021 SCC OnLine SC 222 : Shelly Lal Vs. Union of India.

For Appellant : Dr J.K Lenka.
For Respondents : Mr. A.K. Nanda, AGA

JUDGMENT Date of Judgment : 09.07.2021

SAVITRI RATHO, J.

1. The appellant was one of the ten petitioners in W.P. (C) No. 4114 of 2014 which has been dismissed by the learned Single Judge by judgment dated 09.11.2020.

2. By the impugned judgment, the learned Single Judge has dismissed the writ petition inter alia holding that the issue being one of contract which had not been concluded by valid acceptance and the pricing policy being an executive policy, the Court should refrain from exercising jurisdiction under Article 226 of the Constitution of India of judicial review. The learned Single judge has however directed that the money paid should be returned to the petitioners as early as possible.

3. We have heard Dr. J.K.Lenka, learned counsel for the appellant and perused the impugned judgment and the averments in the writ petition, rejoinder, additional affidavit and the appeal memo.

4. The writ petition had been filed for quashing the demand notice vide Annexures-14 series and 15 series issued by the Berhampur Development Authority (in short "the BDA") and the resolution dated 18.4.2013 vide Annexure 18 and direct the BDA to hand over possession of the land/building to the petitioners.

5. The grievance of the appellant and the other petitioners in the writ application was that the BDA was not proceeding with the Housing Project,

Vivek Vihar Stage – II though initiated since 2008 though the petitioners have already deposited the requisite amount as demanded by the BDA. Instead of providing houses under Housing Project, Vivek Vihar Stage-II, it demanded more than ten times of the actual amount (the rate fixed in the brochure) for the land only.

6. The case of the writ petitioners was that in order to provide houses to the lower middle class people in the name of Vivek Vihar Housing Project was taken up and the first phase work was taken up and completed successfully. In the year 2008 the BDA published a scheme for '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. The petitioners being of lower middle income group of the society wanted a house within the BDA area for their residential abode and obtained copy of the brochure. The following four categories of plots were indicated therein:

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

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

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

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

7. The appellant had deposited Rs 20,000/- by way of demand draft with the application form on 22.01.2008 and subsequently deposited Rs 2,00,300/- on 07.06.2008. The first phase of the scheme was completed successfully and delivery of possession was given to the applicants as per the price quoted in the brochure. However, the second phase for which the petitioners had applied got delayed. After the petitioners applied under the R.T.I Act, on

28.12.2012, the BDA intimated them that due to nonparticipation of the contractors in the tender process and non availability of solid concrete bricks, the project could not be taken up. But thereafter, the petitioners received demand notices from the BDA in December 2013 for an amount that was ten times the price fixed in the brochure initially only for the land, though in the brochure the price has been fixed for both land and building.

8. The petitioners made representations to the BDA ventilating their grievances stating that earlier decision was to allot land with houses and now they were offering only houses at enhanced rate. Earlier, had been decided to make allotment as per lottery and now BDA had decided to allot through auction which was in violation of the terms in the brochure.

9. The decision to enhance the rate of houses was purportedly taken by the Valuation Committee as per information provided under the RTI Act by the BDA on 13.1.2014. This decision has been challenged on the ground that it was unilateral and had overlooked the previous aspects of the matter, overlooking the bench mark valuation of the locality.

10. BDA filed a counter affidavit stating, *inter alia*, that it had conceptualized a group housing scheme consisting of independent houses in the name and style of Vivek Vihar at Amabapua, a prime location in Brahmapur City and the petitioners were some of the applicants for allotment of different category of houses in the said housing scheme. 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. On account of the high rate of inflation, BDA could not have constructed or delivered to the applicants the proposed houses at the price stated in the brochure published eight years ago, even though some of the houses were constructed through the contractors within a reasonable period. So the authorities had decided not to construct any houses and to work out an alternative procedure of closing the Vivek Vihar Scheme and provide plots only the applicants who express the explicit intention of purchasing the lands of different sizes at the price fixed by the authority.

11. The stipulations in the brochure made it clear that the cost of the house so fixed at that time was provisional and tentative. It was stated that 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. In Clause-18 of the brochure, it was stated that any additional cost arising out of special infrastructural development and escalation shall be paid by the allottees 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.

12. As the construction was delayed, it had been decided to work out an alternative scheme and bring an end to the impasse for which 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. This decision was placed before the Government in H & UD Department for approval of the revised rate.

13. On receipt of the approval from the Government, notice was issued to the applicants asking them to state their willingness for depositing the enhanced rate fixed after deducting/ adjusting the earlier deposit made by the applicants. But the petitioners neither expressed their willingness nor deposited the enhanced cost. Three applicants had deposited Rs 35 lakhs each and had been handed over possession of their houses which had been initially constructed.

14. The BDA denied that experts were not consulted or bench mark valuation was revised. It was stated that all options were explored and the price of the plots compatible with the bench mark valuation was fixed. There was no lack of bonafides and there was no arbitrariness in the exercise of discretionary power by the BDA. The action of BDA being reasonable did not warrant any interference by this Court in exercise of the jurisdiction under Articles 226 and 227 of the Constitution of India.

15. A rejoinder was filed by the petitioners, more or less reiterating their contentions in the writ petition and further stating that some applicants had been allotted houses and plots while the petitioners were discriminated against .

16. Respondents No 2 and 3 had filed a further affidavit in July 2017 showing the allotment of different category of houses to 12 applicants and allotment of plots to six applicants who had paid the price at the revised rates

in 2013 annexing a statement, copies of some lease deeds and the copy of the bench mark valuation in respect of the lands in the area.

17. Referring to the decisions of the Hon'ble Supreme Court and this Court in **Saubhagya Ranjan Kanungo v. Smt. Prafulata Mohapatra 2007 (Supp.-1) OLR 811, Tarsem Singh v. Sukhminder Singh AIR 1998 SC 1400, Sri Narayan Gosain represented by Prafulla Kumar Nayak v. The Collector, Cuttack 60 (1985) CLT 514** and **B. Rajamani v. Mrs. Azhar Sultana 2005 (2) C.C.C. 696 (A.P.**), the learned Single Judge held that there appeared to be no concluded contract between the petitioners and the BDA as 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.

18. Referring to the decisions rendered in **Bareilly Development Authority v. Ajai Pal Singh AIR 1989 SC 1076, Satrughna Nayak v. State of Orissa 82 (1996) CLT 907** and **Smt. Kaberi Banerjee v. Orissa State Housing** (**decision dated 20.11.2000 in OJC No.1216 of 1998**), the learned Single Judge further held that the price fixed in the brochure are tentative which is subject to change and Annexure-1 and Annexuire-2 (advertisement and brochure respectively) reveal that the cost of the unit of houses were tentative which were subject to increase depending upon different factors like change of increase construction materials, labour cost, rise in the price of land etc.

19. The decisions rendered in **Premji Bhai Parmar v. Delhi Development Authority (1980) 2 Supreme Court Cases 129**, and **Baldev Singh Dhanij v. Chandigarh Housing Board, Chandigarh *1990 Punjab and Haryana 41*** (**check**) were also referred to and discussed. The learned Single Judge further held that 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 and on examination of the pleadings found that the allegation of arbitrary and whimsical action of the BDA had not been substantiated and on the other hand found that good reason had been shown by BDA for non completion of the works within the stipulated time which was lack of response to the tender floated for construction works for which it was decided to transfer the plots of different sizes in favour of the intending buyers who express the explicit intention to purchase the lands of 13 different sizes at the price fixed by them.

20. In this writ appeal, the appellant has averred that he has deposited the balance cost pursuant to order dated 21.01.2015 of this Court which was not considered by the Single Judge and that WP (C) No. 3761 of 2014 and WP (C) No. 5193 of 2014, WP (C) No. 9269 of 2015 and WP (C) No. 14823 of 2015 challenging the action of the BDA in enhancing the rate in the same housing project are still subjudice before this Court and interim order of status quo is still in force. He has however challenged the order of the learned Single Judge, primarily on the following grounds:

a) The finding that the price was enhanced because of rise in construction materials, labour costs etc is not tenable in view of the stand of the BDA that they had decided to close the construction process and provide only plots.

b) The learned Single Judge failed to appreciate that the benchmark valuation of the locality was very poor.

c) The cases cited by the learned Single Judge were not applicable and it was wrong to hold that contract had not been concluded by a valid acceptance as the appellant had deposited Rs 2 lakhs which was the balance amount of initial demand pursuant to direction of the Court and had deposited the initial cost of Rs 1 lakh as per clause 5 of the brochure at the time of submission of application which exceeded the cost of Rs 1,35,000/- and that BDA had kept the initial cost for 5 years though 18 years months was stipulated for completion of the contract.

d) The decision to demand ten times the amount was arbitrary and whimsical and done without consulting experts and without holding field enquiry.

e) The finding that the pricing policy being an executive policy should not be interfered in exercise of jurisdiction under Article – 226 of the Constitution was erroneous when the demand draft of the appellant had been accepted and retained for years together.

f) As BDA had allotted plots in other categories in Vivek Vihar Phase – II after accepting initial demand, not doing so in case of the appellant was illegal arbitrary and discriminatory.

21. In our considered opinion, none of these grounds have any merit so as to warrant interference with the impugned order. The learned single judge has correctly held that the reason for not proceeding with the construction

was neither unreasonable nor arbitrary and the reasons were bonafide. It cannot be disputed that price of construction as well as the price of the land will escalate with the passage of time. Therefore no fault could be found with the BDA for dropping the construction of the houses and instead offering the plot only, albeit at a higher price. A writ court exercising jurisdiction under Article – 226 of the Constitution neither has the expertise nor the jurisdiction to decide what should be the correct price of a plot of land or house. The contention that applicants in other categories were allotted houses which is discriminatory, in our view does not have any merit as those applicants are not similarly situated as the appellant and the BDA in its counter affidavit and further affidavit has given the circumstances of allotment of those houses and plots and the details of the applicants who had been allotted houses and plots after making payment of the revised cost in 2013. The writ petition has rightly been dismissed and we find no ground to interfere with the same.

22. In this context, the observations of the Hon'ble Supreme Court in the case of **Shelly Lal v. Union of India 2021 SCC OnLine SC 222** are apposite and hence extracted below:

> *" **5.** Several provisions of law confer statutory rights on purchasers of real estate and invest them with remedies enforceable at law. These include the Consumer Protection Act, 1986, the Real Estate (Regulation and Development) Act, 2016 and the Insolvency and Bankruptcy Code, 2016. Parliament has enacted a statutory regime to protect the rights of purchasers of real estate and created fora which are entrusted with decision-making authority.*
>
> ***6.** A decision of a public authority which is entrusted with a public duty is amenable to judicial review. But it is quite another hypothesis to postulate that the decision making authority should be taken over by the court. The latter is impermissible. It would be inappropriate for this Court to assume the jurisdiction to supervise the due completion of a construction project especially in facts such as those presented in the present case. This will inevitably draw the court into the day to day supervision of the project, including financing, permissions and execution – something which lies beyond the ken of judicial review and the competence of the court. The court must confine itself to its core competencies which consist in the adjudication of disputes amenable to the application of legal standards. We, consequently, leave it open to the petitioners to pursue the remedies available in law."…..*

23. The learned Single Judge has directed for refund of the deposited amount. Considering the fact that that the amounts deposited by the appellant towards cost of the house has been retained by the BDA for all these years, liberty is granted to the appellant to file an application before the BDA to

refund the amount paid by the appellant along with interest. In case it is aggrieved by the decision of the BDA, it is open to the appellant to challenge it in the appropriate forum.

24. The appeal is dismissed, with the liberty as aforementioned but in the circumstances, with no order as to costs.

25. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 506

S.K. MISHRA, J.

CRIMINAL REVISION NOS. 730 OF 2013 (WITH BATCHES)

SREE METALIKS LTD. REPRESENTED THROUGH MANAGING DIRECTOR-MAHESH KUMAR AGRAWAL ……..Petitioner

.V.

AGARWAL FUEL CORPORATION (P) LTD. REPRESENTED THROUGH RATNAKAR NAYAK ……..Opp. Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Complaint by Company – The question arose as to who can set the law into motion? – Law on the issue – Discussed.

"Having heard both sides we find it difficult to support the orders challenged before us. A company can file a complaint only through human agency. The person who presented the complaint on behalf of the Company claimed that he is the authorised representative of the Company. Prima facie, the trial court should have accepted it at the time when a complaint was presented. If it is a matter of evidence when the accused disputed the authority of the said individual to present the complaint, opportunity should have been given to the complainant to prove the same, but that opportunity need be given

only when the trial commences. The dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action. We, therefore, set aside the impugned orders and direct the trial court to proceed with the trial and dispose of it in accordance with law. xxx".

In applying the aforesaid authoritative pronouncements of the Hon'ble Supreme Court, thus, the matter can be summarized by the following points.

(i) Anyone can set the criminal law by filing a complaint of facts constituting an offence before a Magistrate empowered to take cognizance.

(ii) The court cannot decline to take cognizance on the sole ground that the complainant was not competent to file the complaint.

(iii) It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offence under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute.

(iv) In case of N.I. Act, the only eligibility criteria prescribed by Section 142 of the Act is that the complaint must be by the payee or the holder in due course. This criteria is satisfied if the complaint is in the name and on behalf of the appellant company.

(v) In case of a complainant-company, a complaint can be initiated in its name by an employee of the company or even by a nonemployee of the company.

(vi) when the complainant is the body corporate, it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in the court proceeding.

(vii) Even presuming that initially there was no authority, still the company can at any stage rectify that defect. At a subsequent stage the company can send a person who is competent to represent the company. Thus, the complaint should not be quashed on that ground.

(v) In a case the accused disputes the authority of individual to present the complaint, opportunity should be given to the complainant to prove the same, which can be done only when the trial commences. Thus, dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action."

(Para 9)

Case Laws Relied on and Referred to :-

1. 2013 (II) OLR 316 : Padmabati Naik vs. State of Orissa & Ors.
2. 2011 (I) ILR-CUT-833 : Eimco Elecon (India) Ltd. vs. Mahanadi Coal Fields Ltd. & Ors.

3. 2014 (I) OLR 211 : Sri Kailash Chandra Mishra vs. Shri Ajitsinh Ulhasrao Babar.
4. 2011 AIR SCW 1948 : State Bank of Travancore vs. M/s Kingston Computers (I) P. Ltd.
5. AIR 2015 SC 1198 : A.C. Narayanan vs. State of Maharashtra & Anr. with G. Kamalakar & Anr.
6. 2017 (I) OLR 745 : Smt. Anita Chowdhary vs. M/s. TRL Krosaki Refractories Ltd. & Ors.
7. (1983) 4 SCC 701 : Vishwa Mitter of Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot vrs. O.P. Poddar & Ors.
8. (2009) 1 SCC 407 : National Small Industries Corporation Ltd. vrs. State (NCT of Delhi) & Ors.
9. 2013 (II) OLR (SC) 884 : A.C. Narayanan vs. State of Maharastra & Anr.
10. (2002) 1 SCC 234 : M.M.T.C. Ltd. & Anr. vs. Medchl Chemicals & Pharma (P) Ltd. & Ors.
11. (1998) 1 SCC 687 : The Associated Cement Co. Ltd. vs. Keshvanand.
12. AIR 2014 SC 71 : A.K. Singhania vs. Gujarat State Fertilizer Co. & Anr.
13. (2014) 59 OCR (SC) 1039 : Gunmala Sales Private Ltd. vs. Anu Mehta & Ors.
14. (2015) 60 OCR 172 : Munshi Abdul Maheraj Ali vs. M/s S.S. Marketing.
15. (2015) 60 OCR 206 : Rajendra Kumar Sahoo vs. Ramakanta Sahoo.
16. 2003 Cr.L.J. 4005 : M. Sreenivasulu Reddy vs. K.S. Raghava Reddy.
17. (2002) 9 SCC 455 : Samrat Shipping Co. (P) Ltd., vs. Dolly George,
18. AIR 1918 P rivy Council 188 : Rachappa Subrao Jadhav vs. Shidappa Venkatrao Jadhav.
19. (2014) 9 SCCs 129 : Dashrath Rupsingh Rathod vs. State of Maharashtra & Anr.
20. 2013(II) OLR 318 : L.P. Electronics (Orissa) Pvt. Ltd. & Ors. vs. Tirupati Electro Marketing Pvt. Ltd.
21. CRLMC 1210/2017 : M/s SMS Asia Private Limited & Anr. vs. M/s. TRL Krosaki Refractories Ltd.

For Petitioners : M/s Sanjeev Udgata, S.B.Udgata & A. Mishra.
For Opp. Party : M/s Biswajit Nayak, B.R. Sahu & S. Samal.

JUDGMENT Date of Judgment : 07.07.2021

S.K. MISHRA, J.

1. All the Criminal Revision Applications were heard on 21.10.2020.

2. Further hearing is taken up today through video conferencing.

3. In this batch of criminal revisions, the petitioners have prayed to quash the orders of taking cognizance and issuance of processes against the petitioners passed on dated 22.02.2013, 18.03.2013, 28.12.2012, 27.02.2013, 25.02.2013, 13.02.2013, 21.02.2013, 06.03.2013, 26.02.2012, 21.02.2013, 13.03.2013, 26.07.2013, 30.01.2013, 24.04.2013 and 20.07.2013 in 1.C.C.

No.579/2012, 1.C.C No.677/2012, 1.C.C. No.542/2012, 1.C. C. No.581/2012, 1.C.C. No.657/2012, 1.C.C. No.544/2012, 1.C.C. No.656/2012, 1.C.C. No.543/2012, 1.C.C. No.530/2012, 1.C.C. No.615/2012, 1.C.C. No.580/2012, 1.C.C. No.614/2012, 1.C.C. No.3/2013, 1.C.C. No.529/2012, 1.C.C.31/2013 and 1.C.C.48/2013, respectively, by the learned S.D.J.M., Panposh.

4. The facts of the cases are not disputed. The complainant-opposite party is a supplier of the petitioner-company. It is alleged that he supplied coal to the petitioner-company for valuable consideration. The accused-petitioners issued several cheques amounting to almost 10 crore rupees. All the cheques were presented before the Uco Bank, Rourkela but the cheques were not honoured, which led to issuance of notices as envisaged under clause (b) of the proviso to Section 138 of the N.I. Act. After service of such notices, there being no payment by the accused, the complaints were lodged before the learned SDJM, Panposh. The learned Magistrate took cognizance of the offence under Section 138 of the N.I. Act in all these cases. Such orders of taking cognizance and issuance of processes have been assailed in all these criminal revision applications.

5. The main contention of the learned counsel appearing for the petitioners in all these cases may be summarized as follows:

It is submitted that in the complaint petition, no where it is mentioned that the Deputy In-charge or the Senior Clerk has been authorized to file the complaint case on behalf of opposite party- M/s. Agarwal Fuel Corporation (P) Ltd.-company about the transaction in question.

It is also submitted that in case a petition is filed by the company, the same can be done through its Director or Principal Officer by a Resolution passed by the Board of Directors of the company in exercise of its statutory power under Section 291 of the Companies Act, 1961. However, in the present cases, opposite parties i.e. the Deputy In-charge, Principal Officer or Senior Clerk of the Company has no statutory power under Section 291 of the aforesaid Act nor they have been authorized by the Board of Directors of the Company to file a complaint case against the petitioners. It is further submitted that Section 142 of the N.I. Act, 1881 contains a non-obstante clause prohibiting the court to take cognizance of offence in case of complaint under Section 138 of the said Act, if the complaint petition is not

filed by the payee or the holder of the cheque. It is further stated that Section 2(10) read with Section 3 of the Companies Act defines a company formed and registered under the Companies Act. The petitioner-company has been registered as "Sree Metaliks Ltd." whereas the case has been filed against "Shree Metaliks Ltd." and hence it is not maintainable.

In support of his contention, as reflected in the preceding paragraphs, the learned counsel for the petitioners relies on the judgments passed in the following cases.

The cases of **Padmabati Naik vs. State of Orissa and others,** 2013 (II) OLR 316, **Eimco Elecon (India) Ltd. vs. Mahanadi Coal Fields Ltd. & others,** 2011 (I) ILR-CUT-833, **Sri Kailash Chandra Mishra vs. Shri Ajitsinh Ulhasrao Babar,** 2014 (I) OLR 211, **State Bank of Travancore vs. M/s Kingston Computers (I) P. Ltd.,** 2011 AIR SCW 1948, **A.C. Narayanan vs. State of Maharashtra and another with G. Kamalakar vs. M/s Surana Securities Ltd. and another,** AIR 2014 SC 630, **A.C. Narayanan vs. State of Maharashtra and another with G. Kamalakar and another,** AIR 2015 SC 1198, **Smt. Anita Chowdhary vs. M/s. TRL Krosaki Refractories Ltd. and others**, 2017 (I) OLR 745.

Mr. Sanjeev Udgata, the learned counsel for the petitioners would further submit that the learned SDJM, Panposh has no jurisdiction to take cognizance and try the case in view of the fact that the cheques were allegedly dishonoured by the Oriental Bank of Commerce, Barbil Branch in the district of Keonjhar, though those cheques were presented to the Uco Bank, Rourkela. He would further argue that the complaints are liable to be dismissed from non-payment of proper court fees as per the Odisha Amendment to the Court Fees Act.

Considering the aforesaid facts of the case, the ratio decided in the aforesaid cases and the material available on record, the learned counsel for the petitioners submits that, the impugned orders of taking cognizance of offence by the learned Magistrate on the dates mentioned above, against the petitioners are liable to be set aside as the complaints are not maintainable.

6. Mr. Biswajit Nayak, the learned counsel appearing for the opposite parties would answer the point raised by the petitionercounsel in the following manner:-

(i) As far as the 1st contention raised by the petitioners that the Senior Clerk or Dy. In-charge is not competent to file the case on behalf of the complainant, it is submitted that at paragraph-1 of the complaint petition, the complainant has specifically averred as follow:

> *"That the complainant is a private limited company, registered under the Companies Act, 1956 in the name & style of Agarwal Fuel Corporation Private Limited, known as Eagle Fuel Private Ltd, having its branch office at Rourkela, in the address noted above. The complainant's company as per the resolution passed by the Board of Directors authorized to Sri Ratnakar Nayak, Deputy In-charge to file the case against the accused nos. 1 and 2*."

The learned counsel for the opposite parties relies on the following cases of ***Vishwa Mitter of Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot vrs. O.P. Poddar and others***, (1983) 4 SCC 701, ***National Small Industries Corporation Ltd. vrs. State (NCT of Delhi) and others***, (2009) 1 SCC 407, ***A.C. Narayanan vrs. State of Maharastra and another*****,** 2013 (II) OLR (SC) 884, ***M.M.T.C. Ltd. and another vs. Medchl Chemicals & Pharma (P) Ltd. and another,*** (2002) 1 SCC 234 and ***The Associated Cement Co. Ltd. vs. Keshvanand,*** (1998) 1 SCC 687.

In the case of Vishwa Mitter of Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot (supra), the Hon'ble Apex Court, at paragraph-5, has held as follows:

> *" 5. It is thus crystal clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance Under Section190 and unless any statutory provision prescribes any special qualification or eligibility criteria for putting the criminal law in motion, no Court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. Section 190 of the CrPC clearly indicates that the qualification of the complainant to file a complaint is not relevant. But where any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. Even with regard to offences under the Indian Penal Code, ordinarily, anyone can set the criminal law in motion but the various provisions in Chapter XIV prescribe the qualification of the complainant which would enable him or her to file a complaint in respect of specified offences and no Court can take cognizance of such offence unless the complainant satisfies the eligibility criterion, but in the absence of any such specification, no Court can throw-out the complaint or decline to take the cognizance on the sole ground that the complainant was not competent to file the complaint."*

In the case of National Small Industries Corporation Ltd. (supra), the Hon'ble Apex Court at paragraph-10 has held as follows:

> "*10. The term `complainant' is not defined under the Code. Section 142 NI Act requires a complaint under section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. The requirement of section 142 of NI Act that payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company. Section 142 of NI Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney".* (underlined to emphasize)

In the case of A.C. Narayanan (supra), the Hon'ble Apex Court at paragraphs 20 and 24 has held as follows:

> *"20. The stand of the appellant in Criminal Appeal No. 73 of 2007 is that no complaint can be filed and no cognizance of the complaint can be taken if the complaint is by the power of attorney holder, since it is against Section 200 of the Code and deserves to be rejected. There is no dispute that complaint has to be filed by the complainant as contemplated by Section 200 of the Code, but the said Section does not create any embargo that the attorney holder or legal representative(s) cannot be a complainant."*
>
> *24. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. x*xx"

In the case of M.M.T.C. Ltd and another (supra), the Hon'ble Apex Court has held as follows:

> *"Anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant Company.*

> *Even presuming, that initially there was no authority with the person lodging complaint on behalf of the company, still the company can, at any stage, rectify that defect. At a subsequent stage the company can send a person who is competent to represent the company. The complaints could thus not have been quashed on this ground". (emphasis supplied)*

In the case of the Associated Cement Co. Ltd., (supra), the Hon'ble Apex Court at paragraphs 23 and 25 has held as follows:

> *"23. The above scheme of the new Code makes it clear that complainant must be a corporeal person who is capable of making physical presence in the court. Its corollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court and it is that natural person who is looked upon, for all practical purposes to be the complainant in the case. In other words, when the component to a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in court proceedings.*
>
> *25. Be that so, we suggest as a pragmatic proposition that no magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. There e may be occasions when a different person can represent the company e.g. the particular person who represents the company at the first instance may either retire for, the company's service or may otherwise cease to associate therewith or he would be transferred to a distant place. In such cases it would be practically difficult for the company to continue to make the same person represent the company in the court. In any such eventuality it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. At any rate for those reasons we are not persuaded to uphold the contention that Section 247 of the old Code (or Section 256 of the new Code) is not applicable in a case where the complainant is a company or any other justice person."*

In support of his contention and the citations relied upon, the learned counsel for the petitioners raises the ground that the learned SDJM, Panposh failed to appreciate that in order to make the petitioner and accused in the proceeding, it is necessary that the liability under Section 141 of the Negotiable Instruments Act, 1881 be presented with a clear averments connecting the petitioners with the company and failure to do so would render the said complaint case unsustainable in law.

7. In addition to the points raised above, the learned counsel for the opposite parties would argue as follows:

" *The present opposite party in his complaint petition has taken clear averments connecting the petitioner with the company. Relevant paragraphs of the complaint petition are quoted herein below.*

That the accused no.1 is Shree Metaliks Ltd., being represented through its Managing Director-Mahesh Agarwal (herein accused no.2), having its office at Barbil in the above noted address.

That, the accused no.2-Mahesh Agarwal, the Managing Director of Shree Metaliks Ltd. Of Barbil (herein accused no.1)

That the complainant company used to supply coal to the different parties. As per the request of the Accused No.2, the complainant had supplied to cal to the accused No.1 Vide Bill/Tax Invoice No. ACCPL/TCR/TI/27, Dt.09.05.2012 for Rs.12,46, 210.39 and Bill/Tax Invoice No.ACCPL/RKL/TI/76, Dt.31.05.2012 for Rs.35,08,067.17 (In total Rs.76, 95, 166.25 (Rupees seventy six lakh ninety five thousand one hundred sixty six and paise twenty five) only.

That, towards part payment against the aforesaid bills amount, the Account No.2 issued and delivered two cheques bearing No.314894, Dt.28.06.12 for Rs.15,00,000/- (Rupees forty five lakh) both drawn on "Oriental Bank of Commerce", Barbil Branch, Keonjhar, Odisha of Shree Metalicks Ltd., under your signature in favour of the complainant i.e. Agarwal Coal Corporation Pvt. Ltd.

That, at the time of handing over the said cheque, the Accused No.2 assured the complainant that there is sufficiently balance in their bank account and the said cheques will be honored positively on presentation.

That, the complainant served a demand notice (Notice dated 03.11.2012) on 03.11.2012 through his advocate Bulu Patnaik by Regd. Post with A.D. in favour of the Accused Nos.1 and 2 demanding therein to make payment of the said cheques amount i.e. Rs.60,00,000/- (Rupees sixty lakhs) only to the complainant within 15 (fifteen) days of receipt of the demand notice.

That, the Accused Nos.1 and 2 have received the said demand notices on 08.11.2012, but despite of receiving the demand notice, the Accused Nos.1 and 2 have not given any reply nor have paid the cheques amount to the Complainant till date."

8**.** In support of his contentions, learned counsel for the opposite parties relies upon the authoritative pronouncements made by the Hon'ble Supreme Court in the following cases:

A.K. Singhania vs. Gujarat State Fertilizer Co. and another, AIR 2014 SC 71, ***Gunmala Sales Private Ltd. vs. Anu Mehta and others,*** (2014) 59 OCR (SC) 1039, ***Munshi Abdul Maheraj Ali vs. M/s S.S. Marketing,***

(2015) 60 OCR 172, ***Rajendra Kumar Sahoo vs. Ramakanta Sahoo,*** (2015) 60 OCR 206, ***M. Sreenivasulu Reddy vs. K.S. Raghava Reddy,*** 2003 Cr.L.J. 4005.

In the case of Associated Cement Co. Ltd., (supra), as noted earlier, it has been held by the Hon'ble Apex Court that:

> "the complainant has to be a corporeal person who is capable of making a physical appearance in the court. It has been held that if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court. It is held that the court looks upon the natural person to be the complainant for all practical purposes. It is held that when the complainant is a body corporate it is the *de jure* complainant, and it must necessarily associate a human being as *de facto* complainant to represent the former in court proceedings. It has further been held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the *de jure* complainant company to seek permission of the court for sending any other person to represent the company in the court."

In the case of ***Samrat Shipping Co. (P) Ltd., vs. Dolly George,*** (2002) 9 SCC 455, the Hon'ble Apex Court has held that:

> "the appellant Company has filed a complaint before a Magistrate's Court for offence under Section 138 of the Negotiable Instruments Act. The Magistrate dismissed the complaint on the ground that there was no resolution of the Board of Directors of the petitioner Company authorising the person who represented the Company before the Magistrate's Court. Though the appellant preferred a revision before the Sessions Court, that became futile and he moved the High Court invoking Section 482 of the Code of Criminal Procedure. Learned Single Judge dismissed the petition of the appellant in spite of the fact that the appellant produced a copy of the resolution for showing that the Company had authorised the particular individual to present the complaint before the Court. The High Court while dismissing the petition observed thus:
>
> "Having heard the parties' counsel and after going through the record it appears that the resolution which has been filed on record of this court is not certified by any person at p. 13. If it is an uncertified copy, how far it could be taken to be a correct and true copy. But nobody is inclined to take responsibility about its correctness. It is a matter of grave doubt that such a resolution should inure to the benefit of the petitioner, for, it is not a civil suit. It is a criminal prosecution. **Authorisation to prosecute, being of the nature of sanction, the Board of Directors is supposed to apply their mind to the facts and circumstances of each case before**

authorizing any person to prosecute any person for any offence in the submission of the learned counsel. It appears plausible at least for the present purpose, for no application has ever been filed before any court seeking permission to file additional evidence, excepting what is filed in this Court for the first time."

3. Having heard both sides we find it difficult to support the orders challenged before us. A company can file a complaint only through human agency. The person who presented the complaint on behalf of the Company claimed that he is the authorised representative of the Company. Prima facie, the trial court should have accepted it at the time when a complaint was presented. If it is a matter of evidence when the accused disputed the authority of the said individual to present the complaint, opportunity should have been given to the complainant to prove the same, but that opportunity need be given only when the trial commences. The dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action. We, therefore, set aside the impugned orders and direct the trial court to proceed with the trial and dispose of it in accordance with law. xxx"

9. In applying the aforesaid authoritative pronouncements of the Hon'ble Supreme Court, thus, the matter can be summarized by the following points.

(i) Anyone can set the criminal law by filing a complaint of facts constituting an offence before a Magistrate empowered to take cognizance.

(ii) The court cannot decline to take cognizance on the sole ground that the complainant was not competent to file the complaint.

(iii) It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offence under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute.

(iv) In case of N.I. Act, the only eligibility criteria prescribed by Section 142 of the Act is that the complaint must be by the payee or the holder in due course. This criteria is satisfied if the complaint is in the name and on behalf of the appellant company.

(v) In case of a complainant-company, a complaint can be initiated in its name by an employee of the company or even by a nonemployee of the company.

(vi) when the complainant is the body corporate, it is the *de jure* complainant, and it must necessarily associate a human being as *de facto* complainant to represent the former in the court proceeding.

(vii) Even presuming that initially there was no authority, still the company can at any stage rectify that defect. At a subsequent stage the company can send a person

> who is competent to represent the company. Thus, the complaint should not be quashed on that ground.
>
> (v) In a case the accused disputes the authority of individual to present the complaint, opportunity should be given to the complainant to prove the same, which can be done only when the trial commences. Thus, dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action.

10. In applying the aforesaid principles to the case at hand, this Court finds from the record that all the complaints have been filed by M/s Agarwal Fuel Corporation (P) Ltd. represented through Sri Ratnakar Nayak, who is Deputy In-charge of the said company. The employee of the company in his affidavit annexed the complaint petition has stated on oath that he has been duly authorized by the Board of Directors of the company to file the case and that he is competent to swear affidavit on behalf of the company. He further swears to the fact that the averments made in Paragraphs 1 to 9 of the complaint petition are true to the best of his knowledge and belief. The complaint petition has been annexed with a letter addressed to Sri Ratnakar Nayak, the employee, who has signed the complaint petition and sworn the affidavit on behalf of the company by Mr. Vinod K Agarwal, Director of the company that as per the Board of Directors Resolution dated 07.07.2012, Sri Nayak has been authorized to consult lawyers and take necessary steps to file case/cases. So, it is apparent from the record that in these cases, the complaint has been filed by an employee of the company, he was duly authorized by a Resolution of the Board of Directors (as there is nothing on record to disbelieve this document on the face of it), and that the complaint has been made in the name of the company.

11. Two other contentions raised by the learned counsel for the petitioners, namely, Mr. Udgata with respect to the court fees and jurisdiction of the learned SDJM, Panposh. It is contended that, as per the Court Fees (Orissa Amendment Act), 2012, the Court-fees to be paid in a case or a complaint for the offence under Section 138 of the N.I. Act, 1881, for a amount involved in a cheque exceeding one lakh rupees is one thousand rupees. Mr. Udgata, therefore, would argue that

as insufficient court fees paid in the cases, the same should be dismissed. It is true that the Court-Fees Act has been amended by the Orissa Legislative Assembly as far as its application to the State of Odisha is concerned with respect to the court fees to be affixed to the complaint under Section 138 of the N.I. Act. But, such amendment, which came into force on 17.02.2013, is only a taxing statute, and therefore, will not defeat a cause of action, if there is no other legal impediment. The privy council in the case of ***Rachappa Subrao Jadhav vs. Shidappa Venkatrao Jadhav,*** AIR 1918 Privy Council 188 has held that:

> " *The Court Fees Act was passed not to arm a litigant with a weapon of technicality against the opponent but to secure revenue for the benefit of the State. The privy council further held that it is evident from the character of the Act, and is brought out by Section12, which makes the decision of the first Court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the first Court decided to the detriment of the revenue. The defendant in the suit seeks to utilize the provisions of the Act not to safeguard the interests of the State, but to obstruct the plaintiff; he does not contend that the Court wrongly decided to the detriment of the revenue but that it dealt with the case without jurisdiction. In the circumstances this plea, advanced for the first time at the hearing of the appeal in the District Court, is misconceived, and was rightly rejected by the High Court."*

12. Thus, it is clear that the Court Fees Act and consequently all the Orissa State Amendment are only to providing for taxing purposes. If insufficient court fees are paid in a proceeding, be it a civil or criminal, the proceeding should not be dismissed at the threshold, rather the Court is under a duty to give a reasonable opportunity to the petitioner in a complaint case or the plaintiff in a civil proceeding to pay the deficit court fees. In no case, a proceeding should be dismissed for payment of inadequate court fees without affording a reasonable opportunity to the petitioner, complainant or the plaintiff to make good deficit court fees. This Court is of the opinion that even at the final hearing of the proceeding, if it is found that insufficient court fees has been paid, the judgment can be pronounced directing the petitioner or complainant to pay the deficit court fees, lest the final order shall not take effect. In that view of the matter, this Court is of the opinion that there is no reason to dismiss the complaint or to allow the revision setting aside the order taking cognizance and issuance of processes by the learned Magistrate.

13. The other issue is relating to jurisdiction. There is no dispute that the cheques were drawn on the Oriental Bank of Commerce, Barbil Branch in the district of Keonjhar. It was presented in the UCo Bank, Bazar Branch, Rourkela, but the cheques were forwarded for clearance to the Barbil Branch of Oriental Bank of Commerce. Thus, as per the ratio decided by the Hon'ble Apex Court in the case of ***Dashrath Rupsingh Rathod vs. State of Maharashtra and another,*** (2014) 9 SCCs 129, the learned JMFC, Barbil has the jurisdiction to take cognizance of the offence and try the case. At paragraph-21 of the aforesaid judgment of the Hon'ble Apex Court, Justice Vikramajit Sen speaking for the three Judge Bench, held that interpretation of Section 138 of the N.I. Act leads to the conclusion that the offence contemplated therein stands committed on the dishonor of the cheque, and accordingly JMFC at the place where this occurs is ordinarily where the complaint must be filed, entertained and tried. The cognizance of the crime by the JMFC at that place however, can be taken only when the concomitants or constituents contemplated by the section concatenate with each other. The Supreme Court clarified that the place of issuance or delivery of the statutory notice or where the complaint chooses to present the cheque for encashment by his bank are not relevant for territorial jurisdiction of the complaint even though non-compliance therewith will inexorable lead to the dismissal of the complaint. It cannot be contested that considerable confusion prevails on the interpretation of Section 138 in particular and Chapter XVII in general of the NI Act. The Hon'ble Supreme Court further held that vindication of the view is duly manifested by the decisions and conclusion arrived at by the High Court even in a few cases that the Supreme Court has decided by the judgment. Therefore, the Hon'ble Supreme Court further clarified that the complaint is statutorily bound to comply with Section 177, etc of Code and therefore, the place or situs where the Section 138 complaint is to be filed is not of his choosing. Therefore, the Hon'ble Supreme Court held that the territorial jurisdiction is restricted to the court within whose local jurisdiction the offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn.

Thus, to consider whether all the complaints filed by the complainant-opposite party in all these cases before the learned SDJM, Panposh, Rourkela in the district of Sundargarh are liable to be set aside. This question has been answered by the Hon'ble Supreme Court in the same judgment of Dashrath Rupsingh Rathod (supra). The Hon'ble Supreme Court held that it is quite alive to the magnitude of the impact that the present decision shall have to

possibly lakhs of cases pending in various courts spanning across the country. After a deep consideration of the matter, the Hon'ble Apex Court held that it is expedient to direct that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will continue to proceed at that place. To clarify, the Hon'ble Apex Court further held, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of complaint cases where proceeding have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by Supreme Court from the court ordinarily possessing territorial jurisdiction, as now clarified, to the court where the cases presently pending. The Supreme Court further held that all the complaints (obviously including those where the respondent-accused has not been properly served) shall be returned to the complainant for filing in the proper court, in consonance with the exposition of the law propounded by the Hon'ble Supreme Court in the said judgment. If such complaints are filed/re-filed within thirty days from their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or proper filing was itself time-barred.

14. Thus, in a careful examination of the provisions of law as well as the facts of the case, this Court is of the opinion that the judgment of the three Judge bench of the Hon'ble Supreme Court in Dashrath Rupsingh Rathod (supra) is only prospective in nature and it shall not affect the present bunch of cases as admittedly all the cases have been filed before the judgment delivered by the Supreme Court on 01.08.2014. So, as per the shaving observation made by the Supreme Court in the aforesaid case, the observation that the learned SDJM, Panposh did not have jurisdiction to try the cases will not make the order taking cognizance by the Magistrate vulnerable requiring the same to be set aside. However, as per the 2nd observation given by the Supreme Court in the aforesaid case, the trial cannot be proceeded in these cases. It is not disputed in these cases, except in one case, i.e. I.C.C. No.579/2012, evidences have not started. Even in the aforesaid complainant case, only the examination-in-chief in the form of affidavit has been filed. Cross examination has not been started. So, this Court is of the opinion that in all fitness of things, all the cases should be re-filed before the learned JMFC, Barbil, who has the jurisdiction to decide the case and try the offence.

15. Hence, this Court is of the opinion that in the present cases the company has been duly authorized an authorized person. If the accused arrayed in this cases wants to disputes those facts and statements, the said issues may be raised at the time of trial of the cases and opportunities should be given to the complainant to show before the learned Magistrate that in fact, the company made a Resolution to authorize Mr. Ratnakar Nayak to file the complaint on behalf of the company and if necessary examine the Managing Director or any of the Directors of the company.

15.1 Mr. Udgata's argument that a complaint case has to befiled only the Secretary or any of the Directors or other principal officer of the Corporation is also of no substance as there is no such provision either in the Companies Act or in the Code of Criminal Procedure requiring the company to file a criminal complaint only through one of its principal officer. I am aware of the provision of Rule-1 of Order XXIX of the Code of Civil Procedure, 1806, which provides that in a suit by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation, who is able to depose to the facts of the case. No such provision appears either in the N.I. Act or in the Companies Act or in the Code of Criminal Procedure. So, any person, who is duly authorized by the Board of Director in terms of Section 291 of the Companies Act and who is able to depose to the facts of the case, can present the complaint before the competent court.

15.2 Another contention is raised that there is a spelling difference in the name of the company i.e. complaint-company. But, I am of the opinion that it may be only a spelling mistake and is of no substance.

16. Mr. Sanjeev Udgata, learned counsel for the petitioners relied upon the case of ***L.P. Electronics (Orissa) Pvt. Ltd. and others vs. Tirupati Electro Marketing Pvt. Ltd.***, 2013(II) OLR 318 and the judgment delivered by this Court in the case of ***M/s SMS Asia Private Limited and another vs. M/s. TRL Krosaki Refractories Limited***, CRLMC 1210/2017 on dated 14.12.2017. The arguments in both the cases are almost similar. In that case, the complainant was filed on behalf of the complaint-company by a power of attorney holder. Having carefully examined the facts of both the cases, I am of the opinion that the facts of those cases mentioned above are factually distinguishable in the sense that in the present cases, the person, who has signed on behalf of the company, has been authorized by the Board of

Directors to initiate the complaint and from the facts narrated to the complaint petition, it is apparent that he has knowledge about the transaction. In that view of the matter, this Court is not inclined to follow the single Bench Judgment in L.P. Electronics (Orissa) Pvt. Ltd. (supra).

17. Hence, I am of the opinion that even though there is some technical clichés regarding the presentation of the complaint in the sense that the complaint has not been initiated by a Director of the company acting on behalf of company but by an employee of the company, who is well acquainted with the facts of the cases, the orders taking cognizance of offences against the petitioners in all the cases cannot be quashed on that ground alone. It is especially so because there is a Resolution of the Board of Directors to authorize Mr. Ratnakar Nayak, Deputy In-charge to initiate the complaint.

18. Furthermore, having considered the facts of the case and the submissions made by the learned counsel appearing for the parties, I am of the considered opinion that when the complainant alleges that a large sum of money (approximately ten crores of rupees) were to be paid to it through cheques and all the cheques bounced, the complaints should not be dismissed at the threshold. This observation is in addition to the other considerations discussed in the preceding paragraphs.

19. In the result, on a careful conspectus of the entire material on record as well as the law governing the field, this Court is of the opinion that the cognizance taken by the learned SDJM, Panposh cannot be quashed or set aside because of non-compliance of the provisions of the Companies Act, 1961 or for deficit court fees or for lack of jurisdiction. However, all these complaints filed before the SDJM, Panposh are allowed to be withdrawn to the complainant to be filed before the learned JMFC, Barbil within the period of limitation as prescribed from the date of such withdrawal. The learned SDJM, Panposh shall make an endorsement on each of the complaints filed before him to that effect and allow the complainant to present it before the learned JMFC, Barbil. It is needless to say that no question has been raised regarding the question of limitation. In other words, it is not disputed by the accused-petitioners that the complaint is filed after the lapse of the prescribed period of limitation.

To obviate further dispute or controversy, the complainant, while re-presenting complaint before the JMFC, Barbil, if so advised, may file a

Copy of resolution(s) of the Board of Directors of the Company authorizing the appropriate person to file the complaints.

20. With the aforesaid observations, all the Criminal Revisions are disposed of.

21. The Trial Court Records bearing I.C.C. No.579/2012 be sent back to the learned SDJM, Panposh immediately by the Registry.

22**.** As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by Mr. Sanjeev Udgata, Advocate or by Sri Biswajit Nayak, Advocate along with his seal, in the manner prescribed vide Court's Notice No.4587, dated 25th March 2020 as modified by Court's Notice No.4798, dated 15th April 2021.

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2021 (II) ILR - CUT- 523

S.K. MISHRA, J & SAVITRI RATHO, J.

CRIMINAL APPEAL NO.122 OF 1998

DWARU PATRA (DEAD) AND ORS. ……Appellants

.V.

STATE OF ODISHA ……Respondent

(A) CRIMINAL TRIAL – Offence of triple murder – Conviction – Plea of right to private defence of life and property – Burden of proof on the question of criminal liability – Principles discussed.

> *"the general principle of the common law is that the prosecution must prove the guilt of a defendant beyond all reasonable doubt; it is not incumbent upon a defendant to establish his innocence. Where one of those mattes affording justification at common law, such as accident , consent, duress, drunkenness, self-defence, or non-insane automatism is set up as a defence, the burden of proving the absence of such justification lies upon the prosecution, this is also the rule in the case of provocation such as to reduce a killing from murder to manslaughter. The burden of proving insanity or the statutory defences of diminished responsibility or marital coercion lies upon the defence; but the standard of proof is not as high as that required of the prosecution to prove guilt."* *(Para 11)*

(B) CRIMINAL TRIAL – Offence of triple murder – Conviction – Appeal – Plea that the prosecution must explain the injuries on the accused persons – Scope of acceptance of such plea – Held, the plea may not be accepted in all cases – Principles – Explained.

> *"There is no hard and fast rule that the prosecution must explain the injuries on the person of the accused in all cases and circumstances. In the case of* ***Bhaba Nanda Sarma Vs. State of Assam****, (1977) 4 SCC 396, the Hon'ble Supreme Court held that prosecution is not obliged to explain the injuries on the person of an accused in all cases and circumstances. It depends upon the facts and circumstances of each case where the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused."* *(Para 15)*

(C) INDIAN PENAL CODE, 1860 – Section 100 and 103 – Right to private defence of body and property – Applicability of both the rights – Principles – Explained in detail.

> *"Both the provisions are quoted above for proper appreciation. Clause seven of Section 100 is not applicable to the present case as it has been inserted in the Penal Code by the Criminal Law Amendment Act, 2013, much after the incident. As far as other ingredients are concerned, it is seen that the right to private defence extends to causing death of any person which occasions in the due exercise of the right to be of any of the description:*
>
> *(i) such an assault as may be reasonably cause the apprehension that death will otherwise be the consequence of such assault;*
>
> *(ii) such an assault as may be reasonably cause the apprehension in the mind of the accused as grievous hurt will otherwise be the consequence of such assault,*
>
> *(iii) an assault with the intention of committing rape;*
>
> *(iv) an assault with the intention of gratifying unnatural lust;*
>
> *(v) an assault with the intention of kidnapping or abducting; and*
>
> *(vi) an assault with intention of wrongfully confining a person.*
> *As far as the present case is concerned, the clauses (3), (5) & (6) are not applicable as no such plea is raised in this case.*
>
> *The first two clauses i.e. apprehension of death or grievous hurt may be applicable keeping in view the consequences of such section. But, having considered the material on record, there is no finding by the learned Trial Judge that there was an apprehension on the part of the appellants that*

death or grievous hurt otherwise be the consequence of the action of the deceased/injured. It is not the case of the appellants that the deceased/injured came to the spot, armed with deadly weapons and attacked the appellants. Rather, it is borne out from the record that the appellants who went to the spot while the deceased and injured were the ploughing land.

As far as the right to property is concerned, it is seen that such a right of private defence of property extends to causing death if, (i) there is apprehension of robbery; (ii) house breaking by night; (iii) Mischief by fire committed on any building, tent or vessel, which is being used as a human dwelling, or as a place for the custody of property; and (iv) theft, mischief or house-trespass, under such circumstances as may be reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. It is not a case of the defence that an attempt to robbery or house-breaking by night or mischief by fire of any building was made by the deceased. It is also not the case of the appellants that there was imminent danger of theft, mischief of house-trespass which may cause apprehension of death or grievous consequences. So, in this case, right to private defence property does not extend to causing of death. Moreover, there is material on record to show that the learned Executive Magistrate, Birmaharajpur has restrained, by order passed under Section 144 of the Code, the appellants, not to enter the land in question. In such a case, the act of the appellants going upon the land while the deceased/injured were cultivating the land is an act of aggression on the part of the appellants themselves. So, there is no reasonable ground to believe that the right of private defence of property extends to causing death. Anyway, the right of private defence of property, in this case cannot extend to such an extent of causing death of three persons and severe injuries to four others. So, we are of the opinion that this is not a case where the right of private defence should be held to have exercised by the appellants thereby holding that they are not guilty of the offence of murder and that they are guilty of the offence of manslaughter or committing homicide not amounting to murder." (Para 17 & 18)

Case Laws Relied on and Referred to :-

1. (1998) 14-OCR-(SC) 358 : U.P. Vs. Lakhmi.
2. AIR 1988-SC-863 : Harekrushna Singh and Others Vs. State of Bihar.
3. All England Law Reports, 1935 : Woolmington Vs. Director of Public Prosecutions.
4. 1962 AIR 605 : K.M. Nanavati Vs. State of Maharastra.
5. (1977) 4 SCC 396 : Bhaba Nanda Sarma Vs. State of Assam.
6. (1973) 3 SCC 881 : Ramlagan Singh and Ors. Vs. State of Bihar.

For Appellants : Mr. D.P. Dhal, Sr. Adv.
For Respondent : Mr. A.K. Nanda, AGA.

JUDGMENT Date of Hearing: 25.01.2021/23.07.2021 : Date of Judgment: 23.07.2021

S.K. MISHRA, J.

A gory episode of killing of three persons has been reported in this case. It appears from the record that three persons were murdered by the appellants for property dispute.

The appellants, namely, late Dwaru Patra and his wife appellant no.4, namely, Bedamati Patra and their sons Mahendra Patra, Indra Kumar Patra have been convicted by the learned Additional Sessions Judge, Balangir in Sessions Case No.28/11 of 1997 as per the judgment dated 02.06.1998 convicting them for the offence under Section 302/149 and also for the offences under Sections 148, 143 and 324 of the Penal Code and sentencing each of them to undergo imprisonment for life. The appellant no.4, namely, Bedamati Patra has also been convicted for the offence under Section 304 of the Penal Code and has been sentenced to undergo imprisonment for six months for that offence.

Dwaru Patra died during pendency of the appeal. The appeal abates as far as he is concerned as per the order of this Court on 24.08.2020.

02. The prosecution alleged that the three deceased, namely, Jhalia Karmi, Khageswar Karmi and Parameswar Karmi, and four injured persons, namely, Ramesh Karmi, Umesh Karma, Sabita Karmi and Lochana alias Sulochana Karmi are members of one family. The prosecution further put forth that they are owners-in-possession of a land, locally known as 'Dimilapidha' or 'Dimilakheta'. On 15.07.1996 in the morning hour, the deceased and injured persons had gone to the Dimilapidha land for sowing paddy seeds. While they were ploughing and working in the field along with two other persons, namely, Panchanan Chaulia and Bhagirathi Chaulia, the accused persons along with Mahendra Patra and other sons of accused Dwaru Patra, rushed to the land being armed with different weapons like tangi, tablee, kati, spear (tenta) and thengas. Accused Bedamati and Mahendra threw glass dusts on the faces, respectively, of Khageswar Karmi and Parameswar Karmi. The three deceased were indiscriminately assaulted mainly by the male accused persons, namely Dwaru, Mahendra and Indra by means of deadly sharp cutting weapons. The accused Bedamati assaulted and injured Sabita Karmi by kati and accused Mahendra and Narendra assaulted

and injured Sulochana Karmi. Accused Mahendra also assaulted the injured Umesh, Narendra Paptra assaulted and injured Ramesh Karmi.

After the assault, the accused persons ran away. Jhalia Karmi and Khageswar Karmi died immediately on the spot. Parameswar Karmi also died on the spot a little later. Saraswati Karmi, wife of deceased Parameswar Karmi informed Sahadev Padhan (P.W.2) about the occurrence. Then Saraswati and Sahadev both went to Khetra Karmi (P.W.1) and informed him at his house about the occurrence. P.W.1 & P.W.2 informed Narayan Badi, the Grama Rakhi (P.W.9) and then all three of them went to the case land and found Khageswar Karmi and Jhalia Karmi lying dead with injuries on their persons. Parameswar Karmi was lying with serious injuries and was gasping and flailing. Umesh Karmi, Ramesh Karmi, Sabita Karmi and Sulochana Karmi were also present there with injuries on their person. P.Ws.1, 2 & 9 ascertained from Umesh Karmi and Ramesh Karmi that the accused persons along with Narendra Patra had assaulted them and the deceased persons. Therefore, P.Ws.1 and 9 and one Suresh Karmi came to Biramaharajpur Police Station. P.W.1, Khetra Karmi orally reported to the O.I.C., Biramaharajpur Police Station about the incident and his oral report was reduced into writing. The OIC, registered the case i.e. Biramaharajpur P.S. Case No.56 of 1996 and immediately took up investigation.

In course of investigation, he visited the spot where he found Parameswar Karmi had already succumbed to the injuries on the spot. He conducted inquest over the dead bodies of Khageswar, Jhalia and Parameswar and sent the dead bodies for post mortem examination to the District Head Quarters Hospital, Sonepur. He seized two sticks, one spade, one tangia and one plough from the spot. He examined witnesses including the injured. He sent requisition to the Medical Officer, Subalaya, P.H.C. for medical examination of the injured persons. He also seized the weapons of offence from the house of the accused persons. The I.O. seized the records of C.M.C. No.50/96, a proceeding initiated under Section 144 of the Code of Criminal Procedure, 1972 (hereinafter referred as “the Code”, for brevity) of the court of the Executive Magistrate, Biramaharajpur pertaining to the lead involved in this case. Upon completion of investigation the charge-sheet against the accused persons and one Narendrea Patra was submitted. Narendra Patra could not be arrested in course of investigation and his case was not committed to the court of Sessions. He has been treated as an absconder.

03. The defence plea is denial of the occurrence. It appears from the record that the accused/appellants also took the plea that they were in possession of land in question and deceased family were forcibly ploughing the same. It is further pleaded by the appellants that when they protested their action, the deceased and other injured assaulted the accused persons and caused injuries.

04. In order to prove its case, prosecution examined 15 witnesses, led in to evidence 26 exhibits and 10 materials objects. P.W.3-Umesh Karmi, P.W.5- Ramesh Karmi, P.W.6- Lochan Karmi and P.W.8- Sabita Karmi are the injured eye witnesses to the occurrence. P.W.10- Panchanan Chaulia is an independent eye witness to the occurrence in the sense that he is not related to the family of the deceased but he was working for the deceased persons on the case land at the time of the occurrence. P.W.1-Khetra Karmi is the post occurrence witness. He is the informant in this case. P.W.4-Jatia Karmi, P.W.7-Hrusikesh Padhan, P.W.9-Naran Badi are the formal witness being the witnesses to the inquest, seizure etc. P.W.11- Gourahari Nag is the Bench Clerk of the Sub-Collector, Birmaharajpur on whose production the records of criminal proceeding were seized by the investigating officer. He was also given zima of the said records. P.W.12- Dr. Anusuman Tripathy, who conducted autopsy over the dead body of the deceased Khageswar Karmi and Jhalia Karmi. P.W.13- Dr. J. Dora, who conducted postmortem on the dead body of the deceased Paramesar Karmi, P.W.15- Dr. Sujit Mahapatra is the medical officer of P.H.C., Subalaya, who examined the injured on police requisition and P.W.14- Khageswar Agasti is the Investigating Officer in this case.

05. The defence, on the other hand, did not examine any witness on its behalf. It has led into evidence, the FIR in the counter case and the injury report in respect of some of the accused persons marked as Exts.-A to F.

06. Mr. D.P. Dhal, learned Senior Counsel appearing for the appellants argued that at this stage the appellants are not disputing on the factual findings of the learned Additional Sessions Judge to the effect that the death of the deceased persons were homicidal in nature and the injured has sustained injuries as found by the doctor P.W.15. He also did not dispute the complicity of the present appellants in the commission of the crime as alleged by the prosecution. He, however, relied heavily on the records of the proceeding under Section 144 of the Code, and stated that there is dispute

regarding possession of agricultural land between the appellants'family and family of the deceased persons and that accused persons also sustained injuries in the occurrence. He also submitted that this is a clear case of right to private defence of property. Therefore, he would argue that the appellants' conviction cannot be upheld by this Court and has to be set aside.

Mr. A.K. Nanda, learned Additional Government Advocate, on the other hand, did not dispute the fact that the accused persons have also sustained some injuries and it is evident from the injury reports G/1, E/1 and F/1 so far it relates to Narendri Patra, Dwaru Patra and Mahendra Patra. But, he argued that this is a case of murder of three persons and the facts of the case do not justify a killing of three persons so that the right of private defence of property cannot be extended to the actions of the appellants. He heavily relied upon the findings recorded by the learned Additional Sessions Judge in this case and very emphatically submitted that the learned Additional Sessions Judge has taken a very perspicacious and sensitive view of the materials on record and has come to a just and proper conclusion requiring no interference in this case.

07. Since the learned counsel appearing for both the parties did not dispute the medical findings or the opinion rendered by the doctors in this case and the complicity of the appellants in the commission of the crime, it is not necessary on our part to examine in detail the medical evidences available on records. It is also not necessary to re-examine the evidences of the eye witnesses in this case to come to the conclusion regarding complicity of the appellants in commission of the alleged offences. However, we have perused the record and found the evidence of P.W.12- Dr. Anusuman Tripathy. P.W.13- Dr.J. Dora together with the contents of Exhibits- 6, 7 and 8, the three inquest reports which prepared by the I.O. with respect to the three deceased i.e. Exhibits 13, 14 and 17, the postmortem examination reports with respect to them and also the injury reports and the evidence of P.W.15, and we are of the opinion that the three deceased did suffer homicidal nature of death. The injured persons also sustained injuries as stated to by P.W.15- Dr. Sujit Mahapatra.

It is also apparent that P.Ws.3, 5, 6, 8 and 10 the eye witnesses are consistent in their evidence regarding complicity of the appellants in commission of the crime. The learned Additional Sessions Judge after careful examination of the material on record keeping in view the suggestions and

the contentions raised by the learned counsel for the defence has come to a conclusion that their evidence are to be accepted to prove the fact alleged by the prosecution. The learned Additional Sessions Judge further held that the contradiction pointed out by the defence in the evidence of these witnesses are minor, having no impact on the veracity of the witnesses. We find no plausible reason to come to a different conclusion than the one arrived at by the learned Additional Sessions Judge. The question that remains to be decided in this case is whether the appellants should be given the benefit of right of private defence of property or/and of life.

08. In developing a case for the appellants, Mr. D.P. Dhal,learned senior counsel, would argue that non-explanation of the injuries on the person of three of the accused persons, the admission of the Investigating Officer that as per the report of the Revenue Inspector the land in question is recorded in the names of the family of the accused persons, pendency of litigation between the parties, the appellants have established a case of right to private defence of life and property, and therefore, they should be acquitted of the offences.

Learned Additional Government Advocate on the other hand would argue that the right to private defence, property and life has to be proved by the appellants. He would also argue that it is necessary on the part of the appellants to establish beyond reasonable doubt an exercise of their right to private defence of life and property on the fateful day of the incident. He further argued that the appellants have failed to establish its case beyond all reasonable doubt and fact that the witnesses have stated that the land in question was in possession of the informant/deceased and their family members and that there was a restraint order passed by the Executive Magistrate, Birmaharajpur, in a proceeding under Section 144 of the Code and that three persons were done to death by the action of the accused persons, it is not a case of right to private defence or rather, it is a clear case of murder. He also argued that the evidence on record reveals that the accused persons came to the spot being arm with deadly and sharp cutting weapon. So, the injuries sustained by the accused persons are of no consequence. Therefore, learned counsel for the State submitted that the appeal should be dismissed and conviction as well as the sentence imposed by the learned Additional Sessions Judge should not be disturbed in any manner.

09. A careful examination of the impugned judgment reveals that the learned Additional Sessions Judge, while dealing with the question of right to private defence and plea set up by the appellants regarding the injuries sustained by them, has taken into consideration the following while rejecting the plea raised by the appellants.

(I) The three of the appellants, namely, Bedamati, Mahendra and Narendra have admitted in their statement under Section 313 of the Code that they were present on the case land at the time of occurrence, as they have taken the plea that the deceased persons and injured witnesses assaulted them. He further took into consideration the reported case of ***U.P. vs. Lakhmi***, (1998) 14-OCR-(SC) 358 that examination of accused is not a mere formality and that the admission made by the accused under Section 313 Code cannot be ignored on such interpretation of the Hon'ble Supreme Court with respect to Sub-clause (4) of Section 313 of the Code.

(II) Taking note of the reported case of ***Harekrushna Singh and Others vs. State of Bihar***, AIR 1988-SC-863 the learned Additional Sessions Judge has held that it is not necessary on the part of the prosecution, in each and every case, to explain the injuries sustained by the accused persons during the course of incident.

(II-A) Therefore, the learned Trial Judge held that in the given case, even if it is established that the accused persons have received injuries in the same transaction, the plea of private defence would not be accepted as *prima facie* established.

(III). The learned Trial Judge did not give much weightage to the concession made by the Investigating Officer, P.W.14, in this case that the Revenue Inspector reported that the land was recorded in the name of accused persons in view of the fact that neither any ROR, nor was any document to show their ownership etc. possession has been filed by the accused persons.

(IV) He also took into consideration the fact that the prosecution has proved in this case that the Executive Magistrate vide order dated 02.07.1996 issues a restraint order against the 2nd party member i.e. the accused persons retraining them from going over the land in question.

(V). The circumstances of this case shows that the accused themselves were the aggressors and they cannot be said to have any right to private defence.

10. Thus, learned Trial Judge has held that the prosecution has proved its case beyond reasonable doubt and that the defence has not established its case of right to private defence.

11. Taking note of the first contention that burden of proving the right of private defence by the appellants should be discharged by standard of proof required as "beyond all reasonable doubt'' by the learned Additional Government Advocate, we are of the opinion that such argument is not acceptable. In the case of ***Woolmington vs. Director of Public Prosecutions***, All England Law Reports, 1935, page 1, a person was convicted by the trial court. His appeal was dismissed. Thereupon the Attorney-General of the United Kingdom gave his fiat certifying that the appeal of Reginald Woolmington involved a point of law of exceptional public importance, and therefore, the matter came before the Law Lords of England. After taking into consideration several earlier precedents and arguments propounded by the Law Lord, it was ruled that *"But while the prosecution must prove the guilt of prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.*

It was further observed that *''throughout the web of the English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilty subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. It is further laid down that dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in a reasonable doubt whether, even if his explanation is not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.*

On a reference to the Principles of Criminal Liability,Voll-11, **Criminal Law, Evidence and Procedure Crown Proceedings and Crown**

Practice (Halsbury's Law of England Forth Edition), we find the Defence in General has been dealt with by following:-

> *"the general principle of the common law is that the prosecution must prove the guilt of a defendant beyond all reasonable doubt; it is not incumbent upon a defendant to establish his innocence. Where one of those mattes affording justification at common law, such as accident , consent, duress, drunkenness, self-defence, or non-insane automatism is set up as a defence, the burden of proving the absence of such justification lies upon the prosecution, this is also the rule in the case of provocation such as to reduce a killing from murder to manslaughter. The burden of proving insanity or the statutory defences of diminished responsibility or marital coercion lies upon the defence; but the standard of proof is not as high as that required of the prosecution to prove guilt."*

12. We are aware that we have adopted the Anglo- Saxon Jurisprudence. It has been, in its application to India suitably notified by the India Parliament and appropriately interpreted by the Hon'ble Supreme Court of India and different High Courts. But the basic tenet largely remains unaffected. An authority pronouncement in the year, 1935 and the Halsbury's Law of England provide that the burden to prove regarding the guilt of the accused is on the prosecution and it has to be establish its case beyond all reasonable doubt, but in case of defence, such a plea, as in this case right to private defence need not be established by the defence beyond all reasonable doubt. It is sufficient for the defence to raise a reasonable doubt regarding the prosecution case and that by proving its case by preponderance of evidence or probability. In our Country, as per Section 105 of the Indian Evidence Act, 1872, if an accused claims benefit of an exception to the burden of proving that case falls under the exception, then the burden shall lie upon him. But, such burden is subject to the burden on the prosecution to prove the guilt of the accused beyond all reasonable doubt. The effect of Section 105 of the Indian Evidence Act on the general rule of proven guilty beyond all reasonable doubt has been explained by the Hon'ble Supreme Court in several cases. It is noteworthy taken into consideration in the case of ***K.M. Nanavati vs. State of Maharastra***, 1962 AIR 605. This ratio has been followed by the Hon'ble Supreme Court as well as the High Court in the several cases.

13. The contention raised by Mr. Nanda, learned Additional Government Advocate that appellants must prove their defence case of right to private defence by proving it beyond all reasonable doubt is not acceptable.

14. As far as injuries found on the person and the appellants, the learned Trial Judge has taken note of the reported case of **Harekrushna Singh and**

Others vs. State of Bihar (supra) and has held that non-explanation by prosecution of the injuries on the accused is a fact which is taken into account in judging veracity of the witness and court will scrutinize their evidence with care if a case is presented on its own fixture. In some cases, such non-explanation may have little or no adverse effect on the prosecution case. It is further held by the learned Trial Judge that in a given case it may strengthen the plea of private defence set up by the accused. But it cannot be laid down as in variable proposition of law of universal appreciation that as soon as it is found that the accused has received injuries in the same transaction, the plea of private defence would stand *prima facie* established. Keeping in view such principles in mind, the learned Trial Judge further held that the in the case in hand the no explanation of injuries on the person of the appellant/accused is of no consequence, and that it does not make out a further case of right to private property as set up by the defence.

15. Such a proposition of law relied upon by the Trial Judge also finds support from the following ratio laid down by the Hon'ble Supreme Court in the following cases. Thus, this Court is of the opinion that the findings given by the learned Trial Judge that the non-explanation of the injuries on the person of the appellants are of no consequence and such findings is based on plausible reasoning and perspicacious appreciation of material on record.

There is no hard and fast rule that the prosecution must explain the injuries on the person of the accused in all cases and circumstances. In the case of **Bhaba Nanda Sarma Vs. State of Assam**, (1977) 4 SCC 396, the Hon'ble Supreme Court held that prosecution is not obliged to explain the injuries on the person of an accused in all cases and circumstances. It depends upon the facts and circumstances of each case where the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused.

16. In an earlier case i.e. **Ramlagan Singh and Ors. Vs. State of Bihar,** (1973) 3 SCC 881, the Hon'ble Supreme Court held that the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution in cases regarding the injuries of the accused persons. When this is not done, there is no occasion for the prosecution witnesses to explain the injuries on the person of the accused. Applying the principles in the case in hand it is seen P.W.3, Umesh Karmi though extensively cross-examined by the defence but have been put only a question regarding the injuries on the person of one of

the appellant. This witness was not asked how the accused sustained such injuries. P.W.5, Ramesh Karmi has also been extensively cross-examined by the defence. He has also not been cross-examined by the learned counsel for the defence to explain the injuries sustained by the injured person. P.W.6, another eye witness, namely, Lochan Karmi has been asked but he has denied that he assaulted the accused persons on the date and time of occurrence. He further stated that he has not seen the injuries on the person of the accused persons at the time of occurrence but voluntarily added that while the accused persons were assaulting them, they also received the injuries from themselves. P.W.8, Sabita Karmi another eye witness to the occurrence was given a suggestion that the accused persons were assaulted by the eye witnesses for which they sustained injuries. P.W.10, Panchanan Chaulia is an independent eye witness in the sense he is not related to the injured/deceased, has not been cross-examined on this point. the Investigating Officer, P.W.14, Khageswar Agasti was not put any question on the question of the injuries sustained by the appellants nor he was given a chance to explain any such injuries sustained by them.

In other words, the defence has not stipulated by effective cross-examination of witnesses that the appellants have in fact sustained injuries during course of the incident. Furthermore, no clarification is sought from them.

In such view of the fact, this Court is of the opinion that the learned Additional Sessions Judge was correct in not giving much weightage to the defence plea that the accused persons have also sustained injuries and that the prosecution has failed to explain the same. In the given facts and circumstances of this case, we are of the opinion that this is not a case where the case of the prosecution has to be thrown out for non-explanation of the injuries on the appellants.

We therefore find no reasonable ground to hold that it shall be expedient in the interest of justice to come to a different conclusion and overrule the findings of the learned Trial Judge.

17. Coming to the question of right to private defence, we take note of the Sections 100 and 103 of the Penal Code.

> "100. **When the right of private defence of the body extends to causing death** - The right of private defence of body extends, under the restrictions mentioned in the

last preceding Section, to the voluntary causing of death of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely.

First- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly- An assault with the intention of committing rape;

Fourthly- An assault with the intention of gratifying unnatural lust;

Fifthly- An assault with the intention of kidnapping or abducting; person under circumstances which may reasonably cause him to apprehended that he will be unable to have recourse to the public authorities for his release.

[Seventhly-An Act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]"

"103. **When the right defence of property extends to causing death**- The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely;-

First- Robbery;

Secondly-House-breaking by night;

Thirdly-Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly-Theft, mischief or house trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised."

Both the provisions are quoted above for proper appreciation. Clause seven of Section 100 is not applicable to the present case as it has been inserted in the Penal Code by the Criminal Law Amendment Act, 2013, much after the incident. As far as other ingredients are concerned, it is seen that the right to private defence extends to causing death of any person which occasions in the due exercise of the right to be of any of the description:

(i) such an assault as may be reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(ii) such an assault as may be reasonably cause the apprehension in the mind of the accused as grievous hurt will otherwise be the consequence of such assault,

(iii) an assault with the intention of committing rape;

(iv) an assault with the intention of gratifying unnatural lust;

(v) an assault with the intention of kidnapping or abducting; and

(vi) an assault with intention of wrongfully confining a person.

As far as the present case is concerned, the clauses (3), (5) & (6) are not applicable as no such plea is raised in this case.

The first two clauses i.e. apprehension of death or grievous hurt may be applicable keeping in view the consequences of such section. But, having considered the material on record, there is no finding by the learned Trial Judge that there was an apprehension on the part of the appellants that death or grievous hurt otherwise be the consequence of the action of the deceased/injured. It is not the case of the appellants that the deceased/injured came to the spot, armed with deadly weapons and attacked the appellants. Rather, it is borne out from the record that the appellants who went to the spot while the deceased and injured were the ploughing land.

18. As far as the right to property is concerned, it is seen that such a right of private defence of property extends to causing death if, (i) there is apprehension of robbery; (ii) house breaking by night; (iii) Mischief by fire committed on any building, tent or vessel, which is being used as a human dwelling, or as a place for the custody of property; and (iv) theft, mischief or house-trespass, under such circumstances as may be reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

It is not a case of the defence that an attempt to robbery or house-breaking by night or mischief by fire of any building was made by the deceased. It is also not the case of the appellants that there was imminent danger of theft, mischief of house-trespass which may cause apprehension of death or grievous consequences. So, in this case, right to private defence property does not extend to causing of death. Moreover, there is material on record to show that the learned Executive Magistrate, Birmaharajpur has

restrained, by order passed under Section 144 of the Code, the appellants, not to enter the land in question.

In such a case, the act of the appellants going upon the land while the deceased/injured were cultivating the land is an act of aggression on the part of the appellants themselves. So, there is no reasonable ground to believe that the right of private defence of property extends to causing death. Anyway, the right of private defence of property, in this case cannot extend to such an extent of causing death of three persons and severe injuries to four others. So, we are of the opinion that this is not a case where the right of private defence should be held to have exercised by the appellants thereby holding that they are not guilty of the offence of murder and that they are guilty of the offence of manslaughter or committing homicide not amounting to murder.

19. Thus, on an analysis of the evidence on record and keeping in view the contentions raised at the Bar, we are of the opinion that the defence has not established a case of committing murder of three persons and injuries on four others in exercise of right of their private defence of property and life. In this case, materials are singularly absent to come to a conclusion hold that the appellants had any imminent threat to either their life or their property as envisaged under Sections 100 and 103 of the Penal Code.

20. In that view of the matter, we are not inclined to interfere with the findings recorded by the learned Additional Sessions Judge leading to the conviction of the appellants. We, therefore, upheld the conviction of the appellants and the sentences awarded by the learned Trial Judge. Hence, the appeal is dismissed.

21. The Trial Court Records (T.C.Rs) be returned back to the trial court forthwith along with copy of this judgment.

22. The learned Additional Sessions Judge, Bolangir is hereby directed to send the records to the Court of the learned Sessions Judge, Sonepur, as in the meantime, the district of Sonepur has been constituted as a separate session's division. The learned Sessions Judge, Sonepur shall immediately take appropriate step for recommitment.

23. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order

available in the High Court's website, at par with certificate copy, subject to attestation by Mr. D.P. Dhal, Sr. Advocate along with seal, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 539

Dr. B.R. SARANGI, J.

W.P.(C) NO. 22946 & 16373 OF 2015

DAMODAR DAS (IN BOTH CASES) .....Petitioner

.V.

UNION OF INDIA & ORS. (IN BOTH CASES) .....Opp. Parties

SERVICE LAW – Departmental proceeding – Criminal trial is pending against the delinquent having been involved in a criminal case – Departmental proceeding initiated for the involvement in the criminal case as well as for some other charges – Plea of the delinquent was that since the criminal proceeding is pending, the departmental proceeding should be stayed – Principles and the law when both criminal and departmental proceeding pending – Discussed.

It is well established in law that in criminal cases, proof required for conviction has to be beyond reasonable doubt, whereas in the departmental proceeding proof based on preponderance of probability sufficient for holding the charges as proved. If the standard of proof in both the proceedings is different, in that case departmental proceeding cannot wait for disposal of the criminal proceeding even if allegations are identical to each other. But fact remains, in the present case, the allegations are different and distinct. Merely because the petitioner has involved in a criminal case and that has referred to Article of charges of the memorandum of charge submitted by the opposite parties in Annexure-6 that ipso facto cannot entitle him to pray for staying of departmental proceeding till finalization of criminal proceeding initiated against him.

Case Laws Relied on and Referred to :-

1. (1996) 6 SCC 417 : State of Rajasthan Vs. B.K. Meena.
2. (1997) 2 SCC 699 : A.P. SRTC Vs. Mohd. Yousuf Miya.
3. (1999) 3 SCC 679 : Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd.
4. (2005) 10 SCC 471 : Hindustan Petroleum Corpn. Ltd. Vs. Sarvesh Berry.
5. (2012) 1 SCC 442 : Divisional Controller, Karnataka SRTC Vs. M.G. Vittal Rao.

For Petitioner : Miss Saswati Mohapatra, (In WP(C) No.22946/2015)
M/s. S.K. Das-2 and A.K. Jena, (In WP(C) No.16373/2015)

For Opp. Parties : Mr. D.K. Sahoo, Standing Counsel for East Coast Railway (in both cases)

JUDGMENT Date of Hearing 02.07.2021 : Date of Judgment : 06.07.2021

Dr. B.R. SARANGI, J.

Both the above noted writ petitions have been filed by Damodar Das. In W.P.(C) No.22946 of 2015 he sought the following reliefs:

> *"(i) Hold/declare that the opp. party No.3, Enquiry officer is conducting the Departmental Enquiry No.323 against the petitioner being preconceived and predetermined and thereby direct the opp. Party No.2 to change the Enquiry officer for fair enquiry;*
>
> *(ii) Pass such other order(s) or issue direction(s) as may be deemed fit and proper in the bonafide interest of justice;"*

Whereas W.P.(C) No.16373 of 2015 has been filed by him seeking following reliefs:

> *"(i) To quash the letter dtd.30.07.2015 under Annexure-14;*
>
> *(ii) Hold/declare that continuation of Departmental Proceeding against the present petitioner during pendency of the criminal case instituted against the petitioner for the self same incident is bad, illegal and cannot be sustainable and/or maintainable in the eye of law."*

Since both the writ petitions have been filed by the selfsame petitioner and they have arisen out of the same occurrence, they have been heard together and are disposed of by this common judgment which will govern in both the cases.

2. The factual matrix of the case, in brief, is that the petitioner was working as constable in Railway Protection Force (RPF) at Rayagada. While he was so continuing, on 16.08.2013 at about 10.30 PM at Ladda Railway Station, there was theft of aluminum powder from a stabled rake of goods train, namely, "VZP/BTAP". On 17.08.2013, the local police caught hold of three accused persons with vehicle and recovered the materials, i.e., all stolen aluminum powder from their possession. Being informed about the theft, the R.P.F. officials on 17.08.2013 conducted raid over the Ladda Railway Station. The Inspector, R.P.F., Rayagada on 17.08.2013 drew and registered an F.I.R. bearing No. R.P.(UP) Case No.17 of 2013 under Section 3(a) of

Railway Property (Unlawful Possession) Act, 1966 against unknown criminals and on the same day, he forwarded the case record to the learned S.D.J.M., Rayagada.

2.1. During enquiry of the aforesaid theft case, opposite party authorities came to know that one K. Ramanjaneyulu, Sub-Inspector, R.P.F. was in contact with some criminals and accused persons of the aforesaid theft case through his cell phone during and after the aforesaid crime. Since the said K. Ramanjaneyulu made call to the petitioner through his cell phone during night of the date of crime, the petitioner was implicated as an accused in the aforesaid R.P.(UP) Case No.17 of 2013, which was registered at RPF/Post/Rayagada. The inquiry officer, in the aforesaid case, vide letter dated 28.11.2013, submitted a report regarding involvement of the petitioner in the theft case while he was deployed for guarding duty at Ladda Railway Station. Basing on the confession statement of some of the accused persons and also on the call detail records of the accused persons and the petitioner revealed that many calls in between the petitioner and some of the accused persons and K. Ramanjaneyulu, Sub-Inspector in the night of 15th, 16th and 17th of August,2013 and thus prima facie his involvement was established in the preliminary enquiry. Consequentially, a criminal case bearing 2(C)CC Case No.504 of 2013, arising out of RP(UP) Case No.17 of 2013, was registered.

2.2 The petitioner filed BLAPL No.27429 of 2013 on 05.12.2013 before this Court, but the same was rejected on 24.04.2014. Thereafter, he surrendered before the learned S.D.J.M., Rayagada on 14.05.2014, on which date he was arrested and remanded to judicial custody up to 27.05.2014. Later, on 24.05.2014, he was released on bail by the learned S.D.J.M., Rayagada and after his release, PC/RPF/Rayagada directed him to SCNL/WAT for his daily attendance at Security Control/Waltair.

2.3 The petitioner was absconded from duty on 27.08.2013 and from 21.09.2013 to 08.01.2014 without any authority. Therefore, in the meantime he was placed under suspension on 28.11.2013 on the basis of fact findings report dated 28.11.2013. The Sr. Divisional Security Commissioner, RPF/E.Co.Rly/ Waltair passed an order on 09.12.2013 under Annexure-4 that during suspension period, the petitioner was to give daily attendance once in a day at Security Control/Waltair at 10.00 hours and sign in the Daily Diary of Security Control/Waltair. The reason for his absence for the period from 21.09.2013 to 08.01.2014 was given by the petitioner for his

hospitalization at SCB Medical College & Hospital for treatment and to that effect he has also submitted medical certificates showing his treatment from 22.09.2013 to 08.01.2014. Taking into account the aforesaid medical certificate, the Post Commander on 09.01.2014 directed the petitioner for examination of his fitness.

2.4. During pendency of the criminal case, charge-sheet under Section 9(1)(i) of the RPF Act, 1957 read with Rule 153 of RPF Rules, 1987 in Annexure-6 was submitted on 26.03.2015 for initiation of disciplinary proceeding against the petitioner. Though Article of charges no.1 and 2 relate to the criminal cases pending before the learned S.D.J.M., Rayagada, Article of charges no.3 and 4 deal with the service conditions of the petitioner. On resumption, his suspension case was reviewed on 01.05.2014 by the disciplinary authority and he was kept under suspension due to prima facie involvement in crime in the above RP (UP) Act and also it was a case of moral turpitude. On an application filed by the petitioner for revocation of his suspension order, the competent authority reviewed his suspension on 21.03.2015 and ordered for continuation under suspension and enhanced the subsistence allowance from 50% to 75%. The departmental enquiry is under examination of prosecution witnesses' stage. However, after revocation of suspension order, the petitioner was reinstated in his service on 17.12.2015.

2.5. For causing departmental enquiry, Sri B. Ramu, Inspector was appointed as inquiry officer to conduct the enquiry by the disciplinary authority. After receiving the charge-sheet dated 26.03.2015 in relation to the disciplinary proceeding, the petitioner on 01.04.2014 submitted a representation on 18.05.2015 to stay the departmental proceeding initiated against him contending that for the self-same allegation he is facing trial in a criminal proceeding, which is sub-judice before the competent court, therefore, the departmental proceeding should not proceed. As the said representation dated 18.05.2015 was not disposed of, the petitioner approached this Court by filing W.P.(C) No.8282 of 2015, which was disposed of vide order dated 04.05.2015 directing opposite party no.2 to consider the representation and pass a speaking order within a period of three months from the date of receipt of the copy of the order. In compliance of the said order, on 30.07.2015, the authority passed a speaking order contending that the charges framed in the charge-sheet against the petitioner and the charges of criminal case are not identical and entirely different from each other. In criminal case, the proof required for conviction has to be beyond

reasonable doubt, whereas in departmental proceeding, proof based on preponderance of probability is sufficient for holding the charges as proved. It is also contended that the trial in criminal case before the learned S.D.J.M., Rayagada is yet to be finalized and it may take considerable period of time to deliver its judgment. The department need not wait for the disposal of criminal case for initiation of departmental proceedings. As such, there is no bar to initiate simultaneously departmental proceedings against the petitioner against whom criminal proceedings are pending as per guidelines issued by Railway Board in terms of CPO/GRC's Estt. Sl. No.195/86 dated 07.10.1986. Thereby, the petitioner was directed to attend D & A proceedings from time to time on receipt of information from the inquiry officer without further delay to complete the departmental enquiry proceedings within the stipulated period. Challenging the said order dated 30.07.2015, the petitioner filed W.P.(C) No.16373 of 2015.

2.6. When the aforesaid matter was listed on 02.12.2015, Mr. D.K. Sahoo, learned counsel appearing for the opposite party-East Coast Railway sought time to file counter affidavit and in compliance of the same, counter affidavit was filed on 14.01.2016. Though in the meantime five years have passed, no rejoinder affidavit has been filed by the petitioner.

2.7. The petitioner filed W.P.(C) No.22946 of 2015 effectively to change the inquiry officer for fair enquiry. While analyzing W.P.(C) No.22946 of 2015, this Court vide order dated 23.12.2015 issued notice and in Misc. Case No.21072 of 2015 passed interim order directing opposite party no.3 not to proceed with the departmental enquiry no.323 pending before him till 21.01.2016. The said interim order was extended vide order dated 21.01.2016 and Mr. D.K. Sahoo, learned counsel appearing for opposite party-East Coast Railway sought time to file counter affidavit, which was filed on 10.02.2016. When the matter was listed on 19.02.2016, learned counsel appearing for the petitioner was granted time to file rejoinder affidavit and interim order was extended till 11.03.2016. Again on 11.03.2016, when the matter was listed, learned counsel for the petitioner sought time to file rejoinder affidavit and the interim order was extended till 05.04.2016. The matter was again listed on 19.04.2014, 25.07.2016 and 15.07.2019 and the petitioner was given opportunity to file rejoinder affidavit. Consequentially, the interim order was extended from time to time. But till date, no rejoinder affidavit has been filed. In the meantime, learned counsel appearing for the opposite party-East Coast Railway filed I.A.

No.2684 of 2016 for vacation of interim order dated 23.12.2015. As such, no objection to such interlocutory application has been filed by the petitioner till today. In the meantime, more than five years have elapsed and the petitioner is enjoying the interim order passed by this Court. Consequentially, when adjournment was sought by the petitioner on 27.02.2021, this Court was not inclined to grant adjournment and called upon learned counsel for the parties to argue the matter on merits. In response to same, the matter was heard at length.

3. Mr. S.K. Das-2, learned counsel appearing for the petitioner in W.P.(C) No.16373 of 2015 contended that for the self-same allegation if the criminal proceeding is pending, the departmental proceeding should be stayed.

4. Miss S. Mohapatra, learned counsel appearing for the petitioner in W.P.(C) No.22946 of 2015 supported the contention raised by Mr. S.K. Das-2, learned counsel for appearing for the petitioner in W.P.(C) No.16373 of 2015. She contended that since the inquiry officer terrorized the petitioner calling upon him to file reply, he should be changed from enquiring the matter so as to have a fair enquiry about the issue.

6. Per contra, Mr. D.K. Sahoo, learned counsel appearing for East Coast Railway argued with vehemence referring to the counter affidavit and contended that the charges framed against the petitioner in the departmental charge-sheet are not identical with the charges in the criminal case and they are entirely different from each other. He also contended that in criminal case, proof required for conviction has to be beyond reasonable doubt whereas in the departmental proceeding proof based on preponderance of probability is sufficient for holding the charges as proved. It is further contended that the trial in criminal case before the learned S.D.J.M., Rayagada is yet to be finalized and it may take a considerable time to deliver its judgment. The Department cannot wait for disposal of criminal case for initiating departmental proceeding against the petitioner. Therefore, there is no bar to initiate departmental proceeding simultaneously against the petitioner, against whom criminal proceeding is pending, as per guidelines issued by the Railway Board. So far as allegation made against the inquiry officer with regard to terrorizing the petitioner, he denied such allegation and contended that adequate opportunity has been given to the petitioner to submit his reply to the allegations made against him. More so, if the

petitioner stated that he was remained unauthorized absent from duty on the ground of illness and also illness of his daughter, to that extent he has to produce relevant documents, that itself also contrary to Rule 272 of the RPF Act. Thereby, he justified initiation of departmental proceeding against the petitioner and contended that the same should be allowed to continue. Therefore, both the writ petitions should be dismissed by vacating the interim order.

7. This Court heard Mr. S.K. Das-2, learned counsel appearing for the petitioner in W.P.(C) No.16373 of 2015; Miss S. Mohapatra, learned counsel appearing for the petitioner in W.P.(C) No.22946 of 2015; and Mr. D.K. Sahoo, learned counsel for opposite party-East Coast Railway in both the writ petitions by virtual mode; and perused the record. Pleadings have been exchanged between the parties. As time and again this case has been adjourned for filing of rejoinder affidavit and in the meantime five years have been passed and the petitioner is enjoying interim order, this Court is not inclined to grant further adjournment and disposed of both the writ petitions finally on the basis of arguments advanced by the respective counsels and pleadings available on records itself.

8. On the basis of factual matrix, as delineated above, there is no dispute with regard to the fact that the petitioner is facing criminal trial as well as departmental proceedings. On perusal of the memorandum of charges annexed as Annexure-6 vis-à-vis the FIR lodged under Railway Act/RP (UP) Act under Annexure-1 to W.P.(C) No.16373 of 2015 and on comparison of both the documents, it clearly indicates that because of involvement of the petitioner in criminal case, he is facing criminal trial as per the memorandum of charge-sheet issued under Section 9(1)(i) of the RPC Act 1957 read with Rule 153 of RPF Rules, 1987, of which two of the Article of charges are referred to the allegation of involvement of the petitioner in the criminal case as in the FIR, and two other charges are regarding his service conditions. The two charges, which are levelled against the petitioner in departmental proceeding with reference to the FIR, i.e. charge no.1 & 2, the conduct and involvement, so far as charge no.1 is concerned, shows that the petitioner has failed to maintain integrity and devotion to duty and unbecoming of railway servant, which is violation of Rule 3.1(i) (ii) & (iii) of the Railway Service (Conduct) Rules, 1966. Similarly Article of Charge no.2 specifically mentioned about the act of involvement of the petitioner in criminal case, which tantamounts to discreditable conduct and has brought discredit to the

reputation of the Force. Thereby, it violates Rule 146.4 of the RPF Rules, 1987. Such link/contact shows that he has failed to maintain integrity and devotion to duty and is an act unbecoming of a Railway servant, which is in violation of Rule 3.1(i), (ii) & (iii) of the Railway Servant (Conduct) Rules, 1966. Therefore, the allegation made in the FIR in Annexure-1 and the memorandum of charge-sheet in Annexure-6, may be charge nos.1 & 2 in departmental proceeding is incidental to criminal charge pending against him, but the charges are distinct and completely different from each other. As such, the contention raised by learned counsel for the petitioner that for self-same charges the petitioner is facing criminal trial and departmental proceeding, cannot sustain in the eye of law.

9. It is well established in law that in criminal cases, proof required for conviction has to be beyond reasonable doubt, whereas in the departmental proceeding proof based on preponderance of probability sufficient for holding the charges as proved. If the standard of proof in both the proceedings is different, in that case departmental proceeding cannot wait for disposal of the criminal proceeding even if allegations are identical to each other. But fact remains, in the present case, the allegations are different and distinct. Merely because the petitioner has involved in a criminal case and that has referred to Article of charges of the memorandum of charge submitted by the opposite parties in Annexure-6 that ipso facto cannot entitle him to pray for staying of departmental proceeding till finalization of criminal proceeding initiated against him.

10. In ***State of Rajasthan v. B.K. Meena***, (1996) 6 SCC 417, the apex Court held that there was no legal bar for both proceedings to go on simultaneously unless there is a likelihood of the employee suffering prejudice in the criminal trial. What is significant is that the likelihood of prejudice itself is hedged by providing that not only should the charge be grave but even the case must involve complicated questions of law and fact. Stay of proceedings at any rate cannot and should not be a matter of course. In paragraph-14, the apex Court stated as follows:

> *"14. … there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges. The staying of disciplinary proceedings, it is emphasized, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard-and-fast rules can be enunciated in*

that behalf. The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is that 'the defence of the employee in the criminal case may not be prejudiced'. This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case. … While it is not possible to enumerate the various factors, for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view the various principles laid down in the decisions referred to above."

11. In ***A.P. SRTC v. Mohd. Yousuf Miya***, (1997) 2 SCC 699, the apex Court held that the purpose underlying departmental proceedings is distinctly different from the purpose behind prosecution of offenders for commission of offences by them. While criminal prosecution for an offence is launched for violation of a duty that the offender owes to the society, departmental enquiry I aimed at maintaining discipline and efficiency in service. The difference in the standard of proof and the application of the rules of evidence to one and inapplicability to the other was also explained and highlighted only to explain that conceptually the two operate in different spheres and are intended to serve distinctly different purposes.

12. In ***Capt. M. Paul Anthony v. Bharat Gold Mines Ltd***., (1999) 3 SCC 679, the apex Court held as follows:

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the

basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

13. In ***Hindustan Petroleum Corpn. Ltd. V. Sarvesh Berry***, (2005) 10 SCC 471, while considering the question whether disciplinary proceedings should remain stayed pending a criminal charge being examined by the competent criminal court, the apex Court in paragraph-8 stated as follows:

"8. … So, a crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of a grave nature involving complicated questions of fact and law. … Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

14. In ***Divisional Controller, Karnataka SRTC v. M.G. Vittal Rao***, (2012) 1 SCC 442, the apex Court held as follows:

"(i) There is no legal bar for both the proceedings to go on simultaneously.

(ii) The only valid ground for claiming that the disciplinary proceedings may be stayed would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts and law.

(iii) Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings.

(iv) Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common."

15. Applying the above judgments to the present case and also analyzing the factual matrix of the case in hand, this Court is of the considered view that since the charges framed in the charge-sheet against the petitioner are not identical and different from each other and more so, in criminal case, proof required for conviction has to be beyond reasonable doubt, whereas in the departmental proceeding proof based on preponderance of probability is sufficient for holding the charges as proved, keeping the departmental proceeding pending till disposal of the criminal case has no justification. So far as removal of inquiry officer is concerned, nothing has been placed on record by the petitioner as to how he is terrorizing the petitioner for filing of reply and on the other hand the counter affidavit indicates that the inquiry officer granted time thrice to file reply to the charges levelled against him, but somehow or other the petitioner wanted to avoid such situation, therefore the allegation that inquiry officer was terrorizing the petitioner to file the reply also cannot sustain in the eye of law.

16. In the result, both the writ petitions merit no consideration and the same are hereby dismissed. However, there shall be no order as to costs.

Consequentially, interim order dated 23.12.2015 passed by this Court in Misc. Case No.21072 of 2015 (arising out of W.P.(C) No. 22946 of 2015) stands vacated.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the judgment available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No. 4798 dated 15th April, 2021.

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2021 (II) ILR - CUT- 550

Dr. B.R. SARANGI, J.

CONTC (CPC) NO. 270 OF 2000
(Arising out of O.A. No.2675(C) of 1999, R.P. No.48(C) of 2000, L.P. No.61 (C) of 2000 & C.P. No.270 (C) of 2000) With Batches

MANOHAR SAHOO	**(CONTC (CPC) No.270/2000)**	
KASIDEV MAHARANA	(CONTC (CPC) No.288/2000)	
KASINATH NAYAK	(CONTC (CPC) No.290/2000)	
GOBINDA CHANDRA ROUL	(CONTC (CPC) No.291/2000)	
SASHI BHUSAN BISWAL	(CONTC (CPC) No.294/2000)	
ABHIMANYU NAIK	(CONTC (CPC) No.295/2000)	
PANCHANAN NAYAK	(CONTC (CPC) No.296/2000)	
JHASAKETAN SAMAL	(CONTC (CPC) No.301/2000)	
BIRA MOHAPATRA	(CONTC (CPC) No.302/2000)	
SUBASH CH. MOHAPATRA	(CONTC (CPC) No.303/2000)	
SURU PRADHAN	(CONTC (CPC) No.304/2000)	
BIJAY KUMAR JENA	(CONTC (CPC) No.305/2000)	
HADIBANDHU BHOL	(CONTC (CPC) No.306/2000)	.....Petitioners

.V.

B.K. PATTNAIK, PRINCIPAL SECY. TO GOVT. OF ODISHA, DEPTT. OF WATER RESOURCES & ORS. (In all cases) .....Opp. Parties

CONTEMPT OF COURTS ACT, 1971 – Section 12 – Law of Contempt – Principles – Discussed.

"Law of contempt is of fundamental importance in every legal system. The power, which the courts have of vindicating their own authority, is coeval with their first foundation and institution. It is necessary incident to every court of justice to fine and imprison for contempt of the court committed on the face of it. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the right of the public by ensuring that the administration of justice shall not be obstructed or prevented. The contempt jurisdiction appears to be based on the principle that the court has the duty of protecting the interest of community in the due administration of justice and so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the court against insult or injury, but to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with. Contempt jurisdiction is exercised for the purpose of upholding the majesty of law and dignity of judicial system and also of the Courts and Tribunals entrusted with the task of administering delivery of justice. Power of contempt has often been invoked, as a step in that direction for enforcing compliance with orders of

courts and punishing for lapses in the matter of compliance. The majesty of judicial institution is to be ensured so that it may not be lowered and the functional utility of the constitutional edifice is preserved from being rendered ineffective." *(Para 7 & 8)*

Case Laws Relied on and Referred to :-
1. (2002) 3 SCC 343 : Arundhati Roy, in Re.
2. (1998) 4 SCC 409 SC : Bar Association Vs. Union of India.

For Petitioners : Mr. S. Patra, (In all cases)
For Opp. Parties : Mr. H.K.Panigrahi,
Addl. Standing Counsel (In all cases)

JUDGMENT Date of Hearing: 20.07.2021: Date of Order : 27.07.2021

Dr. B.R. SARANGI, J.

All the above noted contempt petitions arise out of a common order dated 16.11.1999 passed by the Odisha Administrative Tribunal in O.A. No.2559 (C) of 1999 and batch. The petitioners herein as applicants filed separate Original Applications, as mentioned above. Since the said Original Applications involved identical question of facts and law, they were allowed by the tribunal vide common order dated 16.11.1999. The said order having not been complied with, individual contempt petitions were filed before the Odisha Administrative Tribunal for compliance. But after abolition of Odisha Administrative Tribunal, those contempt petitions have been transferred to this Court and renumbered as above. Since common cause of action is involved, all the contempt petitions are taken up together and are disposed of by this judgment, which will govern in all the contempt petitions.

2. The petitioners in the above noted contempt petitions were engaged in the work-charged establishment and were not brought over to regular establishment on completion of five years of service from the date of their entry. Their grievance is that if they are not appointed in any regular post, they will be deprived of the pension and retiral benefits ultimately. Therefore, they filed individual Original Applications seeking direction for regularization of their services. The said Original Applications were allowed keeping in view the Government of Odisha, Finance Department resolution dated 22.01.1965, by which it was decided for absorption of such employees after completion of five years in work-charged establishment and also Government of Odisha, Finance Department office memorandum dated 06.03.1990, which laid down that the employees under the work-charged

establishment are entitled to get pension. The tribunal also took note that similar question had already been decided in O.A. No.1819 of 1996, wherein it was observed that the benefits of absorption in regular establishment would be available not only to serving work-charged employees, but also to those, who have already retired, and that taking into consideration of the same, the tribunal had already passed order in O.A. No.973 of 1989, O.A. No.920 of 1997 and O.A. No.2309 of 1997. As the petitioners are serving in the work-charged establishment and have stood in same footing, the tribunal held that they are also entitled to be absorbed in terms of the Finance Department resolution dated 22.01.1965. By holding so, the tribunal disposed of all the Original Applications by a common order dated 16.11.1999, the effective part of which runs as follows:

> *"In conformity with the order referred to above, I would like to direct the respondents to absorb the applicants in the establishment post with effect from the date they have completed 5 years of continuous service. After such absorption in the regular establishment, their annual increments as may be found due and admissible in the various revised pay scales be considered within six months from the date of receipt of the copy of this order."*

3. The tribunal, while issuing the above direction, fixed six months time for compliance. Though six months period was over, the said order was not complied with. Hence, the petitioners filed above mentioned individual contempt petitions before the Odisha Administrative Tribunal for compliance of order dated 16.11.1999. Instead of complying with the same, the State filed review petitions against the order passed by the tribunal in each of the Original Applications along with petitions for condonation of delay, which were numbered as mentioned above. The tribunal, vide order dated 13.07.2015, passed the following order:

> *"Law is well settled that review is maintainable, if there is any error or mistake apparent on the face of the record, but not for the purpose of reassessing the evidence, which would amount to sitting on appeal.*
>
> *Since the ground on which review has been sought for, amounts to reassessing the evidence, and there is no mistake or error apparent on the face of record, we are not inclined to accept such contention of the State-respondents. Accordingly the petitions for review and the L.Ps are rejected.*
>
> *List the C.Ps. in the 2nd week of August, 2015. Send copies."*

4. Against the order dated 16.11.1999 passed in O.A. No.2559(C) of 1999 and the order dated 13.07.2015 passed in R.P. No.18(C) of 2000 by the

tribunal, the State and its functionaries approached this Court by filing W.P.(C) No.7246 of 2016. This Court, vide order dated 08.01.2018, passed the following order:

> *"8. Having heard learned counsel for the parties and on perusal of the records, it is apparent that the opposite party no.1, who has been superannuated in the meantime, was in the work-charged establishment for much more than five years of service. Moreover, there can be no second opinion that the resolution dated 22.01.1965 of the Finance Department is applicable to the case of work-charged employees of different Projects of the Government of Odisha. As such, we find no reason to take a different view in this matter interfering with the orders under Annexures-2 and 5 passed by learned Tribunal.*
>
> *9. In view of the discussion made above, this Court is of the opinion that learned Tribunal has passed a just and reasoned order and there is no error apparent on the face of the impugned orders, which would warrant interference of this Court. Hence, we are not inclined to interfere with the impugned orders under Annexures-2 and 5.*
>
> *10. This writ petition is, accordingly, dismissed."*

5. Assailing the order dated 08.01.2018 passed by this Court in W.P.(C) No.7246 of 2016, the State approached the apex Court in SLP, which was registered as Diary No.23207/2018 and the apex Court, vide order dated 30.07.2018, dismissed the said SLP. As a consequence thereof, the order dated 16.11.1999 passed by the tribunal in O.A. No.2559(C) of 1999 and batch, out of which these contempt petitions have been filed by the individual petitioners, has reached its finality. When these contempt petitions were pending before the tribunal, a show cause affidavit was filed on behalf of the opposite parties, stating, inter alia, that the State and its functionaries filed W.P.(C) No.7246 of 2016 before this Court on 26.04.2016 challenging the order dated 13.07.2015 passed in R.P. No.18(C) of 2000 arising out of O.A. No.2559 (C) of 1999 and order dated 16.11.1999 passed in O.A. No.2559(C) of 1999 and batch.

6. Since both writ petition filed before this Court and the SLP preferred before the apex Court by the State have been dismissed, the order dated 16.11.1999 passed by the tribunal in O.A. No.2559 (C) of 1999 and batch has reached its finality. Even though the order dismissing the SLP was passed by the apex Court on 30.07.2018 and in the meantime near about 3 years are going to lapse, the order of the tribunal passed on 16.11.1999 has not be been complied with. Not only that, in the meantime, even though more than 21

years have elapsed, the order dated 16.11.1999 passed by the tribunal has not been complied with by the opposite parties deliberately and willfully.

7. Law of contempt is of fundamental importance in every legal system. The power, which the courts have of vindicating their own authority, is coeval with their first foundation and institution. It is necessary incident to every court of justice to fine and imprison for contempt of the court committed on the face of it. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the right of the public by ensuring that the administration of justice shall not be obstructed or prevented. The contempt jurisdiction appears to be based on the principle that the court has the duty of protecting the interest of community in the due administration of justice and so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the court against insult or injury, but to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with.

8. Contempt jurisdiction is exercised for the purpose of upholding the majesty of law and dignity of judicial system and also of the Courts and Tribunals entrusted with the task of administering delivery of justice. Power of contempt has often been invoked, as a step in that direction for enforcing compliance with orders of courts and punishing for lapses in the matter of compliance. The majesty of judicial institution is to be ensured so that it may not be lowered and the functional utility of the constitutional edifice is preserved from being rendered ineffective.

9. In ***Arundhati Roy, in Re,*** (2002) 3 SCC 343, the apex Court held that the confidence in the courts of justice which the people possess, cannot in any way be allowed to be tarnished, diminished or wiped out by contumacious behavior of many person. The only weapon of protecting itself from the onslaught to the institution is the long hand of contempt of court left in the armoury of judicial repository which, when needed, can reach any neck howsoever high or far away it may be.

10. In ***Bar Association v. Union of India***, (1998) 4 SCC 409 SC, the apex Court in paragraph-39 held as follows:

> *"The power to punish for contempt, as a means of safeguarding Judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is*

not a privilege accorded to Judges. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise."

11. In view of such position, this Court is of the firmed view that the opposite parties are deliberately and willfully not complying with the direction given by the tribunal in its order dated 16.11.1999 passed in respective Original Applications.

12. It has been brought to the notice of this Court that during pendency of this proceeding, some of the petitioners have also died and they have not tested the usufructs of the orders of the tribunal. This case exhibits a bright example that a mighty Government can go to what extent to deprive the legitimate claim of poor employees, who knocked at the door of justice for redressing their grievances. In the premises, this Court comes to a conclusion that opposite parties have violated the order of the tribunal even after dismissal of the SLP on 30.07.2018 preferred by them before the apex Court.

13. In that view of the matter, the opposite parties, having violated the orders of the tribunal, have committed contempt of the Court. However, this Court, instead of punishing, grants a chance to the opposite parties to comply with the order dated 16.11.1999 passed by the tribunal in O.A. No.2559(C) of 1999 and batch, by 31.08.2021, failing which the salary of the Secretary, Water Resources Department, Govt. of Odisha and the Engineer-in-Chief Irrigation, Odisha, Bhubaneswar shall be stopped till the order is implemented. If the order of the tribunal is complied with by 31.08.2021, the direction given in this order with regard to stoppage of salary may not be given effect to.

14. The contempt proceedings are hereby disposed of with the above direction.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the judgment available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No. 4798 dated 15th April, 2021.

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2021 (II) ILR - CUT-556

Dr. B.R. SARANGI, J.

W.P.(C) NO. 17715 OF 2020

ARUN KUMAR BISWAL .....Petitioner

.V.

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

SERVICE LAW – Pensionary Benefits – Entitlement – Petitioner was born on 01.01.1960 and joined in the service on dated 17.10.1988 – Superannuated from service on 31.12.2019 – Petitioner was allowed previous increment on 01.01.2019 – Next increment was due on 01.01.2020 – But he was denied such incremental benefit as he was no more in the service – Representation filed claiming such benefits – Representation rejected – Action of the authority challenged – Held, the petitioner having rendered service from 01.01.2019 to 31.12.2019 for a period of 12 months and his increment having due on 01.01.2020 is entitled to get the notional increment for the year i.e. from 01.01.2019 to 31.12.2019 for the purpose of pensionary benefits only.

(Para 18)

Case Law Relied on and Referred to :-

1. (2005) 5 SCC 561 : AIR 2005 SC 3066 : Kerala Vs. P.N. Neelkandan Nair.

For Petitioner : M/s. S.K. Dash, A.K. Otta, S. Das, A.Sahoo, S.Mohanty and P. Das.

For Opp. Parties : Mr. S.N. Nayak, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment : 30.07.2021

Dr. B.R. SARANGI, J.

The petitioner, who was working as Additional Commissioner of Commercial Tax and Goods and Service Tax (Revenue) in the Commissionerate of the Commercial Tax and Goods and Service Tax, has filed this writ petition seeking to quash the letter dated 14.07.2020 under Annexure-3 rejecting his representations dated 08.01.2020 and 17.03.2020 to treat the next date of retirement i.e., 01.01.2020 as the date of grant of notional increment for the purpose of pensionary benefits, in compliance of direction given by this Court, vide order dated 27.05.2020 in W.P.(C) No. 11642 of 2020, and further seeks for a direction to grant notional increment for the period from 01.01.2019 to 31.12.2019 by treating the next date of increment, i.e., 01.01.2020 as the date of grant of notional increment for the purpose of pensionary benefits.

2. The factual matrix of the case, in hand, is that by following due procedure of selection, the petitioner was appointed and joined in service under the Government of Odisha on 17.10.1988 and subsequently promoted from time to time. His date of birth being 01.01.1960, on attaining the age of superannuation, he retired on 31.12.2019. He was allowed previous increment on 01.01.2019 and, as such, the next increment was due on 01.01.2020, which was the next day of his date of superannuation, i.e., 31.12.2019. But, he was not extended with the incremental benefit, which was fallen due on 01.01.2020, for which he submitted a representation to the authority. The same having not been acceded to, he approached this Court by filing W.P.(C) No. 11642 of 2020, which was disposed of on 27.05.2020 directing the authority to take a decision on the representation filed by the petitioner and pass appropriate order keeping in view the order dated 15.09.2017 of the Madras High Court in W.P.(C) No. 15732 of 2017 (***P. Ayyamperumal v. The Registrar, Central Administrative Tribunal, Madras Bench***), which was confirmed by the apex Court in Special Leave Petition (Civil) Diary No(s). 22283 of 2018. In compliance of the direction given by this Court, opposite party no.2 passed the impugned order dated 14.07.2020 in Annexure-3 stating therein that the date of birth of the petitioner being 01.01.1960, the date of his superannuation was on 31.12.2019, and that as he was allowed previous increment on 01.01.2019, his next increment was due on 01.01.2020, but on that date since the petitioner was no more in service, he was not entitled to any incremental benefit on the day following the superannuation i.e., 01.01.2020. Hence this writ petition.

3. Mr. S.K. Dash, learned counsel for the petitioner contended that admittedly, the date of birth of the petitioner is 01.01.1960 and on attaining the age of superannuation, he was retired from service on 31.12.2019. As such, his next increment was due on 01.01.2020, as he had received the previous increment on 01.01.2019. Therefore, for the period he rendered service from 01.01.2019 to 31.12.2019, he is entitled to get the increment, which should be notionally fixed, as the increment was due on 01.01.2020, so as to entitle him to get pensionary benefits. It is further contended that the rejection of the claim of the petitioner, in compliance of the order dated 27.05.2020 passed by this Court in W.P.(C) No. 11642 of 2020, on the plea that he ceases to draw the pay and allowance as soon as he ceases to discharge duties from the day following the superannuation as per Rule-56 of the Odisha Service Code and becomes eligible for pension under Rule 82 of the Odisha Civil Services (Pension) Rules, 1992. It is further contended that

as per the clarification obtained from the Finance Department, the annual increment falls due irrespective of the date of anniversary of appointment and as per Rule 10 of the Odisha Revised Scales of Pay Rules, 2017, the date of next increment shall be 12 months from the date of last sanction. Therefore, while rejecting the representation of the petitioner, the authority has failed to apply the ratio decided in ***P. Ayyamperumal*** (supra), which has been confirmed by the apex Court in SLP (Civil) Diary No(s). 22283 of 2018, and assign any reason as to why the ratio decided in the said order would not be applicable to the case of the petitioner. Therefore, the order impugned rejecting the representation of the petitioner is cryptic and unreasonable one. It is further contended that the clarification of the Finance Department has been wrongly read and interpreted, inasmuch as the annual increment is always continuous and is not dependent or calculated by taking into account either the entry into or exit from the service.

It is further contended that while disposing of the representation, the opposite party no.2 has candidly admitted that the increment was last sanctioned on 01.01.2019 and therefore the next date of sanction would be on 01.01.2020, and that on attaining the age of superannuation the petitioner having retired from service on 31.12.2019, thereby, Rule 56 of the Service Code laying down the entitlement of pay and allowance cannot be read as a bar to disburse the accrued dues and it is also equally erroneous to import the language of Rule 82 of the Odisha Civil Services (Pension) Rules, 1992 to justify the action taken by opposite party no.2 in rejecting the claim for grant of annual increment to the petitioner.

To substantiate his contention he has relied upon the order dated 15.09.2017 of the Madras High Court in W.P.(C) No. 15732 of 2017 (***P. Ayyamperumal v. The Registrar, Central Administrative Tribunal, Madras Bench***), which was confirmed by the apex Court in Special Leave Petition (Civil) Diary No(s). 22283 of 2018 and the review petition bearing R.P.(C) No. 1731 of 2019 filed by the Union of India; order of the Madhya Pradesh High Court in ***Yogendra Singh Bhaduria & Ors. Vs. State of Madhya Pradesh & Gwalior*** (W.A. No. 645 of 2020 disposed of on 22.09.2020); and the order of the Delhi High Court in ***Gopal Singh v. Union of India and others*** (W.P.(C) No. 10509 of 2019 disposed of on 23.01.2020).

4. Mr. S.N. Nayak, learned Addl. Standing Counsel appearing for the State argued with vehemence and contended that the petitioner is not entitled

to get the next increment which was due on 01.01.2020 notionally, as he was no more in employment and had retired on attaining the age of superannuation on 31.12.2019. He further contended that the last annual increment was sanctioned on 01.01.2019 and, as such, the petitioner is entitled to get monthly pension and other pensionary benefits like, gratuity, unutilized leave salary, etc. on the basis of the last pay arrived at due to sanction of annual increment with effect from 01.01.2019. When the petitioner filed representation for grant of notional increment taking the last pay as 01.01.2020 and grant of consequential pensionary benefits, the Finance Department being the cadre controlling authority and administrative department, the said representation was transmitted to opposite party no.1 by opposite party no.2 for consideration. After receipt of the order dated 27.05.2020 of this Court, the opposite party no.2 requested the opposite party no.1 on 19.06.2020 for necessary clarification in the aforesaid matter. In response to the same, the impugned order has been passed stating inter alia that as per Rule 10 of the Odisha Revised Scales of Pay Rules, 2017 the date of next increment shall be from 12 months from the date of last increment sanctioned. As Government servant ceases to draw the pay and allowances as soon as he ceases to discharge the duties from the day following the superannuation as per Rule-56 of the Odisha Service Code and eligible for pension under Rule-82 of the Odisha Civil Services (Pension) Rules, 1992. As the petitioner's next increment was due on 01.01.2020 and he had already retired from service on 31.12.2019 on attaining the age of superannuation, he is not entitled to get the next increment, as his last increment was sanctioned on 01.01.2019, and on that basis he is entitled to get pension and pensionary benefits as due and admissible to him. Consequently, the rejection order passed by the authority is well justified, which does not warrant interference of this Court, and the writ petition should be dismissed.

5 This Court heard Mr. S.K. Dash, learned counsel for the petitioner and Mr. S.N. Nayak, learned Addl. Standing Counsel appearing for the State opposite parties by virtual mode. Perused the records and with the consent of the parties, the matter is being disposed of finally at the stage of admission.

6. In view of the undisputed factual matrix, as narrated above, and rival contentions raised by learned counsel for both parties, Rule-56 of the Odisha Service Code, being relevant for just and proper adjudication of the case, is extracted hereunder:-

*"**RULE-56: Date of commencement – Termination of Pay and Allowance:** Subject to exceptions specifically provided in these rules, a Government servant shall begin to draw the pay and allowances attached to his post with effect from the date on which he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties."*

7. In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Odisha framed a set of Rules to regulate the grant of pension, gratuity and other retirement benefits to the persons on retirement from service in connection with the affairs of the State of Odisha, called "The Odisha Civil Services (Pension) Rules, 1992". Rule-82 of the Odisha Civil Services (Pension) Rules, 1992, being relevant for the purpose of this case, is quoted hereunder:-

*"**82. Date from which pension becomes payable –** (1) Except in the case of a Government servant to whom the provisions of Rules 43 and 44 apply and subject to the provisons of Rules 7 and 66, a pension other than family pension shall become payable from due date on which a Government servant ceases to be borne on the establishment.*

(2) Pension including family pension shall be payable for the day on which its recipient dies."

8. In exercise of the powers conferred by the proviso to Article-309 of the Constitution of India, the Governor of Odisha had been pleased to make a set of Rules called "The Odisha Revised Scales of pay Rules, 2017". Rule 10 of the Odisha Revised Scales of pay Rules, 2017, being relevant to for the purpose of proper adjudication of the case, is extracted below:

"10. Date of Next increment in the revised pay structure.-
Illustration :-

An employee in the Basic Pay of 27900 in Level-7 will move vertically down the same Level to the Cell and on grant of increment, his basic pay will be 28700 and so on.	***Pay Band***	***5200-20,00***				
	Grade Pay	***1800***	***1900***	***2000***	***2200***	***2400***
	Levels	***3***	***4***	***5***	***6***	***7***
	1.	*18000*	*19900*	*21700*	*23600*	*25500*
	2.	*18500*	*20500*	*22400*	*24300*	*26300*
	3.	*19100*	*21100*	*23100*	*25000*	*27100*
	4.	*19700*	*21700*	*23800*	*25800*	*27900*
						↓
	5.	*20300*	*22400*	*24500*	*26600*	*28700*
	6.	*20900*	*23100*	*25200*	*27400*	*29600*
	7.	*21500*	*23800*	*26000*	*28200*	*30500*
	8.	*22100*	*24500*	*26800*	*29000*	*31400*

> *The date of next increment in the revised pay structure, shall be twelve months from the date of last increment sanctioned. In case where the pay is fixed in the revised pay structure at the minimum pay or the first Cell in the Level, the date of next increment shall be the anniversary of date of coming over to the revised pay structure."*

9. On perusal of the aforementioned provisions, it is made clear that subject to the explanation specifically provided in the rules, the government servant shall begin to draw the pay and allowances attached to the post with effect from the date on which he assumes the duties of the post and shall not be entitled to get the same soon after he ceases to discharge those duties. Thereby, there is no dispute with regard to entitlement of the petitioner to receive the pension and other pensionary benefits on attaining the age of superannuation on 31.12.2019. As per Rule-82 of the Odisha Civil Services (Pension) Rules, 1992, the pension other than the family pension shall become payable to a government servant from due date on which he ceased to borne on the establishment. The pension including family pension shall be payable for the day on which the recipient dies. So, these rules make it clear that on attaining the age of superannuation, the petitioner is entitled to get pension and pensionary benefits. But the present case rests on the question of grant of notional increment, which had fallen due to the next date of retirement. Meaning thereby, the petitioner's date of birth being 01.01.1960 and he having retired on 31.12.2019 on attaining the age of superannuation, and his increment was due on 01.01.2020, and admittedly he had been granted the increment benefit till 01.01.2019, the claim for grant of notional increment from 01.01.2019 to 31.12.2019 is the question to be considered in the present case.

10. As per Rule-10 of the Odisha Revised Scales of pay Rules, 2017, the date of next increment in the revised pay structure, shall be twelve months from the date of last increment sanctioned. The last increment here was sanctioned on 01.01.2019. Therefore, the date of next increment, after the twelve months period, will be 01.01.2020. As the petitioner retired from service on attaining the age of superannuation on 31.12.2019, whether the benefit of notional fixation of increment for the purpose of grant of pensionary benefits is admissible to the petitioner or not, is the short question which is to be adjudicated in the present case.

11. In State of ***Kerala v. P.N. Neelkandan Nair***, (2005) 5 SCC 561 : AIR 2005 SC 3066, the apex Court held that the increment has a definite concept

in service laws. It is conceptually different from revision of pay scale. It is an increase or addition in a fixed scale. It is a regular increment in salary on such a scale.

12. The claim of the petitioner is totally based on the judgment of the Madras High Court in ***P. Ayyamperumal*** (supra), where similar question had come up for consideration, meaning thereby, in that case direction was sought to treat the retirement date of the petitioner as 01.07.2013 and grant all consequential benefits including pensionary benefits. It is made clear, in the said case the petitioner was denied the last increment, though he completed a full one year in service, i.e., from 01.07.2012 to 30.06.2013. But the Central Administrative Tribunal, Madras Bench, in O.A./310/00917/2015, vide order dated 21.03.2017, rejected the claim of the petitioner taking a view that the incumbent is only entitled to get increment on 1st July, 2013 if he continued in service. On that day, since the petitioner was no longer in service, he was denied the relief. The matter was carried to the Madras High Court in a writ petition bearing W.P. No. 15732 of 2017, which was disposed of vide order dated 15.09.2017 observing in para-6 and 7 as follows:

> *"6. In the case on hand, the petitioner got retired on 30.06.2013. As per the Central Civil Services (Revised Pay) Rules, 2008, the increment has to be given only on 01.07.2013, but he had been superannuated on 30.06.2013 itself. The judgment referred to by the petitioner in State of Tamil Nadu, rep.by its Secretary to Government, Finance Department and others v. M.Balasubramaniam, reported in CDJ 2012 MHC 6525, was passed under similar circumstances on 20.09.2012, wherein this Court confirmed the order passed in W.P.No.8440 of 2011 allowing the writ petition filed by the employee, by observing that the employee had completed one full year of service from 01.04.2002 to 31.03.2003, which entitled him to the benefit of increment which accrued to him during that period.*
>
> *7. The petitioner herein had completed one full year service as on 30.06.2013, but the increment fell due on 01.07.2013, on which date he was not in service. In view of the above judgment of this Court, naturally he has to be treated as having completed one full year of service, though the date of increment falls on the next day of his retirement. Applying the said judgment to the present case, the writ petition is allowed and the impugned order passed by the first respondent-Tribunal dated 21.03.2017 is quashed. The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs."*

13. In the above order of the Madras High Court, it was held that as the petitioner therein had completed one full year service as on 30.06.2013, but

the increment fell due on 01.07.2013, on which date he was not in service, though the date of increment fell due on the next date of his retirement, the petitioner would be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he had completed full one year of service, for the purpose of pensionary benefits and not for any other purpose. The said order of the Madras High Court was challenged in SLP(C) Diary No(s). 22283 of 2018 and the apex Court dismissed the said SLP preferred by the Union of India and upheld the order of the Madras High Court in ***P. Ayyamperumal*** (supra). Although a review petition was filed by the Union of India bearing R.P.(C) No. 1731 of 2019, the same was dismissed vide order dated 08.08.2019. Thereby, the order of the Madras High Court has reached its finality by dismissal of the SLP as well as the review petition preferred by the Union of India.

14. Similarly, in the case of ***Yogendra Singh Bhadauria***, mentioned supra, Madhya Pradesh High Court, by applying the ratio decided in ***P. Ayyamperumal*** (supra), directed as follows:-

> *"(i) The official respondents are directed to release the increment due to the appellants w.e.f. 01.07.2014, 01.07.2010, 01.07.2013, 01.07.2012, 01.07.2015 and 01.07.2015 respectively.*
>
> *(ii) The pension be refixed after adding the grant of aforesaid increment and the arrears of pension be paid to the petitioners.*
>
> *(iii) The petitioners are entitled to interest over the aforesaid arrears of pension @ 10% p.a. from the date the arrears became due till their payment.*
>
> *(iv) Despite the rule position having been explained by the Division Bench of Madras High Court on 15.09.2017 against which Supreme Court declined to entertain the SLP of the employer on 23.07.2018, the official respondents ought to have offered the benefit of one increment to the petitioners without compelling the petitioners to approach the court in the evening of 10 WA 645-2020 their life. Not having done so, the official respondents have failed to adhere to the policy of the Government of being a welfare State and therefore, respondents are liable to pay cost of this litigation to the petitioners which are quantified at Rs. 5000/- to each of the petitioners.*
>
> *(v) The aforesaid direction be complied with within a period of 60 days from the date of receipt copy of this order."*

15. In ***Gopal Singh*** (supra), the Delhi High Court in paragraph-10 of the order dated 23.01.2020 directed as follows:

> *"10. Accordingly, the impugned order dated 3rd May, 2019 is set aside. A direction is issued to the Respondents to grant notional increment to the petitioner with effect from 1st July, 2019. The petitioner's pension will consequentially be re-fixed. The appropriate orders will be issued and arrears of pension will be paid to the petitioner within a period of 6 weeks, failing which the respondents would be lilable to simple interest at 6 % per annum on the arrears of period of delay."*

16. The cumulative effect of the ratio decided in all the aforementioned judgments is that if a person continues in service and completes one year, he shall be entitled to get the notional increment to be fixed, as on the next date he is no more in employment, for the purpose of grant of pensionary benefits.

17. The stand taken in the present case by the opposite parties is akin to the objection raised in P. ***Ayyamperumal*** (supra) by Union of India contending that the petitioner being no more in employment on the date the increment fallen due, even though he had completed 12 months of service and on attaining the age of superannuation he was retired. Having considered such contention, the Madras High Court passed an order to fix the notional increment for pensionary benefits and extend the same to the petitioner therein. In such view of the matter, this Court is of the view that the representations filed by the petitioner have been rejected on 14.07.2020 in Annexure-3 without complying with the provisions of law, as have been settled by the different High Courts as well as the apex Court and, thereby, the same cannot sustain in the eye of law.

18. In view of the facts and law, as discussed above, this Court is of the considered view that the petitioner, having rendered service from 01.01.2019 to 31.12.2019 for a period of 12 months and his increment having due on 01.01.2020 and he having stood at par with ***P. Ayyamperumal*** (supra), is entitled to get the notional increment for the year i.e. from 01.01.2019 to 31.12.2019 for the purpose of pensionary benefits only. Accordingly, it is directed that the benefits admissible to the petitioner be re-fixed taking into account the notional increment admissible to the petitioner by 01.01.2020 and the same should be paid as early as possible by revising the pension as due, preferably within a period of 3 (three) months from the date of communication of this judgment. Consequentially, the order dated 14.07.2020 in Annexure-3, whereby the representations of the petitioner have been rejected, is liable to be quashed and is hereby quashed.

19. In the result, the writ petition is allowed. There shall be no order as to costs.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the judgment available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No. 4798 dated 15th April, 2021.

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2021 (II) ILR - CUT- 565

D.DASH, J.

CRA NO.11 OF 1999

DHULESWAR @ DHULA MOHAPATRA …. ….Appellant

.V.

STATE OF ORISSA ……..Respondent

INDIAN PENAL CODE, 1860 – Section 498-A – Offence under – Conviction and sentence for one year – Appeal – Case was of the year 1993 – The accused was in custody for about six months – The accused is now 63 years old and has already suffered half of the sentence period – Plea that the appeal may be allowed treating the sentence as period under gone is accepted.

For Appellant : Mr.G.K.Mohanty, G.P.Samal, B.P.Pradhan, S.R. Swain, D.K.Nanda, P.C.Mohanty and P.K.Panda.

For Respondent : Mr. Soubhagya Ketan Nayak, Addl. Govt. Adv.

JUDGMENT Hearing & Judgment :09.07.2021

D. DASH, J.

1. The Appellant, by filing this Appeal, has assailed the judgment of conviction and order of sentence dated 23.12.1998 passed by the learned Sessions Judge, Khurda at Bhubaneswar in S.T. Case No.84 of 1998.

The Appellant having faced the Trial for the offence punishable under section 498-A/302/201 read with section 34 of the Indian Penal Code (in short, 'the IPC') has been convicted for commission of offence under section 498-A of the IPC. Accordingly, he has been sentenced to undergo R.I. for a period of one year.

2. The prosecution case, in short, is that the Appellant had married Annapurna in the year 1981 and it is said that during said marriage, cash, gold ornament, brass and bell metal utensils and other household articles had been given as dowry. It is the further case of the prosecution that six to seven months after the marriage, the accused demanded more dowry and compelled Annapurna to bring one TV from her parents and in order to fulfill that mission, left Annapurna at her father's place. After some time, Annapurna returned to her matrimonial house when she found that all her gold ornaments etc. had been sold by the accused. It is also stated that Annapurna was tortured thereafter being not provided with food. She then returned to her father's house being not able to tolerate the situation any more in the house of the accused.

It is next alleged that this accused, without bringing Annapurna back or making any attempt in that regard, accepted another wife and kept her in his house and through her, he begot two children. For that, Annapurna had initiated a proceeding claiming maintenance. After that, accused Dhuleswar brought Annapurna with her son back, which was objected to by the second wife. On 22.1.1993, parents of Annapurna were informed that their daughter had died. So, they rushed to the house of the accused. The explanation with regard to the death as offered by family members was that having taken tea, Annapurna met her death. The dead body, however, by that time had been cremated. Being suspicious of said death of Annapurna, information was lodged at Balipatna Police Stations. Police having received the information, registered Balipatna P.S. Case No.9 of 1993 and took up investigation., On completion of investigation, this accused with five others, which include the family member of the accused were placed for Trial by submission of charge sheet for commission of offence under section 498-A/302/201 read with section 34 IPC.

3. In the Trial, the prosecution has examined in total five witnesses. From the side of the defence, one witness has also been examined. Besides the above, the prosecution has proved the FIR (Ext.1), seizure list (Ext.2) and forwarding letter (Ext.3)

The Trial Court, on examination of the evidence of the prosecution witnesses and upon their evaluation at its level, has held this accused guilty of commission of offence under section 498-Aof the IPC. He has been acquitted of other charges. All other accused person stood acquitted of the charges. Hence, the present Appeal is at the instance of the Appellant.

4. Mr.G.K.Mohanty, learned counsel for the Appellant submits that the appreciation of evidence by the Trial Court in recording the finding of guilt as against this accused for commission of offence under section 498- A IPC is perverse. He submits that the Trial Court ought not to have accepted the omnibus nature of evidence in coming to a conclusion that the accused has subjected his wife Annapurna to cruelty. According to him, the evidence to establish the factum of cruelty said to have been meted out at Annapurna are highly discrepant and that aspect being stated by all the witnesses in a general manner without citing any specific instance, attributing the role of the accused therein; the Trial Court erred in accepting the same to fasten the guilt upon the accused for commission of offence under section 498-A of IPC. He, therefore, urges for setting aside the finding of guilt of the accused as has been recorded by the Trial Court.

It is stated that at the time of Trial, the accused was aged around 41 years and at present, he is around 64 years of age and earning hand to mouth by cultivation. He further submits that the accused has remained in custody in the case from 29.03.1993 to 15.09.1993, which covers nearly half of the sentence imposed. He, therefore, alternatively submits that in the event this Court does not feel inclined to interfere with the judgment of conviction, it is a fit case to interfere with the order of sentence by reducing the quantum of sentence to the period already undergone by the Appellant.

Mr. S.K.Nayak, learned Additional Government Advocate submits all in favour of the finding recorded by the Trial Court that it is accused who had subjected his wife (deceased) to cruelty. According to him, the evidence of all the witness on the score are wholly consistent and those being clear, cogent and acceptable, the Trial Court has rightly answered the point that this accused-husband had tortured, harassed and subjected his wife Annapurna to cruelty.

5. In the backdrop of the submission, as above, this Court is now called upon to have relook at the evidence on record so as to judge the sustainability of the finding rendered by the Trial Court on the score.

P.W.2 is the grandmother of the deceased. She has stated that since accused assaulted Annapurna, she was compelled to come to their house and at that time, she was carrying five months old child in her womb. It is also stated that during her stay in their house, she gave birth to a son and for ten years, she continued to stay there. She has further stated that the accused kept a mistress during this period. It is also the evidence of P.W.3 who is a co-

villager of P.W.1 that after marriage, Annapurna gave birth to her daughter at her place of stay away from the house of the accused and thereafter the accused brought her back to his house where again the disturbances started. The brother of the deceased, who is a Doctor by profession, has come to the witness box as P.W.1. He has narrated in detail with regard to demand of dowry etc. as also the subjection of his sister Annapurna to cruelty by this accused.

Fact remains that shortly after the marriage, Annapurna had to leave her matrimonial home and at that time, she was pregnant. In that situation, it is ordinarily not expected from a married woman to leave the company of her husband unless she was uncared for and ill treated is not offering is any explanation as to Annarpurna's leaving her marital home and staying at her father's place at that point of time and there continuing for a long time. The accused appears to have woken up from deep slumber having enjoyed his life with the mistress begetting the children through her only when Annapurna initiated a proceeding claiming maintenance against him as it was not so tolerated by her any more. There is no evidence eon record to show that any point of time, the accused had provided maintenance in any form to Annapurna during her long stay away from her matrimonial home.

The evidence on record being taken together with the circumstances, as afore discussed, provide all the reasons and justifications to hold that the finding rendered by the Trial Court that Annapurna had been subjected to cruelty by this Accused, who happens to be her husband, is well in order.

For the aforesaid, this Court is led to affirm the finding of guilt of the accused for commission of offence punishable under section 498-A of the IPC.

6. Coming to the alternative submission of the learned counsel for the Appellant, it is seen that there has been lapse of about 28 years since the institution of the case and the accused by now is aged about 63 years. Record further reveals that he being arrested in the case on 29.3.1993 was finally released on bail by the order of this Court on 15.09.1993 which nearly covers half of the sentence imposed by the Trial Court. Taking an overall view of the matter, this Court feels inclined to accept the submission of the learned counsel for the Appellant as to the modification of the sentence as imposed by the Trial Court i.e. by reducing the rigorous imprisonment for a period of one year to the period already undergone as that in the facts and circumstances would meet the ends of justice.

7. In the result, the judgment of conviction recorded against the Appellant for commission of offence punishable under section 498-A IPC being maintained; he is sentenced to the period already undergone.

8. The CRA thus stands allowed in part to the extent as indicated above with the modification of the sentence as aforesaid. The bail bonds executed by the accused shall stand discharged.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 569

S. PUJAHARI, J.

ABLAPL NO. 8511 OF 2020

SUMAN CHATTOPADHYAY .....Petitioner

.V.

REPUBLIC OF INDIA ……..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Pre-arrest bail in economic offences – Plea of prosecution that the discretion under Section 438 of the Code should not be exercised – Invoking the power under section 438 – Principles to be followed – Held, economic offences constitute a class apart, the Court need to visit the same with a different approach in the matter of bail and should be loathed while extending the benefit of bail / pre-arrest bail to a person accused of such offences.

> *"The Apex Court have negatived the proposition that the larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised, so also did not endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided there for is imprisonment for life as circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal. The Apex Court have also not held that in case of person accused of economic offence though non-bailable in nature, cannot invoke the jurisdiction of Section 438 of Cr.P.C. for his release on pre-arrest bail nor the aforesaid is*

the contention of the learned counsel for the petitioner. The Apex Court in different decisions, however, held that economic offences constitute a class apart, the Court need to visit the same with a different approach in the matter of bail and should be loathed while extending the benefit of bail/ pre-arrest bail to a person accused of such offences. The aforesaid is also the view of the Apex Court in the case of ***P. Chidambaram (supra).*** *" (Para 12)*

Case Laws Relied on and Referred to :-

1. (2019) 9 SCC 165 : P. Chidambaram Vs. Directorate of Enforcement.
2. (1980) 2 SCC 565 : Gurbaksh Singh Sibbia & Ors Vs. State of Punjab.
3. (2020) 5 SCC 1 : Sushila Aggarwal Vs. State (Nct of Delhi)

For Petitioner : M/s. Devashis Panda, S. Panda, D.K. Mahapatra, G.K. Das.
For Opp.Party (CBI) : Mr. Sarthak Nayak.
For Opp.Party (E.D.) : Mr. Gopal Agarwal.

JUDGMENT Date of Judgment: 17.06.2021

S. PUJAHARI, J.

Being apprehensive of his arrest by the C.B.I. in connection with PMLA Case No.148 of 2019 on the file of the Special Court under the Prevention of Money-Laundering Act, 2002 (hereinafter referred to as the "PMLA Act"), Bhubaneswar registered pursuant to an order of commitment passed in R.C. Case No.31(S) of 2014-Kol. under Section 44(1)(c) of the PMLA Act, by the learned Special C.J.M. (CBI), Bhubaneswar, the petitioner has filed the present application under Section 438 of Cr.P.C. seeking pre-arrest bail.

2. Heard Shri Debasish Panda, learned counsel appearing for the petitioner, Shri Sarthak Nayak, learned counsel appearing for the Republic of India and Shri Gopal Agarwal, learned counsel appearing for the Enforcement Directorate.

3. For the purpose at hand, a brief reference may be made to the background facts as follows:-

Ponzi Companies, many in number, got flourished in the Eastern States of India, basically in Odisha, West Bengal, Assam, Tripura and Bihar, which instigated public through different schemes, to deposit / invest money, with false assurance of impressive returns. Being allured by such lucrative assurance, lacs of gullible depositors parted with their hard earned money

with those ponzi firms, who though at initial stage paid some returns, later on after collecting huge amounts of money from public, disappeared from the scene to the dismay and detriment of the depositors. It is alleged that those ponzi firms were able to operate their network and duped lacs of gullible depositors, under the patronage of political and other influential people of the Society. On the reports of the victims and otherwise, cases were registered and the Investigating Agencies of the respective States handled the investigation. However, in compliance with the order dated 09.05.2014 passed by the Supreme Court of India in two writ petitions, such as, W.P. (Civil) No.401 of 2013 and W.P.(Civil) No.413 of 2013, total forty-four number of such cases were taken over / registered by the then C.B.I. / S.C. / C.I.T./KOL (now renamed as C.B.I./EO-IV-Kol.) and the present case, i.e., R.C. 31(S) of 2014 is one amongst those forty-four cases. It may be mentioned here that the present case had earlier been registered in Odisha vide EOW/Odisha/BBSR P.S. Case No.13 dated 06.05.2013 on the basis of a report lodged by one Rabi Narayan Swain, and the C.B.I. on taking over the said case registered the same as R.C. 31(S) of 2014 on 05.06.2014 against Sudipta Sen and others of "Saradha Group of Industries" for the offences under Sections 120-B read with Sections 406 and 420 of IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1973, and submitted charge-sheet on 13.12.2016 in the Court of the Special C.J.M. (CBI), Bhubaneswar, under Section 120-B read with Sections 420 and 409 of IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1973 against Sudipta Sen, Debjani Mukherjee, M/s. Saradha Reality (India) Limited, M/s. Saradha Tour & Travels Pvt. Ltd., M/s. Saradha Housing Pvt. Ltd. and M/s. Saradha Garden Resort Hotel Pvt. Ltd., keeping open further investigation in view of Section 173(8) of Cr.P.C. The said case has been committed to the PMLA Court, i.e., the Court of the District & Sessions Judge, Bhubaneswar-cum-Special Judge under the PMLA Act within the State of Odisha, pursuant to the application filed by the Enforcement Directorate.

The present petitioner is a journalist who earlier happened to be the Director and share-holder of Disha Productions & Multimedia Pvt. Ltd. (DPMPL). As reported, he ceased to be the share-holder and Director of DPMPL since January, 2013, and presently he is continuing as the Chief Editor of 'Ae Samay', a Bengali newspaper. He was arrested in another case bearing No.R.C.45(S) of 2014 registered in Odisha against another Ponzi Company, namely "I-Core Eservices Ltd.", and in that connection during a

search conducted in his residential premises, some documents were found out to show his relationship with and diversion of funds from M/s. Saradha Group of Industries to DPMPL, of which he earlier happened to be the Director and shareholder, and subsequent misappropriation of an amount of Rs.1.04 Crore. It is alleged that in the year 2010, the petitioner and his Company DPMPL entered into four agreements with two Companies of Saradha Group, and in pursuance of those agreements, an amount of Rs.4,54,00,000/- of Saradha Group was diverted to the petitioner and his company DPMPL as on 20.09.2011, and by another settlement agreement dated 20.09.2011, all the above four agreements were cancelled, and Rs.3.5 Crore out of Rs.4,54,00,000/- was returned to Saradha Group by keeping Rs.1,04,50,000/- with the petitioner. It is alleged that under the agreements aforesaid, no share of DPMPL was parted with, and an amount of Rs.1,04,50,000/- that was wrongfully received by the petitioner from Saradha Group belonged to general public who, ultimately, suffered thereby. According to the C.B.I., the petitioner being well aware of the fact that the selective companies, such as, Saradha Group, M/s. I-Core, etc. were dealing with ponzi schemes and defrauding the public, habitually entered into agreement with them in the garb of business dealing in order to extract money from them, and in the midway he cancelled the agreements after getting illegal benefits of crores of rupee from those ponzi firms, to the ultimate loss and suffering of gullible depositors / investors.

While being in custody in connection with I-core case, the Investigating Officer in the present case got the petitioner notionally arrested and sought for his remand before the Special C.J.M. (C.B.I.), Bhubaneswar. However, in the meanwhile the case having been committed under Section 44(1)(c) of the PMLA Act to the PMLA Court, the Special C.J.M.(C.B.I.), Bhubaneswar expressed its inability to remand the petitioner in the present case. At that stage, the petitioner came to challenge his notional arrest before this Court by filing an application vide CRLMC No.1618 of 2019 wherein this Court for his non-production within twenty-four hours of his arrest before the appropriate Magistrate, held his notional arrest to be an otiose while giving liberty to the C.B.I. to seek production and remand of the petitioner from the appropriate Court where the case is pending. The production of the petitioner in the present case pending before the Special Court under the PMLA Act, however, could not be effected as he was hospitalized by then and subsequently released on bail in I-core case pursuant to the order dated 22.07.2020 of the Supreme Court of India in Special Leave

Petition (Criminal) No.2895 of 2020. According to the petitioner, as the C.B.I. has been chasing him to arrest in connection with the present case, the application for prearrest bail has been filed.

4. Shri Debasish Panda, learned counsel appearing for the petitioner, submitted, inter-alia, that since the petitioner was earlier examined by the Investigating Agency in connection with certain cases of Saradha Group registered at Kolkata, and on those occasions he was not thought necessary or proper to be taken to custody, it would be a futile exercise for the C.B.I. to arrest him in connection with the present case which is also in connection with Saradha Group. According to Shri Panda, the entire transaction of the petitioner with Saradha Group was nothing but a business dealing having no element of criminality, and the C.B.I. is already in possession of all the connected documents of such business transaction. It is further contended by him that on earlier occasions, the petitioner had shown his willingness and readiness to cooperate with the investigation, and in future also he will make himself available before the C.B.I. for the purpose of further interrogation, if necessary, and there is no necessity of his being taken to custody. It is his further submission that the petitioner having already been granted bail by the Apex Court in I-core case for similar allegations, pre-arrest bail should be granted to him in the present case on taking into consideration his health condition and prevailing Covid-19 situation.

5. Shri Sarthak Nayak, learned counsel appearing for the C.B.I. repudiated the contentions of the petitioner and opposed the application on the grounds, inter-alia, as follows:-

> (i) Since the Supreme Court of India has specifically directed the C.B.I. to investigate larger conspiracy, money trail, roles of regulators etc., the arrest and custodial interrogation of the petitioner by the C.B.I. in the present case involving Saradha Group is essential, inasmuch as it is apparent on record that the petitioner by misusing his media company and adopting an arm-twisting technique against some selective companies dealing with ponzi schemes, extracted crores of rupee which belonged to gullible depositors. In the present case, the petitioner aided the principal accused – Sudipta Sen to escape from SEBI enquiry and promote his business of collection of money from public, by publishing advertisement of Saradha Group in his newspaper "Ek-din" and lobbying for the ponzi firm in Ministry of Finance of Government of India.
>
> (ii) Custodial interrogation of the petitioner is essential to know as to whether any other benefits have been received by him from Saradha Group and other ponzi companies, whether there has been diversion of money from Saradha Group to any

other influential persons directly or indirectly, whether there were other patrons of Saradha Group, whether the petitioner has diverted his ill-gotten money to anybody else etc.

(iii) Being a media person the petitioner is in contact with many influential persons, and there is every chance of his tampering with evidence and threatening / influencing material witnesses, and not cooperating with the investigation.

(iv) Economic offences constitute a class apart, having serious social ramification, and there being primafacie materials to show the petitioner's involvement in economic offences with larger scale conspiracy, his application deserves to be dismissed.

The learned counsel appearing for the C.B.I. in support of his aforesaid contention has placed reliance on a decision of the Apex Court in the case of ***P. Chidambaram vrs. Directorate of Enforcement,*** reported in (2019) 9 SCC 165.

6. Shri Gopal Agarwal, learned counsel appearing for the Enforcement Directorate submits that the Enforcement Directorate has got nothing to say in this matter as the petitioner is not required in CMC PMLA Case No.45 of 2017 which has been initiated at the instance of the Enforcement Directorate against the accused persons therein for commission of offence under Section 4 of the PMLA Act. However, the aforesaid PMLA Case having been registered for the scheduled offences alleged to have been committed in R.C. Case No.31(S) of 2014-Kol. then pending before the jurisdictional Magistrate against some of the accused persons, the case has been committed pursuant to an application made under Section 44(1)(c) of the PMLA Act by the Enforcement Directorate, and the case has been registered in the PMLA Court for scheduled offences. The Enforcement Directorate is not a party to the same, even if the trial of the case is to be made in the PMLA Court in view of the provisions contained in PMLA Act, inasmuch as it is required to be prosecuted by the C.B.I. at whose instance the case has been initiated.

7. In course of hearing, the learned counsel appearing for the petitioner has also raised certain points questioning the applicability of PMLA Act to the petitioner, jurisdiction of the Special Court under PMLA Act at Bhubaneswar to try the petitioner, jurisdiction and bona fides of C.B.I. to seek arrest / custody of the petitioner etc. so also, the contention of the learned counsel for the C.B.I. that custodial interrogation is much more fruitful for an effective investigation and economic offences are class apart

and, as such, jurisdiction under Section 438 of Cr.P.C. should not be invoked in favour of the petitioner. Reliance in this regard has been placed by the learned counsel for the petitioner on the Constitution Bench decisions of the Apex Court in the case of ***Gurbaksh Singh Sibbia and others vrs. State of Punjab,*** reported in (1980) 2 SCC 565 and in the case of ***Sushila Aggarwal vrs. State (Nct of Delhi),*** reported in (2020) 5 SCC 1.

8. Before addressing the contention of the parties with regard to the merit of the prayer of the petitioner for prearrest bail, it would be apposite to address the technical questions raised by the petitioner regarding the case being committed to the PMLA Court though in the said case neither the petitioner nor any of the accused persons already charge-sheeted is prosecuted for any offence under the PMLA Act, so also the Authority of the PMLA Court to try a scheduled offence along with the case registered under the PMLA Act against some accused persons for the proceeds of crime of the scheduled offence. Such contention of the petitioner appears to be without any substance in view of the provisions contained in Section 44 of the PMLA Act that the PMLA Court is competent to try a scheduled offence on a case being committed on the prayer of the Enforcement Directorate, if a case is already registered under the PMLA Act, allegedly for proceeds of crime of such scheduled offence and Section 71 of the PMLA act has overriding effect on the other provisions. So far as the contention that the independent registration of a PMLA case with regard to scheduled offence by the PMLA Court is concerned, it is submitted that after commitment of the said case to the PMLA Court, the PMLA Court could not have registered the same independently for trial and the CBI could not have prosecuted the same anymore, appears to this Court to be also fallacious inasmuch as the PMLA Act never mandates that a case registered for scheduled offence when committed has to be tried together with the PMLA case pending before the PMLA Court. The same can also be visualized from the fact that the statute never envisaged for automatic transfer of all the cases registered for commission under scheduled offence pending in different competent courts for trial of the said cases to the PMLA Court, on registration of a case under the PMLA Act with regard to proceeds of crime of such scheduled offences. It is only when the Enforcement Directorate thinks it just and proper for speedy disposal of the case under the PMLA Act which is dependent on the trial of the scheduled offence, can seek for commitment before the Court where the case for scheduled offence is pending and the Court if satisfied can commit the case. Such case committed has to be independently tried by the

PMLA Court and prosecution has to be continued by the Agency prosecuting such scheduled offence. Since in this case the scheduled offence was prosecuted by the CBI even if it has been committed under Section 44(1)(c) of the PMLA Act and independently registered for prosecution of the accused person for the scheduled offence though nomenclature as a PMLA case and the petitioner is being investigated by the CBI, production of the accused in the PMLA Court at the instance of the C.B.I. while he was in custody in another case which could not materialize and after his release the steps taken by the C.B.I. to apprehend him, cannot be said to be unsustainable.

Otherwise also, all those questions appear to be technical and premature in nature, inasmuch as the present case (R.C. No.31(S) of 2014-Kol.) is at the stage of investigation vis-à-vis the petitioner, and the C.B.I. has taken over the investigation in compliance with the order of the Apex Court to delve into the question of larger conspiracy, money trail, roles of regulators etc. in the crimes committed by Saradha Group of Companies as well as other ponzi companies in the country. As reported, the petitioner was earlier indicted or interrogated in connection with some other cases in Kolkata and in those occasions he had not been taken to custody. But, the same ipso facto cannot be a ground to question the bona fides of C.B.I. to seek his arrest / custody in the cases of Saradha Group of Companies.

9. Having regard to the materials on record, existence of a prima-facie case regarding nexus of the petitioner with the Saradha Group cannot be denied. Grant of bail to him by the Supreme Court of India in another case also cannot afford him a ground to seek pre-arrest bail in the present case, inasmuch as he was granted bail in the said case solely on health ground while he was admitted in Apollo Hospital, Bhubaneswar. Admittedly, he has since been discharged from the said hospital.

10. The learned counsel appearing for the C.B.I. has laid much emphasis on the fact that since the petitioner has been indicted in an economic offence and sufficient materials are there showing his indictment in the aforesaid serious offence and need of the custodial interrogation of the petitioner to unearth the involvement of any other persons and the larger angle of conspiracy in commission of the offence alleged to have been committed by the ponzi firm, to oppose the prayer of pre-arrest bail. In support of his contention he has placed reliance on a decision of the Apex Court in the case of ***P. Chidambaram (supra)***. The importance and relevance of custodial

interrogation of the accused in a case of the present nature and also the Court should be loathed in grant of bail / pre-arrest bail in respect of persons indicted in economic offences has been elaborated by the Apex Court in the aforesaid case as follows:-

> "76. In *Siddharam Satlingappa Mhetre v. State of Maharashtra,* the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
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> 77. After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State of Bihar,* the Supreme Court held as under: (SCC p.386, para 19)
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> "19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (*See D.K. Ganesh Babu v. P.T. Manokaran, State of Maharashtra v. Modh. Sajid Husain Mohd. S. Husain and Union of India v. Padam Narain Aggarwal.)*
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> 78. Power under Section 438 Code of Criminal Procedure being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain MANU/SC/0007/1998 : (1998) 2 SCC 105, it was held that in economic offences, the Accused is not entitled to anticipatory bail.
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> 79. The learned Solicitor General submitted that the "Scheduled offence" and "offence of money laundering" are independent of each other and PMLA being a special enactment applicable to the offence of money laundering is not a fit case for grant of anticipatory bail. The learned Solicitor General submitted that money laundering being an economic offence committed with much planning and deliberate design poses a serious threat to the nation's economy and financial integrity and in order to unearth the laundering and trail of money, custodial interrogation of the Appellate is necessary.
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> 80. Observing that economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community, in State of Gujarat v. Mohanlal Jitamalji Porwal and Ors. MANU/SC/0288/1987: (1987) 2 SCC 364, it was held as under:

5. ……. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest…….

81. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in Y.S. Jagan Mohan Reddy v. CBI MANU/SC/0487/2013 : (2013) 7 SCC 439, the Supreme Court held as under:

34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the Accused, circumstances which are peculiar to the Accused, reasonable possibility of securing the presence of the Accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public / State and other similar considerations.

82. Referring to Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria MANU/SC/0872/1998 : (1998) 1 SCC 52, in Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Boara and Ors. MANU/SC/0970/1999 : (1999) 5 SCC 720, while hearing an appeal by the Enforcement Directorate against the order of the Single Judge of the Bombay High Court granting anticipatory bail to the Respondent thereon, the Supreme Court set aside the order of the Single Judge granting anticipatory bail.

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the Accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the Accused knows that he is protected by the order of the Court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the Respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail."

11. However, learned counsel for the petitioner placing placed reliance on a decision of the Apex Court in the case of ***Sushila Aggarwal (supra),***

submitted that there is no restriction in Section 438 of Cr.P.C. to entertain a prayer for bail in respect of the person accused in economic offences. Hence, the contention that since the petitioner has been indicted in economic offence, he should not extended the benefit of pre-arrest bail, appears to be fallacious.

12. There is no reproach on such contention of the counsel for the petitioner with regard to invoking the jurisdiction under Section 438 of Cr.P.C. in respect of the person accused of committing economic offences, inasmuch as there is no such prohibition to entertain such prayer in respect of the accused persons indicted in economic offences in Section 438 of Cr.P.C., provided the offence committed is non-bailable one. It is only in respect of the offences as enumerated under Section 438(4) of Cr.P.C. and also in respect of offence under special statute wherein jurisdiction under Section 438 of Cr.P.C. has been specifically ousted, even if the offences are non-bailable, a person cannot invoke the jurisdiction under Section 438 of Cr.P.C. seeking prearrest bail. In the case of ***Sushila Aggarwal (supra)*** the Apex Court in paragraphs-69, 70 and 71 have held as follows:-

> "69. It is important to notice, here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref Chandra Mohan v. State of Uttar Pradesh & Ors38). In Reserve Bank of India v. Peerless General Finance and 1967 (1) SCR 77 Investment Co. Ltd. & Ors39, the relevance of text and context was emphasized in the following terms:
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> "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then Section by section, Clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

> 70. Likewise, in Directorate of Enforcement v Deepak Mahajan 40 this court referred to Maxwell on Interpretation of Statutes, Tenth Edn., to the effect that if the ordinary meaning and grammatical construction: (scc PP.453-54, PARA 25)
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> "25……leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words…"
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> 71. This court, long back, in State of Haryana & Ors. v. Sampuran Singh & Ors 41. observed that by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. The cardinal principle of construction of statute is that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. It is sufficient, therefore to notice that when Section 438 – in the form that exists today, (which is not substantially different from the text of what was introduced when Sibbia was decided, except the insertion of sub-section (4)) was enacted, Parliament was aware of the objective circumstances and prevailing facts, which impelled it to introduce that provision, without the kind of conditions that the state advocates to be intrinsically imposed in every order under it."

So also, in the case of ***Gurbaksh Singh Sibbia (supra),*** the Apex Court have negatived the proposition that the larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised, so also did not endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life as circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal. The Apex Court have also not held that in case of person accused of economic offence though non-bailable in nature, cannot invoke the jurisdiction of Section 438 of Cr.P.C. for his release on pre-arrest bail nor the aforesaid is the contention of the learned counsel for the petitioner. The Apex Court in different decisions, however, held that economic offences constitute a class apart, the Court need to visit the same with a different approach in the matter of bail and should be loathed while extending the benefit of bail/ pre-arrest bail to a person accused of such offences. The aforesaid is also the view of the Apex Court in the case of ***P. Chidambaram (supra).***

13. Now, coming to the second contention of the learned counsel for the C.B.I. that since custodial interrogation is much more fruitful for collection of further evidence, and the interrogation of the petitioner is required to unveil the larger conspiracy in the aforesaid heinous and serious offence in which crores of rupee has been collected by the ponzi firm, of which money trail was found with the petitioner, pre-arrest bail should not be granted to him. Reliance in this regard has been placed on a decision of the Apex Court in the case of ***P. Chidambaram (supra).***

14. Controverting to the contention of the learned counsel for the C.B.I. that custodial interrogation of the petitioner is much more fruitful for investigation to unearth the larger conspiracy and, as such, the petitioner should not be released on pre-arrest bail, learned counsel for the petitioner would submit that the same is fallacious in view of the observation made by the Apex Court in the case of ***Gurbaksh Singh Sibbia (supra)*** in paragraph-19 which reads as thus:-

> "19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the Judiciary and the police are in a sense complementary and not overlapping. And, as observed by the Privy Council in King Emperor v. Khwaja Nasir Ahmed :
>
> "Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. The functions of the Judiciary and the Police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function...."
>
> But, these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561A, Criminal Procedure Code, to quash all proceedings taken by the police in pursuance of two First Information Reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the Court cannot, in the exercise of its inherent powers, virtually direct that the

> police shall not investigate into the charges contained in the F.I.R. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under Section 438 (1) are those recommended in Sub-section (2) (i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438 (1), appropriate conditions can be imposed under Section 438 (2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167 (2) of the Code is made out by the investigating agency."

In the case of ***Gurbaksh Singh Sibbia (supra),*** even if it is held that a legitimate case for remand of an offender to the police custody under Section 167(2) of Cr.P.C. is made out, the same is a no ground to refuse the anticipatory bail, inasmuch as the same in no manner take away the right of police to investigate into the charges made against the person released on bail as appropriate conditions can be imposed to cooperate with the investigation and requirement of Section 27 of the Evidence Act is also fulfilled even after a person is released on bail when gives an information leading discovery of fact deemed to be in custody of police. But, in the case of ***Gurbaksh Singh Sibbia (supra),*** it has never been laid down that in each and every case of pre-arrest bail, even if the police has made out a case for remand to their custody of the accused for an effective investigation, the same is no ground to refuse pre-arrest bail. Acceding to such an interpretation of the aforesaid observation of the Apex Court in the case of ***Gurbaksh Singh Sibbia (supra)*** as contended by the learned counsel for the petitioner would make the

provisions of seeking remand of the accused by the police during the course of investigation for an effective investigation, a redundant one. Furthermore, the Apex Court in the case of ***Gurbaksh Singh Sibbia (supra)*** in paragraph-15 have held as thus:-

> "15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law.

Further, in the case of ***P. Chidambaram (supra)*** the Apex Court having specifically stated that grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the Accused and in collecting the useful information and also the materials which might have been concealed and success in such interrogation would elude if the Accused knows that he is protected by the order of the Court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation.

15. Since in this case the petitioner has been indicted in an economic offence which is of serious in nature and the larger angle of conspiracy with regard to patronage of political and other persons in growth of such ponzi firms are required to be unearthed, I am of the view that no effective investigation can be made by the police by enlarging the petitioner on pre-arrest bail, even if he is ready and willing to cooperate with the investigation by remaining on pre-arrest bail.

16. As it appears, in this case the Saradha Group of Company was involved in cheating large number of gullible depositors through different ponzi schemes. During course of investigation, admittedly the money trail of the said ponzi firm was found with the petitioner's firm. There is also material to show that the petitioner made advertisement through his media company about the lucrative scheme of ponzi firm which persuaded many more people to invest their hard earned money in such ponzi schemes. So also, the material has been collected indicating that the petitioner was lobbying in the Ministry of Finance, Government of India for the ponzi firm. The petitioner has also applied arm twisted method to collect money from the many ponzi firms knowing their illegal activities in the camouflage of business transaction. His custodial interrogation is likely to throw more light regarding involvement of many other influential people in growth of the ponzi firms and the commission of offence alleged which is an economic offence wherein lacs of gullible depositors were duped. The C.B.I. has been entrusted by the Apex Court to unearth the larger angle of conspiracy and patronage of the ponzi firms by political and other influential people which allowed to the growth of the ponzi firms. The petitioner being an influential person and a journalist having connection with politicians, possibility of his using such contacts for growth of the ponzi firms is also not ruled out and the same can only be unearthed on custodial interrogation of the petitioner, as stated by the C.B.I. So, the allegation being serious in nature and the offence committed being economic offence and the petitioner is being investigated, custodial interrogation is much more fruitful as held by the Apex Court in the case of ***P. Chidambaram (supra)***, this Court is of the view that the petitioner has made out no case for his release on pre-arrest bail, more particularly when present is prima-facie not a case where the allegations brought against the petitioner can be said to be frivolous or groundless.

17. For the discussions made hereinbefore and keeping in view the principles settled by the Apex Court, this Court finds no merit in the application under Section 438 of Cr.P.C. filed by the petitioner.

18. In the result, the ABLAPL stands dismissed. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

2021 (II) ILR - CUT- 585

BISWANATH RATH, J.

W.P.(C) NO.19068 OF 2019

LILADITYA DEB .....Petitioner

.V.

TARA RANJAN PATTANAIK AND ANR. .....Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 29-A – vis-à-vis definition of Court under Section-2 (i) (e) of the Act, particularly involving an appointment of Arbitrator by High Court in exercise of power under Section 11 of the Act, 1996 – Plea of jurisdiction of District Judge raised – Held, the High Court of Orissa does not exercise the original civil jurisdiction – Sub-Section (2) of Section 2 of the Orissa Civil Courts Act, 1984 provides that the court of the District Judge shall be the principal court of original civil jurisdiction in the district and the explanation provides that for the purpose of this sub-section the expression 'District Judge' shall not include an Additional District Judge – Thus, for the State of Odisha, the District Judge is the 'Court' within the definition of the aforesaid Section and has the jurisdiction under Sub-Section (5) of Section 29A of the Act to extend the period of passing of the arbitral award. (Para 19)

Case Laws Relied on and Referred to :-

1. (2005) 8 SCC 618 : M/s. S.B.P. & Co. Vs. M/s Patel Engineering Ltd. And Anr.
2. AIR 2019 SC 4284 : M/s. Mayavati Trading Pvt. Ltd. Vs. Pradyuat Deb Burman.
3. AIR 1966 SC 1631 : Jang Singh Vs. Brij Lal & Ors.
4. (2007) 1 SCC 467 : M/s.Pandey and Co. Builders (P). Ltd.Vs. State of Bihar and Anr.
5. (2009) 17 SCC 313 : Nimet Resources Inc and Anr. Vs. Essar Steels Ltd.
6. (2015) 1 SCC 32 : State of West Bengal & Ors. Vs. Associated Contractors,
7. (2000) 7 SCC 529 : Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan.
8. 1964 (2) SCR 145 : Jang Singh Vs. Brij Lal.
9. AIR 2019 SC 4284 : M/s. Mayavati Trading Pvt. Ltd. Vs. Pradyuat Deb Burman.
10. (2005) 8 SCC 618 : SBP & Co. Vs. Patel Engineering Ltd. & Another.
11. (2000) 7 SCC 529 : Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan.
12. AIR 1966 SC 1631 : Jang Singh Vs. Brij Lal & Ors.
13. (2021) 2 SCC 209 : Union of India & Ors. Vs. G.S.Chatha Rice Mills & Another.

For Petitioner : Mr. D.C. Mohanty, Sr. Adv. & Mr. R.N. Acharya.
For Opp. Parties : Mr. Y. Das, Sr. Adv. & Mr. R. Roy.

JUDGMENT Date of Hearing : 30.06.2021 & Date of Judgment :23.07.2021

BISWANATH RATH, J.

1. This matter is taken up by video conferencing mode.

2. This writ petition involves a challenge to the order passed by the District Judge, Bhubaneswar vide Anenxure-3 in ARB(P) No.68 of 2018, dated 3.8.2019, allowing an application under Sub-Section (4) and (5) of Section 29-A of Arbitration and Conciliation Act, 1996. As it appears, learned District Judge, Bhubaneswar in allowing the arbitration petition finally extended the mandate of the Arbitrator for one year with effect from the date of judgment dated 3.8.2019. Even though the extension of the mandate of the Arbitrator has expired in the meantime, but however, since the mandate of the Arbitrator requires extension in the peculiar circumstance involving the case, the matter needs to be finally adjudicated. This Court thus proceeds to record the factual aspect involving the case as follows :

Parties involved in a dispute regarding the admission of the opposite parties involved herein as a new partner to a farm, namely, M/s.Gangaya Supply Agency. For no amicable resolution of the dispute between the parties, opposite parties involved herein filed an application u/s.11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 (herein after in short called as 'The Act, 1996') in the High Court and the same was registered as ARBP No.5 of 2015. This ARB(P) was finally disposed of with an order of appointment of Justice Sri D.P.Mohapatra, a former Judge of the Hon'ble Apex Court as sole Arbitrator to adjudicate the dispute between the parties. In the disposal of the proceeding on 15.9.2016, it appears after the appointment of the above Arbitrator, learned Arbitrator issued notice to the parties. Opposite Party herein on its appearance filed an application u/s.16 of the Act, 1996 questioning the jurisdiction of the learned Arbitrator. This Court here looking to the order passed by this Court in ARB(P) No.5 of 2015 on 15.9.2016 clearly observing therein that the appointment of the Arbitrator was made after considering the submissions of both the parties and as agreed to by learned counsel for the respective parties, thus there appears, there is grave doubt in the entertainability of the application under Section 16 of the Act keeping in view the specific observation of the High Court in the disposal of ARBP No.5 of 2015 particularly when there involve a consent order for appointment of Arbitrator.

3. Be that as it may, for the arbitration proceeding could not be concluded during reasonable time in terms of Section 29A(i) of the Act, 1996, opposite party filed application under Sub-Sections 4 and 5 of Section 29-A of the Act for extension of time to conclude the arbitration proceeding by the learned Arbitrator. Application so moved to the learned District Judge, Bhubaneswar was registered as ARB(P) No.68 of 2018. The brief further discloses that the opposite party no.2 also filed ARBP No.534 of 2014, the District Judge, in disposal of this ARBP No.534 of 2014 on 20.03.2015 by appointing Hon'ble Mr. Justice M.M. Das (Retd.) as Arbitrator, which order of course did not materialize.

4. In the meantime ARB(P) No.68 of 2018 was taken up for final hearing. After considering the validity of service on the respondents therein and treating the same to have been accepted as sufficient, the above ARB(P) No.68 of 2018 was decided ex parte vide order at Annexure-3 dated 3.8.2019, in the ex parte disposal of the above ARB(P), learned District Judge allowing the application under Sub-Section (4) and (5) of Section 29-A of the Act, allowed the same thereby extending the mandate of Arbitrator for one year with effect from the date of the judgment.

5. Being aggrieved, it appears, the present petitioner brought W.P.(C) No.19068 of 2019 on the file of this Court and this writ petition being accepted, this Court while directing issuance of notice by its order dated 26.11.2019, as an interim measure directed stay operation of the judgment dated 03.08.2019 passed in ARB(P) No.68 of 2018 by the learned District Judge, Khurda and the matter was taken up for hearing on 30.06.2021. After hearing the argument of both learned senior counsels being assisted by associate counsel, the matter was reserved for judgment recording undertakings of both Senior Counsels who have desired to file their respective written notes of submission at least within ten days of matter reserved for judgment. Opposite party filed its written note of submission on 07.07.2021 upon service of copy of the same on opposite party on 07.07.2021 itself. Petitioner herein did not file further written note of submission however record of the case has a written note of submission of petitioner since 24.01.2020 and the same is taken into consideration.

6. Advancing his submission Mr.Mohanty, learned Senior Advocate for the petitioner challenges the order of the learned District Judge, impugned herein, in the following manner:

i) For the ex parte disposal of the proceeding by the District Judge, the judgment becomes bad and needs to be set aside.

ii) There has been no lawful service of notice. Mr. Mohanty, learned senior counsel therefore contended that there has been bad disposal of the proceeding by the learned District Judge and holding the present petitioner ex parte remains contrary to the materials available on record.

iii) For the appointment of the Arbitrator being made at the instance of the High Court in disposal of application u/s.11 of the Act, 1996 in the matter of extension of mandate, jurisdiction lies within the High Court and not the District Judge involved herein. It is, therefore, urged that learned District Judge exercising his power under Section 29-A of the Act becomes illegal. The impugned order suffers on account of no jurisdiction of the District Judge and there is no overreaching of power by the District Judge .

7. Taking this Court to the definition of 'Court', Sri Mohanty, learned senior counsel submitted that Court' here means the institution which appointed Arbitrator. For Sri Mohanty, learned Senior Advocate, as the Orissa High Court has appointed the Arbitrator, therefore High Court has the authority to extend the mandate of the Arbitrator. On the above grounds, learned Senior Advocate for the petitioner also referred to certain decisions in the case of ***M/s. S.B.P. & Co. -Versus- M/s Patel Engineering Ltd. And Anr.,*** *(2005) 8 SCC 618* in the case of ***M/s. Mayavati Trading Pvt. Ltd. -Versus- Pradyuat Deb Burman*****,** *AIR 2019 SC 4284* and in the case of ***Jang Singh -Versus- Brij Lal and Others,*** *AIR 1966 SC 1631*. Referring to above decisions, Sri Mohanty, learned senior counsel urged this Court for interfering in the impugned order and setting aside the same. On the scope of *ex parte* impugned judgment, Sri Mohanty also referred to certain judgments taken note in the petitioner's written note of submission and claimed, for the ex parte nature of impugned judgment, the same should also be interfered with.

8. To the contrary, Sri Jasobanta Das, learned Senior Advocate assisted by Mr. Rajeet Roy, Advocate for the opposite parties taking this Court to the definition 2(e) defining "Court" and the purpose behind Sub-Sections (4) and (5) of Section 29-A of the Act attempted to satisfy the Court that for the definition, the "Court" means the principal Civil Court of original jurisdiction in a district though includes the High Court(s) but High Court which has power of original civil jurisdiction for all purposes. Further on the allegation of the ex parte nature of order, Sri Das, learned senior counsel also taking into account the entire disclosures from the order-sheet, contended learned

District Judge was fully satisfied with the service of notice and he has rightly declared the present petitioner ex parte and proceeded accordingly. Sri Das on the legal aspect involving meaning of "Court" and on the challenge to the jurisdiction of the District Court involving decision on an application u/s.29-A sub-section 4 (A) and (B) of the Act also took this Court to the decisions rendered in the case of ***M/s.Pandey and Co. Builders (P). Ltd.-Versus- State of Bihar and Another***, (2007) 1 SCC 467, ***Nimet Resources Inc and Another –Versus- Essar Steels Limited,*** (2009) 17 SCC 313, ***State of West Bengal and Others –Versus- Associated Contractors,*** (2015) 1 SCC 32, the decision of the Kerala High Court in the case of ***M/s. URC Construction Private td. –Versus- M/s. BEML Ltd.*** OP(C) No.3256 of 2017(O), a decision of the Court dated 6.7.2018 in the case of ***KCS Private Limited –Versus- Rosy Enterprises,*** W.P.(C) No.25344 of 2017, a decision involving ***Nilesh Ramanbhai Patel and Ors. –Versus- Bhanubhai Ramanbhai Patel and Others***, reported in MANU GJ/ 1549/2018, further a decision involving ***Frank Airways Pvt. Ltd. –Versus- Airports Authority of India***, reported in MANU/MP/ 2141 of 2019, a further decision in the case of ***Lots Shipping Company Limited –Versus- Cochin Port Trust***, reported in MANU/KE/1142/2020, a decision in the case of ***Amit Kumar Gupta – Versus- Dipak Prasad,*** reported in MANU/ WB 0068/2021, in the case of ***Sara International Private Limited –Versus- South Eastern Railways and Another***, delivered by this Court in ARBP No.28/2020, in the case of ***Aligarh Muslim University and Others – Versus- Mansoor Ali Khan***, (2000) 7 SCC 529, in the case of ***Jang Singh –Versus- Brij Lal*** 1964 (2) SCR 145 and lastly in the case of ***M/s. Automotive (India) Pvt. Ltd. -Versus- Paradeep Phosphates Limited*** in ARBA No.2/2017.

9. Reading through the aforesaid judgments vis-à-vis the provision taken note hereinabove, Mr.Das, learned Senior counsel submitted that it is too late at this point of time to enter into controversy on the meaning of "Court" and further the arbitration proceeding already initiated on appointment of Arbitrator at the instance of the High Court, the Arbitration Proceeding requires to be effectively adjudicated. Petitioner herein raising technical objection, has a clear attempt to obstruct the Arbitration Proceeding and thereby obstructing an effective adjudication of the dispute between the parties, which if entertained, will lead to disastrous ending of the arbitration proceeding. Further, taking this Court to the dispute between the parties on the agreement involved herein, Mr. Das, learned senior counsel also contended that for an agreement between the parties, conditions therein being

binding to both the parties to the agreement, it is undesirable on the part of the petitioner to challenge the jurisdiction of the District Judge at Bhubaneswar involving such decision. It is in the above background of the case, Mr. Das, learned Senior Advocate prayed this Court for disposal of the petition and to find objective achievement of the issue involved herein, this Court in dismissing the writ petition to modify the order of the District Judge facilitating effective completion of the arbitration proceeding involved herein, taking into account the loss of effect of benefit granted by the District Judge for the dispute here remaining un-disposed of with an interim direction.

10. In attending to the first objection on the question of deciding the matter ex parte, this Court on perusal of the order-sheet of the District Judge, Bhubaneswar find place in Annexure-2, finds the application under Sub-section 4 and 5 of Section 29-A of the Act, 1996 was presented on 14.9.2018. It was put up on 24.09.2018 with office note. On 24.9.2018 after clearing of the office note, the matter was heard and admitted with direction for issuing notice in both ways fixing the date to 10.10.2018. On 10.10.2018, again there was a direction to issue notice to opposite party fixing to 8.11.2018. On 8.11.2018 the matter was postponed to 17.1.2019 awaiting S.R. On 17.1.2019 again the matter was adjourned to 18.3.2019 awaiting S.R. On 18.3.2019, it was adjourned to 29.4.2019 awaiting SR and PA. On 29.4.2019 the matter was again adjourned to 19.6.2019 awaiting S.R. and P.A. On 19.6.2019, it was observed by the District Judge that out of two modes of notices, one comes back with the report 'door lock' and other one with a report affixing service 'on refusal'. Order dated 19.6.2019 reads as follows:

> "Advocate for the petitioner is present and files services affidavit against the O.P. Notices issued to the O.P. by both ways are back with a report "Door Lock" and another with a report "affixture service on refusal‖. Put up on 25.07.2019 for filing of fresh requisites and for further order."

For the above observation clearly reflecting that one of the notice since affixed on refusal of notice, there was no occasion for filing of fresh requisites.

11. This Court finds on 25.7.2019 on the next date, opposite party herein the petitioner therein files an affidavit on sufficiency of notice. For the stamp reporter observing of affixture service of notice even after the opposite party

therein the petitioner herein was set ex parte however, the matter was postponed to 31.7.2019 for hearing. On 31.7.2019 after hearing the petitioner therein, the matter was concluded. This Court finds even though there was number of postings of the matter after 19.06.2019 and one of the notice was affixed on the door of the petitioner on refusal, there was no action taken by the opposite party therein, the present petitioner herein. This Court finds there is mere statement of the petitioner on the service taken to be sufficient and deciding the matter ex parte. There is no head and tail in the submission of counsel for the petitioner on this aspect at least to establish that there is no service of notice at all. In this situation, this Court taking into account the order-sheet of the trial court for clear recording therein accepts the same and decides the allegation of ex parte nature of disposal of the proceeding by the District Judge against the petitioner remain un-established. This Court here also observes for there is clear provision for extension of mandate and an Arbitrator being appointed on agreement of both parties, there cannot be any prejudice to the present petitioner for extension of mandate.

12. Now proceeding to the aspect of entertainability of the application by the District Judge and the challenge thereby, this Court finds in disposal of the ARBP No.5 of 2015 on 15.9.2016, this Court passed the following order:

> "Heard learned counsel for the parties.
>
> This is an application filed under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.
>
> Considering the submissions made and as agreed to by the learned counsel or the parties, Shri Justice D.P. Mohapatra, a former Judge of the Supreme Court, is hereby appointed as the sole Arbitrator to adjudicate the dispute between the parties. The venue of the arbitration shall be at the High Court of Orissa Arbitration Centre and the proceeding shall be conducted by the learned Arbitrator as per the High Court of Orissa Arbitration Centre (Arbitration Proceedings) Rule, 2014.
>
> It is needless to say that the fees of the learned Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.
>
> It is open for the parties to raise all such plea as are available to them in law before the learned Arbitrator, who shall consider the same on its own merit and in accordance with law.
>
> ARBP is accordingly disposed of."

From the above, it becomes clear that the arbitration proceeding initiated hereinabove was disposed of on consent of parties and there remains no doubt that there was merely an appointment of the Arbitrator in exercise of power under Section. 11(5) and 11 (6) of the Act. So far as question of jurisdiction of the court is concerned, this Court finds from the cause title of the writ petition as well as the arbitration petition that the petitioner, Liladitya Deb contested the arbitration proceeding whose address is Niharika Apartment, Cuttack Puri Road and also at Sidhivihar, Jagamara both in Bhubaneswar in the district of Khruda. Present opposite party as well as the petitioner both in arbitration proceeding are also the resident of Tankapani Road, Bhubaneswar in the district of Khruda. In filing the writ petition, the petitioner, opposite party therein in the proceeding before the District Judge has also shown his address to be Sidhi Vihar, Jagamara, Bhubaneswar in the district Khurda. It is at this point of time, taking this Court to the agreement between the parties, copy of which being produced by the counsel for the opposite parties in the written note of submission at item-13, the deed of partnership involving the issue involved herein, it appears, at item -26, parties in agreement have agreed for their local limits of jurisdiction in the Court at Bhubaneswar. There is no doubt that the present dispute has an involvement of Deed of Partnership being presented by opposite party. Now moving to definition part, this Court finds Section 2(e) of the Act, 1996 reads as follows:

> **"Court" means-**
>
> (i) in the 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;
>
> (ii) in the case of international commercial arbitration, 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, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."

13. For the relevancy of section 29A of the Act, 1996 to the case at hand, this Court also takes note of Section 29A of the Act, which is reproduced herein below:

"29A.***Time limit for arbitral award***.— [(1) The award shall be made within a period of twelve months from the date of the arbitral tribunal enters upon the reference.

Explanation.- For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s)appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

14. On reading of the provisions taken note hereinabove this Court finds, the provision of law has the support to the case of the Opposite Party.

15. Taking into account the decisions available for consideration, this Court finds as follows:

In the case of **M/s. Mayavati Trading Pvt. Ltd. – Versus-Pradyuat Deb Burman,** *AIR 2019 SC 4284* as submitted by Bar, it is observed that the said case is in the context of power under provision (6-A) of Section 11 of the Act, which not being a dispute involving the case at hand, there is no application of this case to the case at hand. Further, for consented judgment/order of this Court in ARBP No.5 of 2015 in the matter of approval of arbitration contingency in the case decided vide AIR 2019 (SC) 4284 does not exist here. The decision in the case of ***SBP & Co.-Versus- Patel Engineering Ltd. & Another***, *(2005) 8 SCC 618* since involved appointment of Arbitrator by Chief Justice or his designate is administrative or judicial or no judicial. So, this case has also no application to the case at hand. Above view of the Hon'ble Apex Court has been of course changed by Apex Court later on, where it has been observed that such exercise is judicial exercise. In the case of ***Aligarh Muslim University & Others*** *-Versus-* ***Mansoor Ali Khan***, reported in (2000) 7 SCC 529, this decision involves an issue on natural justice. For the observation of this Court in paragraphs 9 & 10 on the District Judge coming to hold that there is sufficiency of notice on the petitioner rightly, consequently this decision has no application to the case at hand.

16. Further, for the petitioner failing to establish that the District Judge, Bhubaneswar is not the Court in terms of decision at Section-2(e) of the Act, 1996. So as to undertake an exercise under Section 29 A of the Act, the decision relied on by the petitioner has no application to the case at hand. For the nature of dispute, extension of mandate of arbitration since very much warranted for no passing of award by Arbitrator within the time stipulation, there is bound to be an extension of mandate of Arbitrator to achieve a complete effect with the purpose of appointment of the Arbitrator, failure of which it may lead to multiplicity of litigation as there is no end to the dispute involving the parties. By such extension this Court finds, the petitioner is otherwise also not prejudiced.

17. On perusal of the decision in the case **Jang Singh - Versus-Brij Lal and Others,** *AIR 1966 SC 1631,* as cited by the petitioner, this Court finds facts involved in the aforesaid case does not fit to the case at hand and as such the decision has absolutely no application to the case at hand. From the decisions this Court finds, considering the allegation as to whether appeal against arbitral award lies to Principal Civil Court of Original Jurisdiction in the district also include High Court which has even no exercise of original

civil jurisdiction, the Hon'ble apex Court considering the definition of 2(1)(e) vide ***Pandey & Co. Builders (P.) Ltd. Vrs. State of Bihar and another*** : (2007) 1 SCC 467 getting into questions raised therein in para 9(i)(ii) and 24 to 26 observed as follows:

> "9. Two submissions were made on behalf of the appellant before us viz.:
>
> *(i)* Having regard to the definition of "Court" as contained in Section 2(1)(e) of the 1996 Act, the Court of the Principal Civil Court should be held to be not empowered to hear an appeal against an order of the Arbitral Tribunal insofar as if Section 37 of the 1996 Act is not construed, a second appeal being prohibited, no appeal shall ever lie against the order of the District Judge, Principal Civil Court before the High Court.
>
> (ii) As the order of the nominee of the Chief Justice of the Patna High Court under Section 11 of the 1996 Act is a judicial order, in view of the provisions contained in Section 42 thereof, a proceeding was maintainable only before the High Court."
>
> **24.** Section 42 of the 1996 Act, to which our attention has been drawn by the learned counsel appearing for the appellant, in the instant case has no application. The said provision reads thus:
>
> **"**42. *Jurisdiction.*- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitrarl proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court."
>
> **25.** An order passed by a Chief Justice or his nominee under sub-section (6) of Section 11 of the 1996 Act may be a judicial order, as has been held by a seven-Judge Bench of this Court in *SBP & Co. v. Patel Engg. Ltd.* but the same does not take away the effect of the appellate jurisdiction to be exercised by a court under sub-section (2) of Section 37 of the 1996 Act.
>
> **26.** Section 42 of the 1996 Act refers to applications and not to appeals.

18. Again involving a similar issue, the Hon'ble Apex Court in the case of ***State of West Bengal & Others*** – versus-***Associated Contractors*** : (2015) 1 SCC 32 in discussion through paragraphs - 11, 12, 13, 14 15, 16, 17 and 25(a) has come to observe that appointment of Arbitrator by Apex Court is done in exercise of its limited jurisdiction and for Section 2(i) (e) application touching mandates of Arbitrator shall be to Principal Civil Court of Original Jurisdiction keeping in view the broader principle enumerated in the Act, 1996.

> "**11.** It will be noticed that Section 42 is in almost the same terms as its predecessor section except that the words "in any reference‖ are substituted with the wider expression "with respect to an arbitration agreement‖. It will also be noticed that the expression "has been made in a court competent to entertain it‖, is no longer there in

Section 42. These two changes are of some significance as will be pointed out later. Section 42 starts with a non obstante clause which does away with anything which may be inconsistent with the section either in Part I of the Arbitration Act, 1996 or in any other law for the time being in force. The expression "with respect to an arbitration agreement" widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all covered by Section 42. But an essential ingredient of the section is that an application under Part I must be made in a court.

12. Part I of the Arbitration Act, 1996, contemplates various applications being made with respect to arbitration agreements. For example, an application under Section 8 can be made before a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement. It is obvious that applications made under Section 8 need not be to courts, and for that reason alone, such applications would be outside the scope of Section 42. It was held in *P. Anand Gajapathi Raju* v. *P.V.G. Raju,* SCC at pp. 542-43, para 8 that applications under Section 8 would be outside the ken of Section 42. We respectfully agree, but for the reason that such applications are made before "judicial authorities‖ and not "courts" as defined. Also, a party who applies under Section 8 does not apply as *dominus litis*, but has to go wherever the 'action' may have been filed. Thus, an application under Section 8 is parasitical in nature-it has to be filed only before the judicial authority before whom a proceeding is filed by someone else. Further, the "judicial authority" may or may not be a court. And a court before which an action may be brought may not be a Principal Civil Court of Original Jurisdiction or a High Court exercising original jurisdiction. This brings us then to the definition of "court" under Section 2(1)(e) of the Act."

13. It will be noticed that whereas the earlier definition contained in the 1940 Act spoke of any civil court, the definition in the 1996 Act fixes "court" to be the Principal Civil Court of original jurisdiction in a district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Causes Court.

14. It will be noticed that the definition is an exhaustive one as it uses the expression "means and includes". It is settled law that such definitions are meant to be exhaustive in nature – See P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors., (1995) Suppl. 2 SCC 348 at para 19.

15. A recent judgment of this Hon'ble Court reported in State of Maharastra Vs. Atlanta Limited, AIR 2014 SC 1093 has taken the view that Section 2(1)(e) contains a scheme different from that contained in Section 15 of the Code of Civil Procedure. Section 15 requires all suits to be filed in the lowest grade of court. This Hon'ble Court has construed Section 2(1)(e) and said that where a High Court exercises ordinary original civil jurisdiction over a 9 district, the High Court will have preference to the Principal Civil Court of original jurisdiction in that district. In that case, one of the parties moved an application under Section 34 before the District Judge, Thane. On the same day, the opposite party moved an application before the High Court of Bombay for setting aside some of the directions contained in the Award. In the circumstances, it was decided that

the "Court" for the purpose of Section 42 would be the High Court and not the District Court. Several reasons were given for this. Firstly, the very inclusion of the High Court in the definition would be rendered nugatory if the above conclusion was not to be accepted, because the Principal Civil Court of original jurisdiction in a district is always a court lower in grade than the High Court, and such District Judge being lower in grade than the High Court would always exclude the High Court from adjudicating upon the matter. Secondly, the provisions of the Arbitration Act leave no room for any doubt that it is the superior most court exercising original jurisdiction which has been chosen to adjudicate disputes arising out of arbitration agreements. We respectfully concur with the reasoning contained in this judgment.

16. Similar is the position with regard to applications made under Section 11 of the Arbitration Act. In Rodemadan India Ltd. v. International Trade Expo Centre Ltd., (2006) 11 SCC 651, a Designated Judge of this 10 Hon'ble Court following the seven Judge Bench in S.B.P. and Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618, held that instead of the court, the power to appoint arbitrators contained in Section 11 is conferred on the Chief Justice or his delegate. In fact, the seven Judge bench held:

"13. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration. But at the same time, it has made some departures from the model law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act, are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. 'Court' is defined in the Act to be the principal civil court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The principal civil court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the concerned court would be the District Court. Obviously, the Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an arbitral tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the concerned State or in the country. This is to ensure the utmost authority to the process of constituting the arbitral tribunal.

18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power."

It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of 12 the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(e). The said view was reiterated somewhat differently in Pandey & Co. Builders (P) Ltd. v. State of Bihar & Anr., (2007) 1 SCC 467 at Paras 9, 23-26."

17. That the Chief Justice does not represent the High Court or Supreme Court as the case may be is also clear from Section 11(10):

"11.(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by subsection (4) or sub-section(5) or sub-section (6) to him."

The scheme referred to in this subsection is a scheme by which the Chief Justice may provide for the procedure to be followed in cases dealt with by him under Section 11. This again shows that it is not the High Court or the Supreme Court rules that are to be followed but a separate set of rules made by the Chief Justice for the purposes of Section 11. Sub-section 12 of Section 11 reads as follows:

11.(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in subsections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

It is obvious that Section 11(12)(b) was necessitated in order that it be clear that the Chief Justice of "the High Court" will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1) (e). This subsection also does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record.

25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part-I of the Arbitration Act, 1996."

19. This Court in a decision dated 6.7.2018 in W.P.(C) No. 25344 of 2017 in the case of ***KCS Private Limited*** *-Versus-* ***Rosy Enterprises*** dealing with consideration of an application under Section 29 A of the Act vis-à-vis definition of Court under Section-2 (i) (e) of the Act, particularly involving an appointment of Arbitrator by High Court in exercise of power under Section 11 of the Act, 1996, in deciding the matter in paragraph-8, 9 and 10 observed and held as follows:

"08. A Three Judge Bench of the Hon'ble Supreme Court in the case of State of West Bengal and others (supra), wherein the question arose that which court has the jurisdiction to entertain and decide the application under Section 34 of the Act. Hon'ble Supreme Court in the case of State of West Bengal and others (supra) have held that "section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in the district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996. The definition of "court" in Section 2(1)(e) in the 1996 Act fixes "court" to be the Principal Civil Court of Original Jurisdiction in the district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court. The definition is an exhaustive one as it uses the expression "means and includes". It is settled law that such definitions are meant to be exhaustive in nature". Hon'ble Supreme Court further held that "where a High Court exercises ordinary original civil jurisdiction over a district, the High Court will have preference to the Principal Civil Court of Original Jurisdiction in that district. Firstly, the very inclusion of the High Court in the definition would be rendered nugatory if the above conclusion was not to be accepted, because the Principal Civil Court of Original Jurisdiction in a district is always a court lower in grade than the High Court, and such District Judge being lower in grade than the High Court would always exclude the High Court from adjudicating upon the matter. Secondly, the provisions of the Arbitration Act leave no room for any doubt that it is the superior most court exercising original jurisdiction which has been chosen to adjudicate disputes arising out of arbitration agreements". It was a

case of Calcutta High Court which exercised original civil jurisdiction. Hence, the Hon'ble Supreme Court have held that the High Court of Calcutta was held to be the Principal Civil Court of Original Jurisdiction. Thus, it is clear that while the High Courts of Patna and Kerala are not the 'Court', the Calcutta High Court is the 'Court' within the meaning of Section 2(1)(e) of the Act.

9. The High Court of Orissa does not exercise the original civil jurisdiction. Sub-Section (2) of Section 2 of the Orissa Civil Courts Act, 1984 provides that the court of the District Judge shal1 be the principal court of original civil jurisdiction in the district and the explanation provides that for the purpose of this sub-section the expression 'District Judge' shall not include an Additional District Judge. Thus, for the State of Odisha, the District Judge is the 'Court' within the definition of the aforesaid Section.

10. In that view of the matter, the learned District Judge, Sundargarh does have jurisdiction under Sub-Section (5) of Section 29A of the Act to extend the period of passing of the arbitral award. Instead of remanding the matter, as considerable time has been elapsed in the mean time, this Court think it proper to extend the time as prayed for by the petitioner and the opposite parties. It may be remembered that the petitioner and the opposite parties have filed a joint petition before the learned District Judge, Sundargarh and both the parties are agreed to extend the time frame as envisaged under Section 29A of the Act, I am inclined to extend the time for passing of the arbitral award. Secondly, it is stated that the matter of dispute is complicated and involves voluminous evidence. Hence, in the interest of justice, it is appropriate to extend the period of passing of arbitral award by another six months, which would start from the date of production of certified copy of this order before the Arbitral Tribunal."

20. This Court here takes into consideration the latest decision of the Hon'ble Apex Court in the case of ***Union of India & Ors.*** *–Versus-* ***G.S.Chatha Rice Mills & Another***, (2021) 2 SCC 209, in paragraph-57 the Hon'ble Apex Court has the following observation:

"**57.** Mr. Nataraj is textually right when he emphasizes that Section 15(1) contains a reference to date and not time. But there are two responses to his line of approaching the issue. *First,* the legislature does not always say everything on the subject. When it enacts a law, every conceivable eventuality which may arise in the future may not be present to the mind of the lawmaker. Legislative silences create spaces for creativity. Between interstices of legislative spaces and silences, the law is shaped by the robust application of common sense. *Second,* regulatory governance is evolving in India as new technology replaces old and outmoded ways of functioning. The virtual world of electronic filings was not on the horizon when Parliament enacted the Customs Act in 1962. Yet Parliament has responded to the rapid changes which have been brought about by the adoption of technology in governance. In the provisions of Section 17 and Section 46, the impact of ICT-based governance has been recognized by the legislature in providing for the presentation of bills of entry in the electronic form on the customs automated EDI system. Precision, transparency and seamless administration are key features of a system which adopts technology in pursuit of efficiency. As we will explore in greater detail later in this judgment, technology has enabled both administrators and citizens to know precisely when an electronic record is uploaded. The considerations which Parliament had in its view in providing for crucial amendments to the statutory scheme by moving from manual to electronic forms of governance in the assessment of duties must not be ignored. Tax administration must leave behind the culture of

> an age in which the assessment of duty was wrought with delays, discretion, doubt and sometimes, the dubious. The interpretation of the Court must aid in establishing a system which ensures certainty for citizens, ease of application and efficiency of administration."

21. For the support of law of land, for the clear application of provision at Section 2 (i) (e), Section 29 (A) of the Act and for the view of this Court indicated hereinabove, this Court while finding no strength in the submission of Mr. D. Mohanty, learned Senior Counsel, also finds, there is no infirmity in the impugned order vide Annexure-3. Thus while confirming the same, however keeping in view that the extension of mandate of Arbitration by one year time could not be operative for the parties engaged in the present dispute enjoying an order of stay of the impugned order continuing as of now, this Court while dismissing the writ petition directs for calculation of the period of one year as a matter of extension of mandate to start from the date of communication of a copy of the judgment of this Court on the learned Arbitrator. For loss of sufficient time in the meantime, parties are directed to bring the judgment of this Court to the notice of the learned Arbitrator enabling him to immediately proceed and conclude the proceeding within a period of one year.

22. In the result, the writ petition fails. No cost.

23. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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2021 (II) ILR - CUT- 601

BISWANATH RATH, J.

W.P.(C) NO.18007 OF 2021

SAROJA KUMAR MOHANTY AND ANR. .....Petitioners

.V.

THE FAMILY COURT, CUTTACK REPRESENTED THROUGH IT'S REGISTRAR/SHERISTADAR .....Opp. Party

HINDU MARRIAGE ACT, 1955 – Section 13 - B (1) and (2) – Mutual divorce – Joint application filed by both parties – Application filed to waive the waiting period – Application rejected – Writ petition challenging such rejection period – Plea considered – Held, the waiver application can be filed one week after the first motion giving reasons for the prayer for waiver, if the required conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court.

Case Law Relied on and Referred to :-

1. AIR 2017 SC 4417 : Amardeep Singh Vs. Harveen Kaur.

For Petitioners : Mr. Sarathi Jyoti Mohanty.
For Opp. Party : Ms. Samapika Mishra,Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 29.06.2021

BISWANATH RATH, J.

Heard the submission of Mr.S.J. Mohanty, learned counsel appearing for both husband and wife.

2. Petitioners filing the present writ petition challenge the order dated 09.03.2021, passed by the Judge, Family Court, Bhubaneswar in rejection of an application for waiving the six months locking period in considering an application under Section 13-B of the Hindu Marriage Act, 1955 at the instance of both husband and wife.

3. Taking this Court to the position of the parties in the Family Court being undertaking a joint exercise for divorce at their instance and further taking this Court to the decision of Hon'ble apex Court in the case of ***Amardeep Singh Vrs. Harveen Kaur : AIR 2017 SC 4417***, Mr. Mohanty, learned counsel appearing for both husband and wife contended that the rejection of the joint application of the petitioners taking note of an earlier decision becomes bad. A request is thus made by both the petitioners by interfering in the impugned order to direct the Judge, Family Court, Bhubaneswar for immediate disposal of the proceeding u/s.13-B of the Hindu Marriage Act, 1955.

4. Considering the submissions and rival contentions of the State Counsel, this Court finds C.P. No.21 of 2021 undisputedly remain a joint application by both husband and wife and accompanied by joint affidavit for

granting mutual divorce, which is not disposed of expeditiously by the Judge, Family Court, Bhubaneswar and the parties compelled to file application vide Annexure-2 for exemption of the cooling period of six months and disposing the Sec.13(B) application. It is considering such application, the Judge, Family Court, Bhubaneswar has rejected the said application, however taking note of the decision of the Hon' ble Apex Court passed in the year 2009.

5. Considering the submission and the plea of the parties, this Court is of the opinion that for the joint application being filed for a mutual divorce, there should not be any impediment in disposing of such application.

6. At this stage, this Court also takes note of the decision of the Hon'ble apex Court in *Amardeep Singh (supra),* wherein paragraphs-16, 17, 18, 19 and 20 of the said judgment, Hon'ble apex Court observe as follows :

> "16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.
>
> 17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in *Kailash versus Nanhku and ors*. as follows:
>
> "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'
>
> " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some

> penalty; the serious or the trivial consequences, that flow there from; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."
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> 18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following :
>
> i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B (1) of separation of parties is already over before the first motion itself;
>
> ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to re-unite the parties have failed and there is no likelihood of success in that direction by any further efforts;
>
> iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;
>
> iv) the waiting period will only prolong their agony.
>
> 19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.
>
> 20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court."

7. From the above decision it is apparent that law on the issue involved herein and as parties have already mutually agreed to dispose their marriage by mutual divorce, there is no purpose keeping such parties waiting for the required period. Rather by disposing such disputes both parties may be able to get peace in settling for the rest part of life. Considering the submission of learned counsel for both the parties and decision of the Hon'ble apex Court as reflected hereinabove, this Court finds there is mechanical disposal of the application of the petitioners by the Judge, Family Court, Bhubaneswar and he has not exercised discretionary power available with him. For the application of the judgment of the Hon'ble apex Court in *Amardeep Singh (supra)*, this Court interfering in the impugned order dated 9.3.2021 passed in C.P. No.21 of 2021, sets aside the same and directs the Judge, Family Court, Bhubaneswar to dispose of the C.P. No.21 of 2021, as expeditiously as possible, preferably within a period of two weeks from the date of receipt of copy of this order.

8. With the above direction, the writ petition stands succeed. However there is no order as to costs.

2021 (II) ILR - CUT- 605

S.K. SAHOO, J.

JCRLA NO. 74 OF 2016

MADHUSUDAN NAIK ……Appellant

.V.

STATE OF ORISSA ……..Respondent

APPRECIATION OF EVIDENCE – Sole testimony of rape victim – Sustainability of conviction challenged – Held, conviction is sustainable if such sole testimony is found to be natural, trustworthy and corroborated by medical as well as other circumstantial evidence.

For Appellant : Mr. Ajit Kumar Sahoo (Amicus curie)
For State: Mr. Sibani Sankar Pradhan, Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment: 15.07.2021

S.K. SAHOO, J.

The appellant Madhusudan Naik faced trial in the Court of the Addl. Sessions Judge, Kuchinda in S.T. Case No.37 of 2012 for commission of offence punishable under section 376 of the Indian Penal Code and vide impugned judgment and order dated 09.10.2015, he was found guilty of the offence charged and sentenced to undergo R.I. for seven years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo R.I. for one year.

2. The prosecution case, in short, is that on 12.07.2012 at about 2.30 p.m. the victim (P.W.1) had been to attend the call of nature to a nearby Nala of her village Jurapali, Gorposh under Govindpur police station in the district of Sambalpur and while she was attending the call of nature, the appellant came from her back side, caught hold of her and forcibly committed sexual intercourse. On hearing hullah of the victim, his brother Manohar Naik (P.W.2) and other persons grazing cattle nearby came there to rescue the victim and seeing them, the appellant fled away from the spot.

On the same day, the victim lodged F.I.R. before the A.S.I. of Garposh Outpost and it was drafted by P.W.2 as per the instruction of the victim and the report was sent to Govindpur police station and accordingly, Govindpur P.S. Case No.49 dated 12.07.2012 under section 376 of the Indian Penal Code was registered against the appellant.

3. P.W.13 Keshab Chandra Behera, I.I.C. of Govindpur police station after registration of the case, took up investigation of the case and during course of investigation, he examined the victim and other witnesses, arrested the appellant on 13.07.2012, sent requisition for medical examination of the appellant as well as the victim (P.W.1) and he also seized the wearing apparels of the appellant under seizure list (Ext.4) and forwarded him to Court. He also seized vaginal swab and pubic hair of the victim collected by the Medical Officer. He also seized blood sample of the appellant, pubic hair of the appellant, his nail clippings, semen of the appellant etc. which were collected by the Medical Officer during his medical examination. On the same day, he also seized the wearing apparels of the victim such as a synthetic saree, one maroon colour petty coat and one orange colour blouse on production by the victim at Govindpur police station and prepared the seizure list marked as Ext.2. He also visited the spot and prepared the spot map marked as Ext.10 and made a prayer to the learned S.D.J.M., Kuchinda to send the exhibits to R.F.S.L., Sambalpur for chemical examination and on completion of investigation, charge sheet was submitted by the I.O. on 17.08.2012 against the appellant under section 376 of the Indian Penal Code.

4. During course of trial, in order to prove its case, the prosecution examined thirteen witnesses, out of which the relevant witnesses are P.W.1, the informant who is also the victim, P.W.2, Manohar Naik, the younger brother of the victim who is the scribe of the F.I.R., P.W.12 Hari Sankar Dehury, the doctor who examined both the appellant as well as the victim and P.W.13, Keshab Chandra Behera, the Investigating Officer.

The prosecution exhibited eleven documents. Ext.1 is the written F.I.R., Ext.2 is the seizure list of clothes of the victim, Ext.3 is the sketch map, Exts.4 and 5 are the seizure lists, Ext.6 is the report of P.W.12 regarding blood group, Ext.7 is the opinion of P.W.12, Ext.8 is the medical requisition of the victim, Ext.9 is the medical requisition of the appellant, Ext.10 is the spot map and Ext.11 is the forwarding report on M.O. and C.E.

The prosecution also proved seven material objects. M.O.I is the synthetic saree, M.O.II is the petty coat, M.O.III is the blouse, M.O.IV is the Chadi, M.O.V is the vial containing vaginal swab, M.O.VI is the vial containing blood sample, M.O.VII is the vial containing semen.

5. The defence plea of the appellant is one of denial and it is stated that due to previous enmity, he has been falsely implicated in this case.

6. The learned trial Court, relying on the evidence of P.W.1 which is corroborated by the evidence of P.W.2 and the medical evidence of P.W.12 found the appellant guilty of the offence under section 376 of the Indian Penal Code.

7. Since Mr. Priyabrata Sinha, learned counsel engaged by the Legal Aid was not present when the matter was called for hearing, Mr. Ajit Kumar Sahu, Advocate who is having twenty years of practice in the criminal side, was appointed as Amicus Curiae. He was supplied with the paper book and given time to prepare the case. He placed the evidence of the witnesses and also the impugned judgment. While assailing the impugned judgment and order of conviction, he contended that the evidence of the victim is full of contradictions and the independent witnesses who were named in the F.I.R. i.e. P.W.4 Kashimir Kulu and P.W.5 is Kishore Kulu have not supported the prosecution case and therefore, it would not be proper to accept the evidence of the victim and convict the appellant for commission of offence under section 376 of the Indian Penal Code.

Mr. Sibani Sankar Pradhan, learned Addl. Govt. Advocate appearing for the State on the other hand placed the F.I.R., the evidence of the witnesses as well as the impugned judgment and contended that the evidence of the victim (P.W.1) is getting corroboration from none else than P.W.2, who is her brother and also medical evidence adduced by P.W.12. He argued that even though the independent witnesses have not supported the prosecution case, but the same cannot be a ground to disbelieve the version of the prosecutrix and since there is no infirmity in the impugned judgment, the appeal should be dismissed.

8. The victim being examined as P.W.1 has stated that on the date of occurrence at about 2.00 p.m., while she had been nearby Nala to attend the call of nature and sitting there, the appellant came there and caught hold her neck and made her lie on the ground and when she shouted for help, the appellant committed rape on her. She sustained injuries on her front throat, right hand and waist. She further stated that her brother (P.W.2) was grazing cattle nearer to the spot and hearing her hulla, he came to the spot and protested but the appellant did not leave her and P.W.2 separated her from the appellant and took her to the house of Gountia of her village, namely Brundaban Naik. The victim further stated that she accompanied P.W.2 to Garposh outpost where P.W.2 drafted the F.I.R. as per her instruction and

accordingly, the F.I.R. was presented in the outpost. In the cross-examination of the victim, certain confrontations have been made by the defence counsel with reference to her previous statement before police and it has been proved through the I.O. (P.W.13) that she had not stated before the I.O. that the appellant pressed her neck and that her younger brother (P.W.2) separated her from the appellant and that she was taken to the house of Brundaban Naik, Gountia of her village and that she sustained injuries on her neck, waist and hand. In my humble view, on the basis of such contradictions, the evidence of the victim cannot be disbelieved.

It is the settled principle of law that an accused can be convicted for an offence of rape basing on the sole testimony of the prosecutrix, if the same is found to be natural and trustworthy and corroborated by the medical evidence and other circumstantial evidence. Even the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. While trying an accused on the charge of rape, the Court must deal with the case with utmost sensitivity by examining the broader probabilities of the case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the victim which are not of a substantial character. The evidence of a victim of sexual assault stands on par with evidence of an injured witness. She is the best witness in the sense that she is least likely to exculpate the real offender. The evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration to the evidence of the victim cannot be expected always in sex offences in view of the very nature of the offence. No self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. A victim of sex crime would not blame anyone but the real culprit.

The evidence of the victim gets corroboration from the evidence of her younger brother (P.W.2) who has stated that while he was grazing cattle, on hearing hullah of P.W.1, he came to the spot and found the appellant committing rape on the victim inside the Nala and P.W.2 came to her rescue but the appellant did not leave her and P.W.2 separated her by holding her hand and when he asked about the occurrence, the victim disclosed before him how the appellant committed rape on her. P.W.2 further stated that he went to the house of village Gountia namely Brundaban Naik with P.W.1 and as per instruction of P.W.1, he drafted the F.I.R. Nothing has been brought

out in the cross-examination either from the mouth of P.W.1 or P.W.2 to discard their evidence.

No doubt, it is mentioned in the F.I.R. that two other persons namely Kashmir Kulu (P.W.4) and Kishore Kulu (P.W.5) arrived at the scene of occurrence along with P.W.2 and those two witnesses have not supported the prosecution case and they have been declared hostile by the prosecution but when the evidence of the victim (P.W.1) is getting corroboration from the evidence of P.W.2, it would not be proper to discard such evidence merely because P.W.4 and P.W.5 did not support the prosecution case.

The doctor (P.W.12) examined the victim on 13.07.2012 and he stated to have found presence of crescentic nail marks over the front side of the neck on the both side of thyroid cartilage and posterior aspect of left forearm 6" proximal to left wrist joint. The doctor found presence of smegma over the labia majora of the victim. The blood group of the victim was found to be 'B' positive and his report was marked as Ext.6. P.W.12 also examined the appellant and found presence of nail marks on his left thigh and absence of smegma in his glans penis. Thus, the evidence of the victim (P.W.1) and her brother (P.W.2) coupled with the evidence of the doctor, in my humble view, is sufficient to establish the charge under section 376 of the Indian Penal Code against the appellant. In view of the foregoing discussions, I find no illegality or infirmity in the impugned judgment and order of conviction of the appellant under section 376 of the Indian Penal Code passed by the learned trial Court. Keeping in view the nature and gravity of the accusation and the manner in which the crime was committed on the victim, the punishment which has been imposed on the appellant by the learned trial Court cannot be said to be excessive under any circumstances. Therefore, the impugned judgment and order of conviction and sentence passed by the learned trial Court is upheld.

9. It appears that the appellant was taken into custody in connection with this case since 13.07.2012 and he was forwarded to the Court on the very day and he was never released on bail either during course of trial or during pendency of the appeal before this Court. Therefore, he has already undergone not only the substantive sentence imposed by the learned trial Court but also the default sentence for non-payment of fine as awarded by the learned trial Court. Therefore, if the appellant has not been released from custody in the meantime in connection with this case, he shall be released forthwith if his detention is not otherwise required in any other case.

10. In view of the enactment of the Odisha Victim Compensation Scheme, 2017 and the nature and gravity of the offence committed and the family background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Sambalpur to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation. Let a copy of the judgment be sent to the District Legal Services Authority, Sambalpur for compliance.

Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action.

Accordingly, the Jail Criminal Appeal stands dismissed.

Before parting with the case, I would like to put on record my appreciation to Mr. Ajit Kumar Sahoo, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only).

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2021 (II) ILR - CUT- 610

S.K. SAHOO, J.

I.A. NO. 1759 OF 2019
(Arising out of CRLA NO. 492 OF 2017)

1. PYARASA NAIK
2. MALLA NAIK .....Appellants

.V.

STATE OF ODISHA .....Respondent

(A) CODE OF CRIMINAL PROCEDURE,1973 – Section 389 – Provision under – Suspension of sentence and bail – Principles and satisfaction of essential ingredients – Held, Section 389 of the Code of Criminal Procedure deals with suspension of execution of sentence pending the appeal and release of the appellant on bail – There is a distinction between bail and suspension of sentence – One of the essential ingredients of section 389 of Cr.P.C. is the requirement for the Appellate Court to record reasons in writing for ordering

suspension of execution of the sentence or order appealed – If he is in confinement, the said Court can direct that he be released on bail or on his own bond – The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

(B) BAIL – Interim application seeking bail in criminal appeal – Heard by division bench – Difference of opinion regarding grant of bail – Matter referred to third judge – Appreciation of evidence and principles for grant of bail in criminal appeal – Materials available examined in detail – Held, in view of the materials available on record, the nature of evidence adduced by the four eye witnesses to the occurrence relating to the involvement of the appellant no.1 in the assault of the deceased, the fact that the appellant no.1 was on bail during trial and there is no material that he mis-utilized the liberty while on bail and since this criminal appeal is of the year 2017 and older appeals are pending before this Court for hearing and there is no chance of early hearing of the appeal in the near future and the appellant no.1 is a permanent resident of village Padamari Harijan Sahi, P.S. Pattapur in the district of Ganjam and in absence of any criminal antecedents against him on record, the appellant should be released on bail.

Case Laws Relied on and Referred to :-

1. 2004 Criminal Law Journal 3840 : State of Haryana Vs. Hasmat.
2. (2002) 9 SCC 364 : Vinay Kumar Vs. Narendra and Ors.
3. 1977 Criminal Law Journal 1746 : Kashmira Singh Vs. State of Punjab.
4. (2008) 5 SCC 230 : Sidharth Vashisht Vs. The State (N.C.T. of Delhi).

For Appellants : Ms. Bijayalaxmi Tripathy.
For Respondent : Mr.J.P. Patra, Addl.Standing Counsel

ORDER Date of Order : 29.07.2021

S.K. SAHOO, J.

This matter is taken up by video conferencing mode.

This interim application has been referred to me to adjudicate grant of bail to the appellant no.1 Pyarasa Naik.

Both the appellants Pyarasa Naik and Malla Naik along with accused Ramesh @ Kampa Behera faced trial in the Court of learned Sessions Judge,

Ganjam, Berhampur in S.T. No.61 of 2013 for the offences punishable under sections 341, 294, 506, 324, 326, 307, 302/34 of the Indian Penal Code. The learned trial Court vide impugned judgment and order dated 18.07.2017, has been pleased to hold all of them guilty under sections 302, 324/34 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/- (rupees five thousand) each, in default of payment of fine, to suffer further rigorous imprisonment for one year each for the offence under section 302/34 of the Indian Penal Code and to undergo rigorous imprisonment for a period of one year for each for the offence under section 324/34 of the Indian Penal Code and the sentences were directed to run concurrently.

This interim application for bail was argued before the Division Bench of this Court presided over by Hon'ble Mr. Justice S.K. Mishra and Hon'ble Miss. Justice Savitri Ratho and after hearing the learned counsel for the appellants as well as the learned counsel for the State, Hon'ble Mr. Justice S.K. Mishra vide order dated 09.03.2021 directed release of both the appellants, i.e. Pyarasa Naik and Malla Naik on bail, however, Hon'ble Miss. Justice Savitri Ratho while directing release of appellant No.2 Malla Naik on bail, rejected the prayer for bail of appellant No.1 Pyarasa Naik. In view of the difference of opinion of two Hon'ble Judges of this Court regarding grant of bail and suspension of sentence in respect of appellant No.1 Pyarasa Naik, the matter was directed to be placed before Hon'ble Chief Justice for appropriate order/orders and accordingly, the matter has been assigned to me by the Hon'ble Chief Justice as per order dated 23.03.2021.

Ms. Bijayalaxmi Tripathy, learned counsel appearing for the appellant no.1 Pyarasa Naik submitted that during investigation of the case, the appellant no.1 surrendered in the Court below on 06.11.2012 and he was directed to be released on bail as per order dated 23.07.2013 of this Court in BLAPL No.9836 of 2013 and after filing bail bonds, he was released from custody on 27.07.2013. After pronouncement of the judgment on 18.07.2017, appellant no.1 was taken into custody and since then he is in judicial custody. Learned counsel further submitted that the occurrence in question took place on 31.10.2012 and the F.I.R. was lodged on 01.11.2012 by one Rupa Naik (P.W.1) and the deceased Kartika Bisoi, who was assaulted at the time of occurrence expired on 01.11.2012 while undergoing treatment at M.K.C.G. Medical College and Hospital, Berhampur. It is contended that out of nineteen witnesses examined on behalf of the prosecution, P.W.1 Rupa Naik,

P.W.3 Ranjan Naik, P.W.6 Urmila Bisoi and P.W.13 Baidhar Bisoi are the eye witnesses to the occurrence and P.W.16 Dr. Kiran Kumar Patnaik conducted autopsy over the dead body of the deceased. It is further contended that the version of the eye witnesses relating to the overt act committed by the accused persons, particularly that of appellant No.1 Pyarasa Naik are discrepant in nature and there is no chance of early hearing of the appeal in near future and balance of convenience is in favour of appellant No.1 and therefore, the bail application may be favourably considered.

Mr. J.P. Patra, learned Addl. Standing Counsel appearing for the State, on the other hand, opposed the prayer for bail and submitted that the appellant No.1 Pyarasa Naik and the co-accused Ramesh @ Kampa Behera stabbed the deceased Kartika Bisoi on his abdomen, as a result of which his intestine came outside and he fell down on the ground and the doctor conducting post-mortem examination noticed two stab wounds on the abdomen region of the deceased and specifically stated that those two injuries and corresponding internal injuries mentioned in the post mortem report (Ext.16) could be possible by the seized weapon i.e. the knife and further stated that the external injury no.(i) with its corresponding internal injuries alone and all the injuries in combination are sufficient to cause death of the deceased in ordinary course of nature and the death of the deceased was due to hemorrhage and shock as a result of injury to major abdominal structures and vessels due to external injury no.(i). Learned counsel for the State further submitted that the discrepancies, if any, in the statements of the eye witnesses are very trivial in nature and in view of the nature and gravity of accusations against appellant no.1, the bail application should be rejected.

When a query was made by this Court regarding availability of any criminal antecedents against the appellant no.1, learned counsel for the appellant No.1 submitted that there are no criminal antecedents against the appellant no.1. Learned counsel for the State submitted that the records received by him are silent in that respect.

Hon'ble Mr. Justice S.K. Mishra, while passing the order for grant of bail in favour of the appellants, have been pleased to hold that all the witnesses stated that the accused persons have assaulted the deceased by means of knife without specifying the name of the person, who actually dealt the knife blow on the belly of the deceased and the appellants are permanent residents of village Padamari Harijan Sahi, P.S. Pattapur in the district of

Ganjam and there is no reasonable chance of their abscondance from the process of justice. However, Hon'ble Miss. Justice Savitri Ratho discussing the evidence of four eye witnesses to the occurrence so also the evidence of the doctor (P.W.16), has referred to the bail order of appellant No.1 Pyarasa Naik passed in BLAPL No.9836 of 2013 and the bail order of appellant no.2 Malla Naik passed in BLAPL No. 9651 of 2013 and the reasons for grant of bail to the appellants in those two bail applications, though concurred with the view of Hon'ble Mr. Justice S.K. Mishra regarding grant of bail to the appellant no.2 Malla Naik but came to hold that in view of the facts and circumstances, the bail application of appellant No.1 Pyarasa Naik stood rejected.

Section 389 of the Code of Criminal Procedure deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of section 389 of Cr.P.C. is the requirement for the Appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said Court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine. (Ref: **State of Haryana -Vrs.- Hasmat: 2004 Criminal Law Journal 3840**). In the case of **Vinay Kumar -Vrs.- Narendra and Ors. reported in (2002) 9 Supreme Court Cases 364**, it is held that the principle is well settled that in considering the prayer for bail in a case involving serious offence like murder punishable under section 302 of the Indian Penal Code, the Court should consider the relevant factors like the nature of the accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.

In the case of **Kashmira Singh -Vrs.- State of Punjab 1977 Criminal Law Journal 1746**, Hon'ble Justice P.N. Bhagwati speaking for the Bench observed as follows:-

> "Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and

> if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: `We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

In my humble view, while considering an application for bail under section 389 of Cr.P.C., the reasons for grant of bail to the accused either at the stage of investigation or at the stage of trial, is not necessary to be taken into account.

The mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrant suspension of execution of sentence and grant of bail. What really necessary is to consider whether reasons exist to suspend execution of the sentence and grant of bail. (Ref: **Sidharth Vashisht -Vrs.- The State (N.C.T. of Delhi) : (2008) 5 Supreme Court Cases 230**).

The appellate Court can adjudicate the bail application on the basis of the evidence adduced during trial and also keeping in view the nature of the accusation made against the accused, the manner in which the crime has been committed, the gravity of the offence and the desirability of releasing the

accused on bail. If there are good chances of success in the appeal on the basis of evidence adduced during trial and there is no reasonable prospect of early hearing of the appeal in the near future, the same can also be taken into account. If the accused has not misutilized the liberty granted to him during the pendency of the trial and there is no chance of absconding of the accused and there is absence of any criminal antecedents against the accused, those aspects are certainly plus points in favour of the accused and the same can also be taken into account while adjudicating the bail application.

A detailed documentation on the merits of the appeal by making threadbare analysis of evidence adduced during trial should be avoided at the stage of consideration of the bail application inasmuch as that would have an adverse effect on the final adjudication of the criminal appeal.

After going through the evidence of the witnesses placed by the learned counsel for the parties, I find that the homicidal death of the deceased Kartika Bisoi is not in dispute which has been established through evidence of the doctor (P.W.16), who conducted post mortem examination, the post mortem report (Ext.16) and also the other surrounding circumstances.

So far as the assault on the deceased Kartika Bisoi is concerned, coming to the statements of eye witnesses, P.W.1 Rupa Naik has stated in her evidence that the accused persons assaulted on the belly of the deceased by means of swords and knives as a result of which the deceased sustained bleeding injuries on his person and fell down and became senseless. In the cross-examination, she stated that appellant no.1 and co-accused Ramesh @ Kempa Behera were holding knives and co-accused Malla Naik and Santosh were holding swords and all the accused persons conjointly armed with swords and knives assaulted the deceased Kartika Bisoi, the injured Ranjan and Baidhar. P.W.3 Ranjan Naik, who is an injured eye witness, stated that the accused persons assaulted on the belly of the deceased by means of knives as a result of which he sustained bleeding injuries on his person and fell down and his liver came outside. However, in the cross-examination, P.W.3 stated that on the date and time of occurrence, he was present inside his house and when reached at the spot, the deceased was lying senseless on the ground and he was not able to speak. P.W.6 Urmila Bisoi, who is the mother of the deceased, stated that the accused Ramesh along with his friends under the influence of liquor attacked and stabbed on the back of his son Baidhar (P.W.13) and on seeing this, the deceased Kartika rushed to the spot

to rescue P.W.13, but the accused persons also attacked him (deceased) and stabbed on his belly as a result of which he sustained bleeding injuries and his intestine came out. She has not stated specifically as to who those friends of accused Ramesh were who assaulted her two sons Baidhar and the deceased Kartika in her chief examination. P.W.13 Benudhar Bisoi, who is another injured eye witness though specifically stated in the chief examination that the absconding accused Jaga @ Santosh Naik and Malla Naik caught hold of the deceased brother Kartika and accused Ramesh @ Kampa Behera and Pyarasa Naik (appellant no.1), mercilessly stabbed on his abdomen and stretched the stab injury, as a result of which his abdomen came outside and he fell on the ground, but in the cross-examination, he stated that he witnessed the incident from a distance of ten cubits that the absconding accused Jaga @ Santosh Naik and the accused Malla Naik caught hold of his deceased brother and accused Ramesh @ Kempa Behera mercilessly stabbed on his abdomen and thus, in the cross-examination, P.W.13 has not implicated the appellant no.1 Pyarasa Naik giving any stab blow to the deceased on his abdomen. In view of the evidence of the four eye witnesses, which were considered by the Hon'ble Judges, I find that the eye witnesses P.W.1, P.W.3 and P.W.6 have not specifically stated relating to any stab blow given by appellant no.1 Pyarasa Naik on the abdomen of the deceased. The evidence of P.W.13 relating to the participation of the appellant no.1 Pyarasa Naik in giving stab blow on the abdomen of the deceased is discrepant in nature as already indicated.

In view of the materials available on record, the nature of evidence adduced by the four eye witnesses to the occurrence relating to the involvement of the appellant no.1 in the assault of the deceased Kartika Bisoi, the fact that the appellant no.1 was on bail during trial and there is no material that he misutilized the liberty while on bail and since this criminal appeal is of the year 2017 and older appeals are pending before this Court for hearing and there is no chance of early hearing of the appeal in the near future and the appellant no.1 is a permanent resident of village Padamari Harijan Sahi, P.S. Pattapur in the district of Ganjam and in absence of any criminal antecedents against him on record, I am inclined to release appellant No.1 Pyarasa Naik on bail.

Let the appellant No.1 Pyarasa Naik be released on bail pending disposal of the appeal on furnishing bail bond of Rs.50,000/-(rupees fifty thousand) with two local solvent local sureties each for the like amount to the

satisfaction of the learned trial Court with further conditions that while on bail, he shall not indulge himself in any criminal activities and he shall surrender before the learned trial Court in the event the result of the criminal appeal so requires.

The I.A. stands disposed of.

As the restrictions due to resurgence of COVID- 19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No. 4587 dated 25th March 2020 as modified by Court's Notice No. 4798 dated 15th April 2021.

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2021 (II) ILR - CUT- 618

K.R. MOHAPATRA, J.

FIRST APPEAL NO. 121 OF 1990

HEMALATA PANDA @ DIBYA & ORS. …….Appellants

.V.

KUNTALA DEI & ORS. ……..Respondents

CIVIL SUIT – Allegation of fraud – Proof thereof – Held, must be specifically pleaded and proved by adducing evidence to that effect – No specific allegation of fraud made in the plaint – No specific evidence forthcoming – Mere allegation will not suffice.

For Appellants :Mr. Bhaktahari Mohanty, Sr. Adv.
M/s. D.P. Mohanty, R.K. Nayak,
R.N. Panda & S.C. Mohanty.

For Respondents :M/s. P.K. Dhal, A. Deo, R.Ray, B.C. Ray,
P.K. Mohapatra & Mr. B.B. Bhuyan.

JUDGMENT Date of Judgment : 06.04 .2021

K.R. MOHAPATRA, J.

This appeal under Section 96 of the Code of Civil Procedure,1908 (for short 'C.P.C.') has been filed assailing the judgment dated 28th April,

1983 and decree dated 5th May, 1983 passed by learned Subordinate Judge, Jajpur in Money Suit No. 3 of 1981, whereby he decreed the suit in favour of the Plaintiff holding that the Plaintiff is entitled to recover Rs.5,950/- together with *pendente lite* interest and future interest @ 6% per annum on the principal amount from the defendants, who are jointly and severally liable to pay the decreetal amount.

2. The Defendants filed this appeal on 11th August, 1983 along with MJC No. 102 of 1983 under Order XLIV Rule 1 C.P.C. to prosecute the appeal as indigent persons. The said application was rejected vide order dated 28th March, 1990. Accordingly, this appeal has been registered as such (F.A. No. 121 of 1990) and the appellants paid the requisite court fees.

3. For the sake of convenience, parties are described as per their status before learned trial court. The Defendants are Appellants and the Plaintiff, namely, Pachei Nayak, is the Respondent No.1 in this appeal. During pendency of the appeal, the Respondent No.1 died and his successors have been substituted as Respondent Nos. 1(a) to 1(g) in his place. The Plaintiff filed Money Suit No. 3 of 1981 for recovery of Rs.5,950/- together with *pendente lite* interest and future interest at the rate of 12% per annum from the Defendants.

4. The case of the Plaintiff before learned trial court was that the property on which the claim of the Plaintiff rests belonged to common ancestor, namely, Ananta. Hadibandhu was the son of Ananta. Both of them are dead since long. The Defendant No.1 is the widow and Defendant Nos. 2 to 6 are the sons and daughter of said Hadibandhu. On 23rd June, 1972, Ananta sold Ac.0.35 decimals to the Plaintiff by a registered sale deed under Ext.9. On 25th June, 1973, Hadibandhu sold Ac.1.17 decimals to the Plaintiff by a registered sale deed under Ext.10. Again on 3rd August, 1973 and 24th August, 1973, said Hadibandhu sold Ac.0.78 decimals to Bansidhar Panda and Siba Charan Panda vide registered sale deeds under Exts.11 and 12 respectively. On 28th November, 1973, said Hadibandhu again sold Ac.0.40 decimals to the Plaintiff by means of a registered sale deed under Ext. 14. On 28th February, 1975, the Plaintiff purchased Ac. 0.78 decimals from said Bansidhar and Siba Charan as per the registered sale deed under Ext. 13. Thus, the Plaintiff acquired a total extent of Ac.2.70 decimals of land belonging to the family of Ananta and Hadibandhu during the period in between 23rd June, 1972 and 28th February, 1975. After that, the Plaintiff

also purchased Ac.0.51 decimals from Arjun (Defendant No.2) on 28th February, 1975 pursuant to registered sale deed under Ext. 15. While the matter stood thus, the Plaintiff came to know that the aforesaid properties purchased by him from the family of Ananta and Hadibandhu have been mortgaged by Ananta and Hadibandhu with the Land Development Bank as a collateral security for sanction of an agricultural loan of Rs.6,000/-. When the Defendants did not repay the loan amount and the properties were about to be sold in a public auction, the Plaintiff in order to save the property repaid the loan amount in different phases. In total, he paid Rs.5,450/- as per Ext.7 series and Rs.5,950/- as per Exts. 4 and 6 series and obtained the money receipts from the Bank. In spite of repeated requests, the Defendants did not pay the said amount to the Plaintiff, which he paid to the Land Development Bank on their behalf. As the payment made by the Plaintiff under Ext.7 series was barred by limitation by the time the suit was filed, he confined his claim to Rs.5,950/- only.

The Defendant No. 6, who is the married daughter of Hadibandhu, did not contest the suit and was set ex parte. The Defendant Nos. 1 to 5 filed their written statement on the plea that since the time of Ananta, the Plaintiff was enjoying the confidence of the family of Defendants as a 'Mamaltakar' of the locality. In that capacity, the Plaintiff had the opportunity to look after and manage the affairs of the family of Defendants. The Defendants are illiterate and innocent persons. Taking advantage of the same together with the fact that properties were not recorded in the name of the Plaintiff by then, the Plaintiff incurred the loan from the Land Development Bank in the name of Ananta and Hadibandhu.Ananta and Hadibandhu were mere name lenders to the said loan. Ananta and Hadibandhu executed the deed of mortgage in favour of the Bank in good-faith. They had neither any idea of the loan nor did they ever receive any amount from the Bank towards the loan. Since the Plaintiff had incurred the loan for his personal requirement, he repaid the loan and taking advantage of the situation, he filed the suit, which is not maintainable in the eyes of law. Hence, they prayed for dismissal of the suit.

5. Taking into consideration the rival pleadings of the parties, learned Subordinate Judge, Jajpur framed the following issues:

1. Is the suit maintainable?

2. Has the Plaintiff cause of action to file the suit?

3. Is the Plaintiff entitled to the amount claimed from the Defendants?

4. To what relief, if any, the Plaintiff is entitled?

6. In order to substantiate their respective cases, the Plaintiff examined three witnesses out of whom P.Ws. 1 and 3 are the officers of Land Development Bank. The Plaintiff examined himself as P.W.2. The Plaintiff also exhibited documents, marked as Exts. 1 to 21, in support of his case. On the other hand, the Defendants examined four witnesses out of whom D.W.1 is the Defendant No.1 and D.W.2 is the Defendant No.2. D.W. 3 was an attesting witness to Ext.1, i.e. loan bond dated 19th January, 1970 executed by Ananta and Hadibandhu. D.W. 4 is an attesting witness to Exts. 11 and 12 by which Hadibandhu sold the land to Banshidhar and Siba Charan. The Defendants also exhibited certain documents in support of their case marked as Exts. A and B. Learned Subordinate Judge taking into consideration the rival contentions of the parties as well as the materials available on record passed the impugned judgment and decree, which are under challenge in this appeal.

7. On the date of hearing of the appeal, none appeared on behalf of the Respondents. As such, this Court proceeded with the hearing of the appeal in their absence.

8. Mr. Mohanty, learned counsel for the Appellants submitted that in the facts and circumstances of the case, learned trial court ought to have held the sale deeds executed by Ananta and Hadibandhu to be sham and fraudulent transactions and the Plaintiff had acquired no title under the said sale deeds. The Appellants (Defendants) have already filed T.S. No. 176 of 1980, which is pending before learned Civil Judge (Junior Division), Jajpur, for declaring said sale transactions to be null and void. Thus, learned trial court ought to have stayed the proceedings of the Money Suit awaiting disposal of T.S. No. 176 of 1980 in exercise of power under Section 10 of the C.P.C. He further submitted that since the Plaintiff had incurred the loan and repaid it, the Defendants are not liable to pay the decreetal amount to the Plaintiff, more particularly when the Defendants had never received a single pie from the Land Development Bank out of the sanctioned loan amount. The Plaintiff had knowledge about the loan incurred at the time of purchase of the suit land by him. Thus, the liabilities in respect of the suit land ought to have been saddled on the Plaintiff and the Defendants are not liable to pay the said loan amount. That apart, the suit is barred by limitation. Learned trial Court without considering these material aspects from its proper perspective passed the impugned judgment. As such, the same is not sustainable in the eyes of

law. He, therefore, prayed that the impugned judgment and decree are liable to be set aside.

9. Heard Mr. Mohanty, learned counsel for the Appellants and perused the materials available on record.

10. The issue of limitation raised by the Defendants-Appellants is not sustainable in view of the fact that Exts. 4 and 6 by which the Plaintiff repaid the loan amount to the tune of Rs.5,950/- were issued in between 20th June, 1978 and 28th June, 1978 (Exts. 4 to 4(b)) and the suit (M.S. No. 3 of 1981) was filed on 12th January, 1981. Thus, the suit is well within the statutory period and is not barred by limitation.

11. The next question arises as to whether the sale deeds executed by Ananta and Hadibandhu in between 23rd June, 1972 to 28th February, 1975 (Exts. 9 to 15) are sham and nominal transactions and were obtained fraudulently as alleged by the Defendants. The allegation of fraud must be specifically pleaded and proved by adducing evidence to that effect. On perusal of the plaint**,** no specific allegation of fraud appears to have been pleaded. The only allegation made in the plaint in that regard is that the Plaintiff had good relationship and acquaintance with the family of the Defendants as a 'Mamaltakar' and taking advantage of such relationship and the innocence of the Defendants, the sale deeds were executed. From the evidence adduced by the Defendants, it appears that the Defendant No.1 (D.W.1), the widow of Hadibandhu, had no knowledge about the transactions in question. The Defendant No.2, who had executed the sale deed (Ext. 15) in favour of the Plaintiff on 28th February, 1975 does not utter a single word either about the alleged fraud or that the transaction was a nominal one. D.W. 4 is an attesting witness to the sale deeds under Exts. 11 and 12 executed by Hadibandhu in favour of Banshidhar and Siba Charan from whom the Plaintiff purchased the land vide Ext. 13. D.W. 6 does not utter a single word, which would suggest that the transactions in question were fraudulent, nominal or conclusive one. There is no material on record to come to a conclusion that in fact, the sale transactions as per Exts. 9 to 15 are sham transactions and were nominal one. Hence, the contention of Mr. Mohanty, learned counsel for the Appellants is without any basis.

12. Mr. Mohanty, learned counsel for the Appellants further raised an issue to the effect that Ananta and Hadibandhu were mere name lenders to

Ext.1 and the loan amount was, in fact, received by the Plaintiff and not by said Ananta and Hadibandhu. In support of his case, he relied upon the testimony of D.W.3, who was an attesting witness to Ext.1, executed on 19th January, 1970. In his deposition, he has testified that he became an attesting witness to Ext.1 on the request of the Plaintiff. The solitary statement made by D.W.3 is not supported by any other material. Even if for the sake of argument, it is assumed that D.W.3 became an attesting witness to the Ext.1 at the instance of the Plaintiff, that by itself is not sufficient to come to a conclusion that the loan amount was received by the Plaintiff and not by Ananta and Hadibandhu, as alleged. On the other hand, the Plaintiff relied upon Exts. 1 to 7, which are documents relating to loan transactions and were produced by P.Ws.1 and 3, who are officials of the Land Development Bank. The documents marked as Exts. 1 to 7 clearly establishes that the loan in question was sanctioned in favour of Ananta and Hadibandhu who executed Ext.1 by mortgaging the land purchased by the Plaintiff. It is well established that Exts. 1 to 7 are produced from the custody of the Bank. Ext. 8 is an application dated 26th June, 1979 made by the Plaintiff to the Sale Officers of Bank seeking permission to deposit Rs.2,000/- towards the part satisfaction of the loan amount and further seeking four to eight days time to deposit the balance amount. The said application under Ext. 8 clearly shows that consequent upon failure on the part of the Plaintiff to repay the loan amount, the Plaintiff made such an application for repayment of the loan amount to save the property. No rebuttal evidence has been adduced by the Defendants to disbelieve the same. Thus, it is clearly established that the loan amount was, in fact, received by Ananta and Hadibandhu and for non-payment of the loan amount, the properties were going to be sold in public auction for which the Plaintiff in order to save the property made an application under Ext.8. As such, the contention raised by Mr. Mohanty, learned counsel for the Appellants to the effect that the loan amount was received by the Plaintiff is not believable, more particularly when the loan transaction was made much prior to the sale transactions under Exts.9 to 15.

13. The next question that arises for consideration is whether learned trial Court should have stayed further proceedings of the present suit and waited till disposal of T.S. No. 176 of 1980 filed by the Defendants for setting aside the aforesaid sale transactions. Suffice it is to say that no prayer under Section 10 of the C.P.C. was made by the Defendants to stay the further proceedings of the present suit on the ground of pendency of T.S. No. 176 of 1980. Further, the result of the suit if decreed in favour of the Defendants

will not influence the impugned judgment and decree, as the issue involved in the present suit is with regard to recovery of the loan amount paid by the Plaintiff on behalf of Ananta and Hadibandhu, who had incurred the loan. Thus, the question of stay of further proceedings of the present suit awaiting disposal of T.S. No. 176 of 1980 does not arise at all.

14. In that view of the matter, I find no infirmity in the impugned judgment and decree.

15. Accordingly, this appeal being devoid of any merit stands dismissed. Parties shall bear their own cost.

16. Registry is directed to send back the L.C.R. forthwith to the trial Court.

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2021 (II) ILR - CUT- 624

K.R.MOHAPATRA, J.

W.P.(C) NO. 2472 OF 2021

ODISHA STATE ROAD TRANSPORT CORP. ……..Petitioner

.V.

ARSS BUS TERMINAL PVT. LTD. ……..Opp. Party

(A) ARBITRATION & CONCILIATION ACT, 1996 – Section 16 (1) (a) – Whether the arbitration clause which forms or is a part of the concession Agreement perish/extinguish with the declaration of the concession agreement as void? – Held, the principle of Kompetenz Kompetenz which is recognised under Indian law leaves the adjudicatory power of the Arbitral Tribunal unaffected over any objection with regard to validity of arbitration agreement even the main contract between the parties is affected by fraud, undue influence or otherwise.

(B) ARBITRATION – Whether the arbitration agreement/ clause is chargeable with stamp duty? – Held, No.

(C) ARBITRATION AND CONCILIATION ACT, 1996 – Application filed under 16(2) of the Act – But the same was rejected by the Arbitral

Tribunal – Challenging the same Writ petition filed – Maintainability of Writ petition questioned – Held, the Writ petition is not maintainable.

Case Laws Relied on and Referred to :-

1. (2007) UKHL 40 : Fili Shipping Co. Ltd. and Ors Vs. Premium Nafta Products Ltd. & Ors.
2. 2021 SCC : N.N. Global Mercantile Pvt. Ltd Vs. Indo Unique Flame Ltd. & Ors.
3. (2021) 2 SCC 1 : Vidya Drolia & Ors. Vs. Durga Trading Corporation.
4. (2014) 6 SCC 677 : Swiss Timing Limited Vs. Commonwealth Games 2010 Organising Committee.
5. (2020) 2 SCC 455 : Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited
6. AIR 1959 SC 1362 : Union of India Vs. Kishorilal Gupta & Bros.
7. AIR 1974 SC 1579 : Jaikishan Dass Mull Vs. Luchhiminarain Kanoria & Co.
8. (2007) 3 Arb LR 545 : Andritz Oy. rep. through Power of Attorney Agent, Mr. Siraj Ahmad, New DelhiVs. Enmas Engineering Pvt. Ltd., rep. by its Director and Principal Officer, Chennai and Anr.
9. (2016) 10 SCC 386 : A. Ayyasamy Vs. A. Paramasivam & Ors.
10. (2009) 1 SCC 267 : National Insurance Company Limited Vs. Boghara Polyfab Private Limited.
11. (2016) 10 SCC 813 : A. Ayyasamy (supra) and Sasan Power Limited -Vs. North American Coal Corporation (India) Private Ltd.
12. 2020 SCC Online SC 1165 : Punjab State Power Corporation Limited Vs. Emta Coal Limited and Anr.
13. (2020) 15 SCC 706 : Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and Another
14. 2021 SCC Online SC 8 : Bhaven Construction Through Authorised Signatory Premjibhai K. Shah Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Another
15. (2005) 8 SCC 618 : SBP and Co. Vs. Patel Engineering Ltd. and Another.
16. (1962) 2 SCR 747 : Hira Lal Patni Vs. Sri Kali Nath.
17. AIR 1983 Ori 31 : Gopinath Deb Vs. Budhia Swain and Ors.
18. (2015) 13 SCC 477 : Govind Rubber Limited –Vs. Louis Dreyfus Commodities Asia Private Limited
19. (2019) 11 SCC 461 : Caravel Shipping Services Private Limited Vs. Premier Sea Foods Exim Private Limited
20. (2019) 9 SCC 209 : Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Limited.
21. 2020) 4 SCC 612 : Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and Other Charities and Ors. Vs. Bhaskar Raju And Brothers & Ors.

For Petitioner : Mr. Sanjit Mohanty, Sr. Adv.
Mr. Subrat Mishra.

For Opp. Party : M/s. Naresh Thacker and Mr. Manish Panda

JUDGMENT Date of Judgment : 16.07.21

K.R.MOHAPATRA, J.

1. This writ petition has been filed assailing the order dated 11.12.2020 (Annexure-7) passed by learned Arbitral Tribunal in Arbitration Proceeding No.68 of 2019, whereby it rejected an application filed under Section 16(2) of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act').

2. Short narration of facts relevant for proper adjudication of this case are that the Government of Odisha in the Department of Commerce and Transport published notice on 14.12.2009 informing about issuance of Request for Proposal (RFP) and inviting tender from reputed Infrastructure Developers for development of the Baramunda Bus Terminal, Bhubaneswar along with commercial facilities through public private partnership mode. In the said tender process, ARSS Infrastructure Project Limited (ARSS Infra) was selected as the preferred bidder. Accordingly, on 26.07.2010 Letter of Acceptance was issued by the Secretary to Government of Odisha, Department of Commerce and Transport in favour of the ARSS Infra. A Concession Agreement was executed between the General Manager of Orissa State Road Transport Corporation (OSRTC) (the Petitioner) and Opposite Party- ARSS Infra on 16.03.2011 (Annexure-1). Assailing the validity of the execution of such Concession Agreement, Writ Petition (PIL) No.30961 of 2011 (for short 'PIL') was filed before this Court with a prayer to quash the Concession Agreement dated 16.03.2011 along with other reliefs. The Petitioner, Opposite Party as well as ARSS Infra were arrayed as opposite parties to the said PIL.

3. This Court, vide order dated 20.12.2012 (Annexure-2), holding that the Concession Agreement being in contravention of Article 299 of the Constitution of India is not sustainable in law, allowed the said PIL with the following orders:

> *"44. Having answered all the points in favour of the petitioner due to non-compliance of statutory and constitutional provisions referred to above by the opposite parties, the impugned agreement is void ab-initio and accordingly concessionaire cannot have any right or interest over the land in question on the basis of the said void document, which is opposed to the public policy as provided under Section 23 of the Contract Act. For the reasons stated supra, the writ petition succeeds. The impugned agreement dated 16.03.2012 under Annexure-11 is hereby quashed.*
>
> *No order as to costs."*

3.1 The judgment and order dated 20.12.2012 remained unchallenged and attained its finality. Subsequently, invoking Clause-16 of the Concession Agreement (Annexure-1) the Opposite Party filed an application under Section 11 of the Arbitration Act in ARBP No.53 of 2016 before this Court for appointment of Arbitrators. Clause-16 of the Concession Agreement deals with dispute resolution, which reads as follows:-

> ***"16. DISPUTE RESOLUTION***
>
> ***xxx xxx xxx***
>
> ***16.3. ARBITRATION***
>
> *(a)* ***Arbitrators***
>
> *In the event the dispute or difference or claim, as the case may be, is not resolved, as evidenced by the signing of the written terms of settlement by the Parties, within 30 (thirty) days of reference for amicable settlement and/or settlement with the assistance of Expert, as the case may be, the same shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one each to be appointed by the Grantor and the Concessionaire and the third to be appointed by the two arbitrators so appointed, who shall act as chairperson of the Arbitral tribunal."*

Although the plea with regard to sustainability of the arbitration clause after quashing of the Concession Agreement was raised by the Petitioner, this Court vide its order dated 15.11.2019 (Annexure-3), allowed the application under Section 11 of the Arbitration Act appointing arbitrators and leaving open for the parties to raise all issues before the arbitrators. The order under Annexure-3 passed by this Court was assailed by the petitioner before the Hon'ble Supreme Court in SLP(C) No.10086 of 2020, which was dismissed vide order dated 10.06.2020 (Annexure-4) confirming the order of this Court. Accordingly, Arbitration Proceeding No.68 of 2019 was registered on the file of the Arbitral Tribunal at the instance of the Opposite Party. The Petitioner in terms of the liberty granted by this Court, filed an application under Section 16(2) of the Arbitration Act before the Arbitral Tribunal raising certain grounds with regard to existence of the arbitration clause in the Concession Agreement (Annexure-1) and jurisdiction of the Arbitral Tribunal to arbitrate the dispute. The Opposite Party filed its objection to the said application. Considering the rival contentions of the parties, the Arbitral Tribunal passed the impugned order under Annexure-7. Initially, the Petitioner filed CMP No.690 of 2020 assailing the order under Annexure-7, which was converted to Writ Petition (Civil) pursuant to order dated 19.01.2021. Accordingly, this Writ Petition (Civil), i.e., W.P.(C) No.2472 of 2021 was registered. The

Opposite Party filed its counter affidavit raising objection with regard to maintainability as well as merit of the Writ Petition.

4. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner contended that when the Concession Agreement dated 16.03.2011 (Annexure-1) has been held to be *void ab initio* and unenforceable vide judgment dated 20.12.2012 (Annexure-2), the arbitration clause/agreement, which is a part and parcel of the Concession Agreement itself perishes with it. OSRTC has no independent relationship with the Opposite Party. It was authorized by the Government of Odisha to execute the Concession Agreement on its behalf. When the Concession Agreement itself has been declared null and void holding that OSRTC has no authority to execute the Concession Agreement and the execution is violative of Article 299 of the Constitution of India and Section 23 of the Contract Act, there is no signature or agreement in writing and the document (Concession Agreement) does not exist at all. The aforesaid findings extends to and impeaches the arbitration clause/agreement contained in the Concession Agreement.

5. Elaborating his submission Mr. Mohanty, learned Senior Advocate submitted that Clause 16 is an integral part of the Concession Agreement. Though arbitration clause contained in the Concession Agreement is regarded as a separate agreement notionally, but it has no independent and separate existence as it is contained in one document. It exists during the life time of the Concession Agreement. Quashing of the Concession Agreement by this Court affects the existence of the arbitration clause as it perishes along with the Concession Agreement itself. An arbitration agreement must satisfy the requirements of Section 7 of the Arbitration Act and Sections 2(g), (j), 10 and 23 of the Contract Act. The arbitration clause being a part of the Concession Agreement itself comes under first part of Section 7(2) of the Arbitration Act. Therefore, it must satisfy the requirement of Sections 7(3) and 7(4)(a), which requires that the arbitration agreement shall be in writing and signed by the parties. In view of the categorical finding of this Court to the effect that there is no execution of the agreement dated 16.03.2011 (Annexure-1) there remains no signature/signing of the Concession Agreement which contained the Arbitration Agreement in it. Thus, apart from the fact that the arbitration clause has perished with the quashing of the Concession Agreement (Annexure-1), it also does not satisfy the requirements of Section 7(3) read with Section 7(4)(a) of the Arbitration Act. In support of his submission, Mr. Mohanty, learned Senior Advocate relied

upon the case of ***Fili Shipping Co. Ltd. and others v Premium Nafta Products Ltd. and others*** reported in (2007) UKHL 40, which reads thus:

> *"17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.* (*emphasis supplied*)
>
> *18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.*
>
> *xx xx xx*
>
> *35. That is not this case, however. The owners' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect."*

He also relied upon the case of ***N.N. Global Mercantile Pvt. Ltd -V- Indo Unique Flame Ltd. and Others*** , reported in 2021 SCC Online SC 13, wherein, it is held that if an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes.

5.1 He further contended that the arbitration agreement must satisfy the provisions of the Contract Act specifically Sections 2(g), 2(j), 10 and 23 of

the Contract Act. It cannot be bereft of the provisions of Contract act. In support of his case, he relied upon the case of ***Vidya Drolia and Others –v- Durga Trading Corporation***, reported in (2021) 2 SCC 1 in which it is held that 'Agreement' is not defined in the Arbitration Act, albeit it is defined under Section 10 of the Contract Act. It is also held therein that Arbitration Agreement must satisfy the objective mandates of the Law of Contract to qualify as an agreement. Clause (g) and (h) of Section 2 of the Contract Act states that an agreement not enforceable by law is void and an agreement enforceable by law is a contract.

5.2 He also relied upon the decision of the Hon'ble Supreme Court in the case of ***Swiss Timing Limited -v- Commonwealth Games 2010 Organising Committee***, reported in (2014) 6 SCC 677, which laid down that undoubtedly, in cases where the Court can come to a conclusion that the contract is void without receiving evidence, it would be justified in declining reference to arbitration but such cases would be few and isolated.

5.3 He further relied upon the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited -v- Northern Coal Field Limited***, reported in (2020) 2 SCC 455 in which relying upon recommendation of the 246th report of the Law Commission, Hon'ble Supreme Court held that the judicial intervention is only restricted to situations where the Court finds that the arbitration agreement does not exist or is null and void. However, if the Judicial Authority is of the opinion that *prima facie* the arbitration agreement exists then it can refer the dispute to arbitration and leave the existence of arbitration agreement to be finally determined by the Arbitral Tribunal.

6. It is his contention that the Concession Agreement under Annexure-1 itself being violative of Section 23 of the Contract Act and there is no valid contract in the eyes of law. Thus, the findings in the PIL are also applicable and extend to the arbitration clause contained in the main agreement under Annexure-1. As such, the arbitration agreement is void and not enforceable being in contravention of Sections 2(g), 2(j) as well as Sections 10 and 23 of the Contract Act. The invalidity of the arbitration agreement is governed under the principle of *ex nihilo nil fit*, which means '*nothing comes out of nothing'*. When there is no signing of the contract (Concession Agreement) and there is no agreement in writing, the arbitration clause/agreement does not satisfy the requirements of Section 7 of the Arbitration Act.

7. Relying upon the decision in the case of ***Union of India –v- Kishorilal Gupta & Bros.,*** reported in AIR 1959 SC 1362, he submitted that when an arbitration clause is a collateral term of contract and an integral part of the contract, in such a case, howsoever comprehensive the terms of the arbitration clause may be, the existence of the contract is a necessary condition for its operation. In other words, it perishes along with the contract. Since the Concession Agreement has been declared null and void *ab initio*, the necessary inference would be that it had never legally come into existence. Thus, there cannot be any existence of arbitration clause in absence of the main contract itself. He also relied upon the case of ***Jaikishan Dass Mull -v- Luchhiminarain Kanoria & Co.,*** reported in AIR 1974 SC 1579 and ***Andritz Oy. rep. through Power of Attorney Agent, Mr. Siraj Ahmad, New Delhi–V- Enmas Engineering Pvt. Ltd., rep. by its Director and Principal Officer, Chennai and another,*** reported in (2007) 3 Arb LR 545. He, therefore, contended that if a contract is void ab initio, the arbitration clause, which is an integral part of the said agreement, could not be a life boat in a sinking ship but a lifeless boat in a ship which never commenced its voyage.

8. Section 16 (1)(b) of the Arbitration Act is an enabling provision, which, unlike Section 33 of the Arbitration Act, 1940, now permits the Arbitral Tribunal to decide the question relating to existence of the arbitration clause. The principle of separability of Arbitration Agreement empowers an Arbitral Tribunal to rule and decide on its existence, validity or rescission before delving into adjudication of the questions referred by the Court. It is his submission that in the case of ***A. Ayyasamy –v- A. Paramasivam & Others***, reported in (2016) 10 SCC 386, it is held in paragraph 33 that the severability of an Arbitration Agreement is a doctrinal development of crucial significance, for it leaves the adjudicatory power of the Arbitral Tribunal unaffected over any objection that the main contract between the parties is affected by fraud or undue influence. The doctrine of severability and separability of the arbitration agreement is only applicable when a determination is required by the Arbitral Tribunal, save and except where there is already a prior decision by the High Court quashing the agreement itself as in the present case. Validity of a contract under Section 7 of the Act as well as under the provision of the Contract Act is necessary for operation of such doctrine/concept. A concept cannot operate in vacuum, where there is no contract at all. Therefore, the Arbitral Tribunal is required to consider whether the invalidity of the Concession Agreement (Annexure-1)

upon its quashing by this Court makes the arbitration clause/agreement *non-est* in the eyes of law. That having not been considered, the impugned order under Annexure-7 is not sustainable. He, further challenged the impugned order under Annexure-7 contending that when the Arbitral Tribunal accepted the Concession Agreement (Annexure-1) to have been quashed by this Court holding it to be *void ab initio* and unenforceable and it could not have held that "*notwithstanding the fact that the Concession Agreement is not in existence, the arbitration clause remained unaffected"*. He, however, distinguished the applicability of the case law in ***National Insurance Company Limited –v-Boghara Polyfab Private Limited*** reported in (2009) 1 SCC 267*,* ***A. Ayyasamy (supra) and Sasan Power Limited -v- North American Coal Corporation (India) Private Ltd,*** reported in (2016) 10 SCC 813. When it is categorically held by this Court that the Petitioner had no authority to execute the agreement dated 16.03.2011 (Annexure-1) and held it to be violative of Article 299 of the Constitution of India and Section 23 of the Contract Act, the Arbitral Tribunal ought to have taken note of the same and adjudicated as to whether the invalidity of the main agreement extends to arbitration clause or not. Thus, the Arbitral Tribunal has not exercised the jurisdiction conferred on it while adjudicating the application under Section 16 of the Arbitration Act.

9. It is contended that the adjudication of the rights and obligation under the Work Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act. In the present case, the Concession Agreement being inadequately stamped, as held by this Court and quashed on the grounds of non-execution being *void ab initio* and unenforceable in the eyes of law, the original agreement cannot be made available anymore to be stamped and there cannot be impounding of the copy of the agreement to enforce the arbitration clause. However, the Opposite Party made a desperate attempt by alleging in paragraph 23 of the counter affidavit that Rs.100/- being the adequate stamp on which the agreement was executed, the arbitration clause is not suffering from the deficit of stamp duty. Such a contention is not sustainable as the amount involved being Rs.56.00 crores, the Arbitration Agreement/clause was required to be stamped accordingly. As the agreement was insufficiently stamped as per Article 35(a)(v) read with 23(b) of Schedule 1A (Stamp Duty on Instruments-Orissa Amendments) of the Stamp Act, the Arbitration Agreement cannot be given effect to.

10. He, further submitted that in view of the ratio decided in the case of ***Punjab State Power Corporation Limited –v- Emta Coal Limited and Another***, reported in 2020 SCC Online SC 1165, ***Deep Industries Limited – v- Oil and Natural Gas Corporation Limited and Another***, reported in (2020) 15 SCC 706, a writ petition under Article 227 of the Constitution of India assailing the order under Section 16 of the Arbitration Act by the Arbitral Tribunal is maintainable as it is patently illegal and perverse. He also relied upon the recent judgment passed by the Hon'ble Supreme Court in the case of ***Bhaven Construction Through Authorised Signatory Premjibhai K. Shah -V- Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Another*** reported in 2021 SCC Online SC 8 in which it is held that in rare and exceptional circumstances, the High Court can interfere with the orders of the Arbitral Tribunal in exercise of power under Article 227 of the Constitution of India. The present case being one of *'rare and exceptional circumstance'*, this Court has jurisdiction to entertain the Writ Petition (Civil) under Articles 226 and 227 of the Constitution of India.

10.1 Accordingly, he prayed for setting aside the impugned order under Annexure-7 and to declare that the Arbitration Tribunal has no jurisdiction to proceed with the arbitration proceeding.

11. Mr. Thacker, learned counsel for the opposite party while defending the order under Annexure-7 refuted the contentions raised by Mr. Mohanty, learned Senior Advocate. He mainly harped on maintainability of the writ petition under Article 227 of the Constitution of India. It was his contention that the writ petition in the guise of an application under Section 34(2) of the Arbitration Act is not maintainable and should be dismissed at the threshold.

12. It was his submission that after disposal of PIL the Opposite Party was informed by the Petitioner that it was still desirous of implementing the project and was in process of obtaining legal opinion to challenge the said order under Annexure-2 or to explore other mechanism for regularizing the defect including ratification of the Concession Agreement. Despite such assurances, the Petitioner unilaterally terminated the Concession Agreement under intimation to the Opposite Party vide letter dated 30.04.2013 (Annexure-5) taking recourse to the provision of *force majeure.* In that process, the Petitioner dishonored the legal relationship established between the Petitioner and the Opposite Party by issuance of Letter of Acceptance (LOA) dated 26.07.2010. The Petitioner also refused to compensate the

Opposite Party for no fault of the later. As such, the Opposite Party had no other option than to invoke the Arbitration Clause by issuing notice dated 14.03.2016 (Annexure-3). It subsequently filed an application under Section 11 of the Arbitration Act for appointment of arbitrators (ARBP No.53 of 2016). The Petitioner contested the said application under Section 11 of the Arbitration Act raising an objection that the Concession Agreement under Annexure-1 being *void ab initio* due to non-compliance of Article 299 of the Constitution of India, opposed to the public policy as well as being improperly stamped, the Arbitration Clause was not enforceable. The Hon'ble Chief Justice, however, appointed the arbitrators vide its order dated 15.11.2019 (Annexure-3) thereby rejecting the objections raised by the Petitioner. This Court also did not impound the Arbitration Agreement on account of alleged insufficiency of stamp duty. Although the Petitioner assailed the said order under Annexure-3 before the Hon'ble Supreme Court, in SLP (C) No.10086 of 2020, the said SLP was dismissed vide order dated 10.06.2020 (Annexure-4) confirming the order of this Court. After filing of the statement of claim by the Opposite Party before the Arbitral Tribunal on 05.02.2020 (Annexure-5), the Petitioner filed an application under Section 16 of the Arbitration Act raising an issue with regard to the jurisdiction of the Arbitral Tribunal to arbitrate the dispute. The Opposite Party has also filed its objection (Annexure-6) to the said petition. Considering the rival contentions of the parties and upon hearing the parties at length, the Arbitral Tribunal vide order dated 11.12.2020 (Annexure-7) rejected the petition under Section 16 of the Arbitration Act, which is under challenge in this writ petition. Both the petitions under Section 16 of the Arbitration Act as well as the present writ petition are outcome of misuse of law.

13. Since efficacious statutory remedy is available to the Petitioner to challenge the order under Annexure-7, the writ petition is not maintainable. The Arbitration Act is a complete Code itself and has provided various procedures and fora for the redressal of grievances. Section 5 of the Arbitration Act limits judicial intervention except when provided for in the Arbitration Act. Section 16(5) of the Arbitration Act stipulates that once a challenge to its jurisdiction is rejected by the Arbitral Tribunal (like the present one), it can proceed with the Arbitral proceeding and make an Arbitral award. Section 16(6) of the Arbitration Act is a statutory and efficacious remedy available to a party aggrieved by the order rejecting a challenge to the Arbitral Tribunal's jurisdiction, which provides that an order rejecting a challenge to an Arbitral Tribunal's jurisdiction, can be made by

filing an application for setting aside the award under Section 34 of the Arbitration Act. Thus, the Petitioner ought to have waited for a final award from the Arbitral Tribunal to assail the same. In support of his submission, Mr. Thacker, learned counsel for the Opposite Party relied upon the case of ***Bhaven Construction (supra)***, wherein at paragraphs 16 and 17, it is held as follows:

> *"16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as 'Recourse to a Court against an Arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.*
>
> *17. In any case, the hierarchy in our legal framework mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:*
>
> *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation." (emphasis supplied)*

He further relied upon the case of ***SBP and Co. –v- Patel Engineering Ltd. and Another***, reported in (2005) 8 SCC 618, wherein it has been held as follows:-

> *"7……. Chapter IV deals with the jurisdiction of Arbitral Tribunals. Section 16 deals with the competence of an Arbitral Tribunal, to rule on its jurisdiction. The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. A person aggrieved by the rejection of his objection by the Tribunal on its jurisdiction or the other matters referred to in that section, has to wait until the award is made to challenge that decision in an appeal against the Arbitral award itself in accordance with Section 34 of the Act. But an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under Section 37 of the Act. Section 17 confers powers on the Arbitral Tribunal to make interim orders.*

Chapter V comprising Sections 18 to 27 deals with the conduct of Arbitral proceedings. Chapter VI containing Sections 28 to 33 deals with making of the Arbitral award and termination of the proceedings.....

xx xx xx

45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

He further submitted that the present writ petition under Article 227 has been filed in the garb of a petition under Section 34 of the Arbitration Act. It is his submission that in the present writ petition under Article 227 of the Constitution of India, the Petitioner has sought for setting aside the impugned order on the grounds set forth under Sections 34(2)(a)(ii) and 34(b)(i), explanation 1(ii) and (iii) of the Arbitration Act. Thus, the Petitioner has essentially filed an application under Section 34 of the Arbitration Act in the garb of an application under Article 227 of the Constitution. Article 227 of the Constitution of India provides for discretionary powers of this Court, which ought to be exercised in the absence of an alternative and efficacious remedy and in exceptional circumstances. The case at hand, does not fall under the aforesaid category. In the application under Section 16 of the Arbitration Act, the Petitioner has not made out a case of any *mala fide* or bad faith on the part of the opposite party, which would enable the Court to exercise jurisdiction under Article 227 of the Constitution of India. The said plea for the first time has been raised before this Court that too in the rejoinder dated 10.02.2021, which needs no consideration. No case of patent

lack of inherent jurisdiction, i.e., a perversity being not made out, the case of the Petitioner warrants no interference under Article 227 of the Constitution.

14. Patent lack of inherent jurisdiction is understood to mean that the Court could not have *seisin* of the case because the subject matter is wholly foreign to its jurisdiction or such other grounds which could have the effect of rendering the Court entirely lack of jurisdiction in respect of the subject matter of the suit or the parties to it. In support of his case, he relied upon the case of ***Hira Lal Patni –v- Sri Kali Nath,*** reported in (1962) 2 SCR 747.

14.1 He also relied upon the case of ***Gopinath Deb –v- Budhia Swain and others***, reported in AIR 1983 Ori 31 at paragraph-9 it is held as follows:

> *"9. Inherent lack of jurisdiction means a power or jurisdiction which does not at all exist or vest in a Court. To put it otherwise, a Court can be said to lack inherent jurisdiction when the subject-matter before it is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction. Competence of a Court to try a case goes to the very root of jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction. For example, if a suit for declaration of title has been filed in a criminal Court all proceedings relating thereto in that Court are null and void. In this connection, we may usefully refer to the case of Hira Lal Patni v. Kali Nath, AIR 1962 SC 199 where it was observed as follows:— (at p. 200)*
>
> *".....The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it....."*

14.2 The ground taken by the Petitioner that the Arbitral Tribunal had no jurisdiction since the Concession Agreement has been quashed in the PIL and therefore, the arbitration clause also perished with it, cannot be termed as patent lack of inherent jurisdiction as the Arbitration Agreement is separable from the substantive contract in which it is contained. Even if the substantive contract is null and void, that does not automatically render the arbitration agreement as null and void. Thus, the Arbitral Tribunal has acted well within its bounds in passing the impugned order taking into consideration the provision under Section 16(1)(b) of the Arbitration Act.

15. The argument of the Petitioner that the principle of separability does not save the Arbitration Clause when a party alleges that the main agreement was executed by a person with no authority, is factually incorrect as the

Arbitration Clause was signed by the person having due authority to bind the Petitioner. An Arbitration Clause does not require execution/signature as long as parties are consensus *ad idem* regarding the same. Even if the signatory did not have authority to execute the Concession Agreement that does not *ipso facto* disentitle him to enter into an Arbitration Agreement. Thus, the arbitration agreement clause remains unaffected.

16. Assuming though not conceding that if this Court takes a view that the arbitration clause is improperly stamped, the remedy would be to impound the document and not to declare the Arbitral proceedings a nullity. Thus, no patent lack of inherent jurisdiction exists, as alleged.

17. In addition to the above, the argument of learned counsel for the Petitioner to the effect that the impugned order is perverse as it is unreasonable, which is evident from the order itself, is not correct. The learned Arbitral Tribunal after hearing the parties, passed the impugned order referring to the arguments and principle of law involved in it and came to a conclusion. Thus, there is no patent lack of inherent jurisdiction for this Court to exercise its power under Article 227 of the Constitution of India. In the case of ***Emta Coal Ltd. (supra)***, the Hon'ble Supreme Court at paragraph-4 laid down the following principle:-

> *"4. We are of the view that a foray to the writ Court from a section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever - it must be the perversity of the order that must stare one in the face."*

Thus, this Court should only interfere when the perversity stares on the face of the impugned order and no argument is required to be advanced to establish such perversity, which constitutes patent lack of inherent jurisdiction. In the case at hand, the Petitioner in order to challenge the impugned order has advanced a lengthy argument on its merits and has also relied upon several case laws. Thus, it has miserably failed to establish its case on the parameters set out by the Hon'ble Supreme Court in ***Emta Coal Ltd*. *(supra)***. Thus, Mr. Thacker, learned counsel for the Opposite Party urged before this Court that before delving into judicial review of the impugned order the issue of maintainability of the petition is to be decided on the touch stone of established parameters as laid down by the Hon'ble Supreme Court in ***Bhaven Construction (supra)***, ***Deep Industries (supra)***and ***Emta Coal Ltd. (supra)***.

18. In addition to the issue of maintainability, Mr. Thacker, learned counsel for the Opposite Party defended the impugned order also on its merit.

19. It is his submission that the order passed in PIL does not render any finding regarding validity of the arbitration clause, which is admittedly an agreement separate from Concession Agreement. A conspectus of the pleadings of the PIL and final order dated 20.12.2012, it can very well be inferred that no issue with regard to validity of the arbitration clause was raised in the PIL. The validity of the arbitration clause was also not the subject matter in dispute in the said writ petition. Thus, the arbitration clause/agreement which is admittedly a separate agreement and independent of Concession Agreement can be in no manner rendered invalid and/or not enforceable because of the finding in order dated 20.12.2021. In order to elaborate the position of law on separability of the arbitration agreement, Mr. Thacker, learned counsel for the Opposite Party submitted that Section 7 of the Arbitration Act defines an arbitration agreement. It provides that an arbitration agreement is required to be in writing. However, it is settled law that the arbitration agreement need not be signed. It is the requirement of an arbitration agreement to be in writing that distinguishes it from an oral contract, which (in addition to a written contract) is also permitted under the Contract Act. Further, Section 7 provides for arbitration of disputes in respect of defined legal relationship *'whether contractual or not'*. Under the principle of *kompetenz kompetenz,* which is recognized under the Indian law, the Arbitration Clause is an agreement independent and separate from the Concession Agreement, as would be evident from the Section 16(1)(a) of the Arbitration Act. Section 16(1)(b) of the Arbitration Act provides that a decision to the effect that the Concession Agreement is only null and void shall not entail *ipso jure*, the invalidity of the arbitration clause. Thus, quashing of the Concession Agreement in the PIL rendering it to be *void ab initio* and opposed to public policy is to be read in the light of Section 16(1)(b) of the Arbitration Act and thus does not render the arbitration clause invalid and unenforceable. Distinguishing the ratio decided in ***Kishorilal Gupta (supra)***, Mr. Thacker, learned counsel submitted that the ratio laid down therein was by interpreting the provisions of the Arbitration Act 1940, which did not have any provision akin to Section 16(1)(b) of the Arbitration Act. Thus, the ratio decided in ***Boghara Polyfab Private Limited (supra)*** is squarely applicable to the case at hand. In support of his case, with regard to the separability of the arbitration clause from the Concession Agreement,

Mr. Thacker, learned counsel relied upon the case of ***M/s. N.N. Global Mercantile Private Limited (supra)***, ***Boghara Polyfab Private Limited (***supra) and ***SMS Tea Estates Private Limited –v- Chandmari Tea Company Private Limited***, reported in (2011) 14 SCC 66, ***A. Ayyasamy (supra)***, ***Sasan Power Limited (supra)*** and ***Fili Shipping Co. Limited (supra)***. Thus, he submitted that an arbitration clause is separable from the substantive agreement although it forms part of it and remains unaffected albeit quashing of Concession Agreement.

20. He further submitted that parties were in consensus *ad idem* regarding the Arbitration Clause and the Arbitration Clause also satisfies the requirements of the Arbitration Act. Elaborating his submission, Mr. Thacker, learned counsel for the Opposite Party, submitted that the Arbitration Clause as in the Concession Agreement was available in RFP issued by the Petitioner and it was accepted by the Opposite Party without any negotiation. The Arbitration Clause does not necessarily have to be signed. Assuming though not conceding that the Arbitration Clause was required to be signed, it does not require the signature as per Article 299 of the Constitution of India. Hence, signing the agreement by the General Manager, (Admn.) OSRTC on behalf of the Petitioner does satisfy the requirement of signing the arbitration agreement. The requirements of Contract Act are satisfied in respect of the Arbitration Clause, inasmuch as there was offer, unconditional acceptance, consensus *ad idem*, valid and lawful consideration, valid and lawful object etc. The only additional requirement under Section 7 of the Arbitration Act is that the agreement should be in writing which is also satisfied/accepted. The Petitioner claims that the Arbitration Clause was not signed by a person duly authorized in this regard, which is factually incorrect. An arbitration agreement need not be signed to be binding on the party as held in the case of ***Govind Rubber Limited –v- Louis Dreyfus Commodities Asia Private Limited***, reported in (2015) 13 SCC 477, wherein it is held as follows:

> *"17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties". Similarly, Russell on Arbitration (21st Edn.) opined, relying on Astro Vencedor Compania Naviera S.A. v. Mabanaft GmbH [(1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the*

parties have agreed. The learned author has also referred to another judgment in Paul Smith Ltd. v. H and S International Holdings Inc. [(1991) 2 Lloyd's Rep 127] in order to emphasise that in construing an arbitration agreement the court should seek to "give effect to the intentions of the parties". (See p. 28 of the book.)"

In the case of ***Caravel Shipping Services Private Limited –v- Premier Sea Foods Exim Private Limited*** reported in (2019) 11 SCC 461, paragraph -8 of which reads as follows:

"8. In addition, we may indicate that the law in this behalf, in Jugal Kishore Rameshwardas v. Goolbai Hormusji [Jugal Kishore Rameshwardas v. Goolbai Hormusji, AIR 1955 SC 812] , is that an arbitration agreement needs to be in writing though it need not be signed. The fact that the arbitration agreement shall be in writing is continued in the 1996 Act in Section 7(3) thereof. Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3)."

20.1 Thus, the argument raised by learned counsel for the Petitioner is fallacious. Although the Concession Agreement is held to be in violation of Article 299 of Constitution, public policy as well as Section 23 of the Contract Act, the same does not affect the arbitration agreement at all.

21. So far as the contentions with regard to adequacy of stamp duty on the arbitration agreement is concerned, it is submitted by Mr. Thacker, learned counsel for the Opposite Party that the Stamp Act (Orissa Amendment) does not provide for payment of stamp duty on an arbitration agreement. The said issue was also raised in the petition under Section 11 of the Arbitration Act. The law, as it then was, enjoined upon this Court to impound the agreement, if it found the same to be insufficiently stamped. This Court being satisfied with the objection raised by the Opposite Party although granted liberty to the Petitioner to raise all issues before the Arbitral Tribunal, but proceeded to appoint the arbitrators without impounding the arbitration agreement. Thus, this Court while appointing arbitrators was satisfied that the arbitration agreement did not require impounding. Mr. Thacker, learned counsel for the Opposite Party also relied upon the case of ***N.N. Global Mercantile Private Limited (supra)*** wherein it has been held as follows:-

"6. *xxx* *xxx* *xxx*

6.4 The arbitration agreement contained in the Work Order is independent and distinct from the underlying commercial contract. The arbitration agreement is an agreement which

provides the mode of dispute resolution. Section 3 of the Maharashtra Stamp Act does not subject an arbitration agreement to payment of Stamp Duty, unlike various other agreements enlisted in the Schedule to the Act. This is for the obvious reason that an arbitration agreement is an agreement to resolve disputes arising out of a commercial agreement, through the mode of arbitration. On the basis of the doctrine of separability, the arbitration agreement being a separate and distinct agreement from the underlying commercial contract, would survive independent of the substantive contract. The arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence, or cannot be acted upon on account of non-payment of Stamp Duty.

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7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification."

(emphasis supplied)

6.6 In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of Stamp Duty on the substantive contract. The adjudication of the rights and obligations under the Work Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act.

xxx xxx xxx

6.8 In our view, the decision in ***SMS Tea Estates*** *does not lay down the correct position in law on two issues i.e. (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as u/S. 19 of the Indian Contract Act, 1872.*

We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it un-enforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act. The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty.

6.9 The second issue in ***SMS Tea Estates*** *that avoidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct position in law. The allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can certainly be adjudicated through arbitration. We overrule the judgment in SMS Tea Estates with respect to the aforesaid two issues as not laying down the correct position in law.*

*6.10 The **Garware** judgment has followed the judgment in **SMS Tea Estates**. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be non-existent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract.*

We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.

*6.11 We notice that the judgment in **Garware Wall Ropes Limited** has been cited with approval by a co-ordinate bench of this Court in **Vidya Drolia & Ors. v. Durga Trading Corporation. (Delivered on 14.12.2020 in C.A. No. 2402/2019.)** Paragraph 92 of the judgment reads thus:*

xxx xxx xxx

*6.12 We doubt the correctness of the view taken in paragraph 92 of the three-judge bench in **Vidya Drolia**. We consider it appropriate to refer the findings in paras 22 and 29 of **Garware Wall Ropes Limited**, which has been affirmed in paragraph 92 of Vidya Drolia, to a Constitution Bench of five judges."*

22. It is further submitted that the Concession Agreement was executed on an Indian non-judicial stamp paper of Rs.100/- value. Thus, for the sake of argument, if it is held that the arbitration agreement is chargeable with stamp duty, then it can be said that sufficient stamp duty has been paid on the Arbitration Agreement itself.

23. In that view of the matter, learned counsel for the Opposite Party contended that the writ petition having failed both on the count of maintainability as well as merit is liable to be dismissed.

24. Taking into consideration the rival contentions of the parties, following questions are required to be considered in this writ petition.

(i) *Whether the writ petition under Article 227 is maintainable?*

(ii) *Whether in view of the judgment dated 20.12.2012 (Annexure-2) in the PIL the arbitration clause/agreement which forms part of Concession Agreement (Annexure-1), perishes with it?*

(iii) *Whether the arbitration agreement/clause is chargeable with stamp duty and if so whether sufficient stamp duty has been paid?*

24.1 Although Mr. Thacker, learned counsel for the Opposite Party submitted that the issue of maintainability of this petition is to be decided at the threshold before considering the merits of the case, this Court in order to avoid piecemeal adjudication of this writ petition feels it proper to consider all the issues one after another.

QUESTION NO. (ii) ;

25. Taking into consideration the facts and circumstances of this case Issue No. (ii) is taken up first for adjudication.

26. Chapter-II of the Arbitration Act deals with '*arbitration agreement'*. Section 7 describes that an agreement which enables the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined '*legal relationship*', *whether contractual or not*, is called an arbitration agreement. Sub-section (2) of Section 7 prescribes that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In the case at hand, there is no separate arbitration agreement, but Clause-16 of the Concession Agreement contains the provision of arbitration. Sub-section (3) of Section 7 provides that an arbitration agreement shall be in writing. Sub-section (4) further makes it clear that an agreement shall be treated to be in writing if it is contained in a document signed by the parties or an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means which provides a record of the agreement. Thus, in all cases, an arbitration agreement need not be signed separately, if it otherwise satisfies the Clause (b) of Section 7(4) of the Arbitration Act.

27. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner placed much stress on the signing of the arbitration agreement. It is his contention that since the Concession Agreement has been declared to be null and void and it is held that the Petitioner, namely, General Manager, OSRTC, had no authority to sign the Concession Agreement, it cannot be said that the arbitration agreement was signed by the parties.

28. On 14.12.2009, the Petitioner published a notice informing about issuance of RFP and inviting tender from the reputed Infrastructure Developers for development of Baramunda Bus Terminal, Bhubaneswar along with commercial facilities through PPP mode. The Opposite Party, namely, ARSS Infra, being the successful bidder, Letter of Acceptance (LoA) was issued by the Petitioner in its favour on 26.07.2010. Thus, a legal relationship between the Petitioner and ARSS Infra was created. Consequently, the Concession Agreement between them was executed on 16.03.2011 containing the arbitration clause/agreement. Subsequently, vide judgment in PIL, observing that the General Manager, OSRTC was not

authorized under law to execute such agreement and transferring the interest over the Government property in favour of a third party as envisaged under Article 299 of the Constitution, came to a conclusion that the concessionaire cannot have any right or interest over the land in question on the basis of the said void agreement and any right over the land in question on the basis of the said agreement is opposed to the public policy as provided under Section 23 of the Contract Act. Accordingly, the Concession Agreement dated 16.03.2011 was quashed.

29. An arbitration agreement though forms part of a substantive contract has its separate legal entity. There cannot be any quarrel over the position of law on it. As held in ***Boghara Polyfab Private Limited (supra), A.Ayyasamy (supra), Sasan Power Ltd. (supra), Fili Shipping Co. Limited (supra)*** as well as ***M/s. N.N. Global Mercantile Private Limited (supra)***, it is made clear that the arbitration clause/agreement even forms part of a substantive contract does not automatically perish with the substantive contract itself. In ***Fili Shipping Co. Limited (supra),*** it is held in no ambiguous terms that the principle of separability enacted in Section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "*distinct agreement*" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Thus, the matter is to be examined accordingly, keeping the aforesaid position of law in mind.

30. The judgment in PIL (Annexure-2) does not spell out a single word with regard to validity of the arbitration clause/agreement. It is contended by the Petitioner that when it is held that the General Manager, OSRTC had no authority to sign the Concession Agreement, it can be said that the arbitration agreement was not signed. Thus, it is hit by Section 7(4)(a) of the Arbitration Act. Signing of the Concession Agreement under Annexure-1 was held to be unauthorized as it did not qualify the requirements of Article 299 of the Constitution, but that is not so in the case of arbitration agreement. It was well within the authority of the General Manager, OSRTC-Petitioner to sign an arbitration agreement with ARSS Infra. It is not the case of the Petitioner that arbitration clause/agreement was never signed by the Petitioner, but it was his submission that on quashing of the main agreement for non-execution and no authority to execute the agreement, the signing of the Concession Agreement as well as arbitration agreement gets wiped off. In view of the discussions made above, it is very difficult to accept the same

more particularly in absence of any contention/argument to the effect that the General Manager, OSRTC had no authority to sign an arbitration agreement with ARSS Infra. Further, Section 7(4)(b) of the Arbitration Act makes it clear that when parties were consensus *ad idem* regarding arbitration clause and the arbitration clause was available in the RFP issued by the Petitioner, which was accepted by the Opposite Party without any negotiation, signing of the arbitration agreement becomes insignificant and is not required under law. In view of the above, the contention raised by Mr. Mohanty, learned Senior Advocate sans merit.

31. Relying upon the decision in the case of ***Fili Shipping Co. Limited (supra)***, Mr. Mohanty, learned Senior Advocate submitted that if a party alleges that someone who purported to sign as agent on behalf the principal had no authority whatsoever to conclude any agreement on his behalf, it is an attack both on the main agreement and the arbitration agreement. It is further argued that it would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have/had no authority to enter into an arbitration agreement. He also relied upon the decision in the case of ***M/s. N.N. Global Mercantile Private Limited (supra)*** and submitted that if an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes.

32. As discussed above, there is no material on record to show that the Petitioner had no authority to sign an arbitration agreement with ARSS Infra which is separate from the substantive agreement/concession agreement. In the case of ***Fili Shipping Co. Limited (supra)***, the Principal had raised an objection with regard to authority of the agent to sign the substantive as well as arbitration agreement. It was done by practising fraud, which is not the case here. Thus, the aforesaid observation in ***Fili Shipping Co. Limited (supra)*** is distinguishable from the case at hand. Further, the law laid down in ***M/s. N.N. Global Mercantile Private Limited (supra)*** is also not applicable to the case at hand as it cannot be said that the arbitration clause is not valid or non-existent in absence of any material in support of the same.

33. An argument is advanced on behalf of the Petitioner that the arbitration agreement must satisfy the provisions of the Contract Act, namely, Section 2(g), Section 2(j), Section 10 and Section 23 of the Contract Act. Relying upon the decision in the case of ***Vidya Drolia (supra***), Mr.

Mohanty, learned Senior Advocate submitted that '*agreement*' is not defined in the Arbitration Act. However, it is defined in Section 10 of the Contract Act. The arbitration agreement must satisfy the objective mandates of the law of contract for being enforced under law. Clauses (g) and (h) of Section 2 of the Contract Act prescribe that an agreement not enforceable by law is void and an agreement enforceable by law is a contract. There is, however, no material on record save and except the argument on behalf of the Petitioner that the arbitration agreement perishes with the concession agreement itself, as it does not_qualify the aforesaid provisions of the Contract Act. Although it is held in the judgment in PIL that the concession agreement is void *ab initio* and it is opposed to the public policy of Section 23 of the Contract Act, but there is nothing on record to show that the arbitration clause is void *ab initio* in view of the said observation of this Court.

34. Mr. Mohanty, learned Senior Advocate further relying upon the decision in the case of ***Swiss Timing Limited (supra)*** submitted that undoubtedly, in cases, where the Court comes to a conclusion that the contract is void without receiving any evidence, it would be justified in declining reference to arbitration but such cases would be few and isolated. He further relied upon the decision in the case of ***Uttarakhand Purv Sainik (supra)*** and submitted that the Law Commission in the 246th Report recommended that the scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. If the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. Although it is vehemently argued by Mr. Mohanty, learned Senior Counsel, that arbitration clause/agreement perishes with the concession agreement itself, but no material is placed to persuade the Court to accept such contention. Taking into consideration the ratio decided in the cases of ***Swiss Timing Limited (supra)*** and ***Uttarakhand Purv Sainik (supra)***, it can be safely said that when the matter has been referred to the Arbitration Tribunal by this Court in exercise of power under Section 11 of the Arbitration Act, it can be safely said that *prima facie* the arbitration agreement exists. So far as validity of the agreement is concerned, it can only be finally determined by the Arbitral Tribunal after receiving evidence to that effect. Thus, it will be unsafe at this stage to hold that the arbitration agreement does not exist.

35. Mr. Mohanty, learned Senior Advocate relying upon the decisions in the cases of ***Kishorilal Gupta (supra)*** and ***Jaikishan Dass Mull (supra)*** submitted that when the arbitration clause forms an integral part of the concession agreement, it perishes along with the main agreement. In the instant case, the arbitration agreement being an integral part of the concession agreement, the former has no existence *de hors* the main agreement. Even if the arbitration agreement is a separate agreement notionally the existence of the main agreement is a pre-condition for operation of the arbitration clause. If the contract is *non-est* in the sense that it never came legally into existence or *void ab initio* (being quashed by this Court in PIL), the arbitration agreement perishes with the main contract dated 16.03.2011.

36. Relying upon the principle of '*ex nihilo nil fit'*, Mr. Mohanty, learned Senior Advocate submitted that if a contract is illegal and void, an arbitration clause which forms part thereof must also perish along with it. When the whole perishes, its parts must also perish. Thus, it must be held that when a contract is invalid, every part of it including the arbitration clause contained therein, must also be invalid.

37. Mr. Thacker, learned counsel for the Opposite Party refuting such submission contended that ***Kishorilal Gupta (supra)*** does not discuss any provision akin to Section 16 (1)(b) of the Arbitration Act. Thus, in view of the introduction of Section 16 (1)(a) of the Arbitration Act, the position of law has altogether changed and the ratio therein has no application to the case at hand. In reply, Mr. Mohanty, learned Senior Advocate contended that language employed in Section 16 is only an enabling one which unlike Section 33 of the Old Act, 1940, now permits the Arbitral Tribunal to decide a question relating to the '*existence*' of the arbitration clause.

38. In view of the discussions made above, Section 16 (1)(a) of the Arbitration Act as well as the ratio decided in *A.* ***Ayyasamy (supra***), the severability of the arbitration agreement has become a doctrinal development of crucial significance. The principle of *kompetenz kompetenz* which is recognised under Indian law leaves the adjudicatory power of the Arbitral Tribunal unaffected over any objection with regard to validity of the arbitration agreement even if the main contract between the parties is affected by fraud, undue influence or otherwise. Although Mr. Mohanty,

learned Senior Advocate contended that severability and separability of the arbitration agreement can be gone into by the Arbitral Tribunal, but, in the instant case, when there is already a prior decision of this Court quashing the main agreement, it is no more open to the Arbitral Tribunal to delve into such determination. Although the argument appears to be flowery it has no legal basis at all in view of the discussions made above. Thus, even if the main contract has been declared as null and void due to lack of authority of the Petitioner to execute the same, it is still within the domain of the Arbitral Tribunal to delve into validity of the arbitration agreement.

39. It is next contended by Mr. Mohanty, learned Senior Advocate that the learned Tribunal without any discussion recorded the impugned finding that *'notwithstanding'* the fact that the concession agreement has been declared null and void, the arbitration clause/agreement subsists and on such misconception proceeded to pass the impugned order. As such, the impugned finding is perverse and a non-speaking one.

40. Mr. Thacker, learned counsel for the Opposite party, on the other hand, submitted that before recording the finding, as aforesaid, learned Tribunal has discussed the rival contentions of the parties and case laws cited. On scrutiny of the same, it came to the aforesaid conclusion. Thus, the contention of Mr. Mohanty, learned Senior Advocate is not sustainable.

41. While passing the judgment in PIL, this Court has not rendered any finding with regard to validity or otherwise of the arbitration clause contained in concession agreement. The concession agreement was declared null and void as it was in contravention of Article 299 of the Constitution and it was also held therein that the concessionaire cannot have any right or interest over the *'land in question'* on the basis of the said void document, which is opposed to public policy as provided under Section 23 of the Contract Act. Thus, the order passed in PIL only speaks of validity of the concession agreement. In view of the Section 16(1)(a) of the Arbitration Act, which recognized the doctrine of *kompetenz kompetenz*, the arbitration clause becomes an independent agreement separate from the concession agreement. The said principle applies with full force to the case at hand. As discussed above, although Mr. Mohanty, learned Senior Advocate raised an argument that the General Manager, OSRTC (Petitioner) had no authority to execute the arbitration agreement, but in view of the discussions made above, the same is not sustainable.

42. On perusal of the impugned order, it appears that learned Tribunal has discussed the matter in detail and recorded the aforesaid impugned finding. As such, the contentions of Mr. Mohanty, learned Senior Advocate cannot be accepted. As such, this issue is answered accordingly against the Petitioner.

QUESTION NO.(iii);

43. Mr. Mohanty, learned Senior Advocate, vehemently argued that the arbitration clause is not enforceable in law due to non-payment of stamp duty. He referred to the case law in ***N M/s. N.N. Global Mercantile Private Limited (supra)*** in which it is held that non-payment or deficient stamp duty on the work order does not invalidate the main contract. Section 34 of the Contract Act provides that an unstamped instrument would not be admissible in evidence or acted upon, till the requisite stamp duty is paid. This would amount only to a deficiency, which can be cured on payment of the requisite stamp duty. He further relied upon the case law in ***Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Limited,*** reported in (2019) 9 SCC 209, in which it is held that a High Court must impound the instrument which did not bear the requisite stamp duty. As soon as the stamp and penalty is paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously dispose of the Section 11 application. He thus, contended that till the requisite stamp duty is paid on the arbitration agreement, the same cannot be given effect to. However, the concession agreement in the instant case has been declared null and void on the ground of non-execution and it was declared *void ab initio* and unenforceable by this Court. When the original agreement is no more available to be stamped as per the provisions of Stamp Act, the arbitration agreement cannot be impounded. However, the opposite party has stated in paragraph No.23 of its counter affidavit that Rs.100/- being the adequate stamp on which the agreement was executed, it is not suffering from the deficit stamp duty. The said contention of the opposite party is not correct, as the consideration amount is Rs.56.00 crores**.** As per Clause 1.1 (xviii) of the agreement, it was required to be stamped with a higher amount, failing which the arbitration proceeding is liable to be dismissed. He also referred to Article 35 (a)(v) read with Article 23(b) of the Indian Stamp Act and submitted that the arbitration agreement is insufficiently stamped. He, therefore, submitted that the arbitration proceeding should be dismissed in view of ratio decided in the case of

Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram and Other Charities and Others vs. Bhaskar Raju And Brothers and Others, reported in (2020) 4 SCC 612.

44. Mr. Thacker, learned counsel for the Opposite Party, on the other hand, refuting such contention of Mr. Mohanty, learned Senior Advocate contended that the arbitration agreement is not required to be stamped as per the provisions of the Stamp Act (Orissa Amendment). Article 35(a)(v) of the Stamp Act is not applicable to the case at hand. As such, the contention of Mr. Mohanty, learned Senior Advocate is not sustainable. He further submitted that such a plea was raised by the Petitioner before this Court in the proceeding under Section 11 of the Arbitration Act as well as before the Hon'ble Supreme Court. Having considered the same, this Court acted upon the arbitration clause and proceeded to appoint the arbitrators without asking for impounding of the agreement. In view of the above, it is deemed that such a contention of the Petitioner has been overruled by this Court as well as the Hon'ble Supreme Court. Hence, he prayed for answering this issue in favour of the Opposite Party.

45. Although lengthy argument was made by Mr. Mohanty, learned Senior Advocate stating that the arbitration clause/agreement has been insufficiently stamped, but he could not show the specific provisions which requires the arbitration clause/agreement to be stamped separately when it is a part of the concession agreement. He also failed to satisfy this Court as to whether a stamp duty of Rs.100/-paid on the concession agreement is not adequate stamp duty for the arbitration agreement. As held in the case of ***M/s. N.N. Global Mercantile Private Limited (supra)*** and ***Garware Wall Ropes (supra)***, this Court, while adjudicating the petition under Section 11 of the Arbitration Act, should examine issue of sufficiency of stamp duty to be paid on the arbitration agreement and only after payment of adequate stamp duty, if any, should proceed to hear and dispose of application under Section 11 of the Arbitration Act. As it is evident from the order passed by this Court on the application under Section 11, a contention in that regard was raised by learned counsel for the Petitioner before this Court at the time of adjudication of petition under Section 11 of the Arbitration Act. However, without recording any finding on the sufficiency of stamp duty, this Court proceeded to appoint arbitrators, which implies that the contention raised by learned counsel for the petitioner therein was overruled. Although such a contention was also raised before the

Hon'ble Supreme Court, the SLP was dismissed granting liberty to the petitioner to raise all objections before the Arbitral Tribunal. Sufficiency of stamp duty being an issue to be decided before final adjudication of the petition under Section 11 of the Arbitration Act, it is presumed to have been overruled while appointing arbitrators and giving finality to the said petition. Be that as it may, Mr. Mohanty, learned Senior Advocate having failed to show any specific provision requiring an arbitration agreement to be stamped under the Stamp Act when it forms part of the concession agreement**,** such an objection merits no consideration. As such, the issue is answered against the Petitioner.

ISSUE NO.(i);

46. Lengthy arguments were advanced by learned counsel for the parties with regard to maintainability of the writ petition before this Court under Articles 226 and 227 of the Constitution of India as against an order passed under Section 16(2) of the Arbitration Act. Mr. Mohanty, learned Senior Advocate relying upon ***Emta Coal Ltd. (supra)*** and ***Deep Industries Limited (supra)*** contended that order of an Arbitral Tribunal can be challenged under Article 227 of the Constitution, if the order is patently illegal and perverse. He also relied upon a recent decision of Hon'ble Supreme Court in the case of ***Bhaven Construction (supra)*** and submitted that in rare and exceptional circumstances, the High Court can interfere with an order of the Arbitral Tribunal in exercise of power under Article 227 of the Constitution. It is his contention that the present case falls under the category of '*rare and exceptional circumstances*' because Arbitral Tribunal did not at all consider the purport and consequence of order passed in PIL, wherein this Court in exercise of power under Article 226 of the Constitution in a matter inter-parties, has quashed the agreement dated 16.03.2011 which contained the arbitration clause/agreement albeit the Arbitral Tribunal proceeded to hold the arbitration clause/agreement to be valid. It is his contention that in view of the argument laid by the Petitioner as aforesaid, the Arbitral Tribunal has no jurisdiction to proceed with the arbitration proceeding in view of the fact that the arbitration clause/agreement, which was a part of concession agreement, has been declared *void ab initio*.

47. On the other hand, Mr. Thacker, learned counsel contended that the writ petition under Article 227 of the Constitution has been filed in the garb of a petition under Section 34 of the Arbitration Act. Referring to the

opening paragraph-1 of the writ petition, Mr. Thacker, submitted that all the grounds taken in the writ petition, more particularly, paragraph-1.9 (G), (I), (J) and (K) spelt out the grounds under Section 34 of the Arbitration Act. Article 227 provides for a discretionary power to this Court, which ought to be exercised in absence of alternative and efficacious remedy and in exceptional circumstances. In this case, the Petitioner being armed with an efficacious statutory remedy under Section 34 of the Arbitration Act, can challenge the impugned order along with the arbitration award itself under the said provision. Nowhere in the petition under Section 16 of the Arbitration Act, the Petitioner had raised the plea of *mala fide* or bad faith on the part of the Opposite Party, under which it could have taken shelter to move this Court to exercise its jurisdiction under Article 227 of the Constitution. Such a plea is taken by the Petitioner before this Court for the first time that too in the rejoinder filed on 10th February, 2021. As held in the case of ***Bhaven Construction*** (***supra***) and ***Deep Industries Limited (supra),*** patent lack of jurisdiction is understood to mean that the Court could not have *seisin* of the case because the subject matter was wholly foreign to its jurisdiction or on some other grounds which could have the effect of rendering the Court entirely lacking the jurisdiction in respect of subject matter of the case between the parties. The ground that learned Tribunal has no jurisdiction to proceed with the arbitration as the concession agreement was quashed by this Court and therefore, the arbitration agreement perished with it, cannot be termed as patent lack of inherent jurisdiction as the arbitration agreement is separable from the substantive contract. Even if the substantive contract is declared null and void, that does not automatically render the arbitration agreement *void ab initio*. It is all the more apparent from the provision under Section 16 (1)(b) of the Arbitration Act. He also relied upon the case law in ***Emta Coal Limited*** (***supra***), wherein it has been laid down that "*foray to the Writ Court from a Section 16 application being dismissed by the Arbitrator can only be, if the order passed is so perverse; that the only possible conclusion is that there is a patent lack of inherent jurisdiction",* this Court can exercise its jurisdiction under Article 227 of Constitution because "*a patent lack of inherent jurisdiction requires no argument whatsoever-it must be the perversity of the order that must stare one in the face."*

48. He, therefore, argued that in the case at hand, learned counsel for the parties made lengthy argument to establish their respective cases. Thus, by no stretch of imagination, it can be said to be an order suffering from patent

lack of inherent jurisdiction. He further reiterated the argument that there is no final order regarding validity of the arbitration clause/agreement in the order passed in the PIL. Hence, he contended that the writ petition under Article 227 of the Constitution is not maintainable.

49. The Petitioner initially filed CMP No.690 of 2020 under Article 227 of the Constitution assailing the impugned order. But, in view of the order of this Court dated 19.01.2021, this Court taking into consideration the provision under Rule 5 of Chapter XV of Orissa High Court Rules, 1948, directed the Registry to register the instant petition as W.P.(C). Accordingly, it is so registered.

50. On perusal of the pleadings of the writ petition, it appears that the Petitioner has assailed the impugned order on the grounds prescribed under Section 34(2) of the Arbitration Act. It further appears that the plea of *mala fide* and bad faith was never raised either before the Tribunal or in the writ petition. It was only raised in the rejoinder affidavit filed by the Petitioner. Thus, such grounds having not raised before the Arbitral Tribunal cannot be taken into consideration in a proceeding under Article 227 of the Constitution. Moreover, in view of the case law cited above, this Court can only interfere with the impugned order passed under Section 16 (1)(b) of the Arbitration Act in exercise of power under Article 227 of the Constitution in a rare and exceptional circumstance. All the grounds raised by Mr. Mohanty, learned Senior Advocate squarely fall under the provision of Section 34(2) of the Arbitration Act. No exceptional circumstance has been shown by the Petitioner to warrant interference in this writ petition. It further appears that in view of the ratio in the case of ***Emta Coal Ltd. (supra)***, a petition under Article 227 of the Constitution would be maintainable only when the impugned order suffers from a patent lack of inherent jurisdiction, which requires no argument whatsoever to be declared so. The perversity of the order must stare on its face. When lengthy arguments were made in challenging the impugned order, it cannot be said that the impugned order suffers from patent lack of inherent jurisdiction of learned Tribunal.

51. Entertaining an application under Article 227 of the Constitution at this stage will also result in piecemeal trial of the arbitration proceeding, which is deprecated by the Hon'ble Supreme Court time and again. Further, all the arguments raised by the Petitioner could have been raised in a petition under Section 34 of the Arbitration Act after finality of the arbitration

proceeding. Law is well- settled as stated above that when an alternative and efficacious remedy is available to the Petitioner, the writ petition should not be entertained which would impliedly circumvent the efficacious statutory provision made in the Arbitration Act itself.

52. In view of the above, I have no hesitation to hold that the writ petition is under Article 227 of the Constitution is not maintainable and the issue is answered accordingly.

CONCLUSION

53. In view of the discussions made above, I find no infirmity in view of the impugned order under Annexure-7. Thus, the writ petition being devoid of any merit and the same being not maintainable in the eyes of law, is dismissed; but in the circumstances, there shall be no order as to costs.

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2021 (II) ILR - CUT- 655

SAVITRI RATHO, J.

BLAPL NO. 6438 OF 2020

MANOJ KUMAR BHUYAN .....Petitioner

.V.

STATE OF ORISSA .....Opp. Party

BLAPL No. 6706 of 2020
DEBASIS ROYPITAM .....Petitioner

.V.

STATE OF ORISSA .....Opp. Party

BLAPL No. 6520 of 2020
JYOTISH KUMAR KANUNGO .....Petitioner

.V.

STATE OF ORISSA .....Opp. Party

BLAPL NO. 6624 OF 2020
MRUTYUNJAY SAHOO .....Petitioner

.V.

STATE OF ORISSA .....Opp. Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 21 (c) and 29 – Offence under – Case was registered as 3500 bottles of Eskuf cough syrup allegedly containing codeine were recovered – Prayer for bail – Plea that there is no chemical analysis report showing that the seized cough syrups contain the codeine content beyond the prescribed limit – Further plea that in view of the

factual scenario, there may be at best a case construed as a violation of the provisions of the Drugs and Cosmetics Act – Plea of the requirements of Section 37 of the NDPS Act also raised – All the pleas considered – Held, as under:-

"Narcotic drug" has been described in Section – (xiv) of the Act and includes all manufactured drugs. - "Manufactured drugs" have been described in Section 2(xi) of the Act and include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not be a manufactured drug; - (ii) Cough syrups containing codeine up to the prescribed limit (as per Entry No. 35 of the Notification) will not come within the definition of "manufactured drug" provided the drug is for therapeutic purpose or medicinal use - (iii) Once it is found that the cough syrup is not for therapeutic purpose or medicinal use, or the percentage of codeine is more than the prescribed limit as mentioned in Exception No 35, it has to be considered to be a "manufactured drug" for which an offence under Section – 21 of the NDPS Act will be attracted – (iv) A person can be proceeded against simultaneously for commission of offences under the NDPS Act as well as for violation of the provisions of the Drugs and Cosmetics Act and Rules under the Drugs and Cosmetics Act - (v) Once the cough syrup is considered as a manufactured drug, attracting the provisions of section 21 of the NDPS Act, in order to ascertain whether the offence involves, "small quantity", " more than small quantity but less than commercial quantity" or "commercial quantity", the entire mixture/substance has to be taken into account - (vi) If the quantity is a manufactured drug including commercial quantity, then Section – 21 (c) of the NDPS Act will be attracted and the requirements of Section – 37 of the NDPS Act have to be satisfied, for allowing the prayer for bail - In the present case, the following facts emerge: i) Petitioner Manoj Kumar Bhuyan has valid licences under the Drugs and Controls Act and Rules, which authorise him to sell , stock or exhibit or offer for sale or distribute wholesale drugs and the case of the petitioners that the cough syrup is covered under the licences and was meant for supply to medicine shops and licensed retailers- (ii) Petitioners Jyotish Kumar Kanungo and Debasish Roypitam are his employees while Mrutunjay Sahoo is the driver of one of the vehicles from which part of the cough syrup was recovered- (iii) Even though almost one year has elapsed since the date of occurrence and sending of samples to the SFSL, the chemical analysis report has not been produced in spite of sufficient opportunity being granted to the prosecution - In absence of the chemical analysis report, the presence let alone the quantity/percentage of codiene in the cough syrup cannot be ascertained – (iv) Charge sheet has been filed under Section – 21(c) / 29 of the NDPS Act but no material has been produced by the prosecution before this Court to show that the drugs were meant for any purpose other than therapeutic or medicinal purpose except for the two line identical confessions recorded in the case diary, which cannot be relied upon as per decision of the Hon'ble Apex Court in the case of Tofan Singh (supra) - (v) The applications for bail are pending since more than six months – (vi) There is no allegation that the petitioners have any criminal antecedents - In the above facts and circumstances in the absence of the chemical examination report, in my considered opinion, a prima facie case under Section-21

(c) of the NDPS Act is not made out against the petitioners - Hence satisfaction of the requirements of Section-37 of the NDPS Act are not necessary before granting bail.

Case Laws Relied on and Referred to :-

1. (2021) 4 SCC 1 : Tofan Singh Vs. State of Tamil Nadu.
2. AIR 1962 Bombay 21 : State of U.P. Vs. Nathumal Dhanumal
3. (2012) 13 SCC 491 : Mohd. Sahabuddin Vs. State of Assam.
4. 2020 SCC Online SC 382 : Hira Singh Vs. Union of India.
5. (2018) 13 SCC 813 : Satpal Singh vs. State of Punjab

BLAPL NO. 6438 OF 2020

For Petitioner : Mr. A.K. Mohapatra
For Opp. Party : Mr. G.N. Rout, Addl. Standing Counsel

BLAPL No. 6706 of 2020

For Petitioner : Mr. L. Mishra
For Opp. Party: Mr. G.N. Rout, Addl. Standing Counsel

BLAPL No. 6520 of 2020

For Petitioner : Mr. V. Mohapatra
For Opp. Party: Mr. G.N. Rout, Addl. Standing Counsel

BLAPL NO. 6624 OF 2020

For Petitioner : Mr. Binaya Kumar Mohanty
For Opp. Party: Mr G. N. Rout, Addl. Govt. Adv.

ORDER Date of Order : 15.07.2021

SAVITRI RATHO,J.

These matters were heard through video conferencing mode.

Justice Indira Bannerji in her dissenting opinion in the case of **Tofan Singh vs. State of Tamil Nadu** reported in **(2021) 4 SCC 1** has observed as follows:

"*.... 2. The illicit production, distribution, sale and consumption of drugs and psychotropic substances, is a crime of multi-dimensional magnitude, that imposes a staggering burden on the society. In an Article "Narcotic Aggression and Operation Counter Attack" published in the Mainstream dated March 7, 1992, V.R. Krishna Iyer, J. said:-*

"Religion is opium of the people, but today opium is the religion of the people, and like God, is omnipresent, omnipotent and omniscient. Alas! Opium makes you slowly ill and eventually kills, makes you a new criminal to rob and buy the stuff, tempts you to smuggle at risk to become rich quick, makes you invisible trafficker of psychotropic substances and operator of a parallel international illicit currency and sub rosa evangelist mafia culture. Drug business makes you if not killed betimes, the possessor of pleasure, power and empire. What noxious menace is this most inescapable evil that benumbs the soul of student, teacher, doctor, politician, artists and professional, and corrupts innocent millions of youth and promising intellectuals everywhere"

3. In the words of Krishna Iyer, J.,

"the global scenario in its sombre macabre, devouring delinquency, is dominated by drug abuse and narcotic trade. Trafficking in drugs and psychotropic substances is not any local or regional crime confined only to India and third- world countries, but is a worldwide phenomenon. All nations including India, had huge drug abuse as a threat to the survival of human beings."

4. Illicit drug trafficking is an organised crime, highly sophisticated and complex. This illicit traffic, cleverly carried out by hardened criminals with dexterity and skill, not only violates national drug laws and international conventions, but also involves many other criminal activities, including racketeering, conspiracy, bribery and corruption of public officials, tax evasion, banking law violations, illegal money transfers, import/export violations, crimes of violence and terrorism.

5. Narcotics are often supplied for money and also in exchange for weapons. There are numerous drug trafficking mafia yielding, immense power in various regions of the world, including India. The far-reaching consequences of illicit drug trade, even threatens the integrity and stability of governments and renders law enforcement action vulnerable.

6. Considering the huge profits derived by drug barons from rampant consumption of opium and other narcotic drugs, tycoons of the drug cartels, who have international links, go to any extent, to exploit and manipulate unhealthy economic conditions, as well as corruption and weaknesses in the administration, to push drugs into the society, in complete disregard of the health, morality and well- being of the people."….

Here is a case, where a case under Section 21 (c) and 29 of the NDPS Act was registered against the four petitioners as 3500 bottles of Eskuf cough syrup allegedly containing codeine were recovered from them, which they allegedly confessed was being taken for drugging purpose. In view of the large quantity of the cough syrup seized, it was the duty of the prosecution to conclude the investigation without leaving any loose ends or lacuna. But although almost one year has elapsed since the case was registered and charge sheet is stated to be filed, neither the chemical analysis report nor any materials in support of the allegation that the petitioners were indulging in sale of the cough syrup for drugging purpose other than recording a confession of two lines that they are guilty, has been produced before this Court.

I have heard Mr. Aditya Kumar Mohapatra, learned counsel for the petitioner- Manoj Kumar Bhuyan in BLAPL No. 6438 of 2020, Mr. Lalitendu Mishra, learned counsel for the petitioner-Debasis Roypitam in BLAPL No.6706 of 2020, Mr. V. Mohapatra, learned counsel for the petitioner Jyotish Kumar Kanungo in BLAPL No. 6520 of 2020 and Mr. Binaya Kumar Mohanty, learned counsel for petitioner-Mrutyunjay Sahoo in BLAPL No.6624 of 2020 and Mr. G.N. Rout, learned Additional Standing Counsel for the State of Orissa in all the four cases.

These are applications under Section 439 of Cr.P.C. for grant of bail to the petitioners in connection with Baseli Sahi P.S. Case No.213 of 2020 corresponding to Special G.R. Case No.104 of 2020 pending in the Court of the learned Special Judge, Puri for commission of offences punishable under Section 21 (c)/29 of the N.D.P.S. Act.

The allegations in brief are that on 17.08.2020 at about 9.45 A.M., while the informant- S.I. of Baseli Sahi Police Station along with his staff was doing MV checking/naka duty at Mangalaghat Chhak under Baseili Sahi P.S., they stopped two Maruti Suzuki Swift Dzire car bearing Registration No.OD-02-U-7006 and OD-02-AG-1094 moving towards Puri. Accused Mrutunjay Sahoo was driving the car bearing Registration No.OD-02-AG-1094 in which the accused Debashis Raypritam was sitting whereas accused Manoj Kumar Bhuyan was driving the car and accused Jyotish Kumar Kanungo was sitting in the car bearing Registration No.OD-02-U-7006. Some jerry bags were found loaded in the cars and on being questioned the accused persons stated that they were frequently transporting and selling cough syrup for drugging purpose in Puri, Khurda and Nayagarh area. In the presence of two independent witnesses, the cars were searched five bags each kept in the middle space and behind the dickey were found in sealed condition. In the presence of the independent witnesses and Executive Magistrate, the jerry bags were opened and 3500 Eskuf Syrup bottles of 100ml each, having composition of Codeine Phosphate & Chlorpheniramine Maleate, were recovered and seized. 1750 bottles of cough syrup and Maruti Suzuki Swift D Zire car bearing Registration No.OD-02-U-7006 were seized vide from Manoj Kumar Bhuyan and Jyotish Kumar Kanungo vide one seizure list and 1750 bottles of cough syrup and Maruti Suzuki Swift D Zire car bearing Registration No.OD-02-AG-1094 were seized vide another seizure list from Debasish Roypitam and Mrutyunjay Sahoo. On being questioned the accused persons stated huge quantity of Eskuf compositions of codeine phosphate and chlorpheniramine maleate syrup are stored in House No.6, Ground floor, Binayak Enclave, Kolthia, Khandagiri, pursuant to which the informant along with the Executive Magistrate searched the house and seized 5000 x 100 ml bottles of Eskuf cough syrup vide another seizure list. FIR was registered and the seized articles were deposited in the Police Malkhana on that day. On the next day, the accused persons and the seized articles were produced in Court. Twenty samples of the cough syrup were forwarded to the Director of State Forensic Science Laboratory (in short "SFSL") the next day, i.e 18.08.2020. Charge sheet dated 30.10.2020 has been filed against the petitioners for the commission of offences under Section 21(c)/ 29 of the NDPS Act.

It is necessary to note that when BLAPL No. 6438 of 2020 and BLAPL No. 6706 of 2020 were reserved for orders, the learned Additional Standing

Counsel had been directed to submit the case diary and had been granted time to obtain the chemical examination report. He has submitted the case diary in two parts on 14.04.2021. One part of case diary has been sent to the Office of the Advocate General, by the IIC Baseli Sahi Police Station vide letter dated 30.09.2020 and contains. C.D. No 1 to III and entries upto 21.08.2020 only. Vide letter dated 20.10.2020 another part of the case diary containing C.D No. IV to VIII alongwith the final form has been sent by the IIC basely Sahi Police Station. There is a mention in the case diary on 01.09.2020 that the petitioners do not have any criminal antecedents. There is no mention of receipt of the chemical analysis report in the case diaries.

After BLAPL No 6520 of 2020 and BLAPL No.6624 of 2020 were heard and reserved for orders, and the case diary was perused, the copy of the chemical examination report was not found in the case diary, for which all the four cases were listed together on 21.06.2021 under the heading *"To be mentioned"*. The matters could not be taken up on that day due to bad internet connectivity and were listed the next day i.e on 22.06.2021 for "Orders" and further hearing taken up. On that day Mr. G.N .Rout, learned Additional Standing Counsel clarified that the chemical examination report had not been filed as it had not been received from the State Forensic Science Laboratory. Further hearing was taken up and the hearing in the cases was closed on that day. Till date, the same has not been filed/ submitted for perusal of this Court.

I have duly considered the submissions of the learned counsel for the parties and gone through the case diary. I have also perused the impugned order of the learned Special Judge, the written notes of submission and gone through the decisions relied on by the learned counsels for the petitioners and the learned Additional Standing Counsel.

Perusal of the case diary reveals that on 17.08.2020 at 9.00 p.m., the informant -Biplab Kumar Behera, S.I. of Police Baseli Sahi Police Station drew up plain paper FIR and Baseli Sahi P.S Case No.213 was drawn up and S.I. S.K Behera was directed to take up investigation and charge of investigation and custody of the seized articles, bulk packets of Eskuf cough syrup , accused persons and documents of the case were handed over to S.I Sri S.K Behera for further investigation and he received charge of the investigation and (strangely) at 7.15 p.m. seized twenty numbers of Eskuf cough syrup containing 8500 bottles in sealing condition and kept them in the police station malkana on at 7.15 pm and thereafter examined two other and the accused persons. The

following identical entry in respect of each of the accused persons is available in the case diary:– "*Examined the marginally noted accused person. On examination, he confessed his guilty and no cited defense*". No separate statement of the accused persons is available in the case diary.

Mr. Aditya Kumar Mohapatra, learned counsel for the petitioner **Manoj Kumar Bhuyan** has submitted that the petitioner is the proprietor of M/s. Minu Enterprises and he has been issued wholeseller licence in Form 20-B, 21-B and 20-G in respect of Drugs other that Schedule C and C(I) and X drugs, which includes "Schedule H" drugs, Schedule C and C(I) drugs; and Schedule X drugs respectively which were valid perpetually till they were suspended or cancelled and which authorise him to sell , stock or exhibit or offer for sale or distribute wholesale drugs. The cough syrups seized in this case fall within the ambit of Scheduled H Drug which are covered by these licences and have been procured under valid documents - tax invoices and way bills. On 11.08.2020 number of orders had been placed for Eskuf Cough syrup bottles with manufactures and the same was received on 13.08.2020 at Bhubaneswar and were being taken for distribution and supply to licensed medicine shops and retailers in Puri. As per conditions of the licence granted to him, he is authorised to sell, stock, exhibit or offer for sale, distribute wholesale drugs. Relying on the definition of the word "*distribut*e" in Blacks Law Dictionary 6th edition, with respect to distribution of a dangerous drug, and the decision reported in **AIR 1962 Bombay 21 : State of U.P. vs. Nathumal Dhanumal** , he has submitted that transportation of the cough syrup was covered under his licence. The copy of the forwarding letter of the Dy Drugs Controller and the licences have been filed as Annexure 2, copies of the way bills as Annexure-3 Series and copies of invoices as Annexure-4 Series and list of retention products as Annexure-5 series. Although these documents were produced before the police, but they did not accept the same and arrested the petitioners stating that they could not produce any documents in support of possession of the Cough syrup and confessed their guilt. He has further submitted that the learned Court below has recorded its satisfaction that the seized Cough syrup was procured under valid documents but on the ground that there were no documents for its transportation, erroneously proceeded to consider the case as one under the NDPS Act and rejected the prayer for bail holding that the bar under Section-37 of the NDPS Act would be attracted.

It was further submitted that the same could at best be construed as a violation of the provisions of the Drugs and Cosmetics Act and there is no allegation by anybody that he has ever sold it in the open market to other persons. The content of codeine phosphate in the cough syrup was less than 100

mgs per dosage unit and less than 2.5 % in undivided preparations and as it was meant for supply to licenced medicine shops it is a Schedule H drug under the Drugs and Cosmetics Act and not a manufactured drug or substance under Sec -2 (xi)(b) of the NDPS Act. He has relied on the Memo dated 26.10.2005 of the Director General, Health Services where it has been mentioned that in view of Entry No 35 of Notification Number S.O. 826(E) dated 14th November 1985 under the NDPS ACT and Rules, codeine and ethyl morphine and their salts and all dilutions and preparations within the limit prescribed in the Entry and established in therapeutic practice, will not fall under the provisions of the NDPS Act and Rules of 1985 but under Schedule H drugs of the Drugs and Cosmetics Rules and are governed by the said Rules.

Referring to the case of **Mohd. Sahabuddin vs. State of Assam : (2012) 13 SCC 491**, he has submitted that in that case, the Hon'ble Supreme Court rejected the prayer for bail of the driver and the cleaner of the truck who had surreptitiously concealed the cough syrup under household articles in the truck and could not produce any documents in support of their possession and the chemical analysis report in that case indicated that codeine phosphate beyond the prescribed quantity was detected in the cough syrup. In the present case, the petitioner had a valid licence, tax invoices, and way bills in support of procurement of the cough syrup and chemical analysis report has not been produced to show that the cough syrup contained codeine beyond the prescribed quantity for which no case under the NDPS Act is made out against them and Section 37 of the NDPS Act will not be attracted in this case.

His further submission is that the petitioner who suffers from various cardiac ailments had undergone open heart bypass surgery in 2018, had been granted interim bail for six weeks pursuant to order passed in I.A. No. 1094 of 2020 for his treatment and as per the affidavit filed by his father, he has surrendered voluntarily on 08.03.2021 as I.A. No.135 of 2021 filed for extension of time could not be taken up. Thereafter he is suffering in custody due to lack of proper medical facilities and in constant dread of contracting Covid-19 due to overcrowding in the jail. He has also submitted that the petitioner has no criminal antecedents and charge sheet has been filed by the police hastily in the case without considering the valid licences, tax invoices and purchase documents in his possession pertaining to the seized cough syrup and without waiting for the chemical analysis report, which may have made out a case under the NDPS Act if the codeine content was found to be more than the permissible quantity. Apart from the decision in **State of Nathumal Damumal** (supra) and **Mohd. Shahubbdin** (supra), he has relied on the following decisions in support of his prayer for bail:

1. **Amrik Singh vs. State of Punjab : 1996 CrLJ 3329.**
2. **Deep Kumar vs. State of Punjab : 1997 (2) Crimes 732 (P&H).**
3. **Rajeev Kumar vs State of Punjab : 1998 CrlLJ 1460.**
4. **State of Uttaranachal vs. Rajesh Kumar Gupta : (2007) 1 SCC 355.**
5. **Sandeep Kumar vs. State of Punjab: CRM M 14264 of 2013.**
6. **Union of india vs. sanjeev vs. Deshpande (2014) 13 SCC 1.**
7. **Ashok Kumar vs. Union of India : (2015) 2 ALJ 193.**
8. **Niranjan Basti vs. State of Orissa : BLAPL No. 8326 of 2020 decided on 23.03.2021**.

Mr. V. Mohapatra learned counsel for the petitioner- **Jyotish Kumar Kanungo** has submitted that states that he was travelling in the car as an employee of M/s. Minu Enterprises owned by the co accused Manoj Kumar Bhuyan and nothing incriminating has been seized from him. He further states that as the co accused was a licenced distributor of the cough syrup, there was no illegality in transporting the cough syrup and the learned Court below has erroneously rejected his prayer for bail. He further states that the petitioner has no criminal antecedents.

Learned Counsel for petitioner **Debasis Roypitam** has submitted that he has a B Pharma certificate from the Odisha Pharma Council and is an employee of co accused Manoj Kumar Bhuyan and the latter had valid drug licenses, tax invoice and way bills for possession for procurement and possession of the cough syrup and even though these documents were available, the police ignored the same and registered the FIR in order to harass them. He further states that he has no criminal antecedents and that he had no knowledge or control over the quantity or quality of goods. In the note of submission submitted on behalf of the petitioner, it has been urged that Eskuf cough syrup which has been seized is covered under the drugs and Cosmetics Act and as per Rule 65 and 97 of the Drugs and Cosmetics Rules, it is lawfully permissible to store, transport and sell it as a "Schedule H" drug on the prescription of a medical practitioner and therefore no offence under the NDPS Act is attracted. He also relies on the case of **Mohd. Sahabuddin** (supra).

It is the submission of both petitioners Manoj Kumar Bhuyan and Debasis Roypitam that as 1750 bottles of cough syrup have been seized from each vehicle and as per the licence of the manufacturer, 4mg of Codeine is there in each 5ml dose and each bottle consists of 100ml of cough syrup , hence the total codeine concentrate is 700gms (100/5 x10mg 3500). The commercial quantity of codeine being 1kg as per the schedule in the NDPS Act, a case under Section

21(c) /29 of the NDPS Act is not made out against the petitioner and hence Sec-37 of the NDPS Act will not be attracted as petitioner Manoj Kumar Bhuyan had the licence to deal with Schedule C, C(I) and X drugs which include the cough syrup which is a Schedule H drug and violation of its terms will attract penalty (fine) under the Drugs and Cosmetics Act.

Learned Counsel for petitioner **Mrutyunjay Sahoo** has submitted that the petitioner is in judicial custody since 18.08.2020 and that his mother Snehalata Sahoo is the owner of the vehicle bearing Regd. No.OD-02AG-1094 and the petitioner is the driver of that vehicle. He further submits that the petitioner has no criminal antecedents. He states that the car had been hired by co accused Manoj Kumar Bhuyan and he was unaware as to what was in the jerry bags. Even otherwise, as the co-accused had the licence to store and distribute cough syrup, no case under the NDPS Act is made out and the learned Court below has illegally rejected his prayer for bail.

Mr. G.N. Rout, learned Addl. Standing Counsel for the Opp. Party – **State of Odisha** has opposed the prayers for bail stating that as the cough syrup was not meant for therapeutic purpose, as per the notification of the Central Govt and the decision of the Hon'ble Apex Court, the entire quantity i.e 3500 bottles of cough syrup has to be taken into account, for which a case under Section - 21 (c) of the NDPS Act is clearly made out against the petitioners and they cannot be granted bail unless the requirements in section 37 of the NDPS ACT are satisfied.

In his written note of submission, he relies on the GOI Notification **S.O. 826 (E) dated 14.11.1985** which states that Codeine and Ethyl Morphine and their salts, all dilutions and preparations "except those compounded with one or more other ingredients and containing not more than 100mgs of the drug per dosage unit and with a concentration not more than 2.5 % in undivided preparations and which have been established in therapeutic practice, is a narcotic drug (Annexure A/1 to his note) and that as per GOI Notification vide **S.O. 826 (B) "**Methyl morphine (commonly known as codeine) is a manufactured drug. He relies on Notification of the Central Govt to submit that the contravention involves commercial quantity as requirement for therapeutic practice is not satisfied, for which the entire 100 ml content of cough syrup would fall within the penal provisions of NDPS Act as per para 12 of the decision of the Apex court in the case of **Mohd. Sahabuddin** (supra)**.** In view of the huge quantity of cough syrup seized , and failure of the accused to produce documents in support of transportation of the syrup and their confession that it was meant to sold as drugs, the entire quantity of cough syrup has to be taken

into account for which a case under Section 27 (c) of the NDPS Act for possession of "commercial quantity" of codeine - a manufactured drug is made out and in view of the prohibition laid down under Section 37 of the N.D.P.S. Act, the prayers for bail should be rejected.

He however does not dispute the fact that the petitioners have no criminal antecedents and copies of the documents annexed to the bail application in BLAPL No.6438 of 2020 reveal that accused Manoj Kumar Bhuyan has valid drug licences sell, stock or exhibit or offer for sale or distribute wholesale drugs, and tax invoices and way bills in support of procurement of the cough syrup and that chemical analysis report in respect of the cough syrup has not been received till date.

Amrik Singh (supra) was a case under Section – 482 Crl.P.C for quashing proceedings registered under Section – 21/61/85 of the NDPS Act filed by a holder of a drug licence and carrying on business as a retail chemist. Proceedings were quashed on the ground that Phensedyl is excepted under Item 35 of the Notification and mere apprehension that this drug is being misused will not bring it within the mischief of Section- 21 of the NDPS Act.

Sandeep Kumar (supra) was a case under section – 482Cr.P.C for quashing proceedings under Section-22 of the NDPS Act filed by a registered pharmacist who was the proprietor of a Medicine shop from whom 800 bottles of Rexcof had been recovered. Referring to the report of the Committee constituted by the State Government to see whether such cases are covered under the NDPS Act or Drugs and Cosmetics Act and its decision in **Jagjit Singh vs. State of Punjab, CRM-M-5632 of 2010** (O&M) decided on 16.07.2012, and the letter dated 26.10.2005 written by the DGCI, to all State Drugs Controllers regarding sale of cough syrups containing codeine phosphate, held that even though the cough syrup contained Codeine Phosphate and Chlorpheniramine Maleate being covered under serial no 35 of the Notification No. SO-826(E) dated 14.11.1985 do not attract the punitive provisions of the NDPS Act especially when the petitioner therein is a holder of licence and has purchased the medicines through valid bill and quashed the proceedings.

In the case of **Ashok Kumar** (supra), the proceedings in a case registered under Section- 8, 21, 25, 29 of the NDPS Act were challenged in an application under Section-482 of the Code of Criminal Procedure. The court held that Phensedyl Cough Syrup falls within the exception provided under the NDPS Act and therefore its possession with licenced stockists should not invite the penalties under the NDPS Act in the facts and circumstances of the case is

required to be considered as a drug under the Drugs and Cosmetics Act and no offence under Section 8/21 read with Section – 29 NDPS Act is made out even if the allegations are accepted and quashed the proceedings.

Deep Kumar (supra) was again an application under Section-482 Cr.P.C. for quashing the FIR registered under Section 21 of the NDPS Act by the partners of a firm who are carrying on business of chemist and druggists having a valid drug licence and having applied for renewal and they are the authorised stockists of a number of companies dealing in wholesale medicines to be supplied to retailers. The Court considered the question whether the drugs seized fall within the definition of "manufactured drug" or "psychotropic substance" under the NDPS Act with reference to Notification No. SO 826 (E) dated 14.11.1985 and considering the quantity of codeine sulphate apart from others substances, held that it did not fall within the ambit of manufactured drugs and no offence under Section 21 and 22 of the NDPS Act was made out and it was for the Drugs Inspector to initiate action in accordance with the Drugs Act or Rules and quashed the FIR.

In the case of **Rajeev Kumar** (supra), the proceedings in a case registered under Section-22 of the NDPS Act were challenged in an application under Section-482 of the Code of Criminal Procedure by the proprietor of a Medicine shop carrying on business as of wholesale chemists under a valid drugs licence authorising to sell, stock , exhibit (or offer) for sale or distribute by retail the categories of drugs specified in Schedule C and C(I) excluding those specified in Schedule X to the Drugs and cosmetics Rules, 1945 and to operate a pharmacy. The Punjab and Haryana High Court quashed the FIR and consequent proceedings, holding interlia that Phensedyl liquid contained Codeine Sulphate with the permissible limits, hence it falls within the excepted category and that the plea of the prosecution that the preparation in question is being used for intoxication purposes is not enough for prosecution of the petitioner and that none of the drugs allegedly seized from possession of the petitioner fall within the mischief of "narcotic drugs and psychotropic substances" as defined in the Act and are "drugs or medicines" as defined in the Drugs and Cosmetics Act 1940 and if at all there is contravention complaint by the Drugs Inspector to the Court and not FIR and not prosecution by the police.

In the case of **Rajesh Kumar Gupta** (supra) the Hon'ble Supreme Court, considered the case of an Ayurvedacharya from whose premises, 70 Kgs of pure phenobarbitone was recovered and he was proceeded against for commission of offences under Section-8 read with Section -22 of the NDPS Act. The Hon'ble Court held that Section-37 of the 1985 Act would prima facie have

no application in view of the exception contained in Ssection-8 thereof read with the Rules relying on **Rajinder Gupta vs. State: 123 (2005) DLT 55 and Pradeep Dhond vs. Intelligence Officer** : Criminal Application No. 6787 of 2005 decided on 07.02.2006 by the Bombay High Court.

This Court in **BLAPL No. 8326 of 2020** (supra) has allowed the prayer of the accused as the codeine phosphate in the seized cough syrup came to 128 grams which is lesser than commercial quantity.

At this juncture, it would be apposite to refer to few of the decisions of the Hon'ble Apex Court which are relevant for consideration of these bail applications.

The Apex Court in its decision in **Union of India vs. Sanjeev vs. Deshpande** overruled it own judgment in **State of Uttaranchal vs. Rajesh Kumar Gupta**, (supra). It has interlia held:

> *....“**80. Application of the Drugs and Cosmetics Act, 1940 not barred**.- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder.”,*
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> *From a bare reading of the provision , it is apparent that a person can be proceeded against under the provisions of the Drugs and Cosmetics Act, 1940 and rules framed thereunder as well as for commission of an offence under the NDPS Act, 1985, so the above decisions are not of much use to the petitioners because , if it is found that the petitioners have violated any of the provisions of the NDPS Act, they cannot take the plea that only the provisions of the Drugs and Cosmetics Act will apply to them …..*
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> *35. In view of our conclusion, the complete analysis of the implications of Section 80 of the Act is not really called for in the instant case. It is only required to be stated that essentially the Drugs & Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase etc. Of drugs generally whereas Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of 1940 Act.”…*

It has been decided by the Hon'ble Apex Court in **Hira Singh vs. Union of India reported as 2020 SCC Online SC 382** that in case of seizure of narcotics drugs or psychotropic substances mixed with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "*small or commercial quantity*" of the Narcotics Drugs or Psychotropic Substances. One of the questions before the Hon'ble Supreme Court was as to whether while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), the quantity of neutral substance(s) is not

to be taken into consideration or it is only the actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. After a detailed reference to the various provisions of the NDPS Act and the notifications issued in that regard by the Government of India, the Hon'ble Supreme Court has observed as under :-

> *"8.4. Even considering the definition of "manufacture", "manufactured drug" and the "preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent".*

The contention of the learned counsels for the petitioners that the provisions of the NDPS Act will not be applicable to them is therefore fallacious and the cases of various High Courts on that point will not be of any help to them in view of the law laid down by the Hon'ble Apex Court in the case of **Sanjeev vs. Deshpande** (supra) and **Hira Singh** (supra).

The decision of the Hon'ble Supreme Court in the case of **Tofan Singh (supra)**, is also relevant in the facts of the case. In the said case, a three judge Bench had been called upon to answer the following questions:

> "*1. Whether an officer "empowered under Section 42 of the NDPS Act" and/or "the officer empowered under Section 53 of the NDPS Act" are "Police Officers" and therefore statements recorded by such officers would be hit by Section 25 of the Evidence Act; and*
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> *2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under section 42 thereof, and whether power under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused*?"

The Court answered the reference as follows:-

> ….. "*155.We answer the reference by stating:*
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> *(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.*
>
> *(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act"……*

Therefore the alleged confessions of guilt by the petitioners will not be of any help to the prosecution.

In the case of **Mohd. Sahabuddin** (supra), the Hon'ble Supreme Court rejected the prayer for bail of the driver and the cleaner of the truck who had surreptitiously concealed a huge quantity of cough syrup under household articles in the truck, holding interalia as follows:-

> *...."For transporting such a huge quantity of pharmaceutical products, the driver of the vehicle could not produce any valid documents. Further the chemical analysis of the contents of the cough syrup disclosed that it contained codeine phosphate beyond the prescribed quantity and, therefore, the articles were* seized" ....
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> *...."It is not in dispute that each 100 ml. bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg. of codeine phosphate and the each 100 ml. bottle of Recodex cough syrup contained 182.73 mg. of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants*"
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> *..... "As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants.."*.....

But in the present case, while one of the petitioners (petitioner in BLAPL No.6438 of 2020) has filed copies licences under the drugs and licences rules, tax invoices and way bills relating to the cough syrup in support of procurement and possession of the cough syrup, the prosecution has not produced the chemical analysis report in support of its allegation that the cough syrup contained codeine let alone codeine beyond the prescribed limit.

It is no longer res integra that fulfillment of the requirements as enumerated in Section 37 are a pre-requisite before granting bail to an accused who is alleged to have committed offences under the NDPS Act, involving commercial quantity. One of the decisions on this aspect is the decision of the Hon'ble Supreme Court , is the Full Bench decision of the Hon'ble Supreme Court, rendered in the case of **Satpal Singh vs. State of Punjab, : (2018) 13 SCC 813**.

In the present case as I am of the opinion that in the absence of the chemical analysis report , it cannot be stated that the codeine content in the seized cough syrup is beyond the prescribed limit as contained in Exception 35 , the requirements of Section 37 of the NDPS Act are not required to be satisfied before granting bail.

On a consideration of the facts of the case , the statutory provisions, the relevant notifications of the central Govt and the communication of DGCI and the decisions of the Hon'ble Supreme Court, I am of the considered view that :

i) "Narcotic drug" has been described in Section –(xiv) of the Act and includes all manufactured drugs. "Manufactured drugs" have been described in Section 2(xi) of the Act and include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or] preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not be a manufactured drug;"

ii) Cough syrups containing codeine upto the prescribed limit (as per Entry No. 35 of the Notification) will not come within the definition of "manufactured drug" provided the drug is for therapeutic purpose or medicinal use.

iii) Once it is found that the cough syrup is not for therapeutic purpose or medicinal use, or the percentage of codeine is more than the prescribed limit as mentioned in Exception No 35, it has to be considered to be a "manufactured drug" for which an offence under Section – 21 of the NDPS Act will be attracted.

iv) A person can be proceeded against simultaneously for commission of offences under the NDPS Act as well as for violation of the provisions of the Drugs and Cosmetics Act and Rules under the Drugs and Cosmetics Act.

v) Once the cough syrup is considered as a manufactured drug, attracting the provisions of section 21 of the NDPS Act, in order to ascertain whether the offence involves, "small quantity", "more than small quantity but less than commercial quantity" or "commercial quantity", the entire mixture / substance has to be taken into account.

vi) If the quantity is a manufactured drug including commercial quantity, then Section – 21 (c) of the NDPS Act will be attracted and the requirements of Section – 37 of the NDPS Act have to be satisfied, for allowing the prayer for bail.

In the present case, the following facts emerge:

i) Petitioner Manoj Kumar Bhuyan has valid licences under the Drugs and Controls Act and Rules, which authorise him to sell , stock or exhibit or offer for sale or distribute wholesale drugs and it the case of the petitioners that the cough syrup is covered under the licences and was meant for supply to medicine shops and licensed retailers.

ii) Petitioners Jyotish Kumar Kanungo and Debasish Roypitam are his employees while Mrutunjay Sahoo is the driver of one of the vehicles from which part of the cough syrup was recovered.

iii) Even though almost one year has elapsed since the date of occurrence and sending of samples to the SFSL, the chemical analysis report has not been produced inspite of sufficient opportunity being granted to the prosecution. In absence of the chemical analysis report, the presence let alone the quantity/percentage of codiene in the cough syrup cannot be ascertained.

iv) Charge sheet has been filed under Section – 21(c) / 29 of the NDPS Act but no material has been produced by the prosecution before this Court to show that the drugs were meant for any purpose other than therapeutic or medicinal purpose except for the two line identical confessions recorded in the case diary, which cannot be relied upon as per decision of the Hon'ble Apex Court in the case of **Tofan Singh** (supra).

v) The applications for bail are pending since more than six months.

vi) There is no allegation that the petitioners have any criminal antecedents.

In the above facts and circumstances in the absence of the chemical examination report, in my considered opinion, a prima facie case under Section-21 (c) of the NDPS Act is not made out against the petitioners. Hence satisfaction of the requirements of Section-37 of the NDPS Act are not necessary before granting bail.

In view of the aforesaid discussion, position of law and considering the submissions of the learned counsels, nature of materials available against the

petitioners and their period of detention in custody and the alarming situation prevailing in the jails due to overcrowding during continued prevalence of the Covid-19, I am inclined to allow the prayer for bail of the petitioners but however granting liberty to the State of Odisha to apply for recall/modification of this order in the chemical examination report so warrants.

Let the petitioners-Manoj Kumar Bhuyan, Debasis Roypitam, Jyotish Kumar Kanungo and Mrutyunjay Sahoo be released on bail on such terms and conditions as deemed just and proper by the learned Court in seisin of the case including the following conditions:

i) The petitioners will not indulge in any criminal activity while on bail.

ii) The petitioners will not tamper with evidence or try to influence prosecution witnesses.

iii) The petitioners will appear at the Baseli Sahi Police Station once every alternate Sunday between 2.00 p.m. to 5.00 p.m.

iv) The petitioners will appear in court on each date the case is fixed for trial.

v) The petitioners will not leave the State of Odisha without prior permission of the learned trial Court.

Violation of any condition will entail in cancellation of bail.

Copy of the order be sent to the I.I.C. Baseli Sahi Police Station.

Liberty is granted to the Opp. Party-State of Odisha to apply for recall/modification of this order in case the chemical analysis report so warrants.

It is made clear that the observations in this order have been made for the purpose of deciding the bail application on basis of the materials produced before this Court and shall not, be taken as an expression of opinion on the merits of the case. Therefore, the trial court should proceed with the trial without being influenced by any of the findings or observations made in this order.

The bail applications are accordingly allowed with the aforesaid observations.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4798, dated 15th April, 2021.