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should be minimal – The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted – If two interpretations are possible then the interpretation of the author must be accepted – The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

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their face value, do not constitute any offence; or (ii) where the uncontroverted allegations made therein do not disclose commission of any offence or make out a case against the accused; or (iii) where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach at a just conclusion that there is sufficient ground for proceeding against the accused; or (iv) where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive to wreck vengeance on the accused and with a view to spite him due to private and personal grade; or (v) in case there is any express legal bar or prohibition to the institution and continuation of the proceeding as engrafted in Cr.P.C. or any special Act – To sum up, under any of the circumstances narrated above and in such similar situations, a criminal prosecution, if assailed, inherent jurisdiction may have to be exercised in order to meet the ends of justice.

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THE SUPREME COURT OF INDIA

**M.R. SHAH,J & SANJIV KHANNA,J.**

CRIMINAL APPEAL NOS. 90-93 OF 2022

**JOSEPH STEPHEN AND ORS**. ……..Appellants

.V.

**SANTHANASAMY AND ORS.** ……Respondents

**CODE OF CRIMINAL PROCEDURE, 1973 – Sections 372, 378, 397 and 401 – Provisions under – Appeal and Revision against the order of conviction and acquittal – Maintainability – In a given case the following questions arose before the Supreme court and the law was settled in the following manner.**

*i) Whether the High Court in exercise of the revisional jurisdiction under Section 401 Cr.P.C. is justified in setting aside the order of acquittal and convicting the accused by converting the finding of acquittal into one of conviction?*

*ii) In a case where the victim has a right of appeal against the order of acquittal, now as provided under Section 372 Cr.P.C and the victim has not availed such a remedy and has not preferred the appeal, whether the revision application is required to be entertained at the instance of a party/victim instead of preferring an appeal?; and*

*iii) While exercising the powers under sub-section (5) of Section 401 Cr.P.C. treating the revision application as petition of appeal and deal with the same accordingly, the High Court is required to pass a judicial order?*

*Issue No.(i) Held – "High Court has erred in quashing and setting aside the order of acquittal and reversing and/or converting a finding of acquittal into one of conviction and consequently convicted the accused, while exercising the powers under Section 401 Cr.P.C. The order of conviction by the High Court, while exercising the revisional jurisdiction under Section 401 Cr.P.C., is therefore unsustainable, beyond the scope and ambit of Section 401 Cr.P.C., more particularly sub-section (3) of Section 401 Cr.P.C."*

*Issue No.(ii) Held – "In a case where the victim and/or the complainant, as the case may be, has not preferred and/or availed the remedy of appeal against the order of acquittal as provided under Section 372 Cr.P.C. or Section 378(4), as the case may be, the revision application against the order of acquittal at the instance of the victim or the complainant, as the case may be, shall not be entertained and the victim or the complainant, as the case may be, shall be relegated to prefer the appeal as provided under Section 372 or Section 378(4), as the case may be."*

*Issue No.(iii) Held- "The High Court has to pass a judicial order because sub-section (5) of Section 401 Cr.P.C. provides that if the High Court is satisfied that such revision application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do. While treating with the application for revision as petition of appeal and deal with the same accordingly, the High Court has to record the satisfaction as provided under sub-section (5) of Section 401 Cr.P.C. Therefore, where under the Cr.P.C. an appeal lies, but an application for revision has been made to the High Court by any person, the High Court has jurisdiction to treat the application for revision as a petition of appeal and deal with the same accordingly as per sub-section (5) of Section 401 Cr.P.C., however, subject to the High Court being satisfied that such an application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do and for that purpose the High Court has to pass a judicial order, may be a formal order, to treat the application for revision as a petition of appeal and deal with the same accordingly."* *(Para 9 to 12)*

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

1. AIR 1962 SC 1788 : K. Chinnaswamy Reddy Vs. State of Andhra Pradesh.
2. (2010) 2 SCC 190 : Sheetal Prasad Vs. Sri Kant.
3. (2014) 1 SCC 87 : Ganesha Vs. Sharanappa.
4. (2004) 7 SCC 665 : Ram Briksh Singh Vs. Ambika Yadav.
5. (2019) 2 SCC 752 : Mallikarjun Kodagali Vs. State of Karnataka.
6. AIR 1951 SC 196 : D. Stephens Vs. Nosibolla.

For Appellants : M.P. Parthiban
For Respondents : Joseph Aristottle S. [R-4]

JUDGMENT Date of Judgment : 25. 01. 2022

***M.R. SHAH, J.***

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 14.05.2020 passed by the High Court of Judicature at Madras, Madurai Bench in Criminal Revision Application Nos. 323 to 326 of 2013, by which the High Court, in exercise of its revisional jurisdiction under Section 401 Cr.P.C., has set aside the order of acquittal passed by the first appellate Court and has convicted the accused, original accused nos. 6 to 8 have preferred the present appeals.

2. The facts leading to the present appeals in a nutshell are as under:

That all the original accused were charged and tried for the offences punishable under Sections 147, 148, 324, 326, 307, 506(ii) r/w section 149

IPC. That the Chief Judicial Magistrate, Tiruchirapalli, by judgment dated 28.09.2012, convicted the accused under the aforesaid offences except Sections 307 and 506(ii) IPC and thereby acquitted the accused under Sections 307 and 506(ii) IPC.

2.1 Feeling aggrieved and dissatisfied with the judgment and order of conviction passed by the Chief Judicial Magistrate, Tiruchirapalli, the accused preferred Criminal Appeal No. 92/2012 in the Court of III Additional Sessions Judge, Tiruchirapalli (hereinafter referred to as the 'first appellate Court'). Challenging the acquittal of the accused under Sections 307 and 506(ii) IPC, the victims (private respondents herein) filed Criminal Appeal Nos. 108 to 110 of 2012.

2.2 The first appellate Court, vide judgment dated 18.01.2013, allowed the appeal preferred by the accused and acquitted the accused. The criminal appeals filed by the victims against acquittal of the accused under Sections 307 and 506(ii) IPC came to be dismissed.

2.3 Feeling aggrieved and dissatisfied with the common judgment and order passed by the first appellate Court allowing criminal appeal No. 92/2012 preferred by the accused, the victims – private respondents herein preferred criminal revision application nos. 323 to 326 of 2013 before the High Court under Section 397 r/w 401 Cr.P.C. By the impugned judgment and order, while exercising the revisional jurisdiction under Section 401 Cr.P.C., the High Court has set aside the judgment and order passed by the first appellate Court allowing Criminal Appeal No. 92/2012 and acquitting the accused, and consequently has convicted the accused for the offences other than the offences under Sections 307 & 506(ii) IPC and has restored the judgment and order of conviction and sentence passed by the trial Court. The High Court has however modified the sentences imposed by the trial Court.

2.4 Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court reversing the acquittal and thereupon convicting the accused, while exercising the revisional jurisdiction under Section 401 Cr.P.C., original accused nos. 6 to 8 have preferred the present appeals.

3. Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has vehemently submitted that the High Court has erred in

reversing the acquittal and convicting the accused, while exercising the revisional jurisdiction under Section 401 Cr.P.C.

3.1 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has heavily relied upon Section 401(3) Cr.P.C. Relying upon sub-section (3) of Section 401 Cr.P.C., it is vehemently submitted that while exercising the revisional jurisdiction under Section 401 Cr.P.C., the High Court has no jurisdiction at all to convert a finding of acquittal into one of conviction. It is submitted that the only course open to the High Court would be to give its own finding and thereafter remit the matter either to the trial Court or to the first appellate Court, as the case may be. Reliance is placed upon the decisions of this Court in the cases of *K. Chinnaswamy Reddy v. State of Andhra Pradesh, AIR 1962 SC 1788; Sheetal Prasad v. Sri Kant, (2010) 2 SCC 190; Ganesha v. Sharanappa, (2014) 1 SCC 87; and Ram Briksh Singh v. Ambika Yadav, (2004) 7 SCC 665*.

3.2 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has further submitted that after the amendment in Section 372 Cr.P.C., by which proviso to Section 372 Cr.P.C. came to be inserted by Act 5 of 2009, w.e.f. 31.12.2009, the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation and as per the said proviso, such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. It is submitted that therefore once the victim has a statutory right of appeal against the order of acquittal under Section 372, Cr.P.C., the revision application before the High Court shall not be entertained against the judgment and order of acquittal. Reliance is placed on subsection 4 of Section 401 Cr.P.C.

3.3 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has also relied upon the decision of this Court in the case of *Mallikarjun Kodagali v. State of Karnataka, (2019) 2 SCC 752*, by which the right of the victim to prefer an appeal against the order of acquittal has been recognised. It is submitted that as held by this Court, even in a case where the victim prefers an appeal against acquittal, he has an absolute right of appeal and therefore he is not required to even seek leave to appeal as required in case of "complainant" while preferring the appeal under Section 378(4) Cr.P.C.

3.4 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has further submitted that assuming that the High Court in exercise of powers under sub-section (5) of Section 401 Cr.P.C. may treat the application for revision as a petition of appeal and deal with the same accordingly, the High Court has to pass a judicial order to treat the application for revision as a petition of appeal. It is submitted that in the present case, no such judicial order has been passed by the High Court and the High Court has exercised the jurisdiction under Section 401 Cr.P.C. and has reversed the acquittal and has convicted the accused which, as such, is not permissible and it is beyond the scope and ambit of exercise of revisional jurisdiction under Section 401 Cr.P.C.

3.5 Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has also tried to make submissions on merits and has submitted that the first appellate Court gave cogent reasons while acquitting the accused and recorded the findings in favour of the accused which were not required to be interfered with by the High Court in exercise of the revisional jurisdiction. However, for the reasons stated hereinbelow, we propose to remand the matter to the High Court, we do not propose to consider any of the submissions on merits of the case and to go into whether the High Court on merits is justified in reversing the order of acquittal and convicting the accused.

4. Shri (Dr.) Joseph Aristotle, learned Advocate appearing on behalf of the respondent-State has, as such, fairly conceded that in exercise of powers under Section 401 Cr.P.C., the High Court could not have reversed the acquittal and/or convert a finding of acquittal into one of conviction. However, he has submitted that the High Court could have treated the application for revision as a petition of appeal and dealt with the same accordingly as provided under sub-section (5) of Section 401 Cr.P.C.

4.1 It is further submitted that even otherwise the victims in the present case were having a right of appeal to the High Court against the order of acquittal as provided under Section 372 Cr.P.C. It is therefore submitted that even otherwise the victims could have preferred the appeal before the High Court against the order of acquittal. It is submitted that merely because mistakenly and/or inadvertently the victims preferred revision applications, their right to appeal conferred under Section 372 Cr.P.C. could not have been taken away. Therefore, it is submitted that either the revision applications

preferred by the victims may be treated as petitions of appeals in exercise of powers under sub-section (5) of Section 401 Cr.P.C. or the matter may be remanded to the High Court to convert the revision applications into appeals and to treat them as appeals under Section 372 Cr.P.C.

5. Though served, no body appears on behalf of the private respondents – victims.

6. In rejoinder, Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the accused has opposed the prayer made on behalf of the respondent-State to treat the revision applications as appeals as per sub-section (5) of Section 401 Cr.P.C. It is submitted that firstly the High Court has to pass a judicial order to treat the revisional applications as petitions of appeals and thereafter the High Court is required to give an opportunity to the accused as if the High Court is deciding the appeal against the order of acquittal. It is submitted that the scope and ambit of revisional jurisdiction and appellate jurisdiction is distinct and separate. It is submitted that while considering the revision application, the revisional court would have a limited scope, however, while deciding the appeal, the appellate Court has a wide jurisdiction than that of the revisional jurisdiction.

7. We have heard the learned counsel appearing on behalf of the respective parties at length.

Having heard the learned counsel for the respective parties, the following questions arise for the consideration of this Court:

> i) Whether the High Court in exercise of the revisional jurisdiction under Section 401 Cr.P.C. is justified in setting aside the order of acquittal and convicting the accused by converting the finding of acquittal into one of conviction?;
>
> ii) In a case where the victim has a right of appeal against the order of acquittal, now as provided under Section 372 Cr.P.C and the victim has not availed such a remedy and has not preferred the appeal, whether the revision application is required to be entertained at the instance of a party/victim instead of preferring an appeal?; and
>
> iii) While exercising the powers under sub-section (5) of Section 401 Cr.P.C. treating the revision application as petition of appeal and deal with the same accordingly, the High Court is required to pass a judicial order?

8. Now so far as the first issue, whether in exercise of the revisional jurisdiction under Section 401 Cr.P.C., the High Court can convert a finding

of acquittal into one of conviction and what is the procedure to be followed by the High Court, as such, the said issue is now not *res integra*. On the aforesaid, few decisions of this Court, referred to hereinabove, are required to be considered.

a) In the case of *K. Chinnaswamy Reddy (supra)*, while considering the similar provision under the old Code, namely, Section 439(4) Cr.P.C., it is observed and held that "though sub-section (1) of Section 439 of the Criminal Procedure Code authorised the High Court to exercise in its discretion any of the powers conferred on a Court of Appeal by Section 423, yet sub-section (4) specifically excludes the power to convert a finding of acquittal into one of conviction". It is observed that "at that stage the revisional court stops short of finding the accused guilty and passing sentence on him by ordering a retrial". What order should be passed by the High Court in a revision application against the order of acquittal, while exercising the revisional jurisdiction, has been dealt with and considered in paragraph 11, which reads as under:

> "**11.** The next question is what order should be passed in a case like the present. The High Court also considered this aspect of the matter. Two contingencies arise in such a case. In the first place there may be an acquittal by the trial court. In such a case if the High Court is justified, on principles we have enunciated above, to interfere with the order of acquittal in revision, the only course open to it is to set aside the acquittal and send the case back to the trial court for retrial. But there may be another type of case, namely, where the trial court has convicted the accused while the appeal court has acquitted him. In such a case if the conclusion of the High Court is that the order of the appeal court must be set aside, the question is whether the appeal court should be ordered to rehear the appeal after admitting the statement it had ruled out or whether there should necessarily be a retrial. So far as this is concerned, we are of opinion that it is open to the High Court to take either of the two courses. It may order a retrial or it may order the appeal court to rehear the appeal. It will depend upon the facts of each case whether the High Court would order the appeal court to rehear the appeal or would order a retrial by the trial court. Where, as in this case, the entire evidence is there and it was the appeal court which ruled out the evidence that had been admitted by the trial court, the proper course in our opinion is to send back the appeal for rehearing to the appeal court. In such a case the order of the trial court would stand subject to the decision of the appeal court on rehearing. In the present case it is not disputed that the entire evidence has been led and the only defect is that the appeal court wrongly ruled out evidence which was admitted by the trial court. In the circumstances we are of opinion that the proper course is to direct the appeal court to rehear the appeal and either maintain the conviction after taking into consideration the evidence which was ruled out by it previously or to acquit the accused if that is the just course to

> take. We should like to add that the appeal court when it rehears the appeal should not be influenced by any observations of the High Court on the appreciation of the evidence and should bring to bear its own mind on the evidence after taking into consideration that part of the evidence which was considered inadmissible previously by it. We therefore allow the appeal subject to the modification indicated above."

b) In the case of *Ram Briksh Singh (supra)*, after considering the decision in the case of *K. Chinnaswamy Reddy (supra)* and earlier decision in the case of *D. Stephens v. Nosibolla, AIR 1951 SC 196*, it is observed and held that the High Court in a revision application against the order of acquittal and while exercising the powers of the revisional Court can set aside an order of acquittal and remit the case for retrial where material evidence is overlooked by the trial Court.

c) Again, in the case of *Sheetala Prasad (supra)*, it is reiterated that Section 401(3) Cr.P.C. prohibits conversion of a finding of acquittal into one of conviction and in such cases retrial or rehearing of the appeal might be ordered.

d) In the case of *Ganesha (supra)*, it is observed in pragraphs 10 to 12 as under:

> "**10.** Section 386(*a*) thus authorises the appellate court to reverse an order of acquittal, find the accused guilty and pass sentence on the person found guilty. However, sub-section (3) of Section 401 of the Code contemplates that the power of revision does not authorise a High Court to convert a finding of acquittal into one of conviction. On the face of it, the High Court while exercising the powers of revision can exercise all those powers which have been conferred on the court of appeal under Section 386 of the Code but, in view of sub-section (3) of Section 401 of the Code, while exercising such power, cannot convert a finding of acquittal into one of conviction.
>
> **11.** However, in a case where the finding of acquittal is recorded on account of misreading of evidence or non-consideration of evidence or perverse appreciation of evidence, nothing prevents the High Court from setting aside the order of acquittal at the instance of the informant in revision and directing fresh disposal on merit by the trial court. In the event of such direction, the trial court shall be obliged to reappraise the evidence in light of the observation of the Revisional Court and take an independent view uninfluenced by any of the observations of the Revisional Court on the merit of the case. By way of abundant caution, we may herein observe that interference with the order of acquittal in revision is called for only in cases where there is manifest error of law or procedure and in those exceptional cases in which it is found that the order of acquittal suffers from glaring illegality, resulting into miscarriage of justice. The High Court may also

> interfere in those cases of acquittal caused by shutting out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. In such an exceptional case, the High Court in revision can set aside an order of acquittal but it cannot convert an order of acquittal into that of an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial.
>
> **12.** The view, which we have taken finds support from a decision of this Court in *Bindeshwari Prasad Singh* v. *State of Bihar* [(2002) 6 SCC 650 : 2002 SCC (Cri) 1448] , in which it has been held as follows: (SCC pp. 654- 55, para 12)
>
> "*12.* Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction. The aforesaid subsection, which places a limitation on the powers of the Revisional Court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party."

9. Applying the law laid down by this Court in the aforesaid decisions and on a plain reading of sub-section (3) of Section 401 Cr.P.C., it has to be held that sub-section (3) of Section 401 Cr.P.C. prohibits/bars the High Court to convert a finding of acquittal into one of conviction. Though and as observed hereinabove, the High Court has revisional power to examine whether there is manifest error of law or procedure etc., however, after giving its own findings on the findings recorded by the court acquitting the accused and after setting aside the order of acquittal, the High Court has to remit the matter to the trial Court and/or the first appellate Court, as the case may be. As observed by this Court in the case of *K. Chinnaswamy Reddy (supra)*, if the order of acquittal has been passed by the trial Court, the High Court may remit the matter to the trial Court and even direct retrial. However, if the order of acquittal is passed by the first appellate court, in that case, the High Court has two options available, (i) to remit the matter to the

first appellate Court to rehear the appeal; or (ii) in an appropriate case remit the matter to the trial Court for retrial and in such a situation the procedure as mentioned in paragraph 11 of the decision in *K. Chinnaswamy Reddy (supra)*, referred to hereinabove, can be followed. Therefore, in the present case, the High Court has erred in quashing and setting aside the order of acquittal and reversing and/or converting a finding of acquittal into one of conviction and consequently convicted the accused, while exercising the powers under Section 401 Cr.P.C. The order of conviction by the High Court, while exercising the revisional jurisdiction under Section 401 Cr.P.C., is therefore unsustainable, beyond the scope and ambit of Section 401 Cr.P.C., more particularly sub-section (3) of Section 401 Cr.P.C. Issue no.1 is answered accordingly.

10. Now so far as issue no.2, namely, in a case where no appeal is brought though appeal lies under the Code, whether revision application still to be entertained at the instance of the party who could have appealed, the answer lies in sub-section (4) of Section 401 Cr.P.C. itself. Sub-section (4) of Section 401 Cr.P.C. reads as under:

> "(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

10.1 It cannot be disputed that now after the amendment in Section 372 Cr.P.C. after 2009 and insertion of proviso to Section 372 Cr.P.C., a victim has a statutory right of appeal against the order of acquittal. Therefore, no revision shall be entertained at the instance of the victim against the order of acquittal in a case where no appeal is preferred and the victim is to be relegated to file an appeal. Even the same would be in the interest of the victim himself/herself as while exercising the revisional jurisdiction, the scope would be very limited, however, while exercising the appellate jurisdiction, the appellate Court would have a wider jurisdiction than the revisional jurisdiction. Similarly, in a case where an order of acquittal is passed in any case instituted upon complaint, the complainant (other than victim) can prefer an appeal against the order of acquittal as provided under sub-section (4) of Section 378 Cr.P.C., subject to the grant of special leave to appeal by the High Court.

10.2 As observed by this Court in the case of *Mallikarjun Kodagali (supra)*, so far as the victim is concerned, the victim has not to pray for grant

of special leave to appeal, as the victim has a statutory right of appeal under Section 372 proviso and the proviso to Section 372 does not stipulate any condition of obtaining special leave to appeal like subsection (4) of Section 378 Cr.P.C. in the case of a complainant and in a case where an order of acquittal is passed in any case instituted upon complaint. The right provided to the victim to prefer an appeal against the order of acquittal is an absolute right. Therefore, so far as issue no.2 is concerned, namely, in a case where the victim and/or the complainant, as the case may be, has not preferred and/or availed the remedy of appeal against the order of acquittal as provided under Section 372 Cr.P.C. or Section 378(4), as the case may be, the revision application against the order of acquittal at the instance of the victim or the complainant, as the case may be, shall not be entertained and the victim or the complainant, as the case may be, shall be relegated to prefer the appeal as provided under Section 372 or Section 378(4), as the case may be. Issue no.2 is therefore answered accordingly.

11. Now so far as the power to be exercised by the High Court under sub-section (5) of Section 401, Cr.P.C., namely, the High Court may treat the application for revision as petition of appeal and deal with the same accordingly is concerned, firstly the High Court has to pass a judicial order to treat the application for revision as petition of appeal. The High Court has to pass a judicial order because sub-section (5) of Section 401 Cr.P.C. provides that if the High Court is satisfied that such revision application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do. While treating with the application for revision as petition of appeal and deal with the same accordingly, the High Court has to record the satisfaction as provided under sub-section (5) of Section 401 Cr.P.C. Therefore, where under the Cr.P.C. an appeal lies, but an application for revision has been made to the High Court by any person, the High Court has jurisdiction to treat the application for revision as a petition of appeal and deal with the same accordingly as per sub-section (5) of Section 401 Cr.P.C., however, subject to the High Court being satisfied that such an application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do and for that purpose the High Court has to pass a judicial order, may be a formal order, to treat the application for revision as a petition of appeal and deal with the same accordingly.

12. Now the next question is what order should be passed in a case like the present. This Court may either set aside the impugned judgment and order passed by the High Court setting aside the acquittal and convicting the accused so as to enable the High Court to remit the matter to the first appellate Court to rehear the appeal after considering the findings recorded by it or to remit the matter to the High Court to treat the revision application as a petition of appeal against the order of acquittal, which otherwise is permissible under sub-section (5) to Section 401 Cr.P.C. As observed hereinabove, as such, while exercising the powers under sub-section (5) to Section 401 Cr.P.C. to treat the revision application as a petition of appeal, the High Court is required to pass a judicial order. However, considering the fact that even otherwise being victims they are having the statutory right of appeal as per proviso to Section 372 Cr.P.C., we deem it fit and proper to remit the matter to the High Court to treat the revision applications as petition of appeals under Section 372 Cr.P.C. and to decide the same in accordance with law and on their own merits. The same would be in the interests of all, namely, the victims as well as the accused, as the appellate Court would have a wider scope and jurisdiction as an appellate Court, rather than the revisional court.

13. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court reversing the acquittal and convicting the accused is hereby quashed and set aside. The matters are remitted to the High Court. The High Court is directed to treat the revision applications as appeals under Section 372 Cr.P.C. and thereafter to decide and dispose of the same in accordance with law on their own merits.

14. The present appeals are accordingly allowed in the aforesaid terms.

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**2022 (I) ILR - CUT- 12**

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

WRIT PETITION (CIVIL) NO. 26548 OF 2021

**M/s. MYTHRI INFRASTRUCTURE AND MINING INDIA PVT. LTD. AND ANR.** ……Petitioners

.V.

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

**CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Contractual matter – Successful submission/uploading of the technical bid but the Initial Price Offer (IPO) could not be submitted due to technical glitches – Plea that the bid of the petitioner should be considered along with others as the technical aspect was beyond its control – Matter examined with reference to similar judgments and the essence of time line – Held, the scope of interference by the writ Court in such matters is limited – The legal position in this regard is that the essence of the law laid down in the judgments referred is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal – The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted – If two interpretations are possible then the interpretation of the author must be accepted – The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.** (Para 27 & 28)

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

1. (2018) 3 SCC 13 : Maharashtra Housing Development Authority Vs. Shapoorji Pallonji and Company Private Limited.
2. (2012) 8 SCC 216 : Michigan Rubber (India) Ltd. Vs. State of Karnataka.
3. ILR 2018 Kar 5587 : Mahindra Sanyo Special Steel Private Ltd. Vs Union of India.
4. (2020) 16 SCC 489 : Silpi Constructions Contractors Vs. Union of India.
5. 2021 SCC OnLine SC 738 : Uflex Ltd. Vs. Government of Tamil Nadu.

For Petitioners : Mr. Ramesh Singh, Sr.Adv. Mr. Amit Pattnaik,
For Opp. Parties : Mr. Gautam Misra, Sr. Adv.
Mr. P. K. Muduli, Addl. Govt. Adv.
Mr. Pinaki Misra, Sr.Adv. & Mr. Naveen Kumar &
Mr. Rajiv K. Mahanta.

JUDGMENT : Date of Judgment : 10.12.2021

***Dr. S. MURALIDHAR, C.J.***

1. The difficulty faced by the Petitioner No.1 in submitting its Initial Price Offer (IPO) online, for reasons purportedly beyond its control, in respect of its bid for the 'Karlapat Bauxite Block', has led the Petitioner No.1

(Company) and its Chairman-cum-Director (Petitioner No.2) to approach this Court with the present petition under Article 226 of the Constitution of India.

***Background facts***

2. The background facts are that Petitioner No.1 is engaged in civil constructions and mining operations, extraction and transportation of major minerals. A notice inviting tender (NIT) was floated by the Government of Odisha on 7th July, 2021 for e-auction of the Karlapat Bauxite Block.

3. In terms of the NIT, the tender was a two-stage process. The bidders had to initially submit their Technical Bids and Financial Bids comprising of the 'Initial Price Offer' (IPO). Thereafter the preferred bidder would be selected through a process of second round of e-auction. Once the technically qualified bidder (TQB), based on the technical bids submitted is determined, the financial bid of such TQB is to be opened to determine its IPO. The lowest 5 of 50% (whichever is higher) of the TQBs, based on their IPOs, are allowed to participate in the second round of e-auction with the highest IPO among such bidders being the floor price for the auction. If there are between 3 to 5 TQBs, then all such bidders are allowed to participate in the second round. For consideration of the financial bid, the IPO has to be higher than the reserve price of 35% of the value of mineral dispatched for the mineral block as set out in Clause-9 of the NIT. The bidder with the highest final price offer in the second round of auction process will be chosen as the preferred bidder.

4. The bids had to be submitted in terms of the NIT on the website of MSTC Limited (Opposite Party No.3) being the designated e- portal for the tender.

5. In terms of Clause-13.1.2 of the NIT, the bidders were to physically submit the technical bid along with the original documents in the office of the Director of Mines, Bhubaneswar (Opposite Party No.2) while simultaneously uploading the technical bid as well as the IPO on the website of Opposite Party No.3.

6. In the first round, the bidders were required to submit their bids "on or prior to 15:00 hours (IST) on Tuesday, 24th August, 2021." It must be noted here that under the title 'Important Information' enclosed with the tender document, it was *inter alia* indicated in Clause 1.12 as under:

> "1.12. Bidder shall be responsible for any problem at the bidder's end like failure of electricity, loss of Internet connection, any trouble with bidder's computer etc. which may cause inconvenience or prevent the bidder from bidding in e-auction."

7. Petitioner No.1 (Company) states that it submitted its technical bid physically in the office of Opposite Party No.2 along with the bid security of Rs.50,00,00,000/- in the form of Bank Guarantee and all documents in original in a sealed envelope on 23rd August, 2021. Thereafter on the following day i.e. 24th August, 2021, it uploaded the documents for its technical bid in the prescribed format on the designate e-portal of Opposite Party No.3 and received the conformation. The screenshot of such confirmation has been enclosed with the writ petition.

8. According to the Petitioners, on successful submission/uploading of the technical bid of Petitioner No.1, the link/button for the IPO was activated on the e-portal of Opposite Party No.3. The Petitioners state that upon the link/button being clicked, they were directed to a webpage for filling up the IPO figure. After filling in the IPO when the Petitioners clicked on the final submission button "unexpectedly, on account of technical glitches on the server of MSTC, the relevant page on the MSTC portal kept expiring at frequent intervals which prevented the Petitioner from affixing its Digital Signature." It is stated that despite repeated attempts to save/submit the IPO and click on the final submission button prior to the deadline of 3 PM on 24th August, 2021, the web page maintained by Opposite Party No.3 kept expiring "without any fault of the Petitioner No.1." Copies of the screenshots of e-portal of Opposite Party No.3 showing the expiry of the page for submission of IPO has been enclosed with the petition as Annexure-7 series.

9. It is stated that the IPO of Petitioner No.1 was higher than the reserve price of 35% as stipulated under Clause-9 of the NIT. It is claimed that despite attempting to communicate with the Help Desk of Opposite Party No.3 on several occasions, the problem could not be resolved. Petitioner No.1 states that it did not receive any acknowledgement from the Opposite Party No.3 on acceptance of its IPO. The Petitioners then submitted a representation dated 28th August, 2021 by e-mail to the Opposite Parties and requested that they should accept the IPO and allow Petitioner No.1 to participate in the tender process.

10. In a reply e-mail dated 30th August, 2021, Opposite Party No.3 informed the Petitioners that there was no technical glitch at the MSTC

server side and "every minute there is activity recorded from different bidders." It was further stated that "MSTC helped many bidders till the last minute, before closing of the events." It was noted in the letter that tender closed on 24th August, 2021, "but we have not received a call or complaint on 24th from your end."

11. The Petitioners have averred in para 5 of the writ petition that they have reliably learnt that only four other bidders had participated in the e-tender. The evaluation of the technical bids by the Opposite Parties was underway and the list of TQBs was to be published between 16th and 27th September, 2021. Only thereafter, the second and final round of auction would take place. It was further submitted that the Petitioners had reliably learnt that the technical bid of Petitioner No.1 was stored on the website of MSTC Limited and was accessible to both the MSTC Limited and the State Government.

***The present petition***

12. In the circumstances, on 31st August, 2021, the present petition was filed praying for an issuance of a mandamus to the Principal Secretary, Department of Steel and Mines, State of Odisha (Opposite Party No.1) and the Director of Mines (Opposite Party No.2) to show-cause why the technical bid and financial bid of Petitioner No.1 shall not be considered for evaluation and a mandamus to Opposite Party No.3 to retrieve the bids of Petitioner No.1 from its portal/server/website and share with the Opposite Party Nos.1 and 2 for evaluation under the terms of the NIT and a further mandamus to Opposite Parties 1 and 2 to allow the Petitioner No.1 to participate in the second round of auction if its bid was found to be technically qualified.

13. The writ petition was first listed for hearing on 3rd September, 2021 when an advance copy was asked to be served on Opposite Party No.3. Thereafter, the petition was heard on 9th September, 2021 and an order was passed on that day while directing issuance of notice that the tender dated 7th July, 2021 for auction of the Karlapat Bauxite Mining block including the second round of auction "shall remain stayed till the next date."

14. Pursuant to the notice issued, a reply has been filed by Opposite Party No.3. Another separate reply has been filed by Opposite Parties 1 and 2. The Petitioners have filed a rejoinder affidavit.

15. A separate intervention application has been filed being I.A. No.14739 of 2021 by M/s. Anrek Aluminum Limited, which is one of the 4 bidders who had successfully uploaded the IPO.

***Submissions on behalf of the Petitioner***

16. Mr. Ramesh Singh, learned Senior Counsel appearing on behalf of the Petitioners submitted as under:

i. The failure by Petitioner No.1 (Company) to submit its IPO on the web portal of Opposite Party No.3 was for the reasons entirely beyond the control of Petitioner No.1;

ii. Copies of the screenshots of the log record enclosed with the counter affidavit of Opposite Party No.3 showed that Petitioner No.1 had in fact made repeated attempts to upload the IPO. Merely because there was no technical glitch at the end of MSTC Limited, it need not be assumed that there was no genuine difficulty faced by the Petitioners in uploading the IPO.

iii. Once it was clear that 3 attempts were made between 2 and 3 PM by Petitioner No.1, after it had successfully uploaded the technical bid, to enter the IPO and click the submission button, there should be no doubt as to the bonafides of Petitioner No.1. Since its failure to upload the IPO was entirely on account of factors beyond its control, it should not be kept out of the tender process altogether but should be allowed to participate.

iv. Reliance was placed on the decisions of the Supreme Court in ***Ganesh Prasad Sah Kesari v. Lakshmi Narayan Gupta (1985) 3 SCC 53*** and ***D.L.S. Shiksha Mahavidhyalay v. National Council for Teachers Education (2018) 12 SCC 55***. Additionally, reliance was placed on the decision of the Delhi High Court in ***AIMIL Pharmaceuticals (India) Ltd. v. Government of NCT of Delhi*** (decision dated 22nd October, 2018 in W.P.(C) No.11277 of 2018) and the order dated 28th February, 2019 of the Supreme Court of India in S.L.P. (C) 1779 of 2019 (***Government of NCT of Delhi v. AIMIL Pharmaceuticals (India) Ltd.***) affirming the order of the Delhi High Court. It was submitted that the facts of the present case are similar to the case of ***AIMIL Pharmaceuticals*** *(supra)* and just as was ordered by the Delhi High Court in the aforementioned case, in the interests of justice, Petitioner No.1should also be allowed to participate in the tender;

v. By allowing the Petitioner No.1 to participate, no prejudice whatsoever would be caused to any of the other four bidders since their bids were kept encrypted and not in the public domain. In any event, the mere submission of the IPO would not determine the successful bidder. The process involved a second stage before the final price offer could be determined. It was in the interest of everyone that in a competitive bidding process a TQB is not kept out and allowing Petitioner No.1 to participate would only increase the competition which would be in the best interest of the Opposite Parties.

***Submissions on behalf of MSTC Ltd.***

17. Mr. Gautam Misra, learned Senior Counsel appearing on behalf of Opposite Party No.3 submitted that:

> i. The Petitioners need not have waited till the last minute to upload the IPO. There was sufficient cautionary advice in the NIT documents that the bidder should have been aware of. In particular, it was made clear that MSTC Limited had no responsibility for the glitches at the bidders' end. This was a case where the web portal of MSTC Limited worked perfectly well. It continuously received bids online i.e. both the technical bids as well as IPOs without any hitch from several bidders on 24th August, 2021 in the forenoon as well as post lunch sessions. These bidders participated not just in the tender for the Karlapat Bauxite Mining block but other blocks as well;
>
> ii. The NIC itself set out the Help Desk numbers for assistance. The relevant clauses in this regard read as under:
>
> "...It may be noted that bidders need not visit any of the offices of MSTC Limited for submission of the documents. However, the bidders may contact any office of MSTC Limited for seeking assistance on the logging process details of which are available on MSTC website www.mstcindia.co.in or you may contact MSTC's help desk number "033-40645207/ 40609118/40645316" for assistance in any technical or system related issues. Once the complete set of documents and requisite registration fee are received from a bidder, MSTC shall activate the bidder's login after verification/scrutiny of the documents. MSTC Limited reserves the right to call for additional documents from the bidder if needed and the bidder shall be obliged to submit the same."

Furthermore, the relevant cause in Schedule-III of the NIT read as follows:

> "MSTC shall ensure that the bidding process is smooth and bidders do not face any problem in bidding. However, MSTC shall not be responsible for any problem at the bidder's end like failure of electricity, loss of Internet connection, any trouble with bidder's computer etc. which may cause inconvenience or prevent the bidder from bidding in any e-auction."

18. Mr. Misra pointed out that after waiting for 3 days the Petitioners wrote to MSTC on 28th August, 2021. This was a relatively long gap making it even more difficult for Opposite Party No.3 to alter the schedule. He pointed out that there was no complaint from any bidder whatsoever regarding technical glitches on the website of MSTC. Reliance was placed on the decision in ***Maharashtra Housing Development Authority v. Shapoorji Pallonji and Company Private Limited (2018) 3 SCC 13*** to urge that this Court should not interfere with the bidding process.

***Submissions on behalf of the other counsel***

19. Mr. Pinaki Misra, learned Senior Counsel for the Intervener submitted that allowing Petitioner No.1 to now participate would be virtually giving it a second chance, which would completely destroy the sanctity of the schedule attached to the tendering process.

20. Mr. Muduli, learned Additional Government Advocate for the State also supported the stand of Opposite Party No.3 and submitted that the failure by Petitioner No.1 in submitting its IPO before the last date and time i.e. 15:00 hours on 24th August, 2021 should mean that Petitioner No.1 has lost its chance to participate. He pointed out that 122 bidders had submitted their bids with their respective IPOs and it is only the Petitioner No.1, who was unable to do so. He drew attention to Clause-8.1(A) of the tender, which will be referred to hereinafter.

***Analysis and Reasons***

21. The above submissions have been considered. Clause 8.1(A) of the tender document makes it abundantly clear that the bidders "must not submit the initial price offer physically." The said Clause reads as under:

> "The Technical Bid and the initial price offer must be submitted electronically as provided in Schedule-III (Technical details regarding online electronic auction). The duly executed original physical copy of the Technical Bid must be hand delivered to the Joint Director or the Designated Officer of Government of Odisha for this specific purpose on the address specified in Clause 13.1.2 so that they are received on or prior to the Bid Due Date, failing which the Technical Bid shall be deemed to be not received. In case of a conflict between documents submitted electronically and document hand delivered physically, the documents hand delivered physically shall prevail. It is clarified that only the Technical Bid is required to be submitted physically, and the Bidders must not submit the initial price offer physically. In case the Bidder submits the initial price after physically, the Technical Bid and the initial price offer will be summarily rejected. In case the Bidder fails to submit the Technical Bid electronically, the Technical Bid and the initial price offer will be summarily rejected."

22. In the present case a High-Level Committee (HLC), chaired by the Development Commissioner-cum-Additional Chief Secretary on the auction of the Major Mineral which was held on 13th September, 2021 examined the issue raised by the Petitioners. The relevant portion of the minutes of the HLC reads thus:

> "……the Committee was apprised that Mythri Infrastructure and Mining India Private Ltd. has submitted Technical Bid in physical form against Kalarapat Bauxite Block but has not committed has Initial Price Offer in the online Technical Bid. Thus the online technical bid has not deem captured in MSTC portal. Therefore, as per the above condition of the Tender Document, the physical bid of the said bidder was not opened…"

23. Therefore, and rightly, the bid documents of Petitioner No.1 submitted physically were not taken into consideration or opened. Now requiring Opposite Parties to allow Petitioner No.1 to submit its IPO physically will indeed amount to changing the terms of the tender document.

24. While the Petitioners might contend that their inability to upload the IPO was for reasons entirely outside their control, the fact remains that there was no technical glitch on the side of Opposite Party No.3. The log enclosed with its counter affidavit makes it abundantly clear that none of the other bidders encountered any difficulty in uploading the technical bid as well as the IPOs. While the log does show that the Petitioners' three attempts at uploading the IPO prior to 3 PM on 24th August, 2021 were unsuccessful, this is not conclusive proof of the technical glitches at the end of the Petitioners being for reasons entirely outside their control. Even assuming in this regard in favour of the Petitioners, the fact remains that they need not have waited till the last minute to upload the IPO. The tender documents made it clear that Opposite Party No.3 would not be responsible for any problem at the bidder's end. In fact, this is the reason why MSTC Limited had offered help to bidders. The instructions in this regard were specific and read as under:

"Attached Documents

> After uploading these documents, the bidder shall have to attach them with the specific tender for the concerned mine for which it is intending to submit the Technical Bid. It may be noted by the Bidder that in case it intends to use the same supporting document for more than one mine, it does not need to upload the same document every time. The supporting document, once uploaded, can be attached with Technical Bid for multiple mineral block(s), if desired.
>
> *The bidder should note that only a file which is "attached" with a specific mine(s) shall be considered during evaluation of the Technical Bid. Files which are not attached to any mine(s) shall not be considered for evaluation.*
>
> *The Bidder should also note that a Bid will be considered as submitted if and only if the Bidder has submitted the Initial Price Offer. Only such Bids will be opened*

> *for which Initial Price Offer has been submitted. It is further clarified that saving of Technical Bid without saving of the Initial Price Offer will be treated as non-submission of bid.*
>
> Upon successful submission of Initial Price Offer, the Bidder shall receive a bid acknowledgment from the system automatically.
>
> The Bidders may note that the Technical Bid and the Initial Price Offer submitted online as above will be encrypted by the MSTC's own software before storage in the database. This will be done to protect the sanctity and confidentiality of the Bids before the actual opening of the same.
>
> The Bidder has an option to edit Technical Bid and initial price offer as many times as it wishes till the final submission." (emphasis supplied)

25. In similar circumstances, in ***Shapoorji Pallonji*** *(supra)*, the Supreme Court disapproved of the High Court having interfered and allowed the Respondent therein to participate in the tender process. In that case, the deadline for submission of online bids was 13:00 hours. Respondent No.1 had submitted its proposal at 12:16 hours. It was claimed that it pressed the 'freeze button' but could not get any acknowledgement. Its bid was therefore rejected. The system had generated an acknowledgement for other bidders and therefore it was held that there was no glitch in the system as far as the host of web portal i.e. the National Informatics Centre (NIC) was concerned. The Supreme Court came to the following conclusions:

> "9. If NIC, which had developed the e-portal in which bids were to be submitted and maintenance and upkeep of which was its responsibility, had stated in its affidavit what has been indicated above, we do not see how the repeated statements made on behalf of the first respondent that the bid documents can still be retrieved, if required by travelling beyond the Government of India Guidelines, should commend to us for acceptance. The opinion rendered in this regard by the consultant of the first respondent Mr. Arun Omkarlal Gupta on which much stress and reliance has been placed by the first respondent could hardly be determinative of the question in a situation where NIC which had developed the portal had stated before the Court on affidavit that retrieval of the documents even jointly with Maharashtra Housing Development Authority is not feasible or possible. That apart, lack of any timely response of the first respondent when the system had failed to generate an acknowledgement of the bid documents in a situation where the first respondent claims to have pressed the "freeze button"; the generation of acknowledgements in respect of other bidders and the absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not a valid bid and the directions issued by the High Court in favour of the first respondent virtually confer on the said respondent a second opportunity, which cannot be countenanced.

> 10. In the above view of the matter, we are inclined to take the view that the High Court was not correct in issuing the directions extracted above as contained in paragraph 29 of the impugned judgment/order dated 28-9-2017. The same are, therefore, interfered with. The appeal is allowed accordingly."

26. The present case is more or less similar on facts. The Court is therefore inclined not to accept the plea of Petitioner No.1 that it should be allowed to participate in the second round of bidding by requiring the Opposite Parties to accept its IPO, which would be submitted physically.

27. The scope of interference by the writ Court in such matters is limited. The legal position in this regard has been explained in ***Michigan Rubber (India) Ltd. v. State of Karnataka (2012) 8 SCC 216.*** The decision of the High Court of Karnataka in ***Mahindra Sanyo Special Steel Private Ltd. v. Union of India, ILR 2018 Kar 5587*** is instructive. To the same effect is the decision in ***Silpi Constructions Contractors v. Union of India, (2020) 16 SCC 489***, where it was observed as under:

> "20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

28. Turning now to the decision in ***AIMIL Pharmaceuticals*** *(supra)*, the Court finds that it turned on an entirely different set of circumstances. There was no occasion for the Delhi High Court to consider the law as explained by the Supreme Court in ***Shapoorji Pallonji*** *(supra).* It is likely that the said decision was not brought to the notice of the Delhi High Court. It is equally possible that if it had, the decision might have been different. The in limine dismissal of the Special Leave Petition against the said decision would not necessarily affirm its correctness.

29. As far as the ***D.L.S. Shiksha Mahavidhyalay*** *(supra)* is concerned, again this was a short order and not in the context of uploading of tender documents online. It involved a technical defect which did not have much bearing on the outcome of the process. Here it must be noted that in a competitive bidding process, permitting one of the bidders who has missed the bus to participate, may have serious repercussions on the sanctity of the bidding process itself. It will amount to giving the Petitioner No.1 a second chance, which would give it an unfair advantage over other bidders who have taken precautions to ensure that they strictly adhere to the online bidding process.

30. The timelines in a tender and the process itself ought not to be lightly interfered with as was observed in ***Uflex Ltd. v. Government of Tamil Nadu 2021 SCC OnLine SC 738*** as under:

> "In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular26 and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them."
>
> "47. Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate."

31. For all of the aforementioned reasons, this Court is not persuaded to grant the reliefs prayed for by the Petitioners. The writ petition is according dismissed, but in the circumstances, with no order as to costs. The interim order is vacated.

**—— o ——**

**2022 (I) ILR - CUT- 24**

**Dr. S. MURALIDHAR, C.J & A.K. MOHAPATRA, J.**

W.P.(C) NO. 25717 OF 2017

**NILACHAKRA CONSTRUCTION, JHURDA** …. …..Petitioner

.V.

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

**ADMINISTRATION OF JUSTICE – Access and availability of justice delivery system – Abuse and misuse of the scope – Principles to be followed – Held, "another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions – No litigant has a right to unlimited drought upon the Court time and public money in order to get his affairs settled in the manner as he wishes – Easy access to justice should not be used as a licence to file misconceived and frivolous petitions.**

"It is worthwhile to mention here that the Petitioner has unnecessarily troubled this court by filing successive writ petitions involving the self-same cause of action. The record reveals that the Petitioner is guilty of wasting Court's valuable time by approaching this Court in one form or the other on several occasions. After disposal of the first writ petition, in a very clear and unambiguous term, no further direction whatsoever is necessary in this case. Filing of such successive writ petition involving the self-same cause of action is nothing but an abuse of the process of this court. Such practices of filing successive writ petitions have been, time and again, deprecated by the Hon'ble Supreme Court as well as various High Courts. For example; in the case of ***Sarguja Transport Service Vrs. State Transport Appellate Tribunal, M.P., Gwalior and others***, reported in 1987(1) SCC 5 and in the case of ***Ashok Kumar Vrs. Delhi Development Authority***, reported in (1994) 6 SCC 97, Hon'ble Apex Court has held filing of successive petitions before the Court amounts to seer abuse of the process of the Court and is against the public policy. It is also a settled position of law that no one should be made to face the same kind of litigations twice over, because such a process would be contrary to the consideration of fair play and justice, as held by the Hon'ble Supreme Court in ***Daryao and others Vrs. The State of U.P. and others***, reported in AIR 1961 SC 1457. It is also clearly settled by various pronouncements that no litigant has a right to unlimited drought upon the court's time and public money in order to get his affairs settled in the manner as he wishes. The process of the Court shall not be allowed to be abused in the manner it has been done by the Petitioner in the present case. In the case of ***Kishore Samrite Vrs. State of U.P. and others***, reported in **2013 (2) SCC 398,** in paragraph-13 of the said judgment, it has been observed by the Hon'ble Supreme Court that "another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the Court time and public money in order to get his affairs settled in the manner as he wishes.

Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (***Buddhi Kota Subbarao (Dr.) Vrs. K. Parasaran, (1996) 5 SCC 530***)." (Para 35 to 40)

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

1. 2011 (Sup- II) OLR-683 : M/s. Nilgiri Engineering Co-operative Society Ltd. Vs. State of Orissa & Ors.
2. 1994 (I) ALR 341 : Tarapore and Co. Vs. State of Madhya Pradesh.
3. A.I.R. 2005 (Ori) 26 : Suryamani Nayak Vs. Orissa State Housing Board & Ors.
4. OJC No.4744 of 1993 (Surendranath Kanungo Vs. State of Orissa).
5. 1987(1) SCC 5 : Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior & Ors.
6. (1994) 6 SCC 97 : Ashok Kumar Vs. Delhi Development Authority.
7. AIR 1961 SC 1457 : Daryao & Ors. Vs. The State of U.P. & Ors.
8. 2013 (2) SCC 398 : Kishore Samrite Vs. State of U.P. & Ors.
9. 1990 (2) SCC 715 : Direct Recruit Class II Engineering Officers' Association & Ors. Vs. State of Maharashtra & Ors.
10. AIR 1986 SC 391 : Forward Construction Co. & Ors. Etc. Etc. Vs. Prabhat Mandal (Regd.) Andheri & Ors. Etc. Etc.
11. 2011 (3) SCC 408 : M. Nagabhushana Vs. State of Karnataka & Ors

For Petitioner : Dr. K.N. Tripathy, S. Mohapatra and P.K. Chand.
For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 13.12.2021

***A.K. MOHAPATRA, J.***

1. By filing the present writ application, the Petitioner is trying to knock the door of justice for the 4th successive time to get the desired relief as prayed for in the writ petition.

2. The present writ application has been filed with a prayer to quash the impugned letter dated 21st September, 2017 under Annexure-29 on the ground the same is not in conformity with the direction dated 27th June, 2017 passed by this Court in W.P.(C) No.9412 of 2017 as W.P.(C) No.9412 of 2017 was disposed of vide order dated 27th June, 2017 by setting aside the order dated 6th December, 2014 and remitting the matter back to the Executive Engineer, Rural Works Division, Nayagarh-Opposite Party No.3 for fresh consideration with a further direction to the petitioner that he will appear before the Opposite Party No.3 on 25th July, 2017 and produce the certified copy of the order dated 27th June, 2017 along with relevant documents in support of his claim. Further opposite party no.3 is directed to examine the same and pass a reasoned order within a period of four weeks

from the date of appearance of the Petitioner. The Petitioner has also prayed for a direction to the Opposite Parties for enhancement of the labour component on the basis of applicable approved modalities specified in the Government Circulars of the year 1986 and 1991 as has been directed by this Court in its 1st writ application bearing W.P.(C) No.4856 of 2012 vide order dated 15th May, 2012. Therefore, the Petitioner has essentially prayed for a direction to the authorities to calculate his enhanced claim which has already been submitted before the authorities and to disburse the balance amount of Rs.17,42,935/- along with interest.

3. Heard Dr. K.N. Tripathy, learned counsel for the Petitioner and Mr. P.K. Muduli, learned Additional Government Advocate for the State Opposite Parties. Perused the records.

4. The facts which are relevant for adjudication of the dispute involved in the present writ petition are that the Government of Odisha in its Rural Work Department invited tenders for construction/up-gradation/maintenance of Rural Roads and C.D. Works under Pradhan Mantri Gram Sadaka Yojana (PMGSY). Since the bid submitted by the Petitioner was the lowest, the Superintendent of Engineer, Bhubaneswar R.W. Circle accepted the Petitioner's bid and issued work order in favour of the Petitioner after complying with all procedural formalities.

5. The Clause 16.2 of the Bid documents for normal PMGSY/ADM Assisted PMGSY, the captioned work had been indicated to be completely manual labour oriented work. Further as per Clause (f) of the Appendix to Part-I of the General Conditions of the Contract entered into between the Petitioner and the Opposite Parties (in short 'GCC'). The employer was required to pay minimum wages fixed by appropriate Government. As per Clause(1) of the Contract Data of GCC, 'Employer' means the Commissioner-cum-Secretary to Government in R.D. Department, Government of Odisha, Bhubaneswar.

6. It is needless to mention here that the Petitioner had accepted the terms and conditions provided in the agreement and executed the form of contract with the Government of Odisha for execution of the work. While the work was being carried out, the minimum wages, as prescribed by the Government under the Minimum Wages Act, 1948 in respect of the Labourers, i.e. unskilled, Semi-skilled, skilled and highly skilled workers

engaged in the construction works, were revised. As per revised rate, the minimum wages payable to unskilled labourer was enhanced to Rs.55/- to Rs.90/- per labourer per day. The dispute arose when the Government of Odisha estimated the work is being executed by the Petitioner by taking into consideration the rate of wages for unskilled labourer as Rs.55 per day. The claim of the Petitioner is that the Government was required to pay enhanced/escalated wages payable to the unskilled labourers pursuant to the statutory increase in the payment of Minimum Wages Act.

7. In support of its claim, the Petitioner has relied upon a judgment of this Court in the case of ***M/s. Nilgiri Engineering Cooperative Society Ltd. vrs. State of Orissa represented by the Commissioner-cum-Secretary, R.D. Department and others reported in 2011 (Sup-II) OLR-683***. Learned counsel for the Petitioner submitted that the facts in the case of ***M/s. Nilgiri Engineering Co-operative Society Ltd.*** are similar to the facts of the present case.

8. The Petitioner vide his letter dated 20th January, 2012 addressed to the Opposite Parties raised the claim with regard to enhanced wage payable to the unskilled labourer as per revised rate under the Minimum Wages Act, 1948. The specific claim of the Petitioner under the aforesaid letter was for enhancement of minimum wages for unskilled labourers from Rs.55/- to Rs.90 per day and taking into consideration such enhancement, accordingly, the Petitioner had claimed a total sum of Rs.17,42,635,93.

9. Since the Opposite Parties did not do anything and preferred to sit over the matter, the Petitioner was compelled to approach this Court by filing W.P.(C) No.4856 of 2012 praying for issuance of a writ of mandamus to the Opposite Parties directing them to pay the enhanced rate of wages of labour component. This Court vide order dated 15th May, 2012 disposed of the writ petition with the following observations:-

> "02. 15.05.2012
>
> It is stated by learned counsel for both the parties that this writ petition is squarely covered by the judgment 19.09.2011 (M/s. Nilgiri Engineering Co-operative Society Ltd. vrs. State of Orissa represented by the Commissioner-cum-Secretary, R.D. Department and others) passed by this Court in W.P.(C) No.2114 of 2010.
>
> In view of the above statement, this writ petition is also disposed of in terms of the aforesaid judgment passed by this Court."

It is stated by learned counsel appearing for the Petitioner that the aforesaid order dated 15th May, 2012 passed in W.P.(C) No.4856 of 2012 has been confirmed by the Hon'ble Supreme Court of India vide order dated 21st December 2014 passed in SLP(Civil) CC No.2645 of 2014.

10. After disposal of the W.P.(C) No.4656 of 2012, the Opposite Parties vide their letter dated 19th May, 2012 rejected the claim of the Petitioner with regard to enhance/escalated minimum wages and refused to pay the claim of the petitioner in that regard stating therein that there is no clause in the agreement for payment of price under the terms and conditions of the tender.

11. After rejection of the Petitioner's claim vide letter dated 19th May, 2012, the Petitioner is stated to have submitted another bill, enhanced/escalated minimum wages vide his letter dated 6th May, 2013 enclosing their office memorandum dated 7th April, 1986 and 28th October, 1991 to justify his claim of enhanced rate of wages under the Minimum Wages Act, 1948.

12. In course of his argument, learned counsel for the Petitioner referred to a decision taken in 28th State Level Standing Committee Meeting held on 18th December, 2013 in the conference hall of the Chief Secretary to Government of Odisha in connection with payment of labour escalation bill. The attention of this Court was specifically drawn to paragraph-7. Paragraph-7 of the decision taken in the aforesaid meeting reads as follows:-

> "7. It was stated that in SBD of PMGSY work, there is no provision of reimbursement of labour escalation bills. Hon'ble Supreme Court in SLP(C) CC No.11995/2012 have allowed for escalation bills towards enhanced minimum wages.
>
> Hence it was suggested that payment of labour escalation bill is to be done as per labour escalation formula being followed by all non- PMGSY works. Accordingly, escalation formula may be incorporated in SBD of PMGSY for new works. For ongoing and completed PMGSY projects, payment of labour escalation bills should be based on actual.
>
> The SLSC agreed to the same and approved the proposal."

13. It is further contended by the learned counsel for the Petitioner that as a result of non-compliance of the direction passed earlier order dated 15th

May, 2012 by this Court, the Petitioner had filed a Contempt application bearing CONTC No.1045 of 2013 wherein the Principal Secretary Rural Development and the Engineer-in-Chief, Rural Works were directed to appear in person by order of the Court. Both the Officers assured this Court that steps have been taken to reimbursed the enhance minimum wages to the contractor who have executed the PMGSY work in the State of Odisha and the issue has been taken up in High Level Committee meeting held on 28th March, 2014. In support of his claim, the learned counsel for the Petitioner also referred to the decision taken in the High Level Committee dated 28th March, 2014. On perusal of the decision taken in the aforesaid meeting dated 28th March, 2014, it is seen that a decision has been taken to implement the order passed by this Court; no further SLP is to be filed against the order passed by the Hon'ble High Court of Orissa; Government of India have agreed to release the fund on account of escalation of labour charges; in the event Government of India refused to release such fund, then the additional burden is to be borne by the State Government arising on account of escalation of labour charges under PMGSY charges.

14. To strengthen his claim for getting enhanced wages, the learned counsel appearing for the Petitioner relied upon several inter departmental communications. Gist of such communication is that the Government is willing to pay the enhanced minimum wages, however, the same is required to be approved by the appropriate departmental authorities before finalizing and disbursing the claim amount.

15. It is further alleged by the Petitioner that to deprive the Petitioner to get his legitimate claim on account of escalated minimum wages as per the revision in the minimum wages act, 1948, the authorities introduced the office memorandum dated 9$^{th}$ June, 2014. According to the Petitioner, the same is contrary to the decision of this court as well as Hon'ble Apex Court and the same is only designed to take away the effect of the judgments passed by this Court as well as Hon'ble Apex Court. It is further submitted that on the basis of the said office memorandum dated 9th June, 2014, the claim of the Petitioner was recalculated without affording any opportunity of hearing to the Petitioner and finally, the authorities have arrived at a conclusion that the Petitioner is eligible to get a sum of Rs.2,20,369/- on account of hike in labour rate. Due to such dispute, this Court vide order dated 20th November, 2014 passed in CONTC No.1045 of 2013 directed the parties to have a joint sitting to reconcile the records and to finally quantify the amount payable to the Petitioner.

16. While the matter was sub-judice before this Court, the Petitioner approached the Executive Engineer, Rural Works Division, Nayagarh on 20th May, 2014 where he was offered some cheques for settlement of his claim amount of enhance wages. However, the Petitioner refused to accept the same as the same was not in conformity with the State Government Circulars referred to herein above by the Petitioner. On 6th December, 2014, the Executive Engineer informed the Engineer in Chief that the Petitioner had refused to accept the payment on account of enhanced labour claim.

17. Despite the aforesaid exercise undertaken by the Courts and various authorities, the claim of the Petitioner remained hanging in limbo. Which has compelled the Petitioner to again approach this Court by filing writ petition bearing W.P.(C) No.6213 of 2016 seeking indulgence of this Court in the matter of disbursement of his claim with interest @ 18% per annum. On 1st September, 2016, the said writ petition was disposed of along with a batch of similar writ petitions with the following observation :–

> "In view of the entire issue having been decided by the Hon'ble Apex Court nothing remains to be adjudicated, further in the present writ petition the opposite parties are only to comply the order passed earlier."

18. It is further submitted by the learned counsel for the Petitioner that since the Opposite Parties did not carry out the direction of this Court in W.P.(C) No.6213 of 2016, a series of contempt applications bearing CONTC No.1721 to 1742 of 2016 was filed before this Court. The contemnor paid a paltry amount of Rs.26,03,640.00 out of total amount of Rs.6,75,89,676.00 through RTGS. It is submitted that amount offered was also offered earlier and no further exercise was undertaken, pursuant to the direction of this court, to recalculate the claim of the Petitioner after disposal of the above noted writ petitions.

19. It is apt to mention here that the hearing in the above mentioned contempt matter took place on 22nd December, 2016. The Opposite Parties contemnors filed their show cause affidavit stating therein that the order dated 1st September, 2016 have been fully complied with. However, the same was objected to by the learned counsel for the Petitioner. Finally, this Court had directed the contempt matters be posted along with the writ petitions for final hearing on 12th January, 2017. The writ petitions were heard finally by this Court and the same were finally disposed of by holding

that the order dated 1st September, 2016 has already been complied with and after recalculation the amount has been deposited in the accounts of the Petitioners through RTGS and further liberty was granted to the Petitioners to approach this Court whenever fresh cause of action arises. For better understanding the order dated 12th January, 2016 passed in Misc. Case No.18315 of 2016 arising out of W.P.(C) No.8702 of 2016 is quoted here below:-

"09. 12.1.2017 Misc. Case No.18315 of 2016

> This Misc. Case has been filed by the petitioner with a prayer to direct the opposite parties to disburse the amount along with 18% interest as directed by the Court on 1.9.2016 while disposing batch of writ petition.
>
> Heard.
>
> The learned Addl. Government Advocate submits that the order has been complied with and after recalculation the amount has been deposited in the accounts of the petitioner.
>
> The learned counsel for the petitioner submits that the recalculation was not correctly made.
>
> Since the writ petitions were disposed of on 1.9.2016, we are not inclined to entertain the Misc. Case. Thus, if fresh cause of action arose, it is open to the petitioner to challenge the same.

Accordingly, the misc. case is disposed of."

20. The record further reveals that the Petitioner filed two review petitions bearing RVWPET No.27 of 2017 and VWPET No.64 of 2017 challenging the order dated 1st September, 2016 passed in W.P.(C) No.6213 of 2016. The 1st review petition was withdrawn to file a better application and 2nd review petition has been disposed of in view of the order passed in Misc. Case No.18315 of 2016 and further granting liberty to the Petitioner to approach this Court after fresh cause of action arises and as such the review petition had been dismissed.

21. At this juncture, it would be relevant to refer to order dated 1st September, 2016 passed in W.P.(C) No.6213 of 2016 and the operative portion of the order as contained in paragraph-5 of the common order is quoted herein below:-

> "5. In view of the facts and circumstances of the case, this Court disposes of all these Writ Petitions with a direction to the opposite parties to recalculate the

> enhanced rate of wages of labour component as per the earlier bill and part of which has already been disbursed to the petitioner. The above exercise shall be completed within a period of four weeks from the date of production of certified copy of this order and the balance amount shall be disbursed in favour of the petitioner within a period of four weeks thereafter."

22. Once again after dismissal of the review petitions, the petitioner preferred writ petition bearing W.P.(C) No.6966 of 2017. However, the same was withdrawn vide order dated 27th April, 2017 with liberty to file a better application. Thereafter, another writ petition bearing W.P.(C) No.9412 of 2017 was filed by the petitioner. W.P.(C) No.9412 of 2017 has been disposed of with the following observation:-

> "5. Considering above, this Court while setting aside the order dated 1st June, 2012 under Annexure-22 remits the matter back to the Opposite Party No.3 for fresh consideration. The petitioner shall appear before the Opposite Party No.3 on 25th July, 2017 and produced the certified copy of this order along with relevant documents in support of its claim. The Opposite Party No.3 shall examine the same and pass a reasoned order within a period of four weeks from the date of appearance of the Petitioner. The writ petition is accordingly disposed of."

23. Pursuant to the order dated 27th June, 2017 passed in W.P.(C) No.9412 of 2017, the Petitioner appeared before the Opposite Party No.3 on 25th July, 2017. Vide order dated 21st September, 2017, the Executive Engineer Rural Works Division, Nayagarh informed the Petitioner to produce the supporting bills in support of his claimed amount along with detailed calculation to workout additional amount, if any, at an early date.

24. Challenging the said communication dated 21st September, 2017, the Petitioner has again approached this Court by filing the present writ petition.

25. The Opposite Party No.3 has filed a counter affidavit in the present writ petition. A specific stand has been taken by the Opposite Party No.3 in the counter affidavit to the effect that the Government Circulars of the year 1986 and 1991 are not applicable to the facts of the present case. It is further submitted that each item of work to be executed as indicated in the agreement consists of (I)Material component (II) Machinery component and (III) Labour component. The labour component of each item of work has been worked out and calculated basing on the quantity of the work executed. Accordingly, the enhanced value labour cost has been calculated. The final

calculation done by the Opposite Party No.3 has been appended to the counter affidavit as Annexure-A/3.

26. The Opposite Party No.3 has further stated in his counter affidavit that since actual labour component has been taken into account for calculation of the enhanced wages, the question of assuming the labour percentage based on some of the Govt. circulars is untenable and liable to be rejected. Further, the Opposite Party No.3 has disputed the fact that the PMGSY work was manual and labour oriented work. It has been stated by the Opposite Party No.3 that with the enhanced labour component based on the revised minimum wages, the dues payable to the petitioner have been calculated. It is further stated that the enhanced labour cost has been calculated basing on actual labour component of the bill. Further the learned Addl. Govt. Advocate, in course of his argument, has referred to the proceeding of the State Level Standing Committee meeting held on 18th December, 2013 to submit that the escalated labour cost due to increase in minimum wages has to be calculated on actual basis and on that basis only the calculation has been made in Petitioner's case.

27. In reply to the Petitioner's allegation with regard to letter No.9777 dated 12th May, 2014 to the extent that the State Government has agreed that escalation of minimum wages be calculated on the basis of the modalities formulated under the Government circulars of the year 1986 and 1991, it was submitted by the learned Addl. Govt. Advocate for the State that the said letter reveals that no such decision or concession is there to calculate enhance minimum wages basing on the Government circulars of the year 1986 and 1991. Rather the said letter reveals that the Government of India has refused to provide the fund on account of additional burden which has fallen on the State Government due to escalation of minimum wage rate. The State Government has been advised to utilize the Rs.150 crores budget provision towards State share of PMGSY for payment of labour escalation cost. Finally, the Engineer in Chief has sought for approval of the State Government to make payment to the Petitioner and similarly situated other contractors to reimburse the escalated cost of the project due to increase in the rate of minimum wages.

28. The decision of the Executive Engineer to ask the Petitioner to get all the wage register from the Petitioner was to ascertain as to whether the enhanced labor rates were actually paid to the labourers engaged in the work.

Further, the allegation of the Petitioner with regard to the fact that the calculation was done behind its back has been strongly denied by the Opposite Party No.3 in its counter affidavit and the Opp. Party No.3 has further stated that ample opportunity of hearing was given to the Petitioner while recalculating his claim on account of enhancement in minimum wage rate. Since the petitioner refused to accept the amount so calculated, the differential amount has been transferred to the Petitioner's account through RTGS.

29. The grievance of the petitioner in the present writ petition, as it appears, relates to non-payment of escalated price due to increase in minimum wages under the Minimum Wages Act, 1948 and further to calculate the escalation by following modalities prescribed in two circulars of the year 1986 and 1991 issued by the Government of Odisha and for payment of interest on the claimed amount owing to delay in making the payment. Such a prayer of the Petitioner has been vehemently opposed by the learned Additional Government Advocate on the ground that the two circulars referred by the Petitioner are not applicable to the facts of the present case. However, the Petitioner has been filing successive writ petition claiming benefit under the aforesaid two circulars. Moreover, the direction of this Court in the first writ petition filed by the Petitioner was to calculate and pay the dues of the Petitioner following the principle laid down by this Court in ***M/s. Nilgiri Co-operative Society Ltd. Case*** (supra). Further the Petitioner is not entitled to any interest as the Petitioner had earlier refused to accept the enhanced price due to increase in labour component of the bill on several occasions and the petitioner, as it emerges from the facts of the case, has instead of producing the records and documents as required by the authorities vide letter dtd.21.09.2017 (impugned letter in the present writ petition) has preferred to rush to this court for a direction.

30. It also emerges from the records that this Court while disposing of the first writ petition bearing W.P.(C) No.4856 of 2012 vide order dated 15th May, 2012 had directed that since the writ petition is squarely covered by the judgment dated 19th September, 2011 passed in ***M/s. Nilgiri Co-operative Society Ltd. Case***, and hence, the relief in Petitioner's case has to be worked out within the scope and purview of the aforesaid judgment.

31. The learned counsel for the Petitioner has relied upon the judgment of this Court ***M/s. Nilgiri Engineering Co-operative Society Ltd. vrs. State***

***of Orissa and others reported in 2011 (Sup- II) OLR-683*** stating that the facts of the aforesaid case are identical to the facts of the present case. Upon reading of the said judgment, this Court finds that the case reported in **2011 (Sup-II) OLR-683** is a case where there was no clause for escalation of price in the agreement. However, the minimum wage was enhanced by the State Government under the Minimum Wages Act and the contractor paid the enhanced wages to the labourers while executing the contractual work.

32. In the aforesaid reported judgment, a request was made to the Government to pay the enhanced labour component arising as a result of increase in the minimum wage notified by the Government. However, the Government of Odisha refused to pay the enhanced rate of the labour component. Such a decision of the Government was challenged before this Court while allowing the writ petition; this court quashed the decision of the Government refusing to pay escalated price on account of statutory increase in the minimum wage rate. It is further observed that there is no such observation or direction by this Court to pay the enhance rate in any particular manner especially by following two circulars of the year 1986 and 1991 which have been relied upon by the present Petitioner. Moreover, the claim of the petitioner relying on aforesaid two circulars of the Govt. of Odisha is an afterthought and the same was not pleaded in its initial writ petition.

33. The intention of this Court was very clear while allowing the writ petition in the case of ***M/s. Nilgiri Engineering Cooperative Society Ltd.*** (supra). Reliance has been made upon a judgment of Hon'ble Supreme Court of India in the case of ***Tarapore and Co. vrs. State of Madhya Pradesh : reported in 1994 (I) ALR 341*** wherein it has been held by the Hon'ble Supreme Court that payment of wages as per the rate fixed under the minimum wages act is a statutory obligation and although the terms of the contract was silent on payment of minimum wages, the contractor is statutorily bound to pay minimum wages fixed by the State Government to the workers.

34. Similar view has also been taken by this Court in ***Suryamani Nayak vrs. Orissa State Housing Board and others*** : ***reported in A.I.R. 2005 (Ori) 26*** *and in* ***OJC No.4744 of 1993 (Surendranath Kanungo vrs. State of Orissa)***. Thus, the claim of the petitioner in the present case to get the actual differential rate of the labour component which has arisen due to increase in

the minimum wages rate by the State Government Circular under the Minimum Wages Act is a genuine and legitimate one. Accordingly, this Court in the earlier writ petition has already issued a direction for payment of the escalated minimum wages to the Petitioner.

35. It is worthwhile to mention here that the Petitioner has unnecessarily troubled this court by filing successive writ petitions involving the self-same cause of action. The record reveals that the Petitioner is guilty of wasting Court's valuable time by approaching this Court in one form or the other on several occasions. After disposal of the first writ petition, in a very clear and unambiguous term, no further direction whatsoever is necessary in this case. Filing of such successive writ petition involving the self-same cause of action is nothing but an abuse of the process of this court.

36. As discussed hereinabove, the first writ petition filed by the Petitioner was disposed of with a clear direction. Further the Petitioner had filed successive writ petitions thereafter for the selfsame relief. It is made clear here that when the relief sought for has already been granted by this Court in the earlier writ petition there was no necessity of filing successive writ petitions seeking the very same relief with a twist in the language in the subsequent writ petitions. The basic relief remains the same for the entire series of writ petitions filed by the Petitioner. Such practices of filing successive writ petitions have been, time and again, deprecated by the Hon'ble Supreme Court as well as various High Courts. For example; in the case of ***Sarguja Transport Service Vrs. State Transport Appellate Tribunal, M.P., Gwalior and others***, reported in 1987(1) SCC 5 and in the case of ***Ashok Kumar Vrs. Delhi Development Authority***, reported in (1994) 6 SCC 97, Hon'ble Apex Court has held filing of successive petitions before the Court amounts to seer abuse of the process of the Court and is against the public policy. It is also a settled position of law that no one should be made to face the same kind of litigations twice over, because such a process would be contrary to the consideration of fair play and justice, as held by the Hon'ble Supreme Court in ***Daryao and others Vrs. The State of U.P. and others***, reported in AIR 1961 SC 1457.

37. It is also clearly settled by various pronouncements that no litigant has a right to unlimited drought upon the court's time and public money in order to get his affairs settled in the manner as he wishes. The process of the

Court shall not be allowed to be abused in the manner it has been done by the Petitioner in the present case. In the case of ***Kishore Samrite Vrs. State of U.P. and others***, reported in **2013 (2) SCC 398,** in paragraph-13 of the said judgment, it has been observed by the Hon'ble Supreme Court that "another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (***Buddhi Kota Subbarao (Dr.) Vrs. K. Parasaran, (1996) 5 SCC 530***)."

38. The Hon'ble Supreme Court in the matter of ***Direct Recruit Class II Engineering Officers' Association and others Vrs. State of Maharashtra and ors.***, reported in 1990 (2) SCC 715 expounded the principle laid down in the case of ***Forward Construction Co. & Ors. Etc. Etc. Vrs. Prabhat Mandal (Regd.) Andheri & Ors. Etc. Etc.***, reported in AIR 1986 SC 391 and it has been held as under:

> "An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidential to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue, it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The High Court was therefore not right in holding that the earlier judgment would not operate as res-judicata as one of the ground taken in the present petition was conspicuous by its absence in the earlier petition."

39. In the case of ***M. Nagabhushana Vrs. State of Karnataka and others***, reported in 2011 (3) SCC 408, it has been held by the Hon'ble Supreme Court as follows:

> "23. Thus, the attempt to re-argue the case which has been finally decided by the Court of last resort is a clear abuse of process of the Court, regardless of the principles of Res Judicata, as has been held by this Court in ***K.K. Modi Vs. K.N. Modi and Ors.*** - (1998) 3 SCC 573. In paragraph 44 of the report, this principle has been very lucidly discussed by this Court and the relevant portions whereof are extracted below:
>
> "One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to

relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata."

40. Thus the principle of finality of litigation is based on a sound and firm principle of public policy in the absence of such a principle great oppression might result under the colour and pretence of law, in as much as, there will be no end to litigation. The doctrine of res judicata has been evolved to prevent such anarchy. Therefore, the conduct of the Petitioner in the present case is deprecated by this Court.

41. Coming back to the impugned order dated 21st September, 2017, it is seen that the authorities have requested the Petitioner to substantiate its claim by producing records, documents and detailed calculation. The Petitioner instead of complying with said request by the Executive Engineer, Rural Works Division, Nayagarh vide his letter dated 21st September, 2017 preferred to rush to the Court by filing the present writ petition.

42. Finally, in view of the earlier directions issued by this Court in favour of the Petitioner, we are not inclined to issue any further direction to the Opposite Parties. However, it is open to the parties to implement the directions issued earlier by this court and in the event of failure on the part of the Opp. Parties to carry out such directions issued by this court earlier, it is open to the Petitioner to avail remedies under other statutory provisions as available to him in accordance with law. It is needless to mention here that the Petitioner shall cooperate with the Opp. Parties as requested by them to arrive at the correct figure payable to it under the earlier directions of this court.

43. In the aforesaid facts and circumstances, this court while declining to issue any further direction, disposes of the writ application with the observations made herein above. However, there shall be no order as to cost.

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**2022 (I) ILR - CUT- 38**

**Dr. S. MURALIDHAR, C.J & A.K. MOHAPATRA, J.**

CRA NO. 202 OF 2001

**PRASAD ISWAR RAO** .....Appellant

.V.

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

**CRIMINAL TRIAL – Offence under section 302/201 of Indian Penal Code, 1860 – Conviction based of circumstantial evidence – Chain of circumstances conclusively complete, however a plea of defect in charge is raised – Whether any defect in charge can be fatal to the prosecution? – Held, No.**

> *"A defect in the charge would be fatal to the prosecution only where prejudice is shown to have been caused to the accused as a result of such defect. The burden is on the accused to show that there has been a failure of justice occasioned as a result of the error in the charge. Section 464 of the Cr.P.C. read with Section 218 thereof supports the plea of the prosecution that the error in the charge would not result in rendering the finding of the guilt vulnerable to reversal, unless the accused is able to show that there is a failure of justice. In the present case the Appellant has been unable to show that his ability to defend himself in the trial was in any manner impaired on account of the charge being defective" (Para 34)*

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

1. AIR 1955 SWC 274 : Nanak Chand Vs. State of Punjab.
2. AIR 1955 SC 419 : Suraj Pal Vs. State of U.P.
3. (1993) 3 SCC 32 : Suberam @ Subramanyam Vs. State of Kerala.
4. 1995 SCC (Crl.) 17 / (2009) 16 SCC 91 : State of West Bengal Vs. Bindu Laxman Dass.
5. 1971 (37) CLT 477 : Herbetus Oram Vs. State.
6. 1992(1) Crimes 106 : Padmalochan Nayak & Anr. Vs. State.
7. (2009) 16 SCC 91 : State of Punjab Vs. Harjagdev Singh.
8. (2008) 3 SCC 210 : Sattatiya Vs. State of Maharashtra.
9. JT (2018) 4 SC 275 : Navaneeth Krishnan Vs. State by Inspector of Police
10. (2011) 3 SCC 306 : Wakker Vs. State of U.P.
11. (2014) 57 OCR (SC) 901 : Bijay Kumar Vs. State of Rajasthan.

For the Appellant : Mr. D.P. Dhal, Sr. Adv.
For the Respondent : Ms. Saswata Pattanaik, A.G.A.

JUDGMENT Date of Judgment : 13.12. 2021

***Dr. S.MURALIDHAR, C.J.***

1. This Appeal is directed against the judgment and order of conviction dated 25th September, 2001 passed by the learned Additional Sessions Judge, Jeypore in Sessions Case No.41 of 1999, sentencing the Appellant under Section 302, I.P.C. to undergo imprisonment for life and pay a fine of Rs.1000/-, in default to undergo rigorous imprisonment for another one year. The accused-Appellant was also convicted for the offence under Section 201, I.P.C. and sentenced to undergo rigorous imprisonment for five years and to

pay a fine of Rs.500/-, in default to undergo rigorous imprisonment for six months more. Both the sentences were directed to run concurrently.

2. The case of the prosecution was that, the Appellant Prasad Iswar Rao married to the deceased Bijayalaxmi. They had a daughter named Puja and were residing in a rented house at Gandhinagar in Koraput town. The deceased was working as a teacher at Narayanpatna, where her mother was also residing as well. At the time of the occurrence, the deceased was pregnant and the Appellant had suspected her character. On 10th March, 1999 the Appellant, the deceased and their daughter left for Koraput after the deceased applied for availing five days' leave. Thereafter they were seen together in Gandhinagar.

3. On 16th March, 1999 the dead body of an unidentified female was found to be floating in "Sarvodaya Tank" located near the house of the Appellant. After the police was informed about discovery of the dead body in the pond, U.D. Case No.5 of 1999 was registered at Koraput Town P.S.

4. The post-mortem examination revealed that the death of the deceased was homicidal. F.I.R. was then registered against unknown persons as P.S. Case No.28 of 1999.

5. In course of the investigation, the Appellant identified the dead body to be his deceased wife. It was also discovered that the co-accused K. Ravi Kumar (since acquitted) was working as an Assistant to the accused Appellant - Prasad Iswar Rao in his pathological clinic. The case of the prosecution is that, said K. Ravi Kumar had assisted the present Appellant-accused in committing the murder of the deceased by strangulation and after her murder, they thrown the dead body of the deceased into the pond in order to disappear the evidence.

6. The plea taken by the Appellant was his false implication in the case. He pleaded not guilty and claimed for trial.

7. The prosecution examined 12 witnesses and exhibited 16 different documents in support of its case. The case was based on circumstantial evidence.

8. In the impugned judgment, the learned Trial Court has outlined 12 circumstances in para-13 of the judgment, which read as under :

> (i) The accused P. Iswar Rao and the deceased Bijayalaxmi were married and were residing at Gandhinagar in a rented house;
>
> (ii) On 10th March, 1999 deceased Bijayalaxmi availed C.L. on five days and along with her husband, the accused, and daughter Puja proceeded towards Koraput from Narayanpatna where she was working as a teacher;
>
> (iii) On 10th the deceased was seen in the rented house, but thereafter no person have seen her;
>
> (iv) It is evident from the statement of mother of the deceased that the deceased had complained about the assault and torture meted out to her by the accused. The post mortem examination reveals that at the time of her death the deceased was pregnant. These circumstances are in tune with the motive of the crime, i.e. the accused suspecting the character of the deceased;
>
> (v) The fact of blood stain flowing out from the back of the house of the accused one day prior to the discovery of the dead body in the Sarvadaya tank;
>
> (vi) Discovery of a dead body of a woman in the Sarvadaya tank, which situates nearby the house of the accused;
>
> (vii) Homicide nature of death of deceased;
>
> (viii) The identification of the dead body by P.W.5 Paliti Parvati, mother of the deceased, which is supported by P.W.3's statement;
>
> (ix) Leading to discovery of the knife, i.e. weapon of offence and the opinion of the doctor that the injuries found on the deceased could have been caused by such weapon of offence and also the Chemical Examiner's report which shows blood stains on the same which matched with the blood found on the wearing apparels of the deceased;
>
> (x) The conduct of the accused in leading the police to the exact place of concealment;
>
> (xi) Blood stains found from the articles inside the house of the accused; and lastly
>
> (xii) False plea of the accused provides the additional link to complete the chain.

9. The Trial Court concluded that the above circumstances had the cumulative effect of pointing entirely to the guilt of the accused.

10. This Court has heard the submissions of Mr. D.P. Dhal, learned Senior Counsel appearing for the Appellant and Ms. Saswata Pattanaik, learned Additional Government Advocate for the State.

11. The submissions of Mr. D.P. Dhal are as under :-

(i) Charge framed in the present case against the Appellant was defective. It is pointed out that on 21st October, 2000 the following charge was framed against the accused Appellant and the co-accused K. Ravi Kumar –

"First – That, you on or about the 13th Day of March 1999, at Gandhinagar, Koraput at about 1 pm in furtherance of your common intention, did commit murder by intentionally causing the death of Vijaylaxmi, the wife of Prasad Ishwar Raoand here by committed an offence punishable u/s.302/34.

Secondly – That, you on or about, on the above date, place at night knowing that certain offence to wit murder, punishable with death or imprisonment for life has been committed in furtherance of your common intention, did cause certain evidence of the said offence to disappear, to wit, threw the dead body by tying its hand and legs, into the pond situated at the Sarvoday Samiti Koraput with the intention of screening yourself from legal punishment and hereby committed an offence punishable u/s. 201/34 of IPC, within the cognizance of the Court of Session."

(ii) It is submitted that, no evidence has been led with regard to probable time or date of death of the deceased. While the charges state that the offence was committed "on or about 13th day of March, 1999, but in the post-mortem report dated 16th March, 1999 the doctor has placed the time of death to be more than 72 hours. This could connote the date prior to 13th March, 1999 but not 13th March itself. The time mentioned as 1.00 P.M. is also stated to be an imaginary time and not available on record except the confession of the accused Appellant, which is, in any event, inadmissible in law, as it comes under the first part of Section 27 of the Indian Evidence Act, 1872.

(iii) It is further pointed out that the Appellant was charged with the co-accused K. Ravi Kumar (since acquitted) for the offence under Section 302/34, I.P.C. and under Section 201/34, I.P.C. and not independently. With the acquittal of the co-accused K. Ravi Kumar, the Appellant can not be convicted of the charge alone.

12. Reliance was placed on the decisions in ***Nanak Chand v. State of Punjab : AIR 1955 SWC 274, Suraj Pal v. State of U.P. : AIR 1955 SC 419, Suberam @ Subramanyam v. State of Kerala : (1993) 3 SCC 32, State of West Bengal v. Bindu Laxman Dass : 1995 SCC (Crl.) 17 and (2009) 16 SCC 91.***

13. As regards the case of the prosecution based on circumstantial evidence, it was submitted that the prosecution has failed to establish the circumstances that formed a continuous chain pointing unmistakably to the guilt of the accused Appellant. Reliance is placed in the decisions in ***Sharad Birdhi Chand v. State of Maharastra AIR 1984 SC 1622, Sattatiya v. State of Maharashtra (2008) 3 SCC 210 and G. Parshwanath v. State of Karnatak (2010) 8 SCC 593.***

14. It is submitted that, the knife stated to have been recovered on the disclosure of the Appellant was not shown to be belonging to either the accused Appellant or any witness who accompanied the investigating officer (IO). On his part the Appellant had denied the seizure of the knife in his statement recorded under Section 313, Cr.P.C. The blood on the knife as well as on the towels, frock, saya and the full shirt show human blood of the AB group. However, the I.O. did not state anything about taking of blood sample of the Appellant or the deceased to verify the blood groups. Reliance is placed on the decisions reported in ***Prabahu Babaji Navle v. State of Bombay : 1956 SC51*** to urge that matching of blood stains on the clothes of the accused and the blood group of the deceased was an important circumstance to corroborate the other evidence. However, mere recovery of the blood stains sample was not enough to sustain the charge of murder.

15. Mr. Dhal further submitted that there was no evidence to show that how the clothes of the Appellant, the deceased or the material objects have been kept after the seizure. There is nothing to show that they were tampered-free till the articles were sent to the chemical examination for analysis. Evidence on seizing of the articles was also absent.

16. In the present case there are two accused and one of them has got acquitted. Even if the recovery were made regarding incriminating articles at the instance of the present Appellant, unless it was shown that it was the Appellant who concealed the murder of weapon, it would not be a circumstance to establish his guilt. It was further submitted by Mr. Dhal that the Constable, who brought the dead body of the deceased to the hospital, was not examined by the prosecution to say that he had taken the dead body of the deceased and identified it to the doctor.

17. The police requisition, basing on which the doctor (P.W.10) conducted post-mortem examination, has also not been exhibited. It is

submitted that in effect there was nothing to show that the post-mortem report related to the dead body of the deceased, to the doctor. It is accordingly submitted that the post-mortem report (Ext.7) cannot be said to have related to the accused Appellant. Reliance is placed on the decisions in ***Herbetus Oram v. State 1971 (37) CLT 477 and Padmalochan Nayak & Anr. v.State 1992(1) Crimes 106***.

18. Ms. Saswata Pattnaik, learned Additional Government Advocate appearing on behalf of the prosecution, referred to Section 465, Cr.P.C. and pointed out that even if the charge is defective, unless it is shown to be prejudicial to the accused, the Court will not interfere. Reliance is placed on the decision in ***State of Punjab v. Harjagdev Singh (2009) 16 SCC 91***. She further submitted that the prosecution has established each of the circumstances which form a continuous chain and point unerringly to the guilt of the Appellant.

19. It is further submitted by Ms. Pattanaik that no convincing answers were given by the Appellant in the circumstances put to him under Section 313 Cr PC. The evidence points to the guilt of the Appellant and of no one else.

20. Before proceeding to analyze the evidence in the light of the above submissions, it is necessary to recapitulate the settled principles as regards the legal requirements in a case of circumstantial evidence. In ***Sharad Birdhichand v. State of Maharastra*** (supra), the Supreme Court held as under:

> (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.
>
> (ii) The facts so established should be consisted only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (iii) The circumstances should be of a conclusive nature and tendency.
>
> (iv) They should exclude every possible hypothesis except the one to be proved, and
>
> (v) There must be a chain of evidence, so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

21. These principles were reiterated in ***Sattatiya v. State of Maharashtra (2008) 3 SCC 210*** as under:

> "10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances..."

22. In ***Navaneeth Krishnan v. State by Inspector of Police JT (2018) 4 SC 275,*** the Supreme Court held as under:

> (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and formally established.
>
> (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused.
>
> (iii) Circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and
>
> (iv) The circumstantial evidence in order to sustain conviction must be completed and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

23. The Court now proceeds to discuss each of the circumstances put forth by the prosecution to establish the guilt of the Appellant. As regards the marriage of the deceased with the Appellant is concerned, there is sufficient evidence to prove the circumstance.

24. The evidence of Madhusudan Barik - P.W.4, who is a teacher, has established that the deceased availed Casual Leave for five days on 10th March, 1999 and being accompanied by her husband, i.e. Appellant and their daughter Puja, proceeded to Koraput from Narayanpatna. The last time any one saw the deceased was on 10th March, 1999 in the rented house.

25. The evidence of P.W.5 – Palili Parvati, the mother of the deceased, has established that the deceased complained to her about the Appellant

subjecting her (deceased) to assault and torture. The motive of the crime was proved by the post-mortem examination, which showed that the deceased was pregnant at the time of her death. This was consistent with the accused being suspicious of her character, thus providing the motive to commit the crime.

26. The evidence of P.W.2 – Nalla Parvati and P.W.3 – Anil Choudhury revealed the fact of bloodstains flowing out of the rear of the house one day's prior to the dead body was discovered in the Sarbodaya Tank.

27. It is true that P.W.2 did turn hostile when after saying that she saw the accused with the deceased on 10th March, 1999, she claimed she knew nothing else. Her previous statement recorded under Section 161, Cr.P.C. was, in fact, confronted to her in the cross- examination by the prosecution, after she turned hostile. Nevertheless, as is the settled legal position, her entire evidence therefore cannot be discarded in toto.

28. The cross-examination of P.W.3 also has not yielded much for the defence. He is a reliable witness to the fact that bloodstains were flowing from the backside of the house of the accused one day prior to the discovery of the dead body. Likewise, the evidence of the victim's mother has also remained unshaken. These circumstances leading up to the death of the deceased, which was proved to be homicidal in nature, form a continuous chain.

29. The arguments regarding non-identification of the dead body of the deceased must fail when one carefully examines the deposition of P.W.5. She was shown the photographs of the dead body as well as the saree and rings found in the tank where the dead body was found floating. She identified the articles as belonging to the deceased. Her cross-examination did not yield much to help the defence.

30. Turning now to the evidence of P.W.10, the doctor, who conducted the post-mortem. The external injuries, which revealed stab wounds, incised wounds, punctured wound. There were six sharp injuries caused by knife, one burn injury and a bruise. As far as internal injuries are concerned, there were two complete punctured wounds in the skull exposing the brain matter. All the injuries were ante-mortem in nature and the head injuries have possibly caused the death of the deceased. The doctor has specifically

mentioned that, "time of post-mortem examination since death is more than 72 hours".

31. The attempt by the counsel for the accused to expect a mathematically exactness to the statements in order to doubt the accuracy in framing the charge do not impress the Court. The doctor at best can give an approximation of the time of death and certainly he was not too far of the mark giving the time of the discovery of the dead body and when the deceased was seen last. The gap is not so large so as to doubt the approximate time of death, as spoken to by the doctor. Again, the cross-examination of P.W.10 has yielded virtually nothing to doubt the credibility of this witness.

32. P.W.11 is the witness to the recovery. Although he may have made, continuous attempts were made by the defence to discredit him, but he stood firm in his cross-examination. He clearly mentioned how the accused let them go inside the house, how they entered into the kitchen and got the knife kept in the place of shelf inside the Almirah. It is very plain that at the instance of the accused that the knife was recovered.

33. As explained in a series of decisions as regards Section 27 of the Evidence Act, including the decisions in ***Wakker v. State of U.P. (2011) 3 SCC 306 and Bijay Kumar v. State of Rajasthan (2014) 57 OCR (SC) 901***, although the recovery by itself may not be enough to prove the guilt of an accused, it certainly provides a strong link in the chain of circumstances. In the present case that link has been conclusively established by the independent witness to the recovery, PW 11. His evidence lends assurance to the Court as the prosecution has been able to successfully prove each of the links in the chain of circumstances, and those circumstances taken collectively point unerringly to the guilt of the accused.

34. A defect in the charge would be fatal to the prosecution only where prejudice is shown to have been caused to the accused as a result of such defect. The burden is on the accused to show that there has been a failure of justice occasioned as a result of the error in the charge. Section 464 of the Cr.P.C. read with Section 218 thereof supports the plea of the prosecution that the error in the charge would not result in rendering the finding of the guilt vulnerable to reversal, unless the accused is able to show that there is a failure of justice. In the present case the Appellant has been unable to show

that his ability to defend himself in the trial was in any manner impaired on account of the charge being defective.

35. The presence of bloodstains in the knife and the clothes were sufficient to show the involvement of the accused-Appellant in the alleged crime. This is one of the circumstances, and the fact that the blood group did not match, cannot be said to be fatal to the case of the prosecution.

36. For all the aforementioned reasons, this Court is satisfied that no ground has been made out by the accused-Appellant to persuade the Court to interfere with the impugned judgment of the trial court.

37. The appeal is accordingly dismissed, but in the circumstances no orders as to cost. The bail bonds are cancelled. The Appellant will be taken into custody forthwith to serve the remainder of his sentence.

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**2022 (I) ILR - CUT- 48**

**Dr. S. MURALIDHAR, C.J & A.K. MOHAPATRA, J.**

W.P.(C) NOS. 6610 OF 2006 AND 3368 OF 2014

**KRUSHNA PRASAD SAHOO** ……..Petitioner

.V.

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

**CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition by a convict lodged in the District Jail, Balasore highlighting various issues concerning the jails in Odisha – All issues considered – Directions issued.**

***Directions vis-à-vis overcrowding***

*39. In order to streamline the entire process, the Court issues the following directions:*

*(i) The meeting of the UTRCs for the purposes of implementation of the directions of the Supreme Court in **Re: Inhuman Conditions in 1382 prisons** (supra) read with the NALSA SOP, in the districts of Khurda, Cuttack, Balasore and Bhadrak will be held **twice** in a month till such time*

*the prison population in these jails is less than 100% of their respective scheduled capacity. Once the aforementioned level of occupation is reached the UTRC meetings be held once a month.*

*(ii) The DLSA Panel/JVL will offer assistance to all inmates in whose favour recommendations are made by the UTRCs, in drafting application for bail, irrespective of whether the UTP concerned has his or her own lawyer or not.*

*(iii) The DLSA will have one panel lawyer observe the proceedings of the Court when such application of the concerned UTPs is taken up and inform the Member Secretary, DLSA that very day by the evening the outcome of the hearing of such application;*

*(iv) The Member Secretary, DLSA should be sent the copy of the order by the Court immediately after the order is signed. If the recommendation is not accepted, the order should contain reasons therefor.*

*(v) At the next meeting of the UTRCs, the order of the Court concerned should be placed for consideration.*

*(vi) The UTRCs will ensure that recommendations are made in respect of each of the 14 categories of prisoners as indicated in NALSA's SOP. For this purpose, the Court directs the Member-Secretary, OSLSA to again circulate NALSA's SOP on the functioning of the UTRCs to all the DLSAs. Further, the DLSA and the State Prisons Department will use digital tools to prepare list of the prisoners identify the prisoners eligible for early release*

*under Sections 167, 436 and 436-A Cr PC and for evaluating the cases that fall under the petty offences, eligible for Plea Bargaining or compounding.*

*(vii) A direction is issued to the District Courts that where it is found that a prisoner is unable to emerge from jail, despite being granted bail, for want of sureties to consider release on PR bond. A direction is further issued that consistent with the observations of the Supreme Court in numerous judgments including the recent orders emphasizing that bail is the rule and jail is exception, the District Courts should take up in all seriousness applications for bail and anticipatory bail particularly in magistrate triable offences. Judicial notice is taken of the fact that a large number of such applications are filed in the High Court even in magistrate triable offences. Since, according to the counsel appearing in such matters, the sub-ordinate Courts are reluctant to entertain such applications. The Odisha Judicial Academy (OJA) will hold orientation programmes for subordinate Court Judges specific to the issue of bail and anticipatory bails on a constant basis.* *(Para 39)*

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

1. (1980) 1 SCC 81 : Hussainara Khatoon Vs. State of Bihar.
2. AIR 1994 SC 1349 : Joginder Kumar Vs. State U.P.
3. (2007) 15 SCC 337 : R.D. Upadhyay Vs. State of AP.
4. (1998) 7 SCC 392 : State of Gujarat Vs. Hon'ble High Court of Gujarat.

For Petitioner : Mr. Gautam Misra, Sr. Adv. Amicus Curiae
Mr. S.K. Nanda
For Opp. Parties : Mr. Ashok Kumar Parija, Advocate General
Mr. P.K. Muduli, Addl. Government Advocate

ORDER Date of Order : 23.12.2021

***BY THE BENCH***

1. A convict in the District Jail, Balasore filed these petitions highlighting various issues concerning the jails in Odisha. In the first petition, the Petitioner is represented by his lawyer, Mr. S.K. Nanda. In the second petition, soon after it was filed in 2014, this Court had appointed Mr. Gautam Misra, learned Senior Advocate as Amicus Curiae (AC) to assist the Court.

2. On 4th December, 2014, after perusing the note of the learned Additional Standing Counsel (ASC), this Court had indicated that it proposed to take up the following ten issues concerning the human rights of prison inmates:

> "(i) Adoption of model jail manual prepared by NHRC.
>
> (ii) Setting up of an appropriate authority to enquire the violation of human rights in custody.
>
> (iii) Procedure regarding purchase of medicine in jails.
>
> (iv) Effective treatment of prisoners and maintenance of good sanitation inside jails.
>
> (v) Payment of compensation to prisoners who die in custody due to medical negligence.
>
> (vi) Implementation of Hon'ble Supreme Court's guidelines regarding handcuffing during the transit.
>
> (vii) Implementation of the judgments of Hon'ble Supreme Court in *Bhim Singh Vs. Union of India [W.P.(Crl.) No. 310 of 2005]* and *Arnesh Kumar vs. State of Bihar & Anr. [Criminal Appeal No. 1277 of 2014].*
>
> (viii) Whether first time offenders, under trials, life convicts, other convicts, women and children are completely segregated from each other, keeping in mind the observations of the Hon'ble Supreme Court in the case of *Sunil Batra, AIR 1980 SC 1579* (paragraph 65)?
>
> (ix) Whether cell phones are being used inside jails and what steps have been taken to stop the same?

(x) What are the living conditions of the jails for inmates, more particularly, the accommodation available vis-à-vis the number of prisoners in the jails of the State?"

3. These petitions were listed in regular intervals in the first two months of 2015. Thereafter, they were not listed for over six years till 9th March, 2021, on which date a detailed order was passed by this Court noting that the Odisha Model Jail Manual had been published in 2020 adopting the model prepared by the National Human Rights Commission (NHRC). Indeed, the Home Department, Government of Odisha published notification dated 28th September 2020, in exercise of the powers conferred under Section 59 of the Prisons Act, 1894, the Odisha Prison Rules 2020 (OPR, 2020).

***Order dated 19th March, 2021***

4. In its order dated 19th March 2021, this Court referred to the directions issued by the Supreme Court of India in the judgment dated 5th February, 2016 in ***Re: Inhuman Conditions in 1382 Prisons (2016) 3 SCC 700*** as well as the subsequent judgment dated 15th September, 2017 in the same case reported in ***(2017) 10 SCC 658.*** In particular, a reference was made to the Standard Minimum Rules for Inmates of Prisons ('The Nelson Mandela Rules') which had been adopted by the United Nations on 17th December, 2015. This Court took note of the various directions issued by the Supreme Court in the aforementioned orders and the necessity to implement them "in letter and spirit to improve the conditions of the jails in Odisha". This Court emphasised that "this requires to be done in a time bound manner".

5. The State Government was, by the aforementioned order, asked to inform the Court the timelines within which it would implement the directions of the Supreme Court; issue instructions to prohibit handcuffing of the Prisoners in jail or while bringing them from the Jail to the Court; the efforts made for release of prisoners arrested in compoundable criminal cases. This Court, in the said order, acknowledged that without active participation of the Odisha State Legal Services Authority (OSLSA) and the Orissa High Court Legal Services Committee (OHCLSC), "many of the reforms that have been proposed in the above judgment of the Supreme Court may not be able to be implemented."

6. Taking note of the submissions of the AC regarding absence of jail visits by the District Magistrates (DMs), Visitors and medical personnel to the prisons, the Court issued the following directions in its order dated 9th March, 2021:

> (i) Between 15th March, 2021 and 16thApril, 2021 the District Magistrates of the various districts will make a surprise visit to the jails within their jurisdiction, in co-ordination with the Secretary of the concerned District Legal Services Authority (DLSA) or Taluk Legal Services Committee (TLSC) as the case may be and submit a Joint report to this Court on the conditions of the jails, condition of the prisoners, issues of overcrowding, the status of facilities within the jails including provisions for food and shelter, recreation etc. Preferably, these visits should be unannounced.
>
> (ii) The State Government will also organize at least one medical inspection of each of the district jails and sub-jails in the State of Odisha by a team of medical professionals within the aforementioned period and the reports of such visits will also be placed before the Court on the next date.
>
> (iii) Copies of such reports should be served in advance to the learned AC as well as Mr. Sahoo, learned AGA. The issues highlighted in such reports should be immediately acted upon by the State authorities without awaiting further directions from this Court.
>
> (iv) The Court has been informed that every District Judge undertakes a visit to the jails within their jurisdiction every month and submits a report to this Court. A compilation of such reports for the months of January, February, and March, 2021 be placed before the Court on the next date by the Registrar General of this Court."

7. The Court directed that the authorities visiting jails must report on "rampant use of narcotics as well as mobile phones inside jails", installation of CCTVs in the jail. The Member Secretary, OSLSA was asked to take steps to facilitate the release of prisoners who were unable to be released on bail despite being granted bail on account of their inability to furnish bail bonds. The Member Secretary OSLSA was further asked to facilitate their release by getting panel counsel to file further applications before the Court which granted such bail, to modify the conditions in terms of the judgments of the Supreme Court on this issue.

8. Further, the OSLSA was asked, in consultation with the jail authorities, to examine the possibility of conducting Jail Adalats for the purposes of compounding offences, which could facilitate early release of such prisoners.

***Orders of April and May 2021***

9. At the hearing on 7th April, 2021, this Court passed an order permitting the Common Human Rights Initiative (CHRI) to intervene in the petitions and make submissions. The Court subsequently directed that CHRI's prison inspection format be used for jail visits by DMs. On 19th April, 2021, the Court was informed by the AC that 470 prisoners all over the State were unable to avail bail despite being granted bail by the Courts. The Member Secretary, OSLSA was requested to ensure that as many prisoners as possible be extended assistance of OSLSA in this regard.

10. On 27th April, 2021, the State Government was directed to make "appropriate arrangements to ensure that no prison inmates are denied vaccination only on the ground that the inmate is unable to get registered on the COWIN portal. Alternate arrangements should be made to ensure that vaccination is not denied to such inmates." On 12th May 2021, the Court took note of the decision of the Supreme Court in ***Hussainara Khatoon v. State of Bihar (1980) 1 SCC 81*** *(paras-3 and 4)* where it had been directed that whenever the prisoners were unable to furnish bail bonds, they should be released on Personal Recognisance Bond (PR Bond).

11. On 31st May, 2021, the Court took note of the detailed order passed on 7th May, 2021 by the Supreme Court of India in Suo Motu Writ Petition (Civil) No.1 of 2020 (***In Re: Contagion of COVID 19 virus in prisons)***. It was noted that the status of occupancy of jails in Odisha had been uploaded on the website of the Director General (DG) Prisons.

12. On 31st May, 2021 the learned AC drew the attention of the Court to the issue of overcrowding in the prisons in Odisha. The Court noted that there was overcrowding in at least six jails which included the District Jail in Phulbani, the Special Sub-Jail in Bhadrak and the Sub-Jails in Jajpur, Nayagarh, Paralakhemundi and Malkangiri. It was noted that the situation in Bhadrak Special Sub-Jail was particularly acute, where against a capacity of 166 there were over 430 prisoners. The Court observed that, "in the time of COVID 19 pandemic, this can also pose a serious risk to the health and safety of the prisoners as well as the jail staff." The following directions were then issued:

> "6. The Court directs the State of Odisha to place before it, by the next date, a detailed action plan for dealing with this grave situation which requires immediate

attention. The Court is of the view that there is an urgent need to decongest the prisons and to accommodate the prisoners in excess of the holding capacity of the concerned jail to be shifted in a phased manner in other safe and secure premises, which could be by upgrading other state buildings/facilities to meet the requirements of prisons. This aspect also must be taken into account while preparing the action plan."

***Orders of July and August, 2021***

13. On 16th July, 2021 the Court took note of the fact that in one district Jail at Phulbani, one Special Sub-Jail at Bhadrak and eleven sub-jails, the overcrowding ranged between 161 to 260%. The affidavit filed by the Home Department and the DG (Prisons) stated that as of 3rd June, 2021, 737 convicted prisoners were released on Special Parole (Furlough) for a period of 90 days each, pursuant to the order dated 7th May, 2021 passed by the Supreme Court of India in Suo Motu W.P.(C) No.1 of 2020. 89 convicted prisoners had been released on furlough for a period of 14 days each during the months of April and May, 2021. The Court was informed that further steps were being taken for the release of 106 life convicts whose cases had been recommended by the State Sentence Review Board on different dates for premature release. The Court was informed that as of 3rd June 2021, 1239 inmates had either already been shifted or were being shifted from overcrowded jails to less populated jails.

14. The Court was also informed that as on 7th July, 2021, the cases of 1376 prisoners were being considered for shifting. It was noted that as of 31st May 2021, the excess prison population were in fact 242% in Malkangiri, 214% in Paralakhemundi, 209% in Nayagarh 163% and 220% in Jajpur. In Kodala Sub-Jail the prison population was beyond 255% and in Nuapada Sub-Jail, it was 260%. [These figures were inclusive of the original capacity of the respective jails]. Further affidavits were called from IG (Prisons) for the updated statistics on the exact number of prison inmates shifted from one jail to another.

15. As regards the Court's suggestions regarding "temporary prisons", it was stated in the affidavit dated 23rd August, 2021 of the DG Prisons and the Additional Chief Secretary Home Department, that the Superintendent of Police and District Magistrate of Bhadrak, Malkangiri, Kandhamal, Gajapati, Nayagarh and Jajpur districts have been requested to "select Government buildings with adequate security, secured boundary walls in order to accommodate prisoners" and submit feasibility reports. However, in

response to such request, the Superintendents of Police (SPs)of Gajapati, Nayagarh and Jajpur denied availability of such facilties in their respective districts. As regards the remaining districts, the Dg Prisons stated that the "feasibility reports are still awaited."

16. On 16th July 2021, the Court underscored the need for a long-term plan to deal with the issue of overcrowding in prisons "on a consultative basis involving all the important stakeholders and civil society groups actively involved with these issues".

17. Again, on 26th August 2021, the Court observed that the latest figure as of 31st July, 2021 showed that the situation continued to be a cause of great concern with a large number of prisons in Odisha having beyond 20% overcrowding and a substantial number beyond 50% overcrowding. Even at the jail in Bhubaneswar, the scheduled accommodation was 749 whereas the present prisoner population was 1006. The situation was as bad in Malkangiri. There the scheduled accommodation was 314, whereas the current inmate population was 679. In Bhadrak jail, the scheduled accommodation was 166, whereas the current population was 415.

18. At the hearing on 26th August, 2021 the Court took note of the contents of the affidavit dated 23rd August 2021 of the Deputy Inspector General of Prisons on the measures put in place to tackle the issue of overcrowding of jails. *Inter alia*, the affidavit stated that an action plan for 2020-21 and 2021-22 had been approved by Government for construction of additional wards in different jails of the State. It was expected that the scheduled capacity of some of the jails would be upgraded to accommodate 2994 more prisoners. It was further submitted that the new jail building of Special Sub-Jail, Bhadrak would be constructed on the proposed land with an enhanced capacity of 460.

19. On 26th August 2021, the Court reiterated the direction in the earlier order dated 16th July, 2021 and noted as under:

> "5. The DG of Prisons and the Advocate General assure the Court that within the next two weeks a meeting will be convened of the Departments of Home, Prisons, Finance, Office of the Public Prosecutor and all the important stakeholders including civil society groups, and those conversant with the issues including the former Directors General of Prisons of some States, who could participate in the virtual mode and offer suggestions. The outcome of the meeting(s) should be the

> drawing up of a blue print/ action plan, in the short-term and in the long-term, addressing the issue of overcrowding for every jail i.e. circle jail, special jail, district jail, special sub-jail and sub-jail etc. in the State of Odisha. The minutes of such meeting(s) be placed before the Court by the next date along with an affidavit of the DG of Prisons."

20. Further on 26th August, 2021 the Court issued directions regarding quarantine of prisoners, activating the e-mulaqat facility and conducting jail *adalats*. The Court further directed all the concerned DMs "to conduct a surprise visit to the jails within their jurisdiction and submit reports." The Court noted that "many of them have submitted reports", but directed that "as a follow-up each of them shall again visit unannounced, the jails within their jurisdiction, and submit a report by the next date."

21. On 6th November, 2021 the following order was passed:

> "1. A convenience note has been prepared by Mr. Gautam Misra, learned Senior Advocate and Amicus Curiae in the matter highlighting with specific areas, in which, steps are required to be taken by State including the alignment of the present Prison Rules with the 'Nelson Mandela Rules' brought out by the United Nations; compensation for unnatural deaths; steps to reduce the same through training and sensitization programmes, medical assistance and so on and so forth.
>
> 2. The learned Advocate General appearing for the State states that the Director General of Prisons, Odisha is expected to convene a meeting of experts shortly to discuss each of the issues and formulate an appropriate response and plan of action including devising a Standard Operating Procedure.
>
> 3. List on 18th December, 2021."

***Hearing on 18th December, 2021***

22. At the hearing on 18th December 2021, which was in hybrid mode, the Court heard the submissions of Mr. Gautam Misra, the learned AC, Mr. S.K. Nanda, Advocate, Mr. P.K. Muduli, learned Additional Government Advocate (AGA); Mr. S.N. Das, learned Additional Standing Counsel who appeared in the Court physically. Mr. Ashok Kumar Parija, the learned Advocate General (AG); Mr. S.K. Upadhaya, the DG of Prisons; Mr. Sanjib Chopra, Addl. Chief Secretary to Government, Department of Home; Mr. Gouri Shankar Satapathy, Member Secretary, OSLSA; the District Judges and Member Secretaries, District Legal Services Authority (DLSAs) of Cuttack, Khurda, Jajpur, Jeypore, Malkangiri. Phulbani and Bhadrak and the Superintendent of Police (SP) Bhadrak appeared in virtual mode. The Court also heard, in virtual mode, the submissions of experts: Dr. Murli

Karnam, Asst. Professor NALSAR University of Hyderabad; Dr. Vijay Raghavan, Project Director, Tata Institute of Social Sciences (TISS), Mumbai; Ms. Maja Daruwala, Chief Editor, India Justice Reports (IJR); Ms. Sugandha Shankar, Senior Programme Officer, Prisons Reforms Programme, CHRI and Mr. V.K. Singh, former DG Prisons, Telangana.

23. At the commencement of the hearing, Mr. P.K. Muduli, learned AGA, handed over an affidavit dated 17th December, 2021 of the Deputy Inspector General of Prisons in compliance with the directions issued by this Court on 6th November, 2021. The affidavit also contained a tabulated response to the AC's note dated 28th October, 2021.

24. The AC placed before the Court a detailed note on the recommendations and suggestions made by the Civil Society Organizations and individuals working on the issues concerning the prisons reforms at the two virtual meetings organized by the Office of the AG, Orissa on 16th and 23rd October, 2021. It may be mentioned here that the experts who attended the said meetings were present in virtual mode today and gave their suggestions.

***Overcrowding in jails***

25. A tabulated chart depicting the prison population in Odisha as on 31st October, 2021 was presented before the Court by the AC. It showed that there was as many as 87 jails in Odisha which include the five Circle Jails at Baripada, Berhampur, Choudwar (Cuttack), Koraput and Sambalpur; the nine District Jails at Angul, Balasore, Bhawanipatana, Bolangir, Dhenkanal, Keonjhar, Phulbani, Puri and Sundargah; the Special Jails at Bhubaneswar and Rourkela; the Six Special Sub-Jails at Bhadrak, Bhanjanagar, Bonaigarh, Boudh, Deogarh and Talcher and 65 Sub-Jails, which include the Nari Bandhi Niketan at Sambalpur, the Biju Patnaik Open Air Jail at Khurda and the NCP Athagarh. Additionally, there are 59 children accompanying their parents in jails.

26. The data presented as of 31st October, 2021 [downloaded from the website of the IG (Prisons)] showed that most of the jails were overcrowded i.e. their current inmate population was beyond their maximum 'scheduled' capacity. As regards the five Circle Jails, in Baripada against a total scheduled accommodation of 591 [544 Male (M) and 47 Female (F)], the

prison population was 665 comprising 143 convicts and 522 undertrials (UTs). In Berhampur, against the total scheduled accommodation of 743, the prison population was 956. In Choudwar, against the scheduled accommodation of 961, the prison population was 1205.

27. The Court was able to get further updated figures for some of the prisons while the hearing was in progress. In Koraput, prior to 31st October, 2021 against a scheduled accommodation of 739, the prison population was 737. It then became 904 and this included 167 convicts and 737 UTPs. However, the Court was informed that as of 15th December, 2021 the UTP population in Koraput had grown from 737 to 869 primarily due to transfer of some UTPs from the Malkangiri sub-jail, which in turn was overcrowded. In the Sambalpur Circle Jail, against the scheduled accommodation of 604, the prison population as on 31st October, 2021 was 634.

28. The Court now proceeds to highlight some of the stark instances of prison overcrowding which were focused on during the hearing. Conscious that the paucity of time would not permit examining the situation in each of the 87 jails, the Court decided to examine a broad representative sampling of overcrowded jails i.e. one Circle Jail [Choudwar/Cuttack], one District Jail (Phulbani), one Special Jail (Bhubaneswar), one Special Sub-Jail (Bhadrak) and three Sub-jails i.e. the ones at Jajpur, Jeypore and Malkangiri.

29. The figures relating to the Choudwar (Cuttack) Circle Jail have already been noted. In the Bhadrak Special Sub-Jail against the scheduled accommodation of 166, the prison population as on 31st October, 2021 was 456. In Bhubaneswar Special Jail, as against 749, it was 1163; in Phulbani District Jail, as against 277, it was 519; in Jajpur, as against 133, it was 325 (as of 15th December, 2021, this figure has risen to 529). In Jeypore, as against 282, it was 426 (as of 15th December, 2021) while now it has come down to 342; in Malkangiri, as against 314, the population as of 31st October, 2021 was 818. As on 15th December, 2021 it was 715, which is still a high figure.

30. From the submissions made by the experts as regards the major reasons for overcrowding, the following factors emerged:

*(i)* as against the All-India average of 69%, the percentage of UTPs in Odisha Jails is 78%;

*(ii)* 95% of the prisoners were semi-literate or illiterate;

*(iii)* 30% of the present population would be covered by the directions issued by the Supreme Court of India in ***Arnesh Kumar v. State of Bihar (2014) 8 SCC 273***;

*(iv)* There are still many prisoners who are unable to be released on bail on account of their inability to furnish surety.

*(v)* Out of the 87 prisons in Odisha, 48 are overcrowded: 14 had an occupancy up to 120%; 18, between 121 and 150%; 10, between 150 and 200%; 4, between 200 and 299% and 2 prisons more than 300%. Going by the definition used by the European Committee on Crime Problems, prison overcrowding above 120% was considered 'critical overcrowding' and above 150% it was considered as 'extreme overcrowding'. 50% of the sub-jails are overcrowded and 14 of them have more than 150% of the prisoners. Of the six special sub-jails, five are overcrowded with occupancy between 104 to 220 of 4%.

31. Rule 1044 of the OPR 2020 lists "overcrowding" among the "situations to be handled on an emergency basis". The other relevant Rules of the OPR 2020 are:

"***1102. Overcrowding shall be reported to the Inspector General of Prisons***

(1) If a prison becomes overcrowded, the Superintendent shall take suitable action for accommodating all the prisoners properly, duly reporting the circumstance leading to overcrowding to the Inspector General of Prisons.

(2) Any other matter pertaining to overcrowding shall always be referred to the Inspector General of Prisons for orders.

***1103. Reduction of Under-trial Prisoners***

(1) The Prison Welfare Officer and Law Officer shall contact the concerned court for arranging bail of the under-trial Prisoners;

(2) The Inspector General of Prisons may be moved for transfer of prisons from one prison to another with the permission of the Court.

***1104. Measures to relieve overcrowding***

(1) As soon as prisoners in excess of the available accommodation are received in any prison or hospital, the Superintendent shall submit a report to the Head of the Directorate with a statement of the measures which he proposes to adopt to relieve the overcrowding, and such temporary arrangements, as he thinks best, shall at once be adopted for this purpose.

(2) The Superintendent shall also move the Head of Directorate for transfer of convicts to nearby Jails for temporary period where ever possible.

***1105. Keeping prisoners in sheds or tents***

(1) Prisoners in excess of the accommodation shall not, except as a temporary measure, be placed in work-sheds or verandahs, but shall be kept in sheds or tents inside the prison.

(2) The Superintendent shall always obtain prior sanction, whenever necessary, for incurring expenditure in this regard and shall ensure economy in every aspect."

32. The affidavits of the DG Prisons filed thus far are silent on the status of implementation of the above rules. In terms of the directions issued by the Supreme Court in ***Re: Inhuman Conditions in 1382 Prisons*** *(supra)*, in each of the 30 Districts in Odisha there are Under-trial Review Committees i.e. UTRCs which comprise the District Judge, the District Magistrate, the Secretary, DLSA, the Superintendent of Police (SP) and the Jail Superintendent. It must be noted that the National Legal Services Authority (NALSA) has prepared a Standard Operating Procedure (SOP) for the functioning of the UTRCs [available at https://nalsa.gov.in/acts-rules/guidelines/standard-operating-procedure-sop-guidelines-for-utrcs]. 14 categories of UTPs and the Prisoners are to be identified. The SOP also lays down that they could be released on bail without sureties, reduction of bail amount, provisional bail, or on PR Bond. The 14 categories identified in NALSA, SOP are as under:

"a. UPTs/Convicts covered under Section 436A Cr PC.

b. UTPs released on bail by the court, but have not been able to furnish sureties.

c. UTPs accused of compoundable offenses.

d. UTPs eligible under Section 436 of Cr PC.

e. UTPs who may be covered under Section 3 of the Probation of Offenders Act, namely accused of offence under Sections 379, 380, 381, 404, 420 IPC or alleged to be an offence with not more than 2 years imprisonment.

f. Convicts who have undergone their sentence or are entitled to release because of remission granted to them.

g. UTPs become eligible to be released on bail u/s 167 (2)(a)(i) & (ii) of the Code read with Section 36A of the Narcotics Drugs and Psychotropic Substances Act, 1985 (where persons accused of Section 19 or Section 24 or Section 27A or for offences involving commercial quantity) and where investigation is not completed in 60/90/180 days.

> h. UTPs who are imprisoned for offences which carry a maximum punishment of 2 years.
>
> i. UTPs who are detained under Chapter VIII of the Cr PC i.e. u/s. 107, 108, 109 and 151 of Cr PC.
>
> j. UTPs who are sick or infirm and require specialized medical treatment.
>
> k. UTPs who are women offenders.
>
> l. UTPs who are first time offenders between the ages 19 and 21 years and in custody for the offence punishable with less than 7 years of imprisonment and have suffered at least 1/4$^{th}$ of the maximum sentence possible.
>
> m. UTPs who are of unsound mind and must be dealt with Chapter XXV of the Code.
>
> n. UTPs eligible for release under Section 437(6) of Cr PC, wherein in a case triable by a Magistrate, the trial of a person accused of any non-bailable offence has not been concluded within a period of 60 days from the first date for taking evidence in the case."

33. One of the suggestions made by the experts for reducing the overcrowding in jails is that in terms of the decision in ***Arnesh Kumar*** *(supra),* UTPs arrested for offences where the maximum sentence is 7 years or less, should be forthwith released on PR Bond, when unable to fulfil the monetary or 'property' bail condition.

34. At this stage, it must be noted that the High Powered Committee (HPC) set up in term of the order of the Supreme Court in Suo Motu PIL No.1 of 2020 (***In Re: Contagion of COVID 19 virus in prisons****)* was to identify vulnerable categories amongst prisoners who were susceptible of developing symptoms when exposed to the COVID virus. A similar exercise was undertaken correspondingly by the UTRCs. The said exercise is different from exercise to be undertaken by the UTRC in terms of the SOP of NALSA to identify prisoners who might be asked to be released in terms of the directions of the Supreme Court in ***Re: Inhuman Conditions in 1382 prisons*** (*supra*). The frequency of the meeting of the UTRCs has also varied correspondingly. While for release of prisoners as a result of the directions of the Supreme Court in ***In Re: Contagion of COVID 19 virus in prisons*** the UTRCs have been the meeting once in a week, the UTRCs have been meeting only once in a quarter for recommending release of prisoners in terms of the NALSA SOP and the directions of the Supreme Court in ***Re: Inhuman Conditions in 1382 prisons*** (*supra*).

35. With the situation regarding Covid-19 undergoing a change, there is a likelihood of many of the prisoners released pursuant to the directions of HPC and the UTRC in terms of the directions of the Supreme Court in ***In Re: Contagion of COVID 19 virus in prisons*** will soon be returning to the jails. This undoubtedly will further compound the problem of overcrowding in the jails in Odisha.

36. Therefore, the Court would like to request the HPC to consider whether, given the dire situation of overcrowding in many of the jails in Odisha, the return of prisoners post the Covid-19 phase, whenever that might happen, should be staggered or deferred till such time concrete measures to decongest the existing overcrowded jails in Odisha is undertaken. It is of course for the HPC to make an objective assessment of the situation, as it develops, and suggest the modalities whereby the prisoners released for Covid-19 reasons will to return to the prison. A copy of this order will be placed by the Secretary OSLSA before the HPC for its consideration.

37. The Court was also informed that the recommendations made by the UTRCs for release of the UTPs in terms of the SOP of NALSA read with the directions of the Supreme Court in ***Re: Inhuman Conditions in 1382 prisons*** (*supra*) do not always get accepted by the concerned Courts for various reasons. Further, the Court was informed by the Secretary of the DLSAs that the UTRCs are made aware of the judicial orders rejecting the UTRC's recommendations only at the next meeting of the UTRC.

38. The Court was informed in this context that where the UTP has his or her own counsel, the DLSA panel counsel/Jail Visiting Lawyer (JVL) may not submit an application on their behalf to the Court concerned on the basis of the recommendations of UTRCs. This might place the concerned UTP at a disadvantage.

***Directions vis-à-vis overcrowding***

39. In order to streamline the entire process, the Court issues the following directions:

(i) The meeting of the UTRCs for the purposes of implementation of the directions of the Supreme Court in ***Re: Inhuman Conditions in 1382 prisons*** *(supra)* read with the NALSA SOP, in the districts of Khurda, Cuttack, Balasore and Bhadrak will be

held **twice** in a month till such time the prison population in these jails is less than 100% of their respective scheduled capacity. Once the aforementioned level of occupation is reached the UTRC meetings be held once a month.

(ii) The DLSA Panel/JVL will offer assistance to all inmates in whose favour recommendations are made by the UTRCs, in drafting application for bail, irrespective of whether the UTP concerned has his or her own lawyer or not.

(iii) The DLSA will have one panel lawyer observe the proceedings of the Court when such application of the concerned UTPs is taken up and inform the Member Secretary, DLSA that very day by the evening the outcome of the hearing of such application;

(iv) The Member Secretary, DLSA should be sent the copy of the order by the Court immediately after the order is signed. If the recommendation is not accepted, the order should contain reasons therefor.

(v) At the next meeting of the UTRCs, the order of the Court concerned should be placed for consideration.

(vi) The UTRCs will ensure that recommendations are made in respect of each of the 14 categories of prisoners as indicated in NALSA's SOP. For this purpose, the Court directs the Member-Secretary, OSLSA to again circulate NALSA's SOP on the functioning of the UTRCs to all the DLSAs. Further, the DLSA and the State Prisons Department will use digital tools to prepare list of the prisoners identify the prisoners eligible for early release under Sections 167, 436 and 436-A Cr PC and for evaluating the cases that fall under the petty offences, eligible for Plea Bargaining or compounding.

(vii) A direction is issued to the District Courts that where it is found that a prisoner is unable to emerge from jail, despite being granted bail, for want of sureties to consider release on PR bond. A direction is further issued that consistent with the observations of the Supreme Court in numerous judgments including the recent orders emphasizing that bail is the rule and jail is exception, the District Courts should take up in all seriousness applications for bail and anticipatory bail particularly in magistrate triable offences. Judicial notice is taken of the fact that a large number of such applications are filed in the High Court even in magistrate triable offences. Since, according to the counsel appearing in such matters, the sub-ordinate Courts are reluctant to entertain such applications. The Odisha Judicial Academy (OJA) will hold orientation programmes for subordinate Court Judges specific to the issue of bail and anticipatory bails on a constant basis.

### *Adding to Jail Capacity*

40. The Court is informed that in the districts of Malkangiri and Jeypore, over 90% of the UTPs are in custody for grave offence i.e. in possession of

commercial quantity of Ganja thus attracting the severe provisions of the NDPS Act. Therefore, many of them may not qualify for release in terms of the NALSA SOP and the directions of the Supreme Court in the In ***Re: Inhuman Conditions in 1382 Prisons*** *(supra)* or ***Arnesh Kumar*** *(supra).*

41. The DG (Prisons) and the Secretary, Department of Home Affairs have assured the Court that they will be taking a periodic review of the progress in adding to the jail capacity in each of the overcrowded jails including the Circle Jail at Choudwar, the District Jail at Phulbani, the Special Jail at Bhubaneswar; the Special sub-jail at Bhadrak; and the sub-jails in Malkangiri, Jeypore, and Jajpur. The Court would like to underscore that the mere shifting and relocating of the prisoners from one prison to the other may not resolve the problem of overcrowding. It is not even an effective stop-gap arrangement since it pushes the status of the transferee jail to being an even more crowded prison. Further, from the prisoner's point of view, such relocation will cut him off totally from his family, who may not be able to visit him in jail often, create difficulties in his being produced before the Court resulting in further delay of the trial. Therefore, this cannot be a permanent solution to the problem.

42. The DG (Prisons) referred to his affidavit dated 17th December, 2021. The Court would only like to highlight that even as of 31st October, 2021, as against the total capacity in jail of 19855 the present prison population was 21767 and now must have gone up even more. While long term measures in Bhadrak and Malkangiri for construction of additional jail have been taken up, that would obviously take some more time. Therefore, some solution to the problem of overcrowded jails will have to be found out in the short term.

43. Mr. V.K. Singh, the former DGP of Telangana spoke about lack of funds being one of the major constraints and how the Prison Development Board in Telangana was able to make use of the proceeds from the sale of prison products without it having to be deposited with the Government Treasury but with a Prison Development Board. He spoke of prisoners being treated as human resources and Prisons as Human Resources Development Centers.

44. The Court finds that the suggestions of Mr. V.K. Singh have already been taken note of by the Government of Odisha as stated in its affidavit

dated 17th December, 2021. The statistics suggest that a distinction has to be made between habitual and first-time offenders for targeting correctional and welfare measures. Mr. V.K. Singh made a suggestion about the Government generating more employment for both skilled and unskilled labour at Petrol stations and construction sites. His suggestion regarding a correctional approach towards majority of the prisoners who have committed the crime "by accident" has been taken note of, according to the said affidavit of the State Government. Reference has been made to a circular dated 21st August, 2021 issued by the D.G. (Prisons) "5T Module" for the purposes of establishing a "Correctional and Services and Reforms Committee" for all the jails in the State of Odisha.

45. The Court notes that the open prison facility in Khurda has 25 male prisoners as against the capacity of 125, leading to over 80% underutilization. Also, there is no open prison facility for women prisoners. Here again, the Home Secretary and the DG, Prisons were open to the suggestion made of increasing the number of open prisons. Mr. V.K. Singh suggested that semi-open prisons might also be a possibility to be explored. The Court would not like to suggest to the Government which of these systems or perhaps both should be adopted. The fact remains that there is an urgent need to increase the number of such facilities particularly for convicts in jails which include men and women. Concrete measures with regard to open prisons be taken and an action plan in this regard be submitted to the Court by the next date.

46. The Court directs the DG Prisons, Odisha to file an affidavit by the next date on the measures put in place for effective reduction of the prison population including the progress in adding to the capacity of overcrowded jails.

***Tackling the problem of arbitrary arrests***

47. Another important aspect that has been highlighted by the experts who participated in the hearing is the need to check arbitrary and needless arrests of persons as one of the measures to reduce the burgeoning prison population.

48. In ***Joginder Kumar v. State U.P. AIR 1994 SC 1349*** the Supreme Court quoted the observation by the National Police Commission in its third

report that 60% of all the arrests in India were either unnecessary or unjustified. It was noted further that 43.2% of the expenditure in the jails was over such prisoners who on ultimate analysis, need not have been arrested after all. The Parliament in 2009 inserted Section 41 A to 41 D in the Code of Criminal Procedure 1973 (Cr PC). Section 41 A talks of the procedure for notifying this suspect to appear before the police only through a summons without having to be straight away arrested; Section 41 B mandates that all arresting officers should wear identification tags displaying their names; should prepare an arrest memo and inform the arrestee's family or friend of his/her arrest; Section 41 C requires public display at the District level, of the names of the arrested persons, the names and ranks of their arresting officers and at the State level a larger data base of information on persons arrested. Section 41 D operationalizes the fundamental right under Article 22 of the Constitution of a arrested person to have a lawyer of his or her choice at some point during the interrogation.

49. The police authorities in Odisha will ensure that the above statutory provisions in the Cr PC are strictly implemented. The Police will publish every month on its website the relevant information as mandated to ensure transparency and accountability.

***Police Station Duty Lawyer System***

50. To ensure availability of legal assistance to a suspect, an informant/complainant, a victim of crime it is directed that OSLSA should, in consultation with the police in Odisha, put in place a 'police station duty lawyer system' at every police station in a district. Such duty lawyers whose names and mobile numbers will be displayed on a board in a prominent place at the police station should be prepared to offer their services 24 X 7. A roster of the lawyers who will attend to calls 24 hours in the day will be prepared and displayed prominently in every police station. In order to make this system effective, a direction is issued to the police as well as the OSLSA to launch a pilot project of the duty lawyer system in four police stations in Odisha preferably one in each of the four geographical regions beginning 1st February 2022. The NALSA guidelines in this regard be adhered to. An affidavit of compliance be filed by the next date.

***Fees of panel counsel***

51. One of the suggestions received during the hearing was the upward revision of the fees of panel counsel, JVLs and even Para Legal Volunteers

(PLVs). The OSLSA will review the fee structure for panel counsel, JLVs and PLVs and come up with a revised circular in this regard consistent with the best practices elsewhere in the country within a period of three months from today. This is to tackle the refrain regarding inadequate honorarium to legal aid lawyers which de-motivates them.

52. The following further directions are issued regarding JLVs and PLVs:

(i) The OSLSA will specify the minimum tenure, the period of appointment of JVLs. Women JVLs must visit the female wards in prisons. There shall be weekly visits to prisons by both male and female JVLs;

(ii) The NALSA Hand Book of Formats for JVLs and Convict PLVs be provided to all JVLs and PLVs at the time of their appointment.

(iii) The DLSA will appoint one or two community PLVs to visit every district prison and Taluk Prison twice a week to assist the JVLs in the functioning of the Jail Prisoners Clinics.

(iv) The following registers be maintained in the prison clinic (a) the Legal Aid Clinic work Register; (b) the Attendance Register. For the above purpose, sufficient stationery be provided to maintain proper records in the jail legal aid clinic and

(v) Ensure that computers provided to the jail are installed and used by the JVLs. The records to be maintained will also be maintained electronically and to this end a short orientation programme must be organized to familiarize JVLs to use computers to check the case status online, perform online legal research and draft legal documents and maintain electronic records of the work.

***Probation of Offenders Act, 1958***

53. The Court would also take note of the concerns expressed by the experts of the infrequent use by the Courts of the provisions of the Probation of Offenders Act (PO Act). Mr. Upadhaya, the DG (Prisons) was candid that although there were Probation Officers (POs) in each of the 30 districts, there was very little use made of the PO Act either due to lack of training and awareness of the POs themselves or the Courts not being inclined to do so.

54. The Court directs that the Odisha Judicial Academy (OJA) should conduct specific training/orientation workshops involving the POs under the

PO Act and the trial Court judges on the need for more extensive use of the PO Act in cases involving offences triable by the Magistrates.

***Custody warrant***

55. On the issue of "custody warrant", the following observations in NALSA's SOP have been pointed out by the experts:

> "…the need thereof arose since as on date the Prison Data is maintained only on the basis of case details received by the Jail Authorities from the First Custody Warrant which is in turn based solely on case particulars contained in the FIR. This data is amenable to change at different stages i.e. stage of filing of Chargesheet, framing of charge and then passing of final judgment, Adoption of this new Modified 'Custody Warrant' is necessary as unless the specific offence in which UTP is kept in detention is regularly updated, the software filters will not be able to give correct result. For example, an accused initially arrested u/s 302 IPC may be finally chargesheeted u/s 304 IPC. These new Modified Custody Warrants carry the particulars of the Legal Aid Counsel/Private Counsel representing the UTPs at different stages."

56. Thus, the "custody warrant" should assist the Prison Department in having the complete update particulars of the prisoner and in particular at various stages of the progress of the case. The format of the "custody warrant" as provided in the NALSA SOP should be adopted, if not done already. The DG Prisons, Odisha in collaboration with the Member Secretary, OSLSA will ensure compliance with this direction.

***Complaint Boxes in jails***

57. The DG (Prisons) agreed that the system of installing complaints/suggestion boxes in every jail, to be opened only by the Member Secretary, DLSA can be adopted. This would be consistent with the Nelson Mandela Rules that require a transparent and independent complaint mechanism to be put in place to check prison excesses and abuses. Accordingly, a direction is issued that not later than 2nd February, 2022 in every jail in Odisha there should be a complaint box which should be opened only by the Member Secretary, DLSA or to any other official of the DLSA authorized by the Chairman, DLSA. In other words, the key to the said complaint/suggestion box will be available only to the Member Secretary, DLSA or such authorised person of the DLSA. The Member Secretary DLSA will then take up such of the complaints as require action, with the

appropriate Officer in the Directorate of Prisons, Odisha in compliance with the "Nelson Mandela Rules". The report of the action taken on the complaint should be provided by the Directorate of Prisons both to the complainant as well as Member Secretary, DLSA within a period of 10 days from the date of receipt of such complaint.

***Children in jails***

58. As already noticed, there are at present around 59 children in the jails in Odisha. The Court is informed that there are detailed schemes formulated both in Rajasthan and Maharashtra relating to the children in prisons as well children of prisoners, who may not be inside prisons themselves. During the hearing, both the Home Secretary as well as the DG (Prisons) were open to the suggestion of adopting the best elements of such schemes to prepare a scheme for children of prisoners in Odisha which will include mandating a minimum stipend per child per month to meet the expenses connected with a decent standard of living and subsidising the entire expenses connected with the education of such children. A detailed scheme concerning children of prisoners whether within or outside prison be formulated within a period of two months and placed before the Court by the next date. The Court clarifies that the Government need not wait for the Court's green signal to operationalize the aforementioned scheme.

59. The guidelines laid down by the Supreme Court in the case of ***R.D. Upadhyay v. State of AP (2007) 15 SCC 337*** as regards a special diet for children should be kept in view. In Maharashtra, under the ICDS scheme Anganwadis have been established both within the prisons and some outside them. There are also Balwadis set up outside the prison premises to cater to the needs of children. In Rajasthan and Maharashtra there are similar schemes. The best of these practices be adopted for the State of Odisha.

***Inspection of Jails***

60. The Court is informed that under the OPR, 2020 the following seven types of inspections are envisaged: (i) Informal inspections conducted by prison officers (Rule 702, OPR 2020); (ii) Formal inspection by an Inspecting Officer designated by the Government (Rule 703, OPR 2020); (iii) Inspections by Board of Visitors (BoVs) (Chapter XXXV, OPR, 2020); (iv) Half yearly inspections by Senior Superintendent and range DIG (Rules

704 and 855, OPR, 2020);(v) Annual inspections by Head of the Directorate or any other officer of the rank of Deputy Inspector General of Prisons and above from the Prisons Headquarters(Rules 26, 27 and 706, OPR, 2020); (vi) Joint Inspection by the Superintendent and Executive Engineer to examine prison buildings (Rule 1130, OPR, 2020); (vii) Inspections by District & Sessions Judge (Rule 890, OPR, 2020). Additionally, judicial officers and National and State Human Rights Commissions have the mandate to monitor prisons.

61. The OPR 2020 however does not provide for (i) any educational qualifications/criteria for appointment of non-official Visitors (NOVs); (ii) training of NOVs; (iii) reporting to State government; (iv) action taken reports to be submitted by prison authorities to the BoVs, as suggested by the Ministry of Home Affairs' 'Advisory for appointment and working of Non-Official Visitors for Prisons' dated 18 February 2011.

62. The Court directs the Government of Odisha to ensure that:

a. NOVs are appointed for all prisons, including special jails, sub-jails, special sub-jails, women jails and open-air prisons;

b. District Magistrates constitute BOVs for every prison;

c. training/orientation programmes for NoVs are organized in collaboration with any of the three Regional Institutes of Correctional Administration in the country;

d. The OPR, 2020 incorporates the suggestions provided in the MHA's Advisory for appointment and working of NoVs for Prisons, dated 18 February 2011.

63. The Prison Department will publish prison-wise information on the visits by the BoVs/NoVs. The BoVs should ensure that the quality of food served in jails in Odisha is at acceptable levels. It is accordingly suggested that on every visit by the BoVs to jails, preferably without prior announcement, they will ensure that they partake of a meal with the inmates. They will time their visits accordingly. This will help to improve the quality of the food being served in prisons.

64. The Court also reiterates the directions issued para 11 of its order dated 26th August 2021 regarding surprise/unannounced visits by DMs to jails within their jurisdiction. The AC informs the Court that many of the reports of the visits by the DMs, in the format designed by CHRI, have not yet been submitted. The Member Secretary, OSLSA will ensure that at least

ten days prior to the next date, the reports of the DMs of such visits be collated and be provided to the Court as well as the AC.

***Release of Prisoners***

65. Regarding release of prisoners under Section 433 A Cr PC under permanent parole, it was suggested to the Court that a system that has been in operation in Rajasthan, with good results, could be examined for its adoption with suitable modifications for Odisha. It was pointed out that in Telangana, such practice was adopted which ultimately resulted in considerable reduction in the prison population. Some of these measures were providing for the release of:

> (i) All convicted women prisoners sentenced to imprisonment for life, including those governed by Section 433-A Cr PC who have undergone an actual sentence of 6 years including remand period and total sentence of 8 years including remission.
>
> (ii) All convicted male prisoners sentenced to imprisonment for life including those governed by Section 433-A Cr PC and who have undergone an actual sentence of 10 years including remand period and total sentence of 14 years including remission.
>
> (iii) All male convicted prisoners sentenced to imprisonment for life including those governed by Section 433-A Cr PC aged more than 65 years and have undergone an actual sentence of 6 years including remand period and total sentence of 8 years including remission shall be released.
>
> (iv) All women convicted prisoners sentenced to imprisonment for life including those governed by Section 433-A Cr PC aged more than 60 years and have undergone an actual sentence of 6 years including remand period and total sentence of 7 years including remission.

66. The State of Odisha will review its existing Scheme/ guidelines on release of prisoners within a period of three months from today and place it on affidavit before this Court by the next date.

***Wages payable to Prisoners***

67. One of the issues highlighted was of payment of wages to the prisoners. The practice in jails in Odisha, the Court was informed, is that while convicts are engaged in activities of carpentry, farming, etc., it is voluntary when it comes to undertrials. The Court finds that the rate of wages offered to prisoners, when compared to the best practices elsewhere in

the country, is abysmally low. The Court was shown copy of a recent circular dated 25th May 2021 issued under the Minimum Wages Act by the Labour Commissioner of Odisha fixing the minimum wages for unskilled category @ Rs.311/- per day; for semiskilled @ 351/-, for skilled @ Rs.401/- and for highly skilled @ Rs.461/- per day. In comparison, the 'revised' wages paid to prisoners for their labour in terms of a recent circular dated 18th June, 2021 of the Home Department is Rs. 50 per day for 'unskilled', Rs. 60 per day for semi-skilled and Rs. 70 per day for skilled work. This is a pittance.

68. The Court would like to remind the State Government of the legal requirements as spelt out in paragraph 34 of the judgment of the Supreme Court in ***State of Gujarat v. Hon'ble High Court of Gujarat (1998) 7 SCC 392*** where it was observed as under:

> "34. All the learned counsels who argued before us are in unison in agreeing to the proposition that no prisoner can be asked to do labour, free of wages. It is not only the legal right of a workman to have wages for the work, but also a social imperative and an ethical compulsion. Extracting somebody's work without giving him anything in return is only reminiscent of the period of slavery and the system of *begar*."

69. In the same judgment, a series of guidelines had been set out on the modalities for fixing the wages to be paid for prisoners. The best practices in regard to wages to prisoners in the neighbouring State of Bihar, Jharkhand, West Bengal, Telangana and Chhattisgarh may be adopted and a fresh circular be brought out by the Government of Odisha within a period of two months from today and in any event not later than 1st March, 2022.

70. Connected with the payment of wages, is the setting up of jail industries. Annexure-G to the affidavit dated 17th December 2021 of the DG prisons gives the list of activities in the Circle Jails, District Jails and a handful of Sub-Jails. This needs to be expanded substantially so that there is some activity in every jail and sub-jail in Odisha. The DG Prisons will inform the Court on affidavit to be filed by the next date how it proposes to adopt the model of setting of a Prison Development Board and increasing the number of activities in the jails in Odisha that can contribute to the welfare of the prisoners.

***Payment of compensation for death of prisoners***

71. Rule 1028 of the OPR 2020 sets out the steps to be taken in the event of a death of a prisoner in custody. Rule 1026 of OPR 2020 talks of certification by a Medical Officer. Rule 1032 talks of post-mortem examination by 'the outside Medical Officer.". It is not clear how these provisions are actually followed in practice. In the affidavit filed on 17th December 2021 in Annexure-A, the DG Prisons has given the details of payment of compensation for prison custodial deaths. In respect of some of the nine prisoners who are stated to have died in jails in Odisha during 2020-21, and later the payment to the next of their kin is stated to be "under process". Also, the basis for fixation of the compensation amount is not clear. Instead of getting in every case the OHRC or NHRC to fix the compensation amount, a system/scheme should be put in place by the Government itself for such payment. This should be devised in consultation with civil society groups working in the area of prison reforms so that the best practices elsewhere can be adopted.

72. Although the DG, Prisons stated that a judicial enquiry is in fact held even where the death of a prisoner is stated to be due to 'natural' causes, the Court would like a confirmation of the exact process being adopted by way of an affidavit to be filed by the DG Prisons by the next date. The said affidavit will further confirm that payment has indeed been made to the family/next of kin of every person who died in prison in Odisha during 2020-21 and later, as indicated in Annexure-A to the affidavit dated 17th December, 2021. Also, copies of the detailed instructions issued to operationalize the relevant Rules in the OPR and in particular Rules 1026 to 1032 be enclosed with such affidavit.

***Medical and mental health care***

73. The Court notes that Chapter XXXVIII of the OPR 2020 deals with medical care. Rule 976 OPR 2020 mandates that hospital accommodation should be provided on the scale of 5% of the daily average of the inmate population in all jails. There are two types of hospitals i.e. Type-A and Type-B. It also specifies the staff and equipment of two types of hospitals.

74. Mr. V.K.Singh highlighted the need to pay attention to the mental health needs of prisoners. Rule 988 of OPR 2020 requires *inter alia* a prison hospital to have a psychiatric unit with equipment. In addition, there is a need for regular visits by clinical psychologists and counsellors to prisons on a regular basis.

75. In the affidavit dated 17th December 2021 of the DG Prisons, reference has been made to an order dated 15th November 2021 issued by the Health and Family Welfare Department deploying Psychiatric Specialists, Senior Residents and Clinical Psychologists from Medical Colleges and Hospitals and District Head Quarter Hospitals to different districts not having skilled mental health professionals to provide screening, counselling, treatment, follow up and evaluation of prison inmates having mental illness. How effective these measures have been is not clear. The number of consultations that such mental health professionals have had at the request of prisoners, without having to disclose their names, since the issuance of the above order be indicated in an affidavit to be filed by the DG Prisons before the next date.

***Concluding directions***

76. The Court is conscious that it has issued a slew of directions and it is now for the authorities concerned to ensure their implementation. The Court also makes it clear that the aforementioned directions are in addition to the directions issued in the earlier orders. This matter has, from the beginning, proceeded on a non-adversarial basis and the directions issued, in consultation and with inputs from all the actors, are with the sole purpose of improving the condition of prisons and prison inmates in Odisha. Although the Court has in this order taken up seven jails as a sampling, the situation in most of the other jails is not very different. The Court has issued the directions with the expectation that with all the measures envisaged being made operational, the prison population in Odisha is progressively reduced to manageable levels. The Court is conscious that many of the measures will have to be implemented over a considerable period of time. As the experts repeatedly pointed out during the hearings, the problem of overcrowding in jails cannot be tackled on a piecemeal or ad hoc basis. It requires a whole slew of measures to be put in place to achieve that goal.

77. Implementing the directions issued thus far by the Court in this matter will require the active involvement and co-operation of a number of State and non-state agencies. The Court therefore considers it necessary to further direct the setting up of a nodal mechanism for implementation of the directions. It is accordingly directed that the Government of Odisha shall, within ten days from today, set up a Committee for implementation of the Court's directions, comprising:

(i) The Home Secretary, Government of Odisha

(ii) The Principal Secretary, Law and Justice, Government of Odisha;

(iii) The DG of Police or his nominee

(iv) The DG Prisons

(v) Representatives of the Health Department and the Women and Child Development Department, Government of Odisha;

(vi) the Member Secretary, OSLSA who shall also be the convenor of the Committee. The AC shall be an invitee to the meetings.

78. The Committee will hold its first meeting not later than 10th January, 2022 and as many meetings as considered necessary but definitely once in every fortnight. The Court expects that by the next date at least four such meetings would have been held. The Member Secretary, OSLSA will prepare a list of all the directions issued/requests made by the Court (to the various authorities) not only in this order but in the previous orders as well and circulate it to the members of the above Committee not later than 3rd January 2022. He will also transmit the list of directions to each of the Member Secretaries of the DLSAs, the District Judges, the SPs and the DMs for implementation. The Committee will ensure the filing of the affidavits as directed by this Court within the time as indicated.

79. List on 8th March, 2022.

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**2022 (I) ILR - CUT- 75**

**JASWANT SINGH, J & S.K. PANIGRAHI, J.**

W.P.(C) NO. 33158 OF 2021

**ASHIRBAD PATTNAIK AND ORS.** .....Petitioners

.V.

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

**ORISSA HIGH COURT PUBLIC INTEREST LITIGATION RULES, 2010 – Rules 5, 7 & 9 read with Articles 226 and 227 of the Constitution of India, 1950 – Public interest Litigation filed, dismissed as withdrawn – Again another PIL was filed on the same subject by the same lawyer**

**by replacing another set of petitioners – Effect of such action of the petitioners – Held, the court has to be satisfied about the credentials of the applicant; *prima facie* correctness or nature of information given by him and the information furnished being not vague and indefinite. But in the present case, we find it to be a mischievous petition seeking to assail with oblique motives which prevents us from invoking our discretionary writ jurisdiction – Law on the issue discussed in detail – Writ petition dismissed with cost.**

> *"We would have ordinarily observed something against the counsel appearing in the case. However, keeping in view the early stages of his career, we refrain from commenting upon his conduct except to advise him to be careful in future and not be a party to such a litigation initiated by unscrupulous litigants. The Registry is also directed to stringently comply with the rules as indicated hereinabove while dealing with Public Interest Litigations so as to prevent valuable judicial time from being wasted and prevent certain unscrupulous elements from weaponzing petitions in courts of law. We feel constrained to direct the petitioners (10 in number) to deposit cost of Rs.5,000/- each (totalling Rs.50,000/-) before the Orissa High Court Bar Association Advocates Welfare Fund positively within four weeks from today, failing which Collector, Keonjhar shall proceed to recover the same as arrears of land revenue and ensure the deposit of the recovered amount as stated hereabove."*

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

1. (1985) 3 SCC 169 : State of H.P. Vs. A Parent of a Student of Medical College.
2. (1987) 2 SCC 295 : Sachidanand Pandey Vs. State of W.B.
3. (2004) 3 SCC 349 : Ashok Kumar Pandey Vs. State of W.B.
4. (2006) 6 SCC 180 : KushumLata Vs. Union of India.

For Petitioners : Mr. Sambit Samal.
For Opp. Parties : None

JUDGMENT Date of Hearing: 02.12.2021 : Date of Judgment : 02.12.2021

***JASWANT SINGH, J.***

1. The present writ petition has been filed by the petitioners purportedly in the nature of a Public Interest Litigation seeking reliefs against the State and some of the private opposite parties alleging some illegal mining and transportation of minerals etc. resulting in loss of public exchequer.

2. Without going into the merits of the matter, we feel the procedural improprieties resorted to by the petitioners herein and their counsel persuade us to believe that there is something much more than which meets the eye.

3. We find from the perusal of the file attached herewith that the same advocate had filed a previous writ petition in the form of Public Interest Litigation being W.P. (C) 16719 of 2020 with different set of petitioners (11 in number) with similar content and seeking identical relief sought herein. We find further from the perusal of the file of the earlier similar Public Interest Litigation-W.P.(C) No.16719 of 2020 attached herewith that the allegation/grievance raised in both the petitions are similar in substance. In fact, it is noticed that the advocate in both the petitions is the same i.e. one Mr. Sambit Samal. What has changed is that the earlier set of petitioners have merely been replaced by another set of petitioners and some minor alterations have been made in the pleadings in the subsequent/instant Writ Petition. The aforesaid writ petition got dismissed as withdrawn by this Court vide order dated 21.07.2020.

This Court has to be satisfied about the credentials of the applicant; prima facie correctness or nature of information given by him and the information furnished being not vague and indefinite. But in the present case, we find it to be a mischievous petition seeking to assail with oblique motives which prevents us from invoking our discretionary writ jurisdiction.

4. No declaration has been made so as to validate the bona fide of the petitioners or to demonstrate in what manner they have been said to be public spirited persons except for the fact that they are purportedly residents of Keonjhar. It also reveals that in order to pay a lip service to the rules a representation has been made in order to facilitate the filing of the present writ petition.

5. At this juncture, it will be worthwhile to briefly deal with the relevant rules. The petition has not been filed in the form appended to the Orissa High Court Public Interest Litigation Rules, 2010 wherein Rule 6 clearly stipulates that “Public Interest Litigation under Article 226 of the Constitution of India shall be in the form appended here to”. In gross contravention to the mandatory requirements of the form, the petitioners have deliberately suppressed that a previous Writ Petition (PIL) was filed by the same Advocate in question on the very same issue vide W.P.(C) PIL No.16719 of 2020 and the same was withdrawn by the order dated 21.07.2020. Also, the petitioners have not annexed any document in order to validate either their credentials or to demonstrate that they are public spirited persons, except for a bald pleading to that effect. Even the addresses of most of the petitioners are incomplete in contravention to Rule 5 of the Orissa

High Court Public Interest Litigation Rules, 2010. A bare perusal of Rule 5 of the extant rules demonstrates that an obligation is cast upon the court itself to verify and satisfy itself as to the bona fide of not only the cause in question but also the parties who bring such a cause to the court. Rule 5 of the rules provides as hereunder:

> " 5.The Court before entertaining the PIL is to prima facie
>
> (i) verify the credentials of the petitioner/ petitioners
>
> (ii) shall satisfy with regard to the correctness of the contents of the petition and
>
> (iii) shall satisfy that substantial public interest involved in the PIL."

6. Further, Rule 7 of the said Rules provides that if certain pleadings in the petition are based on news reports, the petitioners must verify as to the veracity of the pleadings being made therein and it must be specifically stated that the said exercise as postulated under the said Rule has been undertaken. Such a verification assumes significance because the courts place heavy reliance upon the counsels who appear in the matters and the pleadings being made by parties before it. It must be borne in mind that in petitions which seek to address a public interest, the parties approaching the court must come with clean hands and the same must be borne from the records of the case itself. Generally, the courts rely on the counsels to advise their clients to be truthful and explain to them the consequences that entail in the event of misadventures. More so, in the case of Public Interest Litigation the petitioners must be like the proverbial Caesar's wife "above suspicion". The said Rule 7 reads as hereinunder:

> 7. The petition shall contain the facts of the case in chronological order. If the petition is based on news report, it must be stated as to whether the petitioner has verified the truth of the facts by personally visiting the place or by talking to the people concerned or has verified from the reporter or editor of the newspaper concerned.

In the same vein, Rule 9 deals with frivolous and vexatious PILs and provides that where the Court is of the opinion that the PIL petition filed by the petitioner is frivolous or vexatious or is devoid of public interest or is filed as camouflage to foster personal gain or is filed for extraneous and ulterior motives, it shall dismiss the same with exemplary cost. In the instant case, despite the earlier petition based on the same subject matter with different set of parties being dismissed, the advocate in question should have

known better and advised his purported "clients" accordingly. Instead, another set of petitioners have been replaced in the place of the earlier petitioners while keeping most of the contents of petition unchanged.

7. In fact, almost immediately after the advent of PILs on the jurisprudential horizon of the country, the Hon'ble Apex Court in the case of ***State of H.P. v. A Parent of a Student of Medical College reported in (1985) 3 SCC 169*** used a word of caution wherein it has noted that public interest litigation is a weapon which has to be used with great care and circumspection. In his separate supplementing judgment Khalid, J. recognized the pitfalls attached to such petitions and foresaw those certain self-imposed restrictions might be the call of the hour in ***Sachidanand Pandey v. State of W.B. reported in (1987) 2 SCC 295*** said:

> "....46. Today public-spirited litigants rush to courts to file cases in profusion under this attractive name. They must inspire confidence in courts and among the public. They must be above suspicion.
>
> ....59. Public interest litigation has now come to stay. But one is led to think that it poses a threat to courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions.
>
> ....61. I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

Overtime, having noticed the growing trend of abuse of such petitions the Hon'ble Apex Court in the case of ***Ashok Kumar Pandey v. State of W.B., reported in (2004) 3 SCC 349*** laid down certain parameters, which now stand codified in the form of various High Court rules, by laying down as follows:

> "14. The court has to be satisfied about: (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; and (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests: (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the court cannot afford to be

> liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect.
>
> 15. Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra v. Prabhu [(1994) 2 SCC] and A.P. State Financial Corpn. v. Gar Re-Rolling Mills [(1994) 2 SCC 647]) No litigant has a right to unlimited draught on the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. [See Buddhi Kota Subbarao (Dr) v. K. Parasaran [(1996) 5 SCC 530] .] Today people rush to courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in courts and among the public."

8. In the case of ***KushumLata v. Union of India reported in (2006) 6 SCC 180,*** the Hon'ble Supreme Court held that the Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Hon'ble Supreme Court further held that when genuine litigants with legitimate grievances are standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffing their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions. It would be profitable at this stage to reproduce the observations which were as hereunder:

> "12. It is depressing to note that on account of such trumpery proceedings initiated before the courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving

properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders, etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffing their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.

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

9. With the above observations, the present writ petition stands dismissed.

10. We would have ordinarily observed something against the counsel appearing in the case. However, keeping in view the early stages of his career, we refrain from commenting upon his conduct except to advise him to be careful in future and not be a party to such a litigation initiated by unscrupulous litigants.

The Registry is also directed to stringently comply with the rules as indicated hereinabove while dealing with Public Interest Litigations so as to prevent valuable judicial time from being wasted and prevent certain unscrupulous elements from weaponizing petitions in courts of law.

11. We feel constrained to direct the petitioners (10 in number) to deposit cost of Rs.5,000/- each (totaling Rs.50,000/-) before the Orissa High Court Bar Association Advocates Welfare Fund positively within four weeks from today, failing which Collector, Keonjhar shall proceed to recover the same as arrears of land revenue and ensure the deposit of the recovered amount as stated here above.

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**2022 (I) ILR - CUT- 82**

**JASWANT SINGH, J & S.K. PANIGRAHI, J.**

CONTC NO. 637 OF 2018

**UNITED BILT SEWA WORKERS UNION** .....Petitioner

.V.

**SACHIN RAMCHANDRAN JADAV** ..... Opp. Party

**INDUSTRIAL DISPUTES ACT, 1947 – Section 18 – Provisions under – Settlements – A settlement which arrived at in the course of conciliation proceedings – Validity and binding effect – Held, it may be seen on a plain reading of Subsections (1) and (3) of Section 18 that settlements are divided into two categories, namely, (1) those arrived at outside the conciliation proceedings and (ii) those arrived at in the course of conciliation proceedings – A settlement which belongs to the first category has limited application in that it merely binds the parties to the agreement but the settlement belonging to the second category has extended application since it is binding on all parties to the industrial dispute, to all others who were summoned to appear in the conciliation proceedings and to all persons employed in the establishment or part of the establishment, as the case may be, to which the dispute related on the date of the dispute and to all others who joined the establishment thereafter – Therefore, a settlement arrived at in the course of conciliation proceedings with a recognised majority union will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same.**

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

1. MANU/SC/0784/1990 : Barauni Refinery Shramik Parishad & Ors. Vs. Indian Oil Corporation Ltd and Ors.
2. MANU/SC/0755/1999 : National Engineering Industries Ltd Vs. State of Rajasthan and Ors.
3. MANU/SC/0890/1998 : P. Virudhachalam and Ors. Vs. Management of Lotus Mills and Ors.

For Petitioner : Mr. Satyajit Behera
For Opp. Party: Mr. L. Samantaray, AGA

ORDER Date of Order :13.12.2021

***BY THE BENCH***

**1**. This matter is taken up through hybrid mode.

**2**. It transpires that a statutory bilateral agreement dated 30th of May, 2017 stood executed between the Management of BILT Graphic Paper Products Limited Unit, Sewa and the Workmen represented by different Unions before the Conciliation Officer-cum- Deputy Labour Commissioner, Jeypore in the conciliation proceeding under Section 12(3) read with Section 18(1) of the Industrial Disputes Act, 1947.

**3**. The present Petitioner-Union claiming itself to be the true representative of the Workmen and filed W.P.(C) No.20176 of 2017 challenging the aforesaid bilateral agreement dated 30th of May, 2017. This Court vide order dated 21st of November, 2017 disposed of the aforesaid Writ Petition with a direction to the Commissioner to take appropriate steps within a period of six weeks on the application dated 21st of June, 2017 filed by the Petitioner-Union raising the similar grievance as raised in this Writ Petition.

**4**. Learned counsel for the Petitioner-Union submits that the contemnor sat over the matter and is not taking steps to comply the order dated 21st of November, 2017 passed by this Court in W.P.(C) No.20176 of 2017. Hence, this contempt petition .

**5.** Conciliation proceedings were postulated to put an end to the ongoing disputes between the parties. Upon perusal of the Memorandum of Settlement between the Management of BILT Graphic Paper Products Limited Unit: Sewa and Workmen represented by different Unions dated 30th May, 2017, it is revealed that a bilateral settlement has been secured by the Parties.

**6.** It is well settled that a settlement of such nature is binding on both the employer and the workmen under section-18(1) of the Industrial Disputes Act. Thus, making the workmen unions bound by the settlement. Once a settlement is arrived at under the said provision, none of the parties can go back on their stance. The hypothesis for the same is to vindicate the inviolability of the settlement reached via the length of the conciliation proceedings and the persuasive skills of the conciliation officer.

**7.** The Hon'ble Apex Court has succinctly emphasised the sanctity of Section 18 (1) of the Industrial Disputes Act, 1947 in ***Barauni Refinery Shramik Parishad and Ors v. Indian Oil Corporation Ltd and Ors[1]:***

> ***9.*** *"* ….It may be seen on a plain reading of Sub-sections (1) and (3) of Section 18 that settlements are divided into two categories, namely, (1) those arrived at outside the conciliation proceedings and (ii) those arrived at in the course of conciliation proceedings. A settlement which belongs to the first category has limited application in that it merely binds the parties to the agreement but the settlement belonging to the second category has extended application since it is binding on all parties to the industrial dispute, to all others who were summoned to appear in the conciliation proceedings and to all persons employed in the establishment or part of the establishment, as the case may be, to which the dispute related on the date of the dispute and to all others who joined the establishment thereafter.Therefore, a settlement arrived at in the course of conciliation proceedings with a recognised majority union will be binding on all workmen of the establishment, even those who belong to the minority union which had objected to the same. To that extent it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlements reached with the active assistance of the Conciliation Officer and to discourage an individual employee or a minority union from scuttling the settlement.There is an underlying assumption that a settlement reached with the help of the Conciliation Officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the union signing the settlement but also on others. That is why a settlement arrived at in the course of conciliation proceedings is put on par with an award made by an adjudicatory authority…".

**8.** In addition, the Hon'ble Apex court has also held that the settlement is binding not only on the signatories but also on the members of the union that had objected to it. This binding principle emanates from the intrinsic assumption of fairness and reasonableness with respect to the settlement reached with the efforts of the conciliation officer. In the case of ***National Engineering Industries Ltd v. State of Rajasthan and Ors[2],*** it held that***:***

> "25.…settlement arrived at in the course of conciliation proceedings with a recognised majority union will be binding on all workmen of the establishment, even those who

1. MANU/SC/0784/1990 & 2. MANU/SC/0755/1999

> belong to the minority union which has objected to the same. Recognised union having majority of members is expected to protect the legitimate interest of labour and enter into a settlement in the best interest of labour. This is with the object to uphold the sanctity of settlement reached with the active assistance of the Conciliation Officer and to discourage an Individual employee or minority union from scuttling the settlement. When a settlement is arrived at during the conciliation proceedings it is binding on the members of the Workers' Union as laid down by Section 18(3)(d) of the Act. It would ipso facto bind all the existing workmen who are all parties to the industrial dispute and who may not be members of unions that are signatories to such settlement under Section 12(3) of the Act. Act is based on the principle of collective bargaining for resolving industrial disputes and for maintaining industrial peace….".

**9.** The concept of Industrial Dispute resolution manifests industrial peace and cooperation. Accordingly, all settlements attained between contesting parties are to be positioned with a firm foot. Going back on the same issue and pursuing to alter once reached settlements cannot be countenanced. The Hon'ble Supreme Court has deprecated such stance in ***P. Virudhachalam and Ors v. Management of Lotus Mills and Ors.***[3] and held that it will also bind the non-signatory objectioners to the settlement to keep intact the spirit of Industrial Dispute resolution. The Court reiterated that;

> "10. It is impossible to accept the submission of learned counsel for the appellants that settlements between the parties are different from agreements between the parties. It is trite to observe that all settlements must be based on written agreements and such written agreements get embedded in settlements. But all agreements may not necessarily be settlements till the aforesaid procedure giving them status of such settlements gets followed. In other words, under the scheme of the Act, all settlements are necessarily to be treated as binding agreements between the parties but all agreements may not be settlements so as to have binding effect as provided Under Section 18(1) or (3) if the necessary procedure for giving them such status is not followed in given cases. On the aforesaid scheme of the Act, therefore, it must be held that the settlement arrived at during conciliation proceedings on 5.5.1980 between Respondent No. 1-Management on the one hand and the four out of 5 unions of workmen on the other, had a binding effect Under Section 18(3) of the Act not only on the members of the signatory unions but also on the remaining workmen who were represented by the fifth union which, though having taken part in conciliation proceedings, refused to sign the settlement. It is axiomatic that if such settlement arrived at during the conciliation proceedings is binding to even future workmen as laid down by Section 18(3)(d), it would ipso facto bind all the existing workmen who are all parties to the industrial dispute and who may not be members of unions that are signatories to such settlement Under Section 12(3) of the Act…".

**10.** Moreover, every time an objection to a settlement is raised and countenanced, it falls into the vicious cycle of disagreements, undermining the industrial democracy envisioned by the principle of binding settlements.

3. MANU/SC/0890/1998

Legitimatizing challenges to an already settled contest serves no purpose but would be a retrograde step.

**11.** The said agreement has been entered into by the Parties and they have agreed to the terms and conditions as enumerated in the said settlement. Hence at this juncture, they cannot turn around and seek quashment of the said settlement, nor can it be termed as an arbitrary settlement.

**12**. In view of the above, we do not find any reason to interfere with the bilateral settlement arrived at between the parties and undermine the sanctity of the agreement. Hence, no contempt proceedings can be initiated against the contemnor since he cannot decide an issue which has already received seal of approval by the parties.

**13**. Accordingly, this CONTC is disposed of.

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**2022 (I) ILR - CUT- 86**

**JASWANT SINGH, J & S.K. PANIGRAHI, J.**

W.P.(C) NO. 11425 OF 2021

**BAJAJ FINANCE LTD.** .....Petitioner

.V.

**M/S. ALI AGENCY AND ORS.** .....Opp. Parties

**(A) THE SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 14 – Petition filed by secured creditor rejected – Against the order of rejection writ petition filed – A question of maintainability of writ petition raised by the Borrower – The question was examined with reference to the provisions of the Act and the judgments of the Apex court – Held, the writ petition is maintainable – Reasons indicated.**

(Para 11 to 16)

**(B) THE SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 14 – Power under – Exercise thereof – Held, the Chief Judicial Magistrate would be equally competent to entertain an application filed**

**by the secured creditor under Section 14 of the Act, 2002 and would be entitled to pass such orders as would be required to provide assistance to the secured creditor to take over physical possession of the secured assets.** (Para 20 to 22)

**(C) THE SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 14 – Scope of functions of the District Magistrate while exercising power under Section 14 of the Securitisation Act, 2002 – Principles – Indicated.** (Para 28 & 29)

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

1. 2021 (3) PLR 690; 2021 (4) RCR (Civil) 571 : Allahabad Bank Vs. District Magistrate, Ludhiana.
2. 2021 AIR (Punjab and Haryana) 118 : Kotak Mahindra Bank Vs. Raj Paul Oswal.
3. 2019 (8) SCALE 488 : Sunil Vasudeva Vs. Sundar Gupta.
4. 2021 AIR Punjab : Anu Bhalla Vs. District Magistrate, Pathankot.
5. 2019 AIR SC 4619 : Authorised Officer, Indian Bank Vs. D. Visalakshi and Anr.
6. 2018 (1) PLR 443 : Asset Reconstruction Company (India) Ltd. Vs. State of Haryana.
7. 2019 (2) CWC 697 : M/s Shriram Housing Finance Ltd. Vs. District Collector.
8. 2011 (12) SCC 782 : Kaniyalal Lalchand Sachdev Vs. State of Maharashtra.
9. 2013 (6) SCC 690 : Standard Chartered Bank Vs. Noble Kumar.
10. 2005 (10) SCC 437 : State of Jharkhand Vs. Govind Singh.

For Petitioner : Mr. Ramachandra Panigrahy.

For Opp. Parties : Mr. Santanu Kumar Sarangi.
Mr. S. P. Mishra, Sr. Adv. & Mr. Soumya Mishra.

JUDGMENT Date of Hearing: 06.12.2021: Date of Judgment: 10.01.2022

***JASWANT SINGH, J.***

**1.** The secured creditor is before this Court challenging the order dated 9th of March, 2021 (Annexure-P/1) passed by the learned Chief Judicial Magistrate, Cuttack, rejecting the application filed by the Petitioner-Finance Company under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short referred to as "the SARFAESI Act").

**2.** The brief facts are that M/s. Ali Agency, a partnership farm (O.P. No.1) had been sanctioned and disbursed a loan amount of Rs.2,81,25,000/- (Rupees two crore eighty-one lakhs and twenty-five thousand only) by the Petitioner. The Opposite Party Nos.2 and 3 are the partners of the Opposite

Party No.1, and also co-borrowers. The loan was secured by mortgaging a residential property owned by Opposite Party No.3. Due to lack of financial discipline, the loan account was declared as Non-Performing Asset (NPA) on 4th October, 2017. A demand Notice under Section 13(2) of the SARFAESI Act, 2002 was issued on 6th November, 2017 seeking to recall outstanding amount of Rs.2,85,04,685/- (Rupees two crore eighty-five lakh four thousand six hundred eighty-five only) due as on 6th of November, 2017. Symbolic possession of the mortgaged property was assumed vide Possession Notice dated 21st February, 2018 issued under Section 13 (4) of the SARFAESI Act.

**3.** The Petitioner-secured creditor filed an application under Section 14 of the SARFAESI Act before the District Magistrate (DM), Cuttack in April, 2018 seeking providing of official assistance for taking over actual physical possession of the secured asset-mortgaged residential property. Since the same was not decided within the stipulated time, the Petitioner approached this Court by filing a Writ Petition which was disposed of vide order dated 11th December, 2018 directing the District Magistrate (DM), Cuttack to dispose of the application within a period of six months.

**4.** The District Magistrate (DM), Cuttack vide order dated 19th of June, 2019 decided the application on merits of the case, while rejecting the application filed by the Petitioner-Finance Company. The Petitioner was constrained to file W.P.(C) No.16549 of 2019 assailing the aforesaid order dated 19th of June, 2019 which was disposed of by a Division Bench of this Court vide order dated 19th of September, 2019 directing the District Magistrate, Cuttack to decide the application, within the scope of Section 14 of the SARFAESI Act, and after giving opportunity to the parties concerned, within the statutory period.

**5.** As the directions were not complied with by the District Magistrate, Cuttack, the Petitioner was constrained to file a CONTC before this Court on 4th of September, 2020 which is stated to be pending. The Petitioner, thereafter, filed a fresh application on 7th September, 2020 under Section 14 of the SARFAESI Act before the Chief Judicial Magistrate, Cuttack who has vide the impugned order dated 9th September, 2020 rejected the application on the ground that similar application was pending before the District Magistrate, Cuttack. Consequently, the Petitioner withdrew its application pending before the District Magistrate, Cuttack with liberty to file a fresh one, if so required. The District Magistrate, Cuttack vide order dated 23rd December, 2020 permitted the withdrawal but without liberty as prayed for.

**6.** The Petitioner, thereafter, filed a fresh application along with the withdrawal order on 25th January, 2021 under Section 14 of the SARFAESI Act before the Chief Judicial Magistrate, Cuttack.

**7.** The Chief Judicial Magistrate, Cuttack vide its impugned order dated 9th of March, 2021 has once again rejected the application. Hence, the present petition.

**8.** Learned Counsel for the petitioner has argued that the process of consideration of an application submitted by the secured creditor under Section 14 before the Magistrate does not involve any adjudicatory mechanism and is purely administrative in nature. Section 14 (1) of the SARFAESI Act, 2002 was subjected to an amendment on 15.01.2013 consequent upon which now the secured creditor was required to support its application with 9 point affidavit. The provision requires the Magistrate only to examine whether the application is supported with a 9 point affidavit or not and in case, if the said affidavit contains all the stipulations as required for by virtue of amended Section 14, it is obligated to pass an order providing for assistance to secured creditor to obtain physical possession of the secured asset. He thus submits that the impugned order dated 09.03.2021 (Annexure P-1) may be set aside as Opposite Party No.1 has exceeded its jurisdiction by rejecting the application of the petitioner/secured creditor in spite of being complete in all respects.

**9.** On the other hand, learned Counsel for the Opposite Party Nos.2 and 3 submits that the present petition is not maintainable, as the petitioner has not availed the alternative statutory remedy by filing an application under Section 17 of the SARFAESI Act, 2002 before the DRT to lay challenge to the impugned order dated 09.03.2021 passed by Chief Judicial Magistrate (Opposite Party No.1). He further submits that the petitioner has not brought on record the reply dated 04.04.2018 submitted by the Opposite Party Nos.2 and 3 pursuant to which Rs.7,57,108/- was deposited with the petitioner creditor which disentitles it to maintain the present petition. Still further, the petitioner cannot be permitted to maintain two parallel remedies for the same cause i.e. one before the District Magistrate and the other one before the Chief Judicial Magistrate (Opposite Party No.1). That apart, there is no notification issued by the Government of India authorizing Chief Judicial Magistrate to exercise jurisdiction under Section 14 of the Securitisation Act, 2002. He thus submits that the present petition is devoid any merit and prays for dismissal of the same.

**10.** Having heard both the sides and after carefully scrutinizing the record of the present case, we find that the following issues would arise for consideration of this Court :-

i. Whether the present writ petition is maintainable in view of the remedy provided under Section 17 of the SARFAESI Act, 2002?

ii. Whether Chief Judicial Magistrate would have the jurisdiction to entertain an application under Section 14 of the SARFAESI Act, 2002?

iii. Scope of exercise of jurisdiction by the authorities concerned, while examining an application under Section 14 of the Securitisation Act, 2002.

iv. Relief to which the petitioner would be entitled to in the instant petition.

**ISSUE NO.1**

**11.** The first issue which arises for consideration is regarding the maintainability of the present petition. According to the learned Senior Counsel for Opposite Party Nos.2 to 3 the impugned order dated 09.03.2021 is appealable before the DRT under Section 17(1) of the Securitisation Act, 2002. He contends that an order passed by the Magistrate under Section 14 is to be treated as an action under Section 13(4) and hence is appealable before DRT by filing an application under Section 17 and consequently without first availing such alternative statutory remedy under the Act, 2002 the present petition could not be maintained by the petitioner.

**12.** On the other hand, learned Counsel for the petitioner contends that the remedy under Section 17 before DRT is only available to a person who is aggrieved of an action taken by the secured creditor under Section 13(4). Since in the present case there is no action by the secured creditor rather the secured creditor itself is aggrieved of the order of the Magistrate therefore application under Section 17 would not be maintainable before the DRT. He further states that the writ petition is the only remedy as even the jurisdiction of civil court is barred under Section 34 of the SARFAESI Act, 2002.

**13.** Having heard both sides, we find the preliminary objection raised by the Opposite Party Nos.2 and 3 is liable to be rejected. Section 13(1) and Section 17 of the Act, 2002 reads as under :-

> **13. Enforcement of security interest.** - (1) Notwithstanding anything contained in section 69 or section 69-A of the Transfer of Property Act, 1882 (4 of 1882), **any security interest created in favour of any secured creditor may be enforced**,

**without the intervention of the Court or tribunal**, by such creditor in accordance with the provisions of this Act.

xxx xxx xxx

**17. [Application against measures to recover secured debts.]** - (1) Any person (including borrower), **aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter**, [may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation. For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

[(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.]

**[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person,** it may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

xxxxx xxxxx

**[Emphasis supplied]**

A perusal of Section 13(1) of the Act, 2002 reflects the intention of the legislature to enable the creditor to enforce the charged securities without the intervention of the Court or tribunal. Further, the remedy under Section 17 of the Act, 2002 is only available to a person aggrieved of an action initiated by the secured creditor. **Noticeably, remedy to the secured creditor to approach the Tribunal to lay challenge to an order passed by the Magistrate is conspicuous by its absence.** The scheme of the Act, does not provide for a remedy to the secured creditor within the ambit and scope of Section 17 in absence of an impugned act of a secured creditor. In order to invoke the jurisdiction of the Tribunal and maintain an application before it, it is necessary that there ought to be an action of a secured creditor which is a subject matter of challenge before the DRT. The scope of relief which the Tribunal is intended to grant is provided for under Section 17(4) which also does not in any way provide for an order which the secured creditor is looking for in the present petition. The secured creditor therefore would not have a remedy to challenge an order of the Magistrate before the Tribunal in such circumstances.

**14.** Still further Division Bench of Punjab and Haryana High Court ***Allahabad Bank V/s District Magistrate, Ludhiana***[1] authored by one of us (J. Jaswant Singh) while considering a similar issue has held in extracted Para 30 as under :-

**"30.** …….. It thus clear, that the District Magistrate does not assume any adjudicatory function while examining the application of the secured creditor under Section 14 of the Act, 2002. For the same reason, we find that it would amount to no illegality if an order is passed without effective service upon the borrowers being in the nature of execution process pursuant to statutory notices served under Section 13(2) and (4) as envisaged under the scheme of the Act, 2002. Though, it

[1] 2021 (3) PLR 690; 2021 (4) RCR (Civil) 571

would be desirable that before proceeding to take actual physical possession by the officer so deputed by the District Magistrate, a reasonable notice of say 15 days be served on the occupant so that they are not taken by surprise. It is also to be noticed that in case, a person who is aggrieved of such order, is not remediless as an order under Section 14, has been held to be an action under Section 13(4) of the Act, 2002 and any person aggrieved of the same, shall have a cause of action to challenge the same by filing an application under Section 17 of the Act, 2002. [refer to Para 20 of the judgment of Hon'ble Supreme Court in ***Kaniyalal Lalchand Sachdev v. State of Maharashtra 2011 (2) SCC 782***]. **Similarly, we find that in case if the secured creditor is aggrieved of any action of the District Magistrate or the manner and mode of its enforcement, not involving adjudication of rights of any other secured creditor, the remedy under writ jurisdiction would be available to such a secured creditor. This is because, Section 17 of the Act, 2002 can be invoked only in case, if the applicant is aggrieved of the action of the secured creditor, while in the instant case, the grievance of the secured creditor is against the non-implementation of its rights under Section 14 of the Act, 2002."** **[Emphasis supplied]**

15. Similarly, in yet another judgment a Division Bench of Punjab and Haryana High Court in ***Kotak Mahindra Bank V/s Raj Paul Oswal***[2] held in Para 13 as under :-

**".....**A perusal of the above would show that any person which includes a borrower, who is aggrieved by any of the measures taken by the secured creditor or his authorized officer referred to in sub-section 4 of Section 13 of the SARFAESI Act under the Chapter, can make an application under Section 17 of the SARFAESI Act. **The language itself makes in amply clear that the remedy is available to a person aggrieved by any of the measures referred in sub-section 4 of Section 13 of the SARFAESI Act, which are taken by the secured creditor or his authorized officer. The remedy, therefore, under Section 17 of the SARFAESI Act, would not be available to the secured creditor or his authorized officer for rejection of an application preferred by the said secured creditor or his authorized person under the SARFAESI Act.**

**In the light of the above, the order which has been passed by the District Magistrate under Section 14 of the SARFAESI Act is final qua the petitioner and under these circumstances, the remedy available to the petitioner is only under Article 226/227 of the Constitution of India, which remedy the petitioner has rightly availed of**. Reliance on the judgment of the Hon'ble Supreme Court in ***Kaniyalal Lalchand Sachdev and others' case*** (supra) by the counsel for respondent No.2 is totally misplaced, where the Hon'ble Supreme Court was considering Section 17 of the SARFAESI Act when the person aggrieved was neither the secured creditor nor the authorized officer but any other person. The said judgment, therefore, would not be attracted to the present case.**"**

**[Emphasis supplied]**

2021 AIR (Punjab and Haryana) 118

16. We respectfully agree with the aforesaid views and while reiterating the same, reject the aforesaid submission of the Opposite Party Nos.2 and 3 regarding the maintainability of the present petition. Accordingly, it is held that the petitioner does not have any alternative and statutory remedy before the Tribunal to lay challenge to the impugned order of the Magistrate rejecting its application under Section 14 of the Act, 2002. It is well settled that any aggrieved person cannot be left remediless as held by the Hon'ble Supreme Court in ***Sunil Vasudeva V/s Sundar Gupta***[3] **(Para 31**), which has been relied upon by a Division Bench of Punjab and Haryana High Court in ***Anu Bhalla V/s District Magistrate, Pathankot***[4] ***(Para 35)***. Consequently, the present petition under Article 226 of the Constitution of India is held to be maintainable.

**ISSUE NO. 2**

17. Coming to the heart of the controversy, the next issue is whether Chief Judicial Magistrate would have the jurisdiction to entertain an application under Section 14 of the SARFAESI Act, 2002.

18. Learned Counsel for the petitioner – Secured Creditor while placing reliance upon Section 14 of the Securitisation Act, 2002 contends that the jurisdiction to entertain an application is equally vested with the Chief Judicial Magistrate as well as is with the District Magistrate. The legislature has not created any such distinction between the two authorities and hence both the authorities are equally competent to entertain application of the secured creditor and to pass orders for providing assistance to the secured creditor in taking over of physical possession by the secured creditor.

Per contra, learned Counsel for the Opposite Party Nos.2 and 3-Borrower contends that once the District Magistrate is available which is entrusted with administrative jurisdiction the secured creditor cannot maintain an application before the Chief Judicial Magistrate. Moreover, the legislature never contemplated to provide for an overlapping jurisdiction with two authorities and therefore an application would not be maintainable before the Chief Judicial Magistrate, in the presence of availability of District Magistrate. He further contends that the reason why Chief Metropolitan Magistrate finds mention in the provision is that it is only in those districts, where there is no District Magistrate, could the jurisdiction be treated to be vested with the Chief Judicial Magistrate and not otherwise. He therefore supports the impugned order and prays for dismissal of the present petition.

3. 2019 (8) SCALE 488 **4.** 2021 AIR Punjab

19. Having heard learned counsel for the respective parties, we find that this issue would not detain us any longer, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case of ***Authorised Officer, Indian Bank V/s D. Visalakshi and another***[5] wherein in Para 34 and 48, it has been held as under-

> **"**34. Notably, the powers and functions of the CMM and the CJM are equivalent and similar, in relation to matters specified in the Cr.P.C. **These expressions (CMM and CJM) are interchangeable and synonymous to each other. Moreover, Section 14 of the 2002 Act does not explicitly exclude the CJM from dealing with the request of the secured creditor made thereunder. The power to be exercised under Section 14 of the 2002 Act by the concerned authority is, by its very nature, non judicial or State's coercive power.** Furthermore, the borrower or the persons claiming through borrower or for that matter likely to be affected by the proposed action being in possession of the subject property, have statutory remedy under Section 17 of the 2002 Act and/or judicial review under Article 226 of the Constitution of India. In that sense, no prejudice is likely to be caused to the borrower/lessee; nor is it possible to suggest that they are rendered remediless in law. At the same time, the secured creditor who invokes the process under Section 14 of the 2002 Act does not get any advantage muchless added advantage. **Taking totality of all these aspects, there is nothing wrong in giving expansive meaning to the expression "CMM", as inclusive of CJM concerning nonmetropolitan area, who is otherwise competent to discharge administrative as well as judicial functions as delineated in the Cr.P.C. on the same terms as CMM. That interpretation would make the provision more meaningful. Such interpretation does not militate against the legislative intent nor it would be a case of allowing an unworthy person or authority to undertake inquiry which is limited to matters specified in Section 14 of the 2002 Act.**
>
> xxx xxx xxx
>
> **48. To sum up, we hold that the CJM is equally competent to deal with the application moved by the secured creditor under Section 14 of the 2002 Act.** We accordingly, uphold and approve the view taken by the High Courts of Kerala, Karnataka, Allahabad and Andhra Pradesh and reverse the decisions of the High Courts of Bombay, Calcutta, Madras, Madhya Pradesh and Uttarakhand in that regard. Resultantly, it is unnecessary to dilate on the argument of prospective overruling pressed into service by the secured creditors (Banks)**."**
>
> **[Emphasis supplied]**

20. As regards the contention of the learned Senior Counsel representing Opposite Party Nos.2 to 3 that the petitioner would not be entitled to avail two parallel remedies, this Court is of the opinion that the said issue would not arise in the present petition, as the petitioner has already withdrawn its application before the District Magistrate concerned on 23.12.2020 and it is only thereafter that it preferred a fresh application before the Chief Judicial Magistrate on 25.01.2021 which led to the passing of the impugned order

5. 2019 AIR SC 4619

dated 09.03.2021 (Annexure P-1). In view of the aforesaid fact, the aforesaid argument of the Opposite Party Nos.2 and 3 would not sustain for consideration. Further, Hon'ble Supreme Court in ***Authorised Officer, Indian Bank*** (supra) has held that jurisdiction under Section 14 can be exercised by either of the two authorities namely Chief Judicial Magistrate and District Magistrate. Therefore, both the authorities are equally competent to exercise the jurisdiction.

21. As regards the next contention advanced on behalf of Opposite Party Nos.2 to 3 that there is no notification issued by the Government of India authorizing Chief Judicial Magistrate to exercise powers under Section 14 is concerned, the same is also equally without merit. A perusal of Section 14 nowhere reflects that the authorities mentioned therein are required to act only after issuance of a notification to that effect. Besides, learned Senior Counsel for the Opposite Parties have not been able to show any provision, whereby a notification was contemplated to be issued for any authority to exercise jurisdiction and/or Chief Judicial Magistrate could only act thereafter. Once the notified provision (Section 14) itself enables the authority to exercise jurisdiction, it is sufficient for the said authority to exercise powers as provided for within the ambit of the provision. Consequently, the aforesaid argument of the Opposite Party Nos.2 and 3 cannot sustain and hence is rejected.

22. In view of above, we answer the first issue in affirmative and therefore hold that the Chief Judicial Magistrate would be equally competent to entertain an application filed by the secured creditor under Section 14 of the Act, 2002 and would be entitled to pass such orders as would be required to provide assistance to the secured creditor to take over physical possession of the secured assets.

**ISSUE NO.3**

23. The next issue which arises for consideration is the scope of exercise of jurisdiction by either the Chief Judicial Magistrate or District Magistrate, as the case may be, while proceeding to entertain an application filed by the secured creditor under Section 14 of the Securitisation Act, 2002.

**24.** The necessity to decide this issue has arisen on account of number of such petitions coming up for consideration before this Court which is a regular feature. In an endeavor to reduce multiplicity of litigation and to clear out the grey areas, it is necessary for this Court to examine this issue in detail.

**25.** As is apparent, the very purpose of Section 14 is to ensure assistance to the secured creditor to peacefully take over physical possession of the secured asset if it is faced by resistance from the borrower/occupant. Further, a reading of Section 14 reveals that the authority concerned does not possess any adjudicatory mechanism while entertaining such application under Section 14 of the Act, 2002. This legal position has been reiterated by a Division Bench of Punjab and Haryana High Court in ***Asset Reconstruction Company (India) Ltd. v. State of Haryana***[6] and a Division Bench of Madras High Court in ***M/s Shriram Housing Finance Ltd. v. District Collector***[7]**.**

26. Further, the enactment does not leave the aggrieved person remediless. In case if any person is aggrieved of any action taken by the creditor including of an order passed by the District Magistrate or Chief Judicial Magistrate the remedy lies with DRT in view of Section 17 (1) of the Act, 2002 [See Para 20 of ***Kaniyalal Lalchand Sachdev v. State of Maharashtra***[8]**].** Section 34 of the Act, 2002, excludes the jurisdiction of any court or other authority from granting any injunction in respect of any action taken or to be taken by the secured creditor under the provisions of the Act. Thus, the DRT shall be competent to examine the validity of not only the steps taken by the secured creditor under Section 13(4) but also all subsequent and consequential actions taken by the secured creditor under the Act.

27. It is to be noticed that Section 14 of the Act, 2002 was amended with effect from 15.01.2013 and a proviso was added, which requires the secured creditor to file an application accompanied with an affidavit duly affirmed by the authorised officer of the secured creditor with respect to 9 points stipulated therein. Such recording of satisfaction is only to be restricted with regard to the factual correctness of the affidavit filed by the secured creditor and cannot be stretched to include any quasi-judicial or an adjudicatory function. Hon'ble Supreme Court in ***Standard Chartered Bank v. Noble Kumar***[9] held as under :-

> **"**26. An analysis of the 9 sub-clauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest, (ii) there is a security interest created in a secured asset belonging to the borrower, (iii) that the borrower committed default in the repayment, (iv) that a notice contemplated under Section

6. 2018 (1) PLR 443 , 7. 2019 (2) CWC 697, 8. 2011 (12) SCC 782 , 9.2013 (6) SCC 690

13(2) was in fact issued, (v) in spite of such a notice, the borrower did not make the repayment, (vi) the objections of the borrower had in fact been considered and rejected, (vii) the reasons for such rejection had been communicated to the borrower etc.

**27. The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset."** **[Emphasis supplied]**

28. Further in the case of ***Allahabad Bank*** (supra)**,** particularly in Para 8 and Para 31 to 33 it was held as under:-

**"8**. Having heard both the parties and on noticing that several writ petitions of such like disputes are regularly being filed by the secured creditors, seeking enforcement of their rights under Section 14 of the Act, 2002 *inter alia* involving issues as regards impact of the orders passed by the Civil Courts, we deem it appropriate to cull out the following issues, which are required to be decided in the present application :-

(1) Whether Civil Court would have jurisdiction to negate any right of the secured creditor under the Securitisation Act, 2002, qua the secured asset in a civil suit or proceedings instituted by the borrower/guarantor/any third party qua the secured asset?

(2) Whether the petitioner bank/secured creditor would be bound by an order passed by a Civil Court in a *lis inter-se* between parties pertaining to the secured asset, not having impleaded the Bank/Secured Creditor ?

**(3) Scope of powers of the District Magistrate in exercise of its jurisdiction under Section 14 of the Securitization Act, 2002 ?"**

xxx xxx xxx

**ISSUE NO.3**

25-30 xxx xxx xxx

31……..**Even though the time provided under Section 14 to the District Magistrate to pass an order is directory, it is still to be noticed that the discernable intent of the legislature while providing for such time line was to ensure that the applications filed by the secured creditor are not unduly delayed**. It is to be acknowledged that even after the order is passed by the District Magistrate, it is the implementation of the same which becomes the next hurdle for the secured creditor to complete the process of possession. Incidentally, even though the District Magistrate is required to pass an order within 60 days, but there is no similar provision for the officer so deputed by him in terms of Section 14(1A)

of the Act, 2002 to implement the order in a time bound manner. Since the very object of the Act, 2002 is for ensuring speedier recovery of public money we find, that there ought to have been time limits provided for such officer as well. This would ensure that the orders passed, by the District Magistrate are not frustrated by undue delay by the implementing officer(s). **Therefore, we find that the intent of timely action under Section 14 would be complete only when time lines are equally provided at the stage of execution as well. It is only then, in our considered opinion would the real object of Act, 2002 be fully achieved.**

[32] Two principles of construction one relating to *casus omissus* and the other in regard to reading the statute as a whole appear to be well settled. Under the first principle, a *casus omissus* cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. However, at the same time the need for supplying *casus omissus* should not be readily inferred. As for that purpose all the parts of the statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes it consistent to the whole statute. [See ***State of Jharkhand v. Govind Singh***[10]**].** The object of the Act, 2002 is speedier recovery of public dues. For its effective implementation, provisions like Section 14 were included which enables the creditor to take physical possession with the help of State machinery for the purpose of realizing the security by way of sale etc. Section 14 itself requires District Magistrate to pass an order within 60 days which again aims at timely enforcement and recovery. Applying the said principle of *casus omissus* to the instant case, we find that the provision requires the necessity of making the process of execution also time bound. More so, when it is within the four corners of the statute and consistent with the object of the Act, 2002 as well. It is ironical to note that even though times lines are provided for District Magistrate to pass an order, but for implementing officers, the proviso to Section 14 does not lay down any stipulated time for enforcing the order of the District Magistrate. This at times defeats the very object of the provision and also runs counter to the scheme of the Act, 2002. **It is in these circumstances, that we feel the need of applying the principle of *casus omissus*, to fill in the gap of not having provided the time limits for implementation of the order, on the same lines like the District Magistrate is obliged to do so**. It is only then, that the legislative intent of Section 14 becomes complete. Consequently, we hold that after the order is passed by the District Magistrate, the officer so deputed to execute the said order under Section 14(1A) of the Act, 2002 would also complete the process of execution within 60 days from the date of receipt of such order. **Further in case if for any reason, the order is unable to be executed, the officer shall report the matter back to the District Magistrate, who would then pass such suitable orders as the situation may warrant. Even though the said period is directory but it is to be noticed that such actions of the officer concerned would be open to judicial scrutiny to ensure that the object of the said provision is not frustrated.**

10. 2005 (10) SCC 437

[33] In view of the aforesaid discussion, in our opinion, following principles would emerge as regards the scope of functions of the District Magistrate while exercising powers under Section 14 of the Securitisation Act, 2002:-

(i) District Magistrate would not involve in any process of adjudication of any *inter se* rights of the parties, while examining any application under Section 14 of the Act, 2002.

(ii) Proviso to Section 14 makes it mandatory to record satisfaction by the District Magistrate which is to be restricted with regard to the factual correctness of the 9-point affidavit to be filed by the secured creditor. It cannot examine the legal validity of the steps so taken by the secured creditor as depicted in the affidavit. If the borrower is aggrieved of such steps the remedy would be to approach the DRT.

(iii) If any person is aggrieved of the order of the District Magistrate, the aggrieved person can approach the Debts Recovery Tribunal, under Section 17 of the Act, 2002 as an order passed under Section 14 is in pursuance to the steps provided under Section 13(4).

(iv) In case, if the District Magistrate fails to pass the order in terms of what is provided under Section 14 of the Act, 2002 or if the same is not being implemented, the secured creditor would have the remedy of invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India.

(v) After the order is passed by the District Magistrate, the officer so deputed to execute the said order under Section 14(1A) of the Act, 2002 would also complete the process of its execution within 60 days from the date of receipt of such order. Further in case if for any reason, the order is unable to be executed, the officer shall report the matter back to the District Magistrate, who would then pass such suitable orders as the situation may warrant.

(vi) Though, there is no provision for an advance notice to be given to the occupant/owner of the property before taking physical possession, but it would be desirable, that an advance notice of at least 15 days be served on the occupant before taking physical possession by the officer so deputed by the District Magistrate, so that persons to be dispossessed are not caught unawares**."**

29. Since the aforesaid judgment deals with the identical issue as seized by us in the present petition in great detail, we deem it appropriate to reiterate all of the aforesaid conclusions and directions in the present order as well and hereby **direct** all the District Magistrates and Chief Judicial Magistrates in the State of Odhisa to act strictly within the scope and ambit of the aforesaid directions as contained in para 33 of the judgment in the case of ***Allahabad Bank*** case (supra)**,** while exercising jurisdiction under Section 14 of the Act, 2002.

**ISSUE NO.4**

30. Having considered the legal issues involved in the present petition and as delineated hereinabove, we now proceed to consider the relief to which the petitioner would be entitled to. Vide impugned order dated 09.03.2021 (Annexure P-1), the Chief Judicial Magistrate, Cuttack has dismissed the application of the petitioner/secured creditor under Section 14 of the Act, 2002. We find that such an observation is not sustainable and is not in tune with the discussion and consequent directions as noticed above.

31. As a sequel to the aforesaid conclusions, we allow the present petition and set aside the impugned order dated 09.03.2021 (Annexure P-1) passed by the Chief Judicial Magistrate, Cuttack. Since, we have held that both the authorities i.e. District Magistrate as also Chief Judicial Magistrate would have the jurisdiction to entertain an application under Section 14 of the SARFAESI Act, 2002 therefore, the petitioner would be at liberty to approach either of the authorities by filing a fresh application in terms of Section 14 which shall then be decided by the authority concerned, in accordance with law.

32. As already noticed hereinabove, there have been number of similar petitions, where secured creditors are aggrieved of either the authorities not passing the order or the officer concerned, not implementing the orders in a time bound manner. We therefore, direct the Registry of this Court to circulate this order to all the District Magistrates and Chief Judicial Magistrates of the State of Odhisa for information and compliance.

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**2022 (I) ILR - CUT-101**

**B. MOHANTY, J.**

W.P.(C) NO. 8585 OF 2017

**PUSPANJALI CHHATRIA** .....Petitioner

.V.

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

**ORISSA GRAMA PANCHAYATS ACT, 1964 – Section 13 and 15 read with rule 52 of the Grama Panchayats Rules – Provisions under – Writ petition with a prayer to publish the name of the petitioner as winning Sarpanch and names of other winning Ward Members – Grama Panchayat was constituted after undertaking a series of exercise**

**which included trifurcation, bifurcation and re-organisation of existing Mandal Grama Panchayat – Provisions interpreted with reference to the fact – Held, *no illegality has been committed by the authorities in not issuing a publication, under Section 15 of "the Act".***

> *"Section 15 of "the Act" makes it clear that subject to rules made in that behalf names of all persons elected or nominated as Sarpanch, Naib-Sarpanch and Ward Member shall be published soon after such election or nomination. Proviso to Section 15 permits publication when majority of members including the Sarpanch have been duly returned. Rule 52 makes it clear that when Election Officer finds that majority of members including the Sarpanch have been duly returned, he shall publish the names of Sarpanch and Ward Members duly elected in the notice board under Section 15 of "the Act". So a harmonious reading of Section 15 & Rule 52 makes it clear that unless a majority of Ward Members including Sarpanch has been elected/nominated, no publication of result of election under Section 15 will be permissible. Here only 6 were elected including Sarpanch and offices of rest 6 Ward Members remained vacant both on account of failure of election as well as nomination. Here as indicated earlier on account polarized atmosphere, none could be nominated for 6 Wards. Under these circumstances, clearly a majority of seven as required under law was not available. In such background and in peculiar facts and circumstances of the case, this Court is of the opinion that no illegality has been committed by the authorities in not issuing a publication, under Section 15 of "the Act".* *(Para 8)*

For Petitioner : Ms. G.Majhi.
For Opp. Parties : Mr. A.K.Nanda, Addl. Govt. Adv.
Mr.S.K.Samal, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 23.12.2021: Date of Judgment: 05.01.2022

***B. MOHANTY, J.***

This writ petition has been filed mainly with prayer to direct the opposite parties to publish the name of the petitioner as winning Sarpanch and names of other winning Ward Members of Kotagaon Grama Panchayat under Kalampur Panchayat Samiti in the district of Kalahandi as per Section 15 of the Odisha Grama Panchayats Act, 1964, for short "the Act" and to further direct them to hand over the power to the petitioner as Sarpanch.

2. Ms. Majhi, learned counsel for the petitioner submitted that initially during July, 2016 by way of a notification issued by Government of Odisha in Panchayati Raj Department Mandal Grama Panchayat falling under Dharamgarh Sub-Division of Kalahandi district was trifurcated into Mandal Grama Panchayat, Balagaon Gram Panchayat and Nuagaon Gram Panchayat.

Balagaon Grama Panchayat covered villages like Balagaon, Khandidangariguda and Kotagaon. Later on during December, 2016, the above noted trifurcation was cancelled and existing Mandal Grama Panchayat was bifurcated to Balagaon Grama Panchayat and Mandal Grama Panchayat. Balagaon Grama Panchayat covered villages Balagaon, Khandidangariguda, Kotagaon, Bhalubutura and Bindhaniguda with headquarter at Kotagaon. Further during same month i.e. December 2016, the above bifurcation was cancelled and Mandal Grama Panchayat was again trifurcated to Kotagaon Grama Panchayat, Nuagaon Grama Panchayat and Mandal Grama Panchayat. In such background notification dated 23.12.2016 was issued under Annexure-1 constituting Kotagaon as a new Grama Panchayat. On 27.12.2016, a notification was published by the State Election Commission, Odisha under Annexure-2 appointing various dates with regard to holding of election of Ward Members and Sarpanchas of various Grama Panchayats of the State. Kotagaon Grama Panchayat consists of 11 wards. However none filed nominations in respect of 6 Wards covered by villages Balagaon and Khandidangiriguda and accordingly no election could be held in respect of these 6 Wards. But in other Wards, the election was conducted smoothly and accordingly Ward Members for such Wards were declared elected and the petitioner was declared elected as Sarpanch as per Annexure-5. However, the Block Development Officer-cum-Election Officer, Kalampur (opposite party No.4) did not publish the names of the petitioner and other elected Ward Members under Section 15 of "the Act" read with Rule 52 of the Orissa Grama Panchayats Election Rules, 1965, for short, "the Rules" as a result of which though the petitioner was elected as Sarpanch however she has not been able to perform her duties as Sarpanch. According to her such non-publication is illegal as the same violates Section 15 of "the Act". In such background, the present writ petition has been filed making the above noted prayers.

3. Mr.A.K.Nanda learned Addl. Government Advocate submitted that Kotagaon Grama Panchyat was carved out of Mandal Grama Panchayat after much administrative exercise. Initially Mandal Grama Panchayat was trifurcated to Balagaon, Nuagaon and Mandal Grama Panchayats with Balagaon Grama Panchayat covering villages like Balagaon, Khandidangariguda and Kotagaon. Later on matter was reconsidered in the light of observations made by this Court in W.P.(C) No. 16861 of 2016 and the above noted trifurcation was cancelled and Mandal Grama Panchayat was bifurcated to Balagaon Grama Panchayat and Mandal Grama Panchayat.

On further consideration the above bifurcation was nullified and again Mandal Grama Panchayat was trifurcated to Kotagaon Grama Panchayat, Nuagaon Grama Panchayat and Mandal Grama Panchayat. On account of all these though Kotagaon Grama Panchayat has 11 Wards, but pursuant to Annexure-2 no nominations were filed in 6 Wards viz. Ward Nos. 6 to 11 covering villages Balagaon and Khandidangariguda during 10.1.2017 to 17.1.2017. Accordingly State Election Commission issued Notification No. 1199 dated 21.1.2017 for filing of nominations for the second time from 27.1.2017 to 30.1.2017. Again no nominations were filed. In such background on 8.2.2017 Block Development Officer-cum-Election Officer, Kalampur (oppositepartyNo.4) submitted a report to the Collector & District Election Officer, Kalahandi under Annexure-A/3. Pursuant to this, on 20.2.2017 the Collector, Kalahandi (opposite party No.3) wrote to Sub-Collector, Dharamgarh (opposite party No.5) under Annexure-B/3 to nominate persons to such Wards with least practicable delay in tune with Section 13 of "the Act" and Rules 30 and 54 of "the Rules". On 21.2.2017 vide Annexure-A/4, the opposite party No.5 wrote to Block Development Officers under Dharamgarh Sub-Division to submit proposals to nominate persons to such Wards where no nominations have been filed resulting in failure of election held for the second time. According to him pursuant to the above noted letter, the Block Development Officer-cum- Election Officer, Kalampur (opposite party No.4) in the peculiar background of the case requested the villagers of Balagaon and Khandi Dangariguda to select one person with his/her consent for each Ward viz, Ward Nos. 6 to 11 for being nominated as Ward Members by the Sub-Collector of Dharamgarh for constitution of Grama Panchayat body. But villagers of both the villages strongly refused the proposal and demanded for declaration of Balagaon Grama Panchayat, which was earlier notified twice but later on withdrawn. In this connection the villagers of both the above noted villages submitted their representations to opposite party No.4 on 5.7.2017 which have been enclosed to Annexure-B/4. According to Mr. Samal, learned Addl. Government Advocate on account of such deadlock the Sub-Collector, Dharmgarh (opposite party No.5) could not act as per the Rule 54 of "the Rules". It is in such background publication of result of election under Section 15 of "the Act" could not be made. Both the learned A.G.As. submitted that since only 5 Wards returned elected candidates along with Sarapanch, only 6 elected persons were available and with regard to rest 6 Wards neither anyone could be elected or nominated on account of intractable attitude of the villagers of Balagaon and Khandi Dangariguda.

Thus in the absence of nominated members and in absence of a majority, no wrong has been committed by the authorities in not issuing the notification under Section 15 of "the Act". They also submitted that the present writ petition has been filed by the petitioner only and she cannot espouse the cause of other 5 elected Ward Members. They further submitted that as the election to Grama Panchayats of the State is now imminent, this Court may not otherwise interfere in the matter.

4. In reply, Ms.Majhi reiterated her earlier submission and stated that upon receipt of the letter from Collector under Annexure-B/3, the opposite party No.5 should have nominated persons and should not have asked the opposite party No.4 to propose the names for nomination under Annexure-A/4. Both the learned A.G.As. defended the letter under Annexure-A/4 submitting that in the background of peculiar facts and circumstances, when the feelings were running high on account of re-organisation of Grama Panchayats and when voters of the 6 Wards have refused to file nominations despite two opportunities being given to them, no wrong was committed by opposite party No.5 asking opposite party No.4 to propose names, for nomination to be made by him.

5. Heard Ms. Majhi, learned counsel for the petitioner and Mr.A.K.Nanda as well as Mr.S.K.Samal, learned Addl. Government Advocate. No rejoinder has been filed by the petitioner to the counter of opposite parties.

6. The undisputed facts in this case are that Kotagaon Grama Panchayat was constituted after undertaking a series of exercise which included trifurcation, bifurcation and re-organisation of existing Mandal Grama Panchayat, which probably did not satisfy one and all. The said Grama Panchayat has got 11 Wards and in 6 Wards namely Ward Numbers 6 to 11 falling under village Balagaon and Khandi Dangariguda, nobody filed nominations for being elected as Ward Members though opportunity was given to them twice by the State Election Commission. In such background the Collector, Kalahandi (opposite party no.3) wrote to Sub-Collector, Dharamgarh on 20.2.2017 under Annexure-B/3 for nominating eligible persons to such vacant Offices of Ward Members. It may be noted here that as per Rule 54 of "the Rules" Sub-Collector has been assigned with the requirement to nominate a person where there has been a failure of election for the second time for any seat so that

ultimately notification under Section 15 of "the Act" can be issued. It appears in order to get such names, in the peculiar facts and circumstances, Sub-Collector, Dharamgarh on 21.2.2017 under Annexure-A/4 wrote to the Block Development Officers to propose names so that such persons can be nominated. This letter issued by the Sub-Collector to the Block Development Officer has not been challenged by the petitioner. In fact there exists no pleading from the side of the petitioner questioning its validity. Thereafter it appears the Block Development Officer, Kalampur (opposite party No.4) tried his best to persuade villagers of Balagaon and Khandi Dangariguda and requested them to select one person with his/her consent for each of the Wards covering Ward Nos. 6 to 11 to be nominated by Ward Members by the Sub- Collector, Dharmgarh. But villagers of both the villages refused to select any person to be nominated as Ward Members rather demanded restoration of Balagaon Grama Panchayat. It is in such background the Sub-Collector, Dharamgarh (opposite party No.5) has not been able to nominate any person as required under Rule 54 of "the Rules" for issuance of ultimate notification under Section 15 of "the Act". Before proceeding further, let us refer to certain relevant provision like Sections 13, 15 of "the Act" and Rules 52 and 54 of "the Rules", which are quoted hereunder:-

> **"Section-13**. Nomination on failure of election (reservation in certain cases)-(1) If for any reason whatsoever the concerned electorate fails to return a Sarpanch, or a Naib-Sarpanch, or any other member a fresh election shall be held for the purpose; and if at such fresh election no person is elected the Sub-Divisional Officer shall nominate a person eligible for election to such office to be the Sarpanch, Naib-Sarpanch or such other member, as the case may be, who shall on being so nominated be deemed to have been duly elected. (2) Where the office of the Sarpanch or the seat of any member is reserved under Section 10 for any particular category and the Sub-Collector fails to nominate under Sub-sec.(1) a person to such office or seat, as the case may be, for non-availability of an eligible person belonging to that category, such office or seat shall, on recommendation being made to that effect by the Sub-Collector be de-reserved by the Collector after such enquiry as he may deem fit and shall, thereafter, be filled up by fresh election."
>
> "Section-15.Publication of result of election- Subject to the rules, if any, made in that behalf the names of all persons elected or nominated as Sarpanch, Naib-Sarpanch or any other member of the Grama Panchayat shall, as soon as may be after such election on nomination, be published by the prescribed authority in such manner as may be prescribed.
>
> Provided that if the prescribed authority is satisfied that the majority of members including the Sarpanch of the Grama Panchayat have been duly returned, he shall publish the names of such members, without awaiting for the result of election whether conducted or not of the remaining members."

> **"Rule-52**. If on the basis of the reports of the Presiding Officers of each ward in regard to election of ward members and his own report relating to election of the Sarpanch, the Election Officer finds that majority of members including the Sarpanch have been duly returned, he shall publish the names of the Sarpanch and also the ward members declared duly elected to each Grama Panchayat in the notice board of the block office as required under Section 15 of the Act. A copy of the notification shall be forwarded by the Election Officer to the Collector of the district where election officer is other than the Collector and also to the Grama Panchayat concerned and to the ward members and Sarpanch elected."
>
> **"Rule-54**. In case there is a failure of election for the second time for any seat, the Election Officer shall forthwith intimate the position to the Sub- Collector. On receipt of such intimation the Sub-Collector shall nominate a person to such seat with the least practicable delay and inform the Election Officer so that he may include the name of the nominated person in the notification under Section 15 of the Act. The Sub-Collector shall also forward a copy of the list of nominated persons to the Collector."

7. Section 13 and Rule 54 deal with nomination in case of failure of election for the second time. As per both the provisions in case of failure of election for second time, Sub- Divisional Officer/Sub-Collector has been authorized to nominate persons. Once so nominated, these persons would be deemed to have been duly elected. Under the present circumstances, where no candidate came forward for contesting election and nomination in 6 Wards as the villagers were demanding constitution of a separate Grama Panchayat, an authority can go forward with nomination only when a person is willing to shoulder the responsibility. Therefore the opposite party No.5 vide Annexure-A/4, which has not been challenged by the petitioner, keeping in mind the ground reality wrote to the opposite party No.4 to propose names for nomination as probably the opposite party No.4 by virtue of his office was in a better position to suggest appropriate names eligible for such nomination. Despite his efforts, it seems on account polarized atmosphere amongst the villagers, the opposite party No.4 could not succeed. In such background the opposite party No.5 could not make any nomination.

8. Section 15 of "the Act" makes it clear that subject to rules made in that behalf names of all persons elected or nominated as Sarpanch, Naib-Sarpanch and Ward Membershall be published soon after such election or nomination. Proviso to Section 15 permits publication when majority of members including the Sarpanch have been duly returned. Rule 52 makes it clear that when Election Officer finds that majority of members including the Sarpanch have been duly returned, he shall publish the names of Sarpanch

and Ward Members duly elected in the notice board under Section 15 of "the Act". So a harmonious reading of Section 15 & Rule 52 makes it clear that unless a majority of Ward Members including Sarpanch has been elected/nominated, no publication of result of election under Section 15 will be permissible. Here only 6 were elected including Sarpanch and offices of rest 6 Ward Members remained vacant both on account of failure of election as well as nomination. Here as indicated earlier on account polarized atmosphere, none could be nominated for 6 Wards. Under these circumstances, clearly a majority of seven as required under law was not available. In such background and in peculiar facts and circumstances of the case, this Court is of the opinion that no illegality has been committed by the authorities in not issuing a publication, under Section 15 of "the Act".Accordingly, the writ petition is dismissed.

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**2022 (I) ILR - CUT- 108**

**Dr. B.R.SARANGI, J.**

WPC (OA) NO. 923 OF 2015

**BIKASH MAHALIK** .....Petitioner

.V.

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

**INDIAN EVIDENCE ACT, 1872 – Section 115 – Promissory Estoppel – Applicability in service law – Principles discussed.**

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

1. 2021 (I) OLR 174 : Pratima Sahoo Vs. State of Orissa.
2. (1956) 1 All ER 256 : Central London Property Trust Ltd. Vs. High Treas House Ltd.
3. (1970) 1 SCC 582 : Century Spg. And Mfg. Co. Ltd Vs. Ulhasnagar Municipal Council.
4. (1983) 3 SCC 379 : Gujurat State Financial Corporation Vs. Lotus Hotels.
5. 1988 SCC LSS 592 : Ashok Kumar Maheswari Vs. State of U.P.
6. AIR 2002 SC 322 : 2002) 2 SCC 188 : Sharma Transport Vs. Govt. of A.P.
7. (2004) 7 SCC 673 : State of Rajasthan Vs. J.K. Udaipur Udyog Ltd.
8. (2007) 2 SCC 725 : A.P. Steel Re-rolling Mill Ltd. Vs. State of Kerala.
9. (2003) 9 Scale 578 : State of Orissa Vs. Manglam Timber Products Ltd.

10. (2003) 2 SCC 355 (365) : B.L. Sreedhar Vs. K.M. Munireddy.
11. (2010) 12 SCC 458 : H.R. Basavaraj Vs. Canara Bank.
12. AIR1968 SC 718 : Union of India Vs. M/s Anglo, Afghan Agencies etc.
13. AIR 1971 SC 2021 : Chowgule & Company (Hind) Pvt. Ltd. Vs. Union of India.
14. AIR 1979 SC 621 : M/s Motilal Padampat Sugar Mills Co. Ltd. Vs. The State of Uttar Pradesh.
15. AIR 1986 SC 806 : Union of India Vs. Godfrey Philips India Ltd..
16. AIR 1987SC 2414 : Delhi Cloth & General Mills Ltd. Vs. Union of India.
17. AIR 1988 SC 2181 : Bharat Singh Vs. State of Haryana.
18. 1989(1) OLR 440 : Ambika Prasad Mohanty Vs. Orissa Engineering College.
19. 2014 (I) OLR 226 : Dr. (Smt.) Pranaya Ballari Mohanty Vs. Utkal University.
20. 2015 (I) OLR 212 : Rajanikanta Priyadarshy Vs. Utkal University.

For Petitioner : M/s. P.K. Mishra, K.L. Kar & A Ganejdra.
For Opp. Parties : Mr. M. K. Balabantaray, Standing Counsel.

JUDGMENT Date of Hearing 25.11.2021 : Date of Judgment : 03.12.2021

***Dr. B.R. SARANGI, J.***

The petitioner, who belongs to Scheduled Caste category and is serving as Junior Clerk in the establishment of Collectorate, Boudh, has filed this writ petition to quash the show-cause notice dated 31.03.2015 under Annexure-13 issued by opposite party no.3 directing him to give reply within 30 days from the date of its receipt as to why his services shall not be terminated; as well as letter dated 09.02.2015 under Annexure-13/1 issued by opposite party no.2 to opposite party no.1 intimating for deletion of the name of the petitioner from the final list and his removal from service on the ground of violation of G.A. Department Notification; and the letter dated 26.03.2015 under Annexure-13/2 issued by the Joint Secretary to Govt. of Odisha, Revenue & Disaster Management Department to opposite party no.2 recommending for issuance of show-cause notice prior to termination of the petitioner from service. He further seeks direction to the opposite parties to allow him to continue as Junior Clerk as usual with all service and financial benefits, as stipulated in the appointment order under Annexure-7 dated 26.11.2013, as he was validly recruited as per the statute.

2. The facts of the case, in brief, are that opposite party no.3-Collector & District Magistrate, Boudh issued an advertisement dated 8.07.2013, captioned as "Special Recruitment Drive for ST/SC" to fill up the vacant posts of Jr. Stenographer/Jr. Clerk/ Revenue Inspector/Assistant Revenue Inspector/Amin. So far as the vacancy position of Jr. Clerk is concerned, total vacancies were 16 and the posts were distributed as per post based

roster i.e. 8 posts meant for ST, 4 posts meant for ST (W), 3 posts meant for SC and 1 post meant for SC (W). For recruitment to the posts of Jr. Clerk, the candidate shall have to appear written test and practical computer skill test as provided in appendix to Rule-10 of Odisha Ministerial Service Rules, 1985, as amended vide notification dated 12.04.2010. As per appendix, opposite party no.3 had specified in the advertisement, that the competitive examination shall consist of written test and practical skill test. The written test shall consist of paper-1 for 3 hours and paper-II for 3 hours. Each paper consists of two parts. Paper-1 consists of Part-1, Language Test (English and Oriya) and Part-II, Objective General Knowledge, carrying each 100 marks and the duration of examination was three hours. Similarly Paper-II consists of Part-1, Objective Mathematics and Part-II, Basic Computer Skill carrying each 100 marks. Total mark of written test (Paper-1 & Paper-II) was 400. The maximum mark of practical skill test i.e. Basic Computer Skill (Objective) was 50. Therefore, total maximum mark was 450 as provided under the statute. In similar manner, another advertisement dated 08.07.2013 was issued in order to fill up the posts of Junior Clerks and other posts from among the UR and SEBC category.

2.1. When the advertisement was published, the petitioner was serving as Jogan Sahayak on consolidated pay of Rs.3,500/- per month in Mathura G.P. under Panchayat Samiti Charichhak in the district of Boudh. While serving as such, he having requisite qualification, applied for the post of Jr. Clerk with required documents within the prescribed period of time. As his application was in order, opposite party no.3 issued admit card bearing his Roll No.JC-0071 instructing him to attend the written test, which was to be held on 06.10.2013 (Sunday) in Jogindra Dev High School, Boudh. Pursuant thereto, he appeared in the written test on the scheduled date and time and secured 234 marks (113 in Paper-I + 121 in Paper-II), out of total 400 marks. Taking into account the marks secured in the written test, opposite party no.3 vide letter dated 19.11.2013 asked the petitioner to appear in the computer skill test on 16.11.2013 at 10.00 AM in the Collectorate, Boudh. Accordingly, the petitioner appeared computer skill test and secured 31 marks out of total marks 50.

2.2. On the basis of marks secured both in written test and computer skill test, opposite party no.3 prepared a merit list on 26.11.2013. The petitioner having placed at Sl. No.2 securing 265 marks, opposite party no.3 issued appointment letter on 26.11.2013 in his favour appointing him as Jr. Clerk.

As a consequence thereof, he was appointed as Jr. Clerk on regular basis being selected through recruitment test. As a result, he resigned from his previous post, i.e. Jogan Sahayak of Mathura G.P. under Panchayat Samiti, Charichhak on 27.11.2013, which was duly allowed by the Sarapanch of Mathura G.P. vide letter dated 27.11.2013 and he joined in his new post on the very same day under opposite party no.3 as Jr. Clerk and discharged his duty assigned to him.

2.3. After joining of the petitioner, opposite party no.3 sanctioned Rs.7,500/- towards one time refundable G.I.S. advance in favour of the petitioner to enable him to make one time deposit under GIS, pursuant to which said amount was recovered from his salary in 10 equal instalments, and he was also enrolled under defined Contributory Pension Scheme as per Finance Department notification dated 17.07.2009 and 24.10.2005 and accordingly, PRAN kits (Permanent Retirement Account Number) was issued in his favour. After completion of one year service, opposite party no.3 opened the Service Book and his name was placed at Sl. No.38 in the gradation list of Jr. Clerk. He also completed departmental examination to be eligible for consideration of promotion to the next higher rank as per the statute.

2.4. The petitioner, while continuing as Jr. Clerk, having completed about one year and four months of service under opposite party no.3, all on a sudden, pursuant to direction of opposite parties no.1 and 2, opposite party no.3 issued impugned show-cause notice dated 31.03.2015 and vide memo dated 31.03.2015 communicated to the petitioner, along with impugned enclosures such as letter dated 09.02.2015 of RDC, (SD), Berhampur, Ganjam, letter dated 26.03.2015 of Government and letter dated 29.03.2015 of RDC (SD), Berhampur, Ganjam, calling upon him to explain as to why he shall not be terminated from Government Service, for having been appointed vide order dated 26.11.2013 by violating the G.A. Department Notification dated 12.04.2010. Hence this application.

3. Mr. P.K. Mishra, learned counsel for the petitioner contended that in view of provisions contained in appendix to Rule-10 of the Orissa Ministerial Services (Method of Recruitment to the Posts of Junior Clerks in District Offices) Rules, 1985, a candidate has to appear in the written test for maximum marks of 400 and practical skill test of maximum marks of 50 and on the basis of aggregate marks secured in both tests, the merit list/select list

has to be prepared for appointment as Junior Clerk. Accordingly, opposite party no.3 conducted the written test and practical skill test for total maximum marks of 450 and on the basis of total marks secured in both the tests, opposite party no.3 rightly prepared the merit list. The petitioner was selected and his name found place at Sl. No.2, pursuant to which he joined as Junior Clerk. Subsequently, the G.A. Department, vide notification dated 12.04.2010, notified that the practical skill test shall be qualifying in nature and the marks awarded in practical skill test should not be added to the marks secured by the candidates in the written test examination. But such notification of the G.A. Department cannot have any justification, as it cannot supersede the statutory provisions contained in Rules, 1985. It is further contended that opposite party no.2, has arbitrarily directed opposite party no.3 to redraw the merit list by excluding the marks of practical skill test, which is absolutely an outcome of non-application of mind. It is further contended that opposite party no.2, vide letter dated 09.02.2015 at Annexure-13/1 issued with regard to the special recruitment drive for the post of Jr. Clerk, directed that the petitioner need to be deleted from the final merit list and removed from the service, because of the reason that he had been awarded 31 marks in practical skill test and thus 31 marks when added to written test marks 234, he secured 2nd position and as per law, the practical test mark is not to be added with aggregate marks of Paper-I and Paper-II and as a consequence his position does not remain in the final merit list. Such a direction contained in Annexure-13/1, being in violation of G.A. Department notification, cannot sustain in the eye of law, as the same is hit by principle of estoppel. Therefore, the petitioner seeks for quashing of the same.

To substantiate his contentions, he has relied upon the judgment of this Court in ***Pratima Sahoo v. State of Orissa***, 2021 (I) OLR 174.

4. Mr. N.K. Praharaj, learned Standing Counsel for the State argued with vehemence that opposite party no.3 published the common merit list, vide office order dated 26.11.2013, by adding the marks secured in the skill test to the marks secured in the written test. In the said merit list, the petitioner stood second, got appointed and continued in service. Such select list prepared by opposite party no.3 was declared wrong by opposite party no.2, vide letter dated 09.02.2015 stating that the computer skill test is qualifying in nature and the marks awarded therefor should not be added with the marks secured in the written test, otherwise it would be in deviation

of the Government guidelines. It is further contended that the petitioner has secured 31 marks in computer skill test and got qualified as the qualifying mark was 15 and his merit list should be placed taking into account 234 marks (Paper-I=113, Paper-II=121) secured in written test only. It is further contended that opposite party no.3 has conducted the written test and the practical skill test for total maximum mark of 400 and 50 respectively. There is stipulation in the G.A. Department notification dated 12.04.2010 in paragraph-3 at foot note that the practical skill test shall be qualifying in nature and the marks awarded for practical skill test should not be added with the mark secured by the candidates in the written test examination, as observed by opposite party no.2. Therefore, inclusion of the name of the petitioner in the final merit list, by adding his marks secured in the computer skill test and placing him at serial no.2 cannot sustain. As a consequence thereof, he should be removed from service.

5. This Court heard Mr. P.K. Mishra, learned counsel for the petitioner and Mr. N. K. Praharaj, learned Standing Counsel for the State by hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa framed the rules to regulate the method of recruitment to the posts of Junior Clerks in the District Offices and the offices subordinate thereto called the "Orissa Ministerial Services (Method of Recruitment to the Posts of Junior Clerks in the District Offices) Rules, 1985 (hereinafter referred to as "Rules, 1985").

7. For just and proper adjudication of the case, Rule 10 of the Rules, 1985 is extracted below:

> *"10.* ***Standard and syllabus of the Examination****-The Scheme and subjects for the examination and the Syllabus shall be as specified in the APPENDIX.*

The said appendix to Rule 10 was amended consequent upon amendment of Rules, 1985 as Orissa Ministerial Services (Method of Recruitment to the post of Junior Clerks in District Offices) Amendment Rules, 2009. Appendix-III of the amended Rule 10 states about scheme and subjects for examination. The extract of the same reads as follows:

"**Appendix – III**
**(See Rule 10)**
**Scheme and Subjects for Examination**

| Papers | Subjects | Maximum Marks | Time |
|---|---|---|---|
| Paper- I | Part- I – Language Test<br><br>(English & Odiya)<br>Part –II – Objective<br>General Knowledge | 100<br><br>100 | 3 Hours |
| Paper – II | Part – I Objective<br>Mathematics | 100 | 3 Hours |
| | Part – II Basic Computer Skills | 100 | |
| | TOTAL | 400 | 6 Hours |
| | **Practice Skill Test**<br><br>**BasicComputer Skills** | 50 | 1 Hour |

Subs vide O.G.E NO. 2161, Dt. 05.11.2013

Note : - (i) The Standard of examination shall be equivalent to that of Secondary School,

(ii) Those who will qualify written test shall be called for the practical Skill test.

(iii) The practical test shall be of qualifying nature."

8. There is no dispute with regard to the fact that the petitioner appeared in the written test and secured 234 marks out of 400 marks and also secured 31 marks in practical skill test out of 50. Opposite party no.3 prepared a select list taking into account marks secured in the written test as well as practical skill test and placed the petitioner at Sl. No.2 of the merit list. Subsequently, opposite party no.2 found out that marks secured in the practical skill test, being qualifying in nature, should not be added to the marks secured in the written test. Consequentially, he directed opposite party no.3 to redraw the final merit list on the basis of marks secured by the petitioner in the written test i.e. 234 marks excluding the marks secured in the practical skill test, in which the petitioner had qualified by securing 31 marks, which is above the qualifying mark of 15, out of 50 marks. But fact remains pursuant to merit list prepared by opposite party no.3, the petitioner has already joined and his service book has been opened. The amount

towards GIS has been deducted from his salary and he has also been enrolled in the contributory pension scheme of the Government. As a result, a right has been accrued in his favour to continue in his post. Now, after lapse of one year 4 months, as per direction given by opposite party no.2, opposite party no.3 has redrawn the merit list and called upon the petitioner to show-cause why he shall not be removed from service. Whether such action of opposite party no.3 is hit by principle of estoppel, is the short question to be decided in the facts and circumstances of this case.

9. Section-115 of the Indian Evidence Act, 1872 deals with *Estoppel*, which reads as follows:-

> *"115. Estoppel:- When one person has, by this declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*
>
> *To bring the case within the scope of estoppel as defined in Section 115 of the Evidence Act;*
>
> *1. There must be a representation by a person or his authorized agent to another in any form, a declaration, act or omission;*
>
> *2. The representation must have been of the existence of a fact and not of promises be future or intention which might or might not be enforceable in contract;*
>
> *3. The representation must have been meant to be relied upon;*
>
> *4. There must have been belief on the part of the other party in its truth;*
>
> *5. There must have been action on the faith of that declaration, act or omission that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to this prejudice or detriment;*
>
> *6. The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice;*
>
> *7. The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel;*
>
> *8. Only the person to whom representation was made or for whom it was designed can avail himself of it."*

10. In ***Black's Law Dictionary***, 7th Edn. At page 570 'estoppel' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.

11. The ***Law Dictionary*** expresses promissory estoppel to the following effect:-

> *"A promise by which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promise, and which does induct such action or forebearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise."*

12. In ***Halsbury's Laws of England***, Fourth Edition, Vol.16 in Para-1514 at page 1017, the "promissory estoppel" has been defined to the following effect:-

> *"Promissory estoppel: When one party has, by his words or conduct made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."*

13. In ***Central London Property Trust Ltd. v. High Treas House Ltd.***, (1956) 1 All ER 256, it has been held that a promise is intended to be binding, intended to be acted upon, and in fact acted upon is binding.

14. In ***Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council***, (1970) 1 SCC 582, it has been held that there is no distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.

15. In ***Gujurat State Financial Corporation v. Lotus Hotels***, (1983) 3 SCC 379, it has been held that the principle of "promissory estoppel" would estop a person from backing out of its obligation arising from a solemn promise made by it to the respondent.

16. In ***Ashok Kumar Maheswari v. State of U.P.***, 1988 SCC LSS 592, it has been held that doctrine of "promissory estoppel" has been evolved by the Courts on the principle of equity to avoid injustice.

17. In ***Sharma Transport v. Govt. of A.P.***, AIR 2002 SC 322: 2002) 2 SCC 188, it has been held that the Government is equally bound by its promise like a private individual, save where the promise is prohibited by law, or devoid of authority or power of the officer making the promise. The equitable doctrine of promissory estoppel must yield where the equity so requires in the larger public interest.

18. In ***State of Rajasthan v. J.K. Udaipur Udyog Ltd.***, (2004) 7 SCC 673, it has been held that the "promissory estoppel" operates on equity and public interest.

19. In ***A.P. Steel Re-rolling Mill Ltd. v. State of Kerala***, (2007) 2 SCC 725, it has been held that where a beneficent scheme is made by the State, the doctrine of "promissory estoppel" would apply.

20. In ***State of Orissa v. Manglam Timber Products Ltd.***, (2003) 9 Scale 578, it has been held that to attract applicability of promissory estoppel a contract in writing is not a necessary requirement. This principle is based on premise that no one can take advantage of its own omission or fault.

21. In ***B.L. Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 (365) it has been held by the apex Court that 'estoppel' is based on the maxim *"allegans contrarir non est audiendus"* (a party is not to be heard contrary) and is the spicy of presumption "*juries et de jure*" (absolute, or conclusive or irrebuttable presumption).

22. In ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458, it has been clarified that in general words, 'estoppel' is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be stopped from going back on the word given. The principle of estoppels is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

23. The principle of promissory estoppels has been considered by the apex Court in ***Union of India v. M/s Anglo, Afghan Agencies etc.***, AIR1968 SC 718; ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India***, AIR 1971 SC 2021; ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh***, AIR 1979 SC 621; ***Union of India v. Godfrey Philips India Ltd.,*** AIR 1986 SC 806; ***Delhi Cloth & General Mills Ltd. v. Union of***

***India***, AIR 1987SC 2414; and ***Bharat Singh v. State of Haryana***, AIR 1988 SC 2181 and many other subsequent decisions also.

24. In ***Ambika Prasad Mohanty v. Orissa Engineering College***, 1989(1) OLR 440, the Division Bench of this Court has already held that a student admitted after satisfying all qualifications, subsequently his admission is cancelled and he cannot prosecute his studies elsewhere, rule of estoppel is applicable.

25. This Court in ***Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University***, 2014 (I) OLR 226 has come to a finding that the action taken at belated stage by the University after lapse of 20 years of publication of the result is hit by the principle of estoppel.

26. Similar view has also been taken by this Court in ***Rajanikanta Priyadarshy v. Utkal University, represented through its Registrar,*** 2015 (I) OLR 212, wherein this Court held that the result of +3 Final Degree (Regular) Examination, 2010 of the petitioner therein having been published and on that basis he has already undergone higher studies and passed in different courses, subsequently his initial result cannot be cancelled on the ground that he has failed in the said examination.

27. In ***Pratima Sahoo*** (supra), this Court held that the order of disengagement of the petitioner from the post of Sikhya Sahayak, pursuant to decision of the district administration, having found qualified in the selection process and appointed after resigning from her erstwhile post of Anganwadi Worker and having worked for six to eight months, amounts to putting the petitioner in prejudical and disadvantageous position and the reason assigned for later finding the petitioner not suitable for securing less marks than other meritorious candidates do holds good, the petitioner cannot be found faulted by the mistake committed by the appointing authority in calculating the percentage. Consequentially, direction was given to absorb the petitioner forthwith applying the doctrine of promissory estoppel in the said case.

28. In view of the law and fact, as discussed above, the irresistible conclusion is that the show-cause notice dated 31.03.2015 under Annexure-13 issued by opposite party no.3, the letter dated 09.02.2015 under Annexure-13/1 issued by opposite party no.2 to opposite party no.1 and letter

dated 26.03.2015 under Annexure-13/2 issued by the Government of Odisha, Revenue and Disaster Management Department to opposite party no.2 cannot sustain. Therefore, the same are liable to be quashed and hereby quashed. Pursuant to interim order passed on 07.04.2019 by the Odisha Administrative Tribunal since the petitioner is still continuing, he shall be allowed to continue with all service and financial benefits as due and admissible to him in accordance with law.

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

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**2022 (I) ILR - CUT- 119**

**Dr. B.R.SARANGI, J & S.K. PANIGRAHI, J.**

W.P.(C) NO. 38965 OF 2021

**ST MINERALS PVT. LTD.** ..…… Petitioner

.V.

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

**CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Prayer to direct the opposite parties to extend the lease period for 10 years or the maximum period as permissible under the Orissa Minor Minerals Concession Rules, 2016 – Contract matter – Lease conditions already accepted and acted upon – The question thus arose as to whether in a purely contractual matter, the High court in exercise of its power conferred under Article 226 of the Constitution of India can extend the lease period by changing the lease conditions? – Held, No – Reasons explained.** (Para 8 to 11)

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

1. (2012) 4 SCC 629 : Deepak Kumar & Ors. Vs. State of Haryana & Ors.
2. AIR 2012 Orissa 163 : Bhramarbar Das Vs. State of Orissa.

For Petitioner : M/s. S. Palit, A. Mishra, A. Kejriwal, A. Parija and S. Bose.

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

JUDGMENT Date of Hearing and Judgment: 07.01.2022

***Dr. B.R. SARANGI, J.***

The petitioner, by means of this writ petition, seeks direction to the opposite parties to extend the lease period for 10 years or the maximum period as permissible under the Orissa Minor Minerals Concession Rules, 2016 (for short "OMMC Rules, 2016").

2. The factual matrix of the case, in brief, is that the petitioner was granted on lease Bholanugaon Stone Quarry, Ghasipura Tahasil in the district of Keonjhar for mining of stone for a term of five years from 2015-2020. Since then, the petitioner has been operating the said quarry in accordance with law and in full compliance with the provisions of the OMMC Rules, 2016 as well as mining plan. The requisite environmental clearance, consent to establish and consent to operate were granted after a delay of two years, and accordingly the lease period was further extended until 04.04.2022. The petitioner has invested significant sums of money and has even established a stone crusher in the region for processing of the quarry output in accordance with the norms prescribed by the competent authority. As per the OMMC Rules 2016, the period of mining lease for any specified minor minerals is 30 years and for quarry lease it is 10 years. The minimum period for any quarry lease is 5 years. The opposite parties granted the quarry lease only for the minimum period prescribed, which is arbitrary and unreasonable and does not take into account the investments made by the leaseholder as also the impact on the environment causes by such short lease periods and repeated change of leaseholder as well as mining plans. There being no rational nexus between the quarry lease period granted by the opposite parties and the objective sought to be achieved by the OMMC Rules, 2016, such action of the opposite parties is manifestly arbitrary and is liable to be set aside. It is further averred in the writ petition that the previous rules, i.e., Orissa Minor Minerals Concessions Rules, 2004 (for short "OMMC Rules, 2004") provided for grant of mining lease for a maximum period of 30 years and a minimum period of twenty years for all minor minerals and there was no categorization for specified and non-specified minor minerals. Therefore, the action of opposite parties in granting the quarry lease for only five years is completely non-application of mind and mechanical decision making. There is no economic sense for granting of leases for a period of only five years. All leaseholders invest considerable amount of money for operation and establishment of the quarries and lease period of five years is not adequate enough to realize the

true potential from the quarry. A longer quarry lease period permits a more systematic and sustainable mining process and also facilitates proper implementation of the mining plan as well as supports thorough rehabilitation of the quarry lease area to negate the adverse environmental impact caused by the mining. Therefore, the petitioner has approached this Court by filing the present writ petition seeking for extension of quarry lease period from five years to ten years.

3. Mr. S. Palit, learned counsel for the petitioner contended that pursuant to the auction notice issued by the authority, the petitioner participated in the proceeding for grant of lease in respect of the stone quarry under consideration and got selected. As a consequence thereof, the petitioner executed quarry lease agreement in the prescribed Form-N as per Rule-27(13) of OMMC Rules, 2016 for a period of five years. It is contended that the said lease period should be extended for a period of 10 years in the facts and circumstances of the case. The same having not been extended by the authority, the petitioner has approached this Court by invoking the extraordinary jurisdiction of this Court under Article 226 of Constitution of India. To substantiate his contention, he has relied upon the judgment of the apex Court in the case of ***Deepak Kumar and others v. State of Haryana and others,*** (2012) 4 SCC 629, and that of this Court in the case of ***Bhramarbar Das v. State of Orissa, AIR 2012 Orissa*** 163.

4. Mr. P.K. Muduli, learned Addl. Government Advocate contended that the petitioner, having participated in the process of tender, was granted above noted quarry lease and, as such, lease agreement was executed in the prescribed Form-N as per Rule-27(13) of OMMC Rules, 2016. The lease agreement was executed for a period of five years and, as such, the same is valid till 04.04.2022. Therefore, the petitioner cannot invoke extraordinary jurisdiction of this Court under Article 226 of the Constitution of India to change the terms and conditions of the lease seeking extension of the period from five years to ten years. It is further contended that since the claim of the petitioner emanates from an agreement, the condition of the agreement cannot be changed by virtue of the direction of this Court under Article 226 of the Constitution of India.

5. This Court heard Mr. S. Palit, learned counsel for the petitioner and Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State-opposite parties by hybrid mode. Pleadings having been exchanged

between the parties, with the consent of learned counsel for the parties, this writ petition is disposed of finally at the stage of admission.

6. On the basis of facts narrated above, it appears that by following due process, the petitioner was granted on lease Bholanuagaon Stone Quarry, Ghasipura Tahasil in the district of Keonjhar for mining of stone for a term of five years from 2015-2020. As a consequence thereof, the petitioner has executed quarry lease agreement in Form-N as per Rule-27(13) of OMMC Rules, 2016 for a period of five years. The terms and conditions of the agreement clearly specify to the following effect:-

> *"……..WHEREAS the lessee has applied to the competent Authority-concerned for a quarry mining lease for Stone in accordance with the provisions of the OMMC Rules, 2016 in respect of the lands described in part-I of the schedule* ***for a term of 5 years*** *and the lease agreement for the year 2017-18 & 2018-19 has already been made on 05.04.2017 vide ID No.1021700206/2017 & made on 31.01.2019 vide id no.1021900059/2019.*
>
> *xxx xxx xxx*
>
> *As per OMMC Rules 43 (2) "the date of commencement of the period for which a prospecting license-cum-mining lease or mining lease or quarry lease is granted shall be the date on which a duly executed deed is registered", according the lease is valid till 04.04.2022.* "

7. On perusal of the above mentioned conditions, it is made clear that the petitioner was granted with the above noted lease for a period of five years, which was commenced from the date of its execution, as per Rule-43(2) of OMMC Rules, 2016, and the same is going to expire on 04.04.2022. Thereby, at the fag end of the lease period, the petitioner has approached this Court seeking extension of the period from five years to ten years. As such, the terms of the lease agreement were known to the petitioner, when it had executed the same with the opposite parties with eyes wide open. In such event, the petitioner should not have come to this Court for extension of the period from five years to ten years.

8. Much reliance was placed by learned counsel for the petitioner on Rule-8 of the Orissa Minor Mineral Concession Rules, 2004, sub-rule (2) whereof provides that the lease granted shall not be less than twenty years. But the said Rule-8 has undergone amendment in OMMC Rules, 2016 and under sub-rule (4) thereof it is provided that the maximum period for which a quarry lease may be granted shall not exceed ten years and shall be subject to such terms and conditions as may be specified by the competent

authority. Provided that the minimum period for which any such lease may be granted shall be five years. There is no dispute that the minimum five years period of lease has been granted in favour of the petitioner. But whether the said period will be extended to ten years or not, the same is within the complete domain of the competent authority and, as such, this Court has no jurisdiction to make any change in the terms and conditions of the agreement executed between the parties under Annexure-1.

9. In the case of ***Deepak Kumar*** (supra), on which reliance was placed by learned counsel for the petitioner, the apex Court has taken into consideration the back-ground facts in sub-para 4.3 of paragraph-19 on which mining leases for various periods are granted. But the said case has got no nexus to the issue involved in the present case, in view of the fact that rules have been framed by the authority and pursuant to which lease deed has been executed between the petitioner and the opposite parties specifying the terms and conditions in the agreement. At this stage, the petitioner wants to change the terms and conditions of the lease deed, which is not permissible. The context on which the judgment in ***Deepak Kumar*** (supra) has been rendered may have a bearing, so far as OMMC Rules, 2004 is concerned, but the case at hand deals with OMMC Rules, 2016. Furthermore, by the time the judgment in ***Deepak Kumar*** (supra) was delivered, OMMC Rules, 2016 had not seen the light of the day and that itself does not permit the benefit to the petitioner by extending the lease period from five years to ten years, as claimed in this writ petition. More so, when this Court called upon learned counsel for the petitioner to produce any provision with regard to jurisdiction of this Court to extend the period of lease agreement, he is not able to produce any such provision nor any law decided on this issue. Thereby, this Court is of the considered view that this being a purely contract, the condition of the contract cannot be changed in exercise of powers conferred under Article 226 of the Constitution of India.

10. In ***Bhramarabar Das*** (supra), on which reliance was also placed on behalf of the petitioner, the prayer was twofold; the first prayer was that Rules-35 and 36 of OMMC Rules, 2004 are invalid; and the second prayer was that authorities were not justified in rejecting petitioner's application for stone query lease and that decision making process of the authority was arbitrary and unreasonable. This Court in paragraph-32 held that the application of the petitioner, who was already lessee, might be considered by putting the sairat source to public auction and that it would be open for

any category of applicant referred to in Rule-27, including the petitioner, to participate in public auction of minor minerals and in case the petitioner was not found to be the highest bidder, but agreed to match with the price at which the bid was knocked, preference would be given to him even though he is not the highest bidder and also held that writ petition is maintainable in a contractual dispute. But the factual matrix of the said case is absolutely different from that of the present one.

11. In the above view of the matter, this Court is of the considered view that the relief sought by the petitioner for extension of lease period from five years to ten years under OMMC Rules, 2016 invoking extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be acceded to.

12. In the result, the writ petition merits no consideration and the same is accordingly dismissed. However, there shall be no order as to costs.

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**2022 (I) ILR – CUT- 124**

**ARINDAM SINHA, J.**

W.P.(C) NO. 21100 OF 2021

**CHINMAY MOHANTY AND ANR.** .....Petitioners

.V.

**BAR COUNCIL OF INDIA AND ANR.** .....Opp. Parties

**ADVOCATES ACT, 1961 – Section 8 and 8-A read with Section 49 – Provisions under – Term of office of members of State Bar Council – Writ petition seeking a direction to the Orissa State Bar Council to hold election as the term of the last election has been expired since 2019 – Plea of the Bar Council that time required for correction of electoral roll – Plea considered with reference to the provisions of law as well as the decisions of the Apex court – Held, Bar Council could only extend the period for six months and as such Rule 23 cannot be read as barring holding of elections against the mandate in section 8.**

(Para 7 & 8)

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

1. (1985) 4 SCC 689 : Lakshmi Charan Sen Vs. A.K.M. Hassan Uzzaman.
2. (2006) 8 SCC 352 : Kishansing Tomar Vs. Municipal Corporation of the City of Ahmedabad.
3. (2012) 7 SCC 683 : Union of India Vs. S.Srinivasan

For Petitioners : Mr.Asok Mohanty, Sr. Adv. Mr. G.M.Rath.
For Opp. Parties : Mr. Amit Prasad Bose & Mr. Amitav Das.

ORDER Date of Order 04.01.2022

***ARINDAM SINHA, J.***

**1.** Two persons have joined as petitioners. Petitioner no.1 claims to be former Chairman of Odisha State Bar Council and petitioner no.2, three times elected member of Odisha State Bar Council. Mr. Mohanty, learned senior advocate appears on their behalf. He submits, election has not been held in the State Bar Council. He draws attention to paragraph 3F of the petition, where there is clear averment that the State Bar Council (O.P. no.2) conducted its last Council Election in year 2014 and tenure of the members expired on 5th May, 2019. There is further statement that the State Bar Council had by letter dated 27th January, 2019 written to Bar Council of India (O.P. no.1) for extension of the term under section 8 in Advocates Act, 1961.

**2.** He relies on following judgments of the Supreme Court.

(i) **Lakshmi Charan Sen vs. A.K.M. Hassan Uzzaman**, reported in **(1985) 4 SCC 689**, particularly paragraphs 18, 20 and 21.

He submits, this judgment consisting of majority view of four learned Judges, including those expressed in paragraphs relied upon, clearly declares the law regarding the rule relied upon for verification of electoral roll causing elections to the State Bar Council to be pended as creating a vacuum. Election laws abhor a vacuum. There cannot be arrest of the process of election.

(ii) **Kishansing Tomar vs. Municipal Corporation of the City of Ahmedabad**, reported in **(2006) 8 SCC 352.**

He submits, this also is a Constitution Bench judgment of the Supreme Court where the views expressed are unanimous. He relies on paragraphs 19 to 22. Paragraph 20 is reproduced below.

*"20. The majority opinion in Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman held that the fact that certain claims and objections are not finally disposed of while preparing the electoral rolls or even assuming that they are not filed in accordance with law cannot arrest the process of election to the legislature. The election has to be held on the basis of the electoral rolls which are in force on the last date for making nomination. It is true that the Election Commission shall take steps to prepare the electoral rolls by following due process of law, but that too, should be done timely and in no circumstances, it shall be delayed so as to cause gross violation of the mandatory provisions contained in Article 243-U of the Constitution."*

(iii) **Union of India v. S.Srinivasan**, reported in **(2012) 7 SCC 683**. Mr. Mohanty relies on paragraph 21, quoted below.

*"21. At this stage, it is apposite to state about the rule-making powers of a delegating authority. If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it."*

**3.** Mr. Das, learned advocate appears on behalf of opposite party no.2. He, on behalf of his client has filed memorandum dated 3rd January, 2022 pursuant to direction in order dated 16th December, 2021. In this connection paragraphs 3 and 4 in said order dated 16th December, 2021 are reproduced below.

*"3. Mr. Das, learned advocate appears on behalf of the State Bar Council and draws attention to proceedings in 16 Special Committee meeting held on 22nd November, 2021, disclosed by way of compliance affidavit affirmed on 3rd December, 2021. He relies on following in the resolution:-*

*"However, it has been* ***unanimously resolved to conduct the Election to the State Bar Council after completion of the time frame indicated under Rule18,19,20,23 of Chapter-VI of Verification Rules, 2015 read with Part-III, Chapter-I of Bar Council of India Rules****."*

*4. State Bar Council is required to give dates, of commencement of the time frame indicated and its expiry."*

**4.** Mr. Das submits, annexed to the memo are official gazette dated 13th January, 2015 notifying Bar Council of India Certificate and Place of Practice (Verification) Rules, 2015 and list of dates of commencement of time frame and its expiry, for holding elections to the State Bar Council. He draws attention to rule 23, which provides, inter alia, as follows:

> *"**23. Updating of the electoral rolls of the State bar Council for the purposes of elections**:*
>
> *xx xx No State Bar Council shall undertake to prepare electoral roll or to conduct elections to the State Bar Councils unless the process of verification of Certificate of Practice and of identification of non-practicing advocates is completed under these Rules by publication of their names under Rule 20.4.*
>
> *xx xx"*

He submits, it is in terms of rule 20 that the list of dates of commencement and time frame have been given. Minimum time to complete the verification process will require 519 days. As such projected time frame expires on 4th January, 2023. He however submits, efforts shall be made to complete the process by November, 2022. On query from Court he submits, last extension had from Bar Council of India under section 8 expired in November, 2021. Further extensions will be necessary for the purpose of verification and till before its completion, the rules will not allow for holding of elections. On further query from Court, Mr. Das draws attention to paragraph 8 in the preliminary counter filed by his client regarding statements made in paragraph 3F in the petition. Said paragraph 8 is quoted below.

> *"8. That in reply to para-3E and 3F, it is humbly submitted at the cost of repetition that in consonance with section-8 of the Advocates' Act, the Orissa State Bar Council in its meeting dtd. 27.01.2019 under additional Agenda-1 resolved that the Bar Council of India may be requested to extend the present term of the elected members for a period not exceeding six months as per proviso to section 8 of advocates' Act, 1961. Copy of Resolution dtd. 27.01.2019 is filed herewith as Annexure-B/2."*

**5.** Mr. Bose, learned advocate appears on behalf of opposite party no.1 and submits, it was found that electoral rolls of State Bar Councils consist of persons ineligible to vote. That is why the exercise undertaken, to clear the electoral rolls, of those enrolled but who are not practicing advocates. This exercise required making of the rules by his client, in exercise of powers, inter alia, as in clauses (ag) (ah) and (i) of section 49. Necessarily the provision had to be included pending the elections till the electoral rolls are settled as verified. His client cannot be faulted for having undertaken the exercise. Power under section 8 has been duly exercised in the circumstances and needs to be further exercised.

**6.** Fact situation emerging from record of submissions above are clearly similar to those dealt with in paragraphs 18 and 21 of **Lakshmi Charan Sen** (supra). Said paragraphs are reproduced below.

> *"18. Section 21(3) of the Act of 1950 confers upon the Election Commission the power to direct a special revision of the electoral roll. The proviso to that sub-section also says that until the completion of the special revision so directed, the electoral roll for the time being in force shall continue to be in force. That proves the point that election laws abhor a vacuum. Insofar as the electoral rolls are concerned, there is never a moment in the life of a political community when some electoral roll or the other is not in force.*
>
> *21. As a result of this discussion, it must follow that the fact that certain claims and objections are not finally disposed of, even assuming that they are filed in accordance with law, cannot arrest the process of election to the Legislature. The election has to be held on the basis of the electoral roll which is in force on the last date for making nominations."*

Above quoted paragraphs were part of the majority view. Sub-section (3) in section 21 of Representation of the People Act, 1950 was under consideration. The proviso says that until the completion of special revision, the electoral roll for the time being in force shall continue to be in force. The proviso in rule 23 is however a departure from said proviso inasmuch as, it bars State Bar Councils from, inter alia, conducting elections unless the process of verification of certificate of practice and of identification of non-practicing advocates is completed under the rules by publication of their names under rule 20.4**.** This has been relied upon by the opposite parties in continuing to pend elections, which are long overdue.

**7.** Section 7 provides for functions of Bar Council of India. Section 15 gives power to Bar Council of India to make rules to carry out purposes of the chapter. General power of Bar Council of India to make rules stands provided under section 49. Obviously the 2015 rules were made by Bar Council of India in exercise of power under section 49. Undoubtedly, there was necessity for verification of electoral rolls as well as conduct of elections to the State Bar Council. Here, it would be useful to reproduce section 8 in Advocates Act, 1961.

> *"8.* ***Term of office of members of State Bar Council****.—The term of office of an elected member of a State Bar Council (other than an elected member thereof referred to in section 54) shall be five years from the date of publication of the result of his election:*
>
> *Provided that where a State Bar Council fails to provide for the election of its members before the expiry of the said term, the Bar Council of India may, by order for reasons to be recorded in writing, extend the said term, for a period not exceeding six months."*

Also reproduced below is sub-section (3) in section 8-A.

> *"(3) The Special Committee constituted under sub-section (1) shall, in accordance with such directions as the Bar Council of India may give to it in this behalf, hold election to the State Bar Council within a period of six months from the date of its constitution under sub-section (1), and where, for any reason the Special Committee is not in a position to conduct election within the said period of six months, the Bar Council of India may, for reasons to be recorded by it in writing, extends the said period."*

It appears from proviso under section 8 that Bar Council of India may by order, for reasons to be recorded in writing, extend the term for a period not exceeding six months. In facts of the present case, it is doubtful whether sub-section (3) under section 8-A can at all be relied upon by opposite parties. This is simply because it is nobody's case that the special committee has undertaken the exercise to conduct elections, giving rise to a situation where Bar Council of India may deliberate whether there should be extension of time to complete the election. Therefore, Bar Council of India could only extend the period for six months beyond May, 2019.

**8.** It appears from **Lakshmi Charan Sen** (supra) that Parliament while legislating the Act of 1950, provided for continuation of existing electoral roll, while revision thereof was in process. The Bar Council of India, however, appears to have put a bar in conducting elections, till completing verification by the rules. This creates a vacuum but as declared in **Lakshmi Charan Sen** (supra), election laws abhor a vacuum. This Court is convinced that election must be held by the State Bar Council and Bar Council of India is not empowered to have extended the period under section 8 beyond six months on expiry of May 2019.

**9.** The writ petition succeeds. Rule 23 cannot be read as barring holding of elections against the mandate in section 8. **S.Srinivasan** (supra) is clearly applicable here. Opposite party no.2 will conduct election on the basis of existing electoral roll within six weeks from date of communication of this order.

**10.** The writ petition is disposed of.

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**2022 (I) ILR – CUT- 130**

**D.DASH, J.**

R.S.A. NO. 208 OF 2017

**JAGANNATH PADHI** …….. Appellant

**.V.**

**CHITTA RANJAN PADHI & ORS.** …….. Respondents

**INDIAN SUCCESSION ACT, 1925 – Section 213 read with section 57 – Right as executor or legatee when established subject to the application of the provisions in clauses (a) and (b) of section 57 – Plea that the, will having been executed in the erstwhile Princely State of Mayurbhanj, whether the same requires probate or not? – Provisions with reference to the facts examined – Held, the bar contained in section 213 of the Act stands on the way.**

*"The Ex-State of Mayurbhanj got merged with the province of Odisha w.e.f. 01.01.1949 and thus became a part of it followed by Administration of Mayurbhanj State Order 1949 and by virtue of that Order as indicated in its schedule the provision of the above, the Act came to be applied to the District of Mayurbhanj. The bar under section 213(1) of the Act to be not having the application, the nativity of the testator/testatrix does not matter and is of no significance. For attraction of that, the Will must not have been made within the territories specified in Clause (a) of Section 57 of that or that the immovable property in whole or part to which they relate must not have been within those specified territories. In the case, the Will does not find mention about bequeath of immovable property situated in the Ex-State area of Mayurbhanj in particular but it has only been executed there. So, from the nativity of the testator, it is not permissible to infer that the reference to immovable property made in the so called Will is also for some property situated within the Ex-State area of Mayurbhanj when no such property of that area is the subject matter of the Will either as a whole or in part being so stated/described therein. The Will covers the property at Bhubaneswar with general clause of bequeath regarding movable, immovable properties of the testator including service benefits receivable. In view of the aforesaid, the bar contained in section 213 of the Act stands on the way of projection of this Will in claiming the right, title and interest of the properties said to have been bequeathed by late Durga Charan in favour of his three sons, i.e, Plaintiff, Defendant Nos.1 and 2 in respect of the land with the house at Saheed Nagar in Bhubaneswar."* *(Para 11 & 12)*

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

1. 1972(2) CWR 1451 : Amrutlal Majhi and Others Vs. Gopi Satuani and Ors.
2. AIR 1973 Orissa 112 : Balaram Tripathy and another Vs. Lokanath Tripathy
3. (48) 1979 CLT 211 : Radha Hota Vs. Dutika Satpathy.

For Appellant : M/s. Prafulla Kumar Rath, A. Behera, S.K. Behera, P.Nayak, K. Kashyap and B.K.Dash M/s.S.P.Raju, U.K.Mishra, S.K.Kanungo,S.R.Jena,

For Respondents : M/s.Smita R.N. Pattnaik, S.M.Dwibedi, S.K.Nayak, P.K. Nayak, P.K. Mohanty, S.Mohakud. S.Mohanty & S. Lenka M/s.A.K.Pandey, D.N.Mishra M/s.B.Bhuyan, S.Sahoo M/s.P.C.Jena, B.S. Mishra, P.Ch. Dash & S.K.Mohanty.

JUDGMENT Date of Hearing : 01.11.2021: Date of Judgment:03.01.2022

***D.DASH, J.***

The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as 'the Code') has assailed the judgment and preliminary decree passed by the learned District Judge, Khurda in RFA No.74 of 2015.

By the said judgment and preliminary decree, the First Appellate Court while confirming the judgment and preliminary decree passed by the learned Additional Senior Civil Judge Bhubaneswar in C.S. No.1828 of 2010 has given a direction to the parties to have an amicable partition of the properties in suit in line of the observation made in the order and carry out the same in consonance with the allotment as reflected in Schedule-B thereof.

Plaintiff is the Respondent No.1. The present Appellant has been arraigned as the Defendant No.1 in the Trial Court. The Plaintiff (Respondent No.1) and the Appellant (Defendant No.1) are brothers. The Respondent No.2 (Defendant No.2) is another brother; whereas Respondent Nos. 3 and 4 (Defendant Nos.3 & 4) are their sisters. It may be stated that upon the death of Respondent No.3 her legal representatives have come on record.

**2**. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to as they have been assigned with the position in the Trial Court.

**3.** The Plaintiff has filed the suit for declaration of his right, title, interest and possession over lot-2 of the property described in Schedule-B of the plaint; further in the alternative, he has prayed for partition of Schedule-A property by allotting 1/3rd share in favour of the Plaintiff, Defendant No.1

and Defendant No.2 each giving due regard to the possession of the properties by the parties in consonance with the spirit as expressed in the Will executed by their father late Durga Charan Padhi.

The properties described in lot-1, 2 and 3 of the Schedule-B of the plaint was the leasehold property of late Durga Charan Padhi, the father of the parties. The lease had been granted by the Government of Odisha in the Department of the General Administration. Durga Charan Padhi had constructed a double storied building over the said land from out of his own income. In the year 1987, he expired. His wife Mandakini had predeceased him. Plaintiff stated that said Durga Charan Padhi during his lifetime on 15.04.1986 had executed a Will which is a registered one in bequeathing the property in the suit to his sons i.e. Plaintiff, Defendant No.1 and Defendant No.2 and had left the same. It is stated that in the said exercise of bequeathing the property, he had divided the schedule property in allotting specific portion of the same to the Plaintiff, Defendant No.1 and Defendant No.2 which find clearly indicated in the Will and shown in lot-1, 2 and 3 of the Will.

It is stated that the Plaintiff and Defendant No.1 and Defendant No.2 identified lot-1, 2 and 3 of Schedule-B of the property as so specified in the Will by due measurement and demarcation and accordingly since the year,1987 they are in possession of the respective portion of Schedule-B property as per the lot shown in the Will in their favour. The Defendant No.1 when refused to accord consent for obtaining probate with the copy of the Will annexed, the suit has been filed. For better appreciation, the prayer advanced in the Plaint are re-produced hereunder:-

> "A. Let it be declared that the Plaintiff has right, title, interest in respect of Lot No.2 of Schedule-B;
>
> B. In the alternative let a decree for partition be passed in respect of 'A-Schedule property declaring 1/3rd share each in favour of the Plaintiff and Defendant Nos.1 & 2 respectively and to respect the possession of the partition in the spirit of the Will;
>
> C. Let a Civil Court Commissioner be deputed to effect partition between the parties as per the preliminary decree keeping their respective possession over the suit schedule property and the preliminary decree be made final as deem fit and proper; and
>
> D. Cost of the suit be decreed in favour of Plaintiff.'"

**4**. The Defendant No.1 in his written statement has not disputed the fact that the property in question was the self-acquired property of their father, late Durga Charan. It is stated that Durga Charan Padhi had executed Will which had never been handed over to him for obtaining probate annexing the copy of the Will. The Will was brought to the knowledge of all the legal heirs on the first death anniversary of their father.

The Defendant No.2 in his written statement has also not disputed the factum of acquisition of property by his father on lease from the Government of Odisha in the Department of General Administration. He submitted that Will executed by his father came to his knowledge on the first death anniversary of Durga Charan as it was in custody of Mr. G.C.Dash, the eldest brother-in-law of the parties.

The Defendant Nos. 3 & 4, the sisters of the Plaintiff and Defendant No.1 and Defendant No. 2 have not filed any written statement. They also have not contested the suit in denying the factum of execution of the Will.

**5**. Faced with the above pleadings, the Trial Court framed six issues. In the trial, the Plaintiff has examined himself as P.W.2 and has proved the certified copy of Khatian of Schedule-B property standing recorded in the name of Defendant No.1, Defendant No.2 and himself as Ext.1, the certified copy of the registered Will executed by Durga Charan marked Ext.2 and one affidavit jointly sworn by the Plaintiff, Defendant No.1 and Defendant No.2 on 12.12.2008 as to division of the property amongst themselves marked as Ext.3.

**6.** Going to address issue nos.4 & 5 as to the claim of the Plaintiff for partition and his entitlement of the parties specified in lot-2 of Schedule-B; the Trial Court has refused to declare the right, title and interest over that specific portion of the property as at Lot No.2 of Schedule-B in favour of the Plaintiff. Having said so, on the admitted case of the parties; preliminary decree has been passed for partition allotting 1/3rd share each to the Plaintiff, Defendant No.1 and Defendant No.2. Since the sisters are stated to have relinquished their interest as also they did not come to contest in claiming anything disputing the bequeath made by their father in favour of three sons in depriving them, they have not been given any share.While so holding, the Trial Court however keeping in view the equitable consideration has directed

for partition and allotment of the portions of the land to the parties repecting their individual possession as far as possible and practicable.

**7**. The Defendant No.1 being aggrieved by the said judgment and preliminary decree, filed the Appeal under Section-96 of the Code, which has been disposed by passing the order as stated in the first paragraph. Thus, the Defendant No.1 before this Court carrying this second Appeal which he assails the judgment and preliminary decree passed by the said lower Appellate Court.

**8.** The Appeal has been admitted on the following substantial questions of law:-

> 1) In view of provision contained under Section-57 read with Section-213 of Indian Succession Act, whether the Courts below are correct in passing decree for partition dividing the properties contrary to the provision made in the Will particularly when the said Will is not required to be probated since is executed in a princely State of Odisha?
>
> 2) Whether the learned Courts below are correct in decreeing the suit for partition on the face of existence of a Registered Will defining the last wishes of the Testator in respect of his self-acquired property and the decree passed for partition of the suit property is inconsistent to the terms of the Will executed by the Testator?

**9.** Mr. P.K. Rath, learned Counsel for the Appellant (Defendant No.1) submitted that in view of the clear pleadings available on record with regard to complete division of suit schedule property between three brothers, and respective allotment as indicated in Schedule-B, the suit ought to have been dismissed. He further submitted that the Plaintiff's prayer to the effect of permitting the distribution of the property as shown in the lots of Schedule-B being accepted, the suit stands finally decreed which is wholly contrary to the declaration of the Courts below as to 1/3$^{rd}$ interest of the Plaintiff, Defendant No.1 and Defendant No.2 each over the said property in suit. He further submitted that since the issue that the Will having been executed in the erstwhile Princely State of Mayurbhanj, whether the same requires probate or not for the beneficiaries to claim title over the property bequeathed in their favour has not been decided by the lower Appellate Court, the judgment and preliminary decree passed by the lower Appellate Court stand vitiated and therefore, the matter need be remanded the said Court to answer the same in clear terms.

**10.** Mr. D.N. Mishra, learned Counsel for the Respondent No.1 and Mr. A.K. Pandey, learned Counsel for the Respondent No.3(a) to 3(d) and Mr. B. Bhuyan, learned Counsel for the Respondent No.5 were heard.

It may be stated here that this Respondent No.5 was not a party before the Courts below and he for the first time has been impleaded in this Appeal by order dated 07.01.2021 passed in I.A. No.04 of 2021 as the purchaser of the property allotted to the Plaintiff as per final decree passed and drawn on 17.09.2018 and 09.10.2018 respectively followed by mutation after filing of this Appeal on 19.08.2017.

The Defendant No.1 claims to have no knowledge about the said passing of the final decree and mutation which according to him have been passed behind his back.

It may be stated here that the Second Appeal has been admitted on 18.09.2019 and the Plaintiff has executed registered sale-deed on 11.03.2020.

The above learned Counsels submitted all in favour of the affirmation to the findings recorded by the lower Appellate Court and the confirmation of the judgment and preliminary decree passed therein. It was also submitted that final decree having been drawn and since the suit has come to an end and the purchaser-Respondent No.5 having came into picture, the impugned judgment and preliminary decree are not also required to be interfered with.

**11.** From a plain reading of section 213 of the Indian Succession Act (for short called as 'the Act'), it is clear that sub-section 1 prohibits persons from establishing their rights in any Court without obtaining a probate, while sub-section (2) restricts the application of the above prohibition to classes specifies in clauses (a) and (b) of section 57. In other words, if a particular Will is not covered by clause (a) or (b) of section 57, the prohibition under section 213(1) does not apply. Section 57 of the reads as under:-

> "57. The provision of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply:-
>
> (a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the

ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits."

**12.** The Ex-State of Mayurbhanj got merged with the province of Odisha w.e.f. 01.01.1949 and thus became a part of it followed by Administration of Mayurbhanj State Order 1949 and by virtue of that Order as indicated in its schedule the provision of the above, the Act came to be applied to the District of Mayurbhanj. The bar under section 213(1) of the Act to be not having the application, the nativity of the testator/testatrix does not matter and is of no significance. For attraction of that, the Will must not have been made within the territories specified in Clause (a) of Section 57 of that or that the immovable property in whole or part to which they relate must not have been within those specified territories.

In the case, the Will does not find mention about bequeath of immovable property situated in the Ex-State area of Mayurbhanj in particular but it has only been executed there. So, from the nativity of the testator, it is not permissible to infer that the reference to immovable property made in the so called Will is also for some property situated within the Ex-State area of Mayurbhanj when no such property of that area is the subject matter of the Will either as a whole or in part being so stated/described therein. The Will covers the property at Bhubaneswar with general clause of bequeath regarding movable, immovable properties of the testator including service benefits receivable.

A careful reading of the decisions of this Court in case of ***Amrutlal Majhi and Others V. Gopi Satuani and Others;*** 1972(2) CWR 1451, ***Balaram Tripathy and another V. Lokanath Tripathy;*** AIR 1973 Orissa 112, ***Radha Hota V. Dutika Satpathy;*** (48) 1979 CLT 211, the above view is clearly deducible.

In view of the aforesaid, the bar contained in section 213 of the Act stands on the way of projection of this Will (Ext.2) in claiming the right, title and interest of the properties said to have been bequeathed by late Durga Charan in favour of his three sons, i.e, Plaintiff, Defendant Nos.1 and 2 in respect of the land with the house at Saheed Nagar in Bhubaneswar.

In that view of the matter, since the daughters of late Durgar Charan have relinquished their interest over the property in the suit, the Courts below have rightly held that the Plaintiff and Defendant Nos.1 and 2 each are entitled to 1/3rd share each over the same.

**13.** Now, the question arises as to whether in effecting such partition in the field, it would be strictly in accordance with the respective shares, as allotted to the Plaintiff and Defendant Nos.1 and 2 giving due regard to their separate possession and enjoyment as far as practicable and possible or giving respect to the desire and wish of their father, Late Durga Charan as the property was exclusively his own and he, in clear terms, had expressed his wish and desire to put the sons in possession of separate parcels as indicated in the Will (Ext.2). The father of a Hindu joint family has certainly the power to divide the family property at any moment during his life time, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from his sons but a separation of the sons inter se, the consent of the sons is not necessary for the exercise of that power, which the father enjoys by virtue of his special status in the family. The contents of the Will being gone through, it is seen that late Durga Charan has indicated in clear terms that the movable and immovable property which he may be possessing or entitled to at his death in the schedule appended would be held by the three sons as the absolute owners with full power of dispossession as specifically indicated in three different lots. Everything are stated in future terms. So, it cannot strictly be taken to be a partition effected by late Durga Charan and any construction in that light would frustrate the very intention behind the execution of such Will that Durga Charan had never wanted to make his three sons owners in respect of his separate property in dividing the same in three parts during his life time. It also cannot be construed to be a family arrangement in strict sense of the terms as there Durga Charan has neither made any provision for himself nor has expressed to be having no further interest over the said self-acquired property since that time onwards and conduct of the parties are also not seen to be in that direction in getting those lands and house in different plots as allotted in separately recorded in the official records so as to infer that the arrangement has been acted upon.

**14.** With all the aforesaid, when the parties do not seriously dispute the fact as to the execution of the Will by Durga Charan; keeping in view the wish and desire of the testator Durga Charan as expressed in clear terms in

the said document, when the lower Appellate Court has found that the parties are in possession of the Schedule-A property in accordance with the allotments under Lot Nos.1, 2 and 3 as described in Schedule-B as per the desire and wish expressed by Durga Charan, it has rightly held that the possession of the land and house by the parties as such be given due regard to while partitioning the suit property in providing 1/3rd share to each of them, i.e, the Plaintiff, Defendant Nos.1 and 2 each.

**15.** In the result, the Second Appeal stands dismissed. However, there shall be no order as to cost.

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**2021 (I) ILR - CUT- 138**

**BISWANATH RATH, J.**

WPC (OAC) NO. 2124 OF 2003

**LADUKESWAR ACHARYA SINCE DEAD, HIS LEGAL HEIR, MANORAMA ACHARYA & ORS.** ……..Petitioners

.V.

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

**SERVICE LAW – Disciplinary proceeding – Order of dismissal confirmed in appeal – Proceeding initiated and inquiry conducted – Inquiry Officer recommended certain punishments which were not accepted by the Disciplinary Authority – No reason assigned for taking a different view than that of the Inquiry officer and the order of dismissal passed – Confirmed in appeal – Delinquent died in the mean time – Held, the proceeding cannot be reopened as the delinquent is dead – Records show the delinquent was not supplied with the documents he asked for and no subsistence allowance was paid – Order of dismissal set aside and the matter was remitted back to the Disciplinary Authority to impose punishment as recommended by the inquiry officer as the delinquent has already expired and financial benefits be paid to the legal heirs.**

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

1. (1998) 7 SCC 84 : Punjab National Bank & Ors. Vs. Kunj Behari Misra.
2. (2021) 2 SCC 612 : Deputy General Manager (Appellate Authority) & anr. Vs. Ajai Kumar Srivastava.

For Petitioners : Mr.S.D.Routray.
For Opp.Parties : Mr.S.S.Kanungo, AGA.

JUDGMENT Date of Hearing & Judgment: 22.12.2021

***BISWANATH RATH, J.***

1. The Writ Petition involves the following prayer

> "In view of the facts and circumstances of the case the applicant therefore pray that this Hon'b1e Tribunal be graciously pleased to quash the dismissal order passed by the Collector dt.5.10.99 which was communicated to the applicant vide order dt.4.12.99 under Annexure-7 and the order of the R.D.C. dated 26.9.2002 which was duly communicated to the applicant vide order dated 25.1.2003 under Annexure-8; And necessary direction be issued to the Respondents, particularly Collector to reinstate the applicant in his former post forthwith with all consequential service benefits."

2. The Proceeding was originally instituted as O.A. No.2124(C) of 2003 in the State Administrative Tribunal, Cuttack Bench, Cuttack. On the Tribunal coming to be closed permanently, the matter being transferred to this Court is entertained and disposed of by this Court in exercise of power under Article 226 of the Constitution of India.

3. Background involving the case is that while the deceased Petitioner, Ladukeswar Acharya working as a Senior Clerk in the Tahasil Office, Purusottampur was transferred to the Tahasil Office, Bhanjanagar. Sri Acharya while continuing as such was placed under suspension on10.01.1997 but with effect from 14.01.1997, vide annexure -1.Memorandum of charges being communicated, vide Annexure-2, it appears, the Petitioner requested for supply of copies of relevant documents, vide Annexure-3. It is alleged that not only there was no supply of documents requested for but these was even not providing subsistence allowance to the Petitioner for long time became an impediment in attending the enquiry. In the circumstance, the enquiry was closed on the premises that the Petitioner had nothing to submit. Finally the Enquiring Officer submitted his report recommending different punishments as disclosed at Page-40 of the Brief. It is after submission of the enquiry report on 26.3.1999, vide Annexure-5 the Petitioner was served with a second show cause notice in the month of August asking the Petitioner to have his response on the punishment of dismissal decided by the Disciplinary Authority. The Petitioner submitted his response to the second show cause notice and dependent on the submission of the Petitioner, vide

Annexure-6, by the order dated 4.12.1999, vide Annexure-7 the Petitioner has been dismissed from service with effect from 5.10.1999. In the Appeal, challenging the said order, the Appeal Petition of the Petitioner appears to have been rejected, vide Annexure-8.

4. Taking this Court to the plea of the Petitioner and the grounds therein, Mr.Routray, learned counsel for the Petitioner challenging the order of dismissal at Annexure-7 and the appellate order at Annexure-8 advanced his argument on two scores.

One being looking to the recording in the Proceeding File keeping in view at this stage, vide Annexure-3 the request of the Petitioner for supply of several documents for preparing his submission to the charges, Mr. Routray, learned counsel for the Petitioner contended that enquiry was conducted not only in absence of supply of documents but also without taking into consideration the impediment on the part of the Petitioner created by the Disciplinary Authority for not providing him even the subsistence allowance during the period of enquiry. Taking this Court to the observations of the Enquiring Officer through the enquiry report, Mr.Routray, learned counsel for the Petitioner also contended that for the clear recording therein that the enquiry was closed in absence of proper participation of the Petitioner, the said closure of the enquiry appears to be an ex parte one. It is keeping this in view and the grounds taken in Annexure-6 as well as the Appeal Memorandum, learned counsel for the Petitioner claimed, both the Disciplinary Authority as well as the Appellate Authority failed in appreciating such gross-negligence aspect in the matter of disciplinary proceeding and thus Claimed for interference of this Court in both the order of dismissal as well as the appellate order.

The second limb of argument of the learned counsel for the Petitioner is that even assuming that the delinquent has attained the age of superannuation and even dead in the meantime leaving no scope for fresh enquiry, taking into consideration the recommendation of punishment by the Enquiring Officer, as clearly disclosed from the part-document at Annexure-5, Sri Routray contended that the Disciplinary Authority at least could have punished the delinquent in terms of the recommendation of the Enquiring Officer. Mr.Routray, learned counsel for the Petitioner here also contended that in the worse in the event the Disciplinary Authority had a different view than the opinion of the Enquiring Officer on punishment

aspect, then there must be a proceeding recording the different view of the Disciplinary Authority other than the Enquiring Officer. Mr.Routray, learned counsel for the Petitioner further contended that for the specific allegation and the counter averments of the Authority denying such allegation specifically the punishment order otherwise would also go for being violation of the recording of different view and also in absence of providing further opportunity to the Petitioner to answer on such different view of the Disciplinary Authority. Learned counsel for the Petitioner, therefore, harping the second part of argument contended that the dismissal order in any event should go and in the minimum the delinquent can be punished in terms of the recommendation of the Enquiring,Officer and thus requested to dispose of the Writ Petition accordingly.

5. Mr.S.S.Kanungo, learned Additional Government Advocate for the State while not disputing the fact that there was a departmental proceeding against the delinquent, that there have been charges communicated to the delinquent, that the delinquent has submitted a letter for supply of number of documents, vide Annexure-3 and the recording of the Enquiring Officer in the proceeding on 24.2.1999, that the delinquent is not being paid with subsistence allowance, as alleged by the delinquent, and the recording of the Enquiring Officer that there was no defence statement against the delinquent leading to a presumption to the Enquiring Officer that the delinquent has nothing to submit his defence, but however taking into consideration the issuing of second show cause notice, vide Annexure-5, particularly reading through Paragraph therein, an attempt is made by Mr. Kanungo that in the issuing of second show cause notice, there was clear indication of the intention of the Disciplinary Authority asking the delinquent as to why he should not be dismissed from service, thus claimed, there is sufficient safeguard by the Disciplinary Authority. It is in the circumstance, Mr.Kanungo, learned Additional Government Advocate opposed the claim of the Petitioner in the second limb of argument recorded herein above and attempted to justify the closure of the proceeding by the awarding of dismissal of service to the delinquent. Further taking this Court to the consideration of the Appellate Authority, Mr.Kanungo also contended that there is nothing left to be considered by this Court as this Court cannot sit as a second appellate authority involving a disciplinary proceeding. It is in the circumstance, Mr.Kanungo, learned Additional Government Advocate prayed for dismissal of the Writ Petition.

6. Hearing the rival contentions of the Parties, this Court finds, coming to consider the submission of the respective Counsel on the first limb of argument that the enquiry suffers on account of non-compliance of natural justice as well as not providing subsistence allowance as a minimum support to have the defence by the delinquent, this Court on perusal of the recording of the Enquiring Officer nowhere finds, there is any material to supply the document as per the asking of the delinquent. It is at this stage of the matter, from perusal of the Enquiring Officer's observation, this Court again from two different orders finds, there has been clear recording of the allegation of the Petitioner regarding non- payment of subsistence allowance becoming an impediment on the part of the delinquent in participating in the disciplinary proceeding. Further this Court finds, there is recording of the Enquiring Officer that enquiry was closed under the presumption that the delinquent had nothing to defend his case for his unable to file his defence. It is at this stage, this Court also the delinquent is no more, his legal heirs a1so brought on record to defend the case, though finds, there is a serious defect in the completion of the disciplinary proceeding right from the enquiry stage but however keeping in view that there is already death of the delinquent in the meantime, there will be no purpose served in interfering with such enquiry report and the remand order will not facilitate the re-enquiry in absence of the delinquent presently. This Court, therefore, is not inclined to entertain the first limb of argument of the learned counsel for the Petitioner.

7. Coming to consider the second limb of argument advanced by the learned counsel for the Petitioner, this Court on perusal of the enquiry report submitted by the Enquiry Officer forming part of the second show cause notice by the Enquiring Officer in submitting finds from his report at Page-40 of the Brief reads as follows:-

> "Hence, I recommend (1) to recover the amount for Rs.1,45,844.98 from the delinquent.
>
> (2) Two increments with cumulative effect may be withheld.
>
> (3) He may not be posted in a seat to handle Government money."

8. Looking to the second show cause notice at Annexure-5, this Court finds, the second show cause notice did not indicate regarding the recommendation of the Enquiring Officer.It is on the other hand, the delinquent has been asked to submit show cause as to why he should not be dismissed from service misappropriation of heavy Government cash,

irregular maintenance of Records and disobedience order of the Superior Authority. This Court is of the clear view that since the Enquiring Officer had recommended the punishment in a particular manner and for the Disciplinary Authority differing from the recommendation of the Enquiring Officer, it was incumbent on the Disciplinary Authority that in the event it was to differ with the recommendation of the Enquiring Officer to at least observe in a proceeding its different view and to forward a show cause to the delinquent with a copy of such different view for his response on the decision of the Competent Authority on different punishment rather than the punishment recommended by the Enquiring Officer, in absence of which this Court finds, the second show cause notice remains unsustainable.

9. This Court here takes into account certain decisions of the Hon'b1e apex Court, which decided as follows :-

A) In the case of ***Punjab National Bank & ors. vrs. Kunj Behari Misra : (1998) 7 SCC 84,*** Hon'b1e apex Court in Paragraph-17 observed as follows:-

> "17. These observations are clearly in tune with the observations in *Bimal Kumar Pandit's* case quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the inquiry officer had given an adverse finding, as per *Karunakar's* case the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the inquiry officer. It will not stand to reason that when the finding in favor of the delinquent officers is proposed to be over-turned by the disciplinary authority then no opportunity should be granted. The first stage of the inquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the inquiring officer holds the charges to be proved then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the inquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."

B) In the case of ***Deputy General Manager (Appellate Authority) & anr. Vrs. Ajai Kumar Srivastava : (2021) 2 SCC 612***, Hon'ble apex Court in Paragraphs-26 & 33 came to observe as follows:-

> "26. It is well settled that where the enquiry officer is not the disciplinary authority, on receiving the report of enquiry, the disciplinary authority may or may not agree with the findings recorded by the former, in case of disagreement, the disciplinary authority has to record the reasons for disagreement and after affording an opportunity of hearing to the delinquent may record his own findings if the evidence available on record be sufficient for such exercise or else to remit the case to the enquiry officer for further enquiry.
>
> 27. The submission which was made in regard to the note of disagreement not being served upon the respondent delinquent as to Charge no. 1 is concerned, this Court do find substance to hold that the disciplinary authority on receiving the report of enquiry, if was not in agreement with the finding recorded by the enquiry officer, was under an obligation to record its reasons of disagreement and call upon the delinquent for his explanation in the first place before recording his finding of guilt and undisputedly the procedure as prescribed by law was not followed and that has caused prejudice to the respondent and indeed it was in violation of the principles of natural justice. We are of the considered view that so far as the finding of guilt recorded by the disciplinary authority in reference to Charge No. 1 is concerned, that could not be held to be justified in holding him guilty."

10. In the above findings of this Court and keeping in view the settled position of law on this particular issue, this Court declaring Annexure-5 as bad in law sets aside the same. As a consequence, the order of punishment, vide Annexure-7 as well as the order of the Appellate Authority, vide Annexure-8 must also go.

11. Keeping in view that the second show cause notice is already set aside by this Court and as a consequence of setting aside the second show cause notice, the consequential order of punishment and the order of the Appellate Authority, in natural course the matter should go back to the Disciplinary Authority for considering the awarding of punishment on the delinquent in terms of the recommendation of the Enquiring Officer particularly keeping in mind that the enquiry cannot be re-opened for the death of the delinquent in the meantime.

12. It is accordingly while allowing the Writ Petition in setting aside the second show cause notice under Annexure-5, the order of punishment under Annexure-7 and the consequential order of the Appellate Authority remits the matter to the Disciplinary Authority to consider to close the disciplinary proceeding at least in terms of the recommendation of the Enquiring Officer and to work out retiral dues of the delinquent accordingly. The entire exercise shall be completed by the Disciplinary

Authority within a period of one month from the date of communication of this order. For therer is huge delay in deciding such matter, this Court also observes, since there is alternate punishment to the delinquent and his Legal Heirs are likely to get financial benefit as a consequence of this order, the Legal Heirs will also be entitled to interest on the arrear including pension, if available, minimum @ 5% per annum all through. The payment may be made within a period of one and half months from the date of communication of this order in favour of the Wife of the deceased delinquent as the Custodian of the benefit. The Disciplinary Authority while taking decision in the matter shall also keep in mind the acquittal of the delinquent involving disposal of G.R. Case No.51/1996.

13. Writ Petition succeeds. No costs.

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**2022 (I) ILR – CUT- 145**

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

CRLLP NO. 29 OF 2021

**KUTTAM KISHORE SARJANSINGH** ……..Petitioner

.V.

**BIKASH NAYAK** ……..Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(4) – Grant of leave to file appeal against the order of acquittal – Principles – Held, an order of acquittal should not be disturbed in an appeal unless it is perverse or unreasonable – There must exist very strong and compelling reasons to interfere in the order of acquittal – If two views are possible, the appellate court should be slow in disturbing the finding of fact of the trial court simply because it feels that it would have taken a different view.** (Para 10)

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

1. (2013) 56 OCR 829 : Ramesh Chandra Nayak .Vs. Shivam Finance.
2. 2010(I) OLR (S.C.) 354 : K.K. Ahuja Vs. V.K.Vora and another.
3. (2007) 6 SCC 555 : C.C. Alavi Hazi Vs. Palapetty Muhammed & Ors.
4. (2006) 6 SCC 456 : D.Vinod Shivappa Vs. Nanda Belliappa.
5. (1999) 7 SCC 510 : K.Bhaskaran Vs. Sankaran Vaidhyan Balan & Anr.
6. A.I.R. 1983 SC 308 : Babu Vs. State of Uttar Pradesh.
7. (2008) 10 SCC 450 : Ghurey Lal Vs. State of Uttar Pradesh.
8. (2018) 5 SCC 790 : Bannareddy Vs. State of Karnatak.

For Petitioner : Mr. Himanshu Bhusan Dash
For Opp. Party : None

JUDGMENT Date of Hearing and Order : 04.12.2021

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

Heard Mr. Himansu Bhusan Dash,learned counsel for the petitioner.

2. The petitioner Kuttam Kishore Sarjansingh ,who is the complainant, has filed this application under section 378(4) of Cr.P.C for grant of leave to file appeal against the impugned judgment and order dated 23.08.2021 passed by learned Chief Judicial Magistrate, Jagatsinghpur in I.C.C. case No.337 of 2015/T.R. No.73 of 2021 in acquitting the opposite party Bikash Nayak of the charge under section 138of Negotiable Instrument Act,1881(hereafter 'N.I. Act').

3. The case of the complainant-petitioner is that he and the opposite party were the business men and they had good relationship with each other. On good faith, the petitioner lent a sum of Rs.1,30,000/- (rupees one lakh thirty thousand) to the opposite party on the assurance of the later to repay the same as soon as possible. To discharge the liability, the opposite party issued a cheque bearing No.315823 of Rs.1,30,000/- on 27.06.2015 to the petitioner, which was payable at Indian Bank, Jagatsinghpur Branch in respect of his account No.608764138.The petitioner deposited the said cheque in Indian Bank, Jagatsinghpur Branch for Collection but the cheque was dishonoured due to insufficient fund in the account of the opposite party on 16.07.2015.The petitioner issued a demand notice to the opposite party through his advocate on 24.07.2015 for payment of the amount. After receiving the demand notice, since the opposite party failed to pay the amount mentioned in the cheque within the statutory period, the complaint petition was filed on 19.08.2015 against the opposite party and accordingly, cognizance of offence under section 138 of the N.I. Act was taken.

4. The petitioner examined himself in the trial cour4t as P.W.1 and proved certain documents like the dishonoured cheque bearing No.315823 dated 27.06.2015 marked as Ext.1, deposit slip marked as Ext.2,dishonour memo marked as Ext.3,intimation slip marked as Exp.4,pleader notice dated 24.02.2015 marked as Ext.5 and registered postal receipt marked As Ext.6.

5. The defence plea was one of denial and it was further pleaded that he had no liability towards the petitioner and the petitioner was his partner and

without his knowledge ,the petitioner had taken his bank cheque, which was not containing his signature and the cheque was misutilised by the petitioner in order to extract money from him.

6. The learned trial court formulated the points of determination are as follows:-

i. Whether the accused-Bikash Nayak had issued a cheque bearing No.315823 dated 27.06.2015 worth Rs.1,30,00/- drawn on Indian Bank, Jagatsinghpur Branch,in favour of Kutam Kishore Sarjansingh (complainant) in order to discharge his liability?

ii. Whether the said cheque was dishonoured due to insufficient fund?

iii. Whether the statutory provisions of N.I Act being comply by the complainant in the present case?

7. The learned trial court after analyzing the evidence on record came to hold that from the evidence of the complainant-petitioner and admission of the accused-opposite party, it is crystal clear that cheque in question belonged to the opposite party. Learned trial court further held that from the case record it appeared that though the opposite party had taken several inconsistent pleas in respect of the issuance of cheque and existence of liability but he had not adduced any oral testimony nor documentary evidence on his behalf in support of his plea. It was further held that the defence had vividly cross examined the petitioner but unable to elicit anything from the mouth of the petitioner to disbelieve his evidence or to discredit it that the petitioner had not given the alleged amount and that the opposite party had no liability towards the petitioner and that 9inorder top establish the defence plea, the opposite party neither adduced any oral evidence nor documentary evidence. Learned trial court further held that the opposite party had not intimated the bank to stop payment after loss of cheque and therefore, the plea taken by the opposite party is not believable one without any rebuttal evidence adduced by him. Learned trial court further held that the opposite party could not substantiate the plea taken by him and has not rebutted the presumption raised under section.118(A) and 139 of the N.I. Act and thus ,it was held that the opposite party had issued the cheque in favour of the petitioner in order to discharge his liability. Learned trial court then discussed about the legal aspect after verifying the oral as well as documentary evidence and came to hold that the cheque was issued in favour of the petitioner on 27.06.2015 which was presented in the bank by the petitioner for collection of the amount on 15.07.2015 which was

within statutory period. The intimation came from the bank about the dishonour of the cheque on account of insufficient fund in the account of the opposite party and the petitioner received the same on 16.07.2015 and from the evidence it appears that the demand notice was issued by the petitioner through his advocate to the opposite party on 24.07.2015 which was also within statutory period. Then the learned trial court observed that the evidence of the petitioner remained silent as to the date of service of notice on the opposite party. It was held that giving of notice is not relevant but receipt of the same by the drawer and then his failure to make payment within 15 days there after gives rise to causer of action and since there was no specific pleading and evidence to that effect adduced by the petitioner during trial, the learned trial court was pleased to hold that it can not be said that the demand notice was duely served upon the opposite party with in due time and that the opposite party held to discharge his liability.

The learned trial court placed reliance in the case of ***Ramesh Chandra Nayak -vrs.- Shivam Finance reported in (2013) 56 Orissa criminal reports 829*** wherein it was held that unless the ingredients of the offence as mentioned under section 138 of the N.I. Act are satisfied, the proceeding so initiated against the accused cannot be sustainable. Further reliance was placed in the case of ***K.K. Ahuja –vrs.- V.K.Vora and another reported in 2010(I) Orissa Law Reviews (S.C.) 354***, where in it was held that penal statues are to be constructed strictly and there is no question of inferential or implied compliance.

Learned trial court ultimately concluded that the evidence on record though indicates that the petitioner was able to prove the factual aspect that the opposite party had legal liability towards him and to discharge of the said liability the opposite party issued a cheque in his favour, but the petitioner is unable to prove the legal aspects as mentioned in section 138(c) of the N.I. Act and accordingly, the opposite party acquitted of the charge.

8. Learned counsel for the petitioner fairly submitted that neither in the complaint petition nor in the evidence, the petitioner has stated anything as to what happened to the demand notice, which was issued to the opposite party on 24.07.2015. However, he placed reliance in the case of ***C.C. Alavi Hazi –vrs.-Palapetty Muhammed and others reported in (2007) 6 Supreme court cases 555***. In the said case, a reference was made by a two-judge Bench of Hon'ble Supreme Court to the larger Bench to adjudicate the

question of service of notice in terms of clause(b) of proviso to section 138 of the N.I. Act and the specific question was as to whether in absence of any averments in the complaint to the effect that the accused had a role to lay in the matter of non-receipt of legal notice or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of the hon'ble Supreme court in the case of ***D.Vinod Shivappa –vrs.- Nanda Belliappa reported in (2006) 6 supreme court cases 456.***The three-Bench of the Hon'ble Supreme court in that case discussed the provision under section 27 of the General clauses Act (hereafter 'Act') and it was held that when a notice was sent by registered post and was returned with a postal endorsement refused or not available in the house or house closed or addressee not in station, due service has to be presumed. In view of the presumption available under section 27 of the Act, it is not necessary to aver in the complaint under section 138 of the N.I. Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved. The court came to hold that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filling a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within fifteen days of receipt of summons from the court in respect of the complaint under section 138 of the N.I. Act, make payment of the cheque amount and submit to the court that he had made payment within fifteen days of receipt of summons ( by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within fifteen days of receipt of the summons from the court along with the copy of the complaint under section 138 of the N.I. Act, cannot obviously contend that there was no proper service of notice as required under section 138 of the N.I Act, by ignoring statutory presumption to the contrary under section 27 of the act and section 114 of the Evidence Act. The court further held that any other interpretation of the proviso would defeat the very object of the legislation. The Court placed reliance in the case of ***K.Bhaskaran – vrs.- Sankaran Vaidhyan Balan and Another reported in (1999) 7 Supreme Court cases 510*** that if the giving of notice in the context of clause(b) of the proviso was the same as the receipt of notice, a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of section 138 of the N.I. Act. The court then consider the factu7al aspect and averments taken in the complaint objection which was to the effect that the complainant issued lawyers notice intimating the dishonour of cheque and demanded payment

on 04.08.2001 and the same was returned on 10.08.2001 saying that the accused was out of station. It was held that true that there was no averment that the notice was sent at the correct address of the drawer of the cheque by registered post acknowledgment due, but the returned envelope was annexed to the complaint and it thus formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that the addressee was abroad. Therefore the court in the factual scenario held that the requirements of section 138. Of the N.I Act had been sufficiently complied with.

9. In the case in hand, however the factual scenario is completely different than the case of ***C.C. Alavi hazi*** (Supra).Learned trial court has rightly observed that neither in the complaint petition nor in the evidence, the petitioner has stated anything as to what happened after the demand notice was issued to the accused opposite party on 24.07.2014 which was within statutory period. Therefore, I am of the humble view that the learned trial court has rightly held that in absence of specific pleading and evidence to that effect, it can't be said that demand notice was duly served upon the opposite party with in stipulated time and the opposite party failed to discharge his liability. As stated by the learned counsel for the petitioner the complaint petition was filed on 15.08.2015.Therefore, I am of the humble view that the trial court has not erred in holding that the complainant petitioner is unable to prove the legal aspect has mentioned in section 138(D) of the N.I. Act.

10. Law is well settled as held in case of ***Babu -vrs.- State of Uttar Pradesh reported in A.I.R. 1983 Supreme Court 308*** that in appeal against acquittal, if two views are possible, the appellate court should not interfere with the conclusions arrived at by the trial court unless the conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the appellate court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial judge has the advantage of seeing and hearing the witness and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate court, therefore, should be slow in disturbing the finding of fact of the trial court and if two views are reasonably possible on the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it.

In case of ***Ghurey Lal –vrs.- State of Uttar Pradesh reported in (2008) 10 Supreme Court cases 450***, it is held as follows:-

> "75. The trial court has the advantages of watching the demeanour of the Witness who have given evidence, there fore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable."

In case of ***Bannareddy –vrs.- State of Karnatak reported in (2018) 5 Supreme court cases 790***, it is held as follows:-

> "10...It is well settled principle of law that the High court should not interfere in the well reasoned order of the trial court which has been arrived at after proper appreciation of the evidence. The High court should give due regard top the findings and the conclusions reached by the trial court unless strong and compelling reasons exist in the evidence itself which can dislodge the findings itself."

Thus, an order of acquittal should not be disturbed in appeal under section 378 of Cr.P.C. unless it is perverse or unreasonable. There must exist very strong and compelling reasons in order to interfere with the same. Findings of fact recorded by a court can be held to be perverse if the same have been arrived at by ignoring or excluding relevant materials on record or by taking into consideration irrelevant/inadmissible material or if they are against the weight of evidence or if they suffer from the vice of irrationality.

In view of the forgoing discussions, I find no illegality or perversity in the impugned judgment. Therefore, I am not inclined to grant leave to the petitioner to prefer appeal against the impugned judgment and order of acquittal. Accordingly, the leave petition stands dismissed.

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**2022 (I) ILR – CUT- 151**

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

I.A. NO. 836 OF 2021
(Arising out of CRLA No.355 of 2019**)**

**PRUTHWIRAJ LENKA** …….. Appellant/Petitioner

.V.

**STATE OF ODISHA** (Vig.) ……Respondent/Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 389 – Stay of conviction – Scope and principles to be followed – Indicated.**

*"In view of the ratio laid down in the aforesaid decisions and keeping in view the submissions raised by the learned counsel for the respective parties, it is to be seen whether it is a very exceptional case for grant of stay of order of conviction? What the evil that is likely to befall on the petitioner, if the order of conviction is not stayed? Whether failure to stay the order of conviction would lead to injustice and irreversible consequences?*

*Law is well settled that possible delay in disposal of the appeal and/or presence of arguable points in the appeal by itself may not be sufficient in staying the order of conviction of the trial Court without assigning any special reasons. An order granting stay of conviction is not the Rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative. The petitioner having been convicted under section 477-A of the Indian Penal Code which deals with falsification of accounts has already been dismissed from service since more than two years back. This is not a rare case where the stay of conviction should be granted."* *(Para 8)*

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

1. 2010 (Supp.-I) OLR 87 : Harihar Mishra Vs. Republic of India.
2. 2009 (Supp.-II) OLR 226 : Dr. Shailendra Kumar Tamotia Vs Republic of India.
3. 2013(I) OLR 1081 : Bedadyuti Samantaray Vs.State.
4. (2001) 21 OCR (SC) 325 : K.C. Sareen Vs. C.B.I., Chandigarh.
5. (2012) 12 SCC 384 : State of Maharashtra through C.B.I. Vs. Balakrishna Dattatrya Kumbhar

For Petitioner : Mr. Asok Mohanty (Sr. Adv.)
For Opp. Party : Mr. Sanjay Kumar Das Standing Counsel (Vigilance)

ORDER Date of Order: 03.01.2022

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

The appellant/petitioner Pruthwiraj Lenka has filed this interim application under section 389 of Cr.P.C. for staying the order of conviction passed against him by the learned Special Judge (Vigilance), Phulbani in G.R. Case No. 74 of 2013 (v) (T.R. No.74 of 2013) vide impugned judgment and order dated 16.05.2019 under section 477-A of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for one year and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for a further period of three months.

2. The petitioner was the Technical Consultant of K. Nuagaon Block, Office of the D.P.C., D.P.E.P., S.S.A. in the district of Kandhmal. The co-accused Basant Kumar Mohanty was the Headmaster of Asumadhi Primary School (hereafter 'the school') for the period from 10.05.2002 to 28.02.2008 and co-accused Kantheswar Pradhan was the SEC President of the school for the period 31.08.2004 to 02.04.2011. The petitioner along with co-accused Basanta Kumar Mohanty and Kantheswar Pradhan were charged under section 13(1)(c) punishable under section 13(2) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and sections 409, 120-B, 201 of the Indian Penal Code on the accusation that in between the year 2005 to 2007, they dishonestly or fraudulently misappropriated or otherwise converted for their own use Rs.75,798/- (rupees seventy five thousand seven hundred ninety eight) from the school account sanctioned for construction of one additional classroom in the school and they committed criminal breach of trust in respect of the property/amount so entrusted. The petitioner was charged separately under section 477-A of the Indian Penal Code on the further accusation that during the period from 2005 to 2007, he willfully with intention to defraud entered false measurements in the Measurement Book No.144, which was received by him on behalf of his employer D.P.C., S.S.S., Kandhamal and was under his possession.

The learned Trial Court acquitted the co-accused Kantheswar Pradhan of all the charges and he was set at liberty. The petitioner and co-accused Basanta Kumar Mohanty were acquitted of the charges under sections 120-B and 201 of the Indian Penal Code. The petitioner was acquitted of the charges under section 409 of the Indian Penal Code and section 13(1)(c) punishable under section 13(2) of the 1988 Act. The co-accused Basanta Kumar Mohanty was found guilty under section 409 of the Indian Penal Code and section 13(1)(c) punishable under section 13(2) of the 1988 Act. The petitioner was found guilty only under section 477-A of the Indian Penal Code.

3. The prosecution case, in short, is that pursuant to an allegation of misappropriation of government money in construction of one additional classroom of the school under K. Nuagaon Block in the district of Kandhamal, a vigilance enquiry was taken up by Santosh Kumar Samantara (P.W.8), Inspector of Vigilance, Berhampur Division. During enquiry, it was found that in the year 2004-05, for construction of one additional classroom of the school, a sum of Rs.1,50,000/- was approved by D.P.C., D.P.E.P.,

Kandhamal. By that time, the co-accused Basanta Kumar Mohanty was the Headmaster of the school as well as Secretary of the School Education Committee and co-accused Kantheswar Pradhan was the President of the School Education Committee. Both of them entered into an agreement with D.P.C., D.P.E.P., Kandhamal to execute the construction work and accordingly, work order letter no.470(A) dated 05.03.2005 (Ext.2/3) was issued in their favour. A joint Savings Bank Account vide A/c. No.8032 was opened in the name of the school at UCO Bank, Raikia Branch, in which account an amount of Rs.1,30,000/- was credited towards execution of the aforesaid work. It was further found that both the co-accused President and Secretary withdrew Rs.1,30,000/- in between 15.04.2005 to 12.02.2007 from the D.P.E.P. fund and started construction of the work. They constructed the building up to roof level and then stopped the work since 2007. Thereafter, the co-accused Basanta Kumar Mohanty retired from his service on 29.02.2008 and the construction work remained as such. In spite of repeated reminders of the D.P.C., D.P.E.P., Kandhamal, the work did not proceed further. As per the direction of the D.P.C., the petitioner measured the work done and valued it at Rs.59,642/-. However, on the requisition of Enquiring Officer, when the building was technically inspected on 26.11.2010, the technical inspection team calculated the cost of the work done to be Rs.54,202/- and as such it was held that the petitioner found to have made some false entries in the measurement book (Ext.3) by showing inflated measurements. As the technical inspection team calculated the value of the work done at Rs.54,202/- against the sanctioned and received amount by the accused persons to the tune of Rs.1,30,000/-, the Enquiring Officer (P.W.8) lodged an F.I.R. (Ext.15) on 28.11.2011 with the Superintendent of Police, Vigilance, Berhampur alleging misappropriation of Rs.75,798/- by the co-accused Basanta Kumar Mohanty in connivance with the petitioner, who intentionally entered excess measurements in the measurement book by showing excess work done value of Rs.5,440/-.

After the F.I.R. was lodged, investigation was taken up by P.W.8 as per the direction of the Superintendent of Police, Vigilance, Berhampur, who in course of his investigation, examined the witnesses, seized the case records for the work, measurement book, cheque issue registers of the D.P.C., S.S.A., Kandhamal, Resolution Register, paid vouchers of S.B. account vide no.8032 of UCO Bank, Raikia. He found in course of his investigation that the accused persons have not submitted the account register, register of procurement and utilization of materials, visitors' book to

the successor of the co-accused Basanta Kumar Mohanty at D.P.C. Office in order to cause disappearance of evidence. It was also found during course of investigation that neither the co-accused Basanta Kumar Mohanty nor co-accused Kantheswar Pradhan produced any documents in support of purchase of any material, utilization register, cash book as per the terms and conditions of the agreement and all the accused persons in connivance with each other misappropriated a sum of Rs.75,798/- sanctioned for construction of one additional classroom of the school.

4. The learned trial Court in the impugned judgment has been pleased to hold that the prosecution has failed to bring home the charges under sections 409/120-B of the Indian Penal Code and section 13(1)(c) punishable under section 13(2) of the 1988 Act against the petitioner as there is no evidence on record to show that the petitioner was in charge of the project or in any manner had dominion over the government money sanctioned for construction of the building. It was further held that there is nothing on record to prove that the accused persons caused disappearance of evidence to screen them from the punishment and that the I.O. has neither examined the successor of the co-accused Basanta Kumar Mohanty nor it is in his evidence that despite he searched for the registers and records, it was not made available at the school. It was further held that in the year 2010, when the enquiry was conducted, the co-accused Basanta Kumar Mohanty had already retired from his service and hence, there was no scope on his part to cause disappearance of the records. Learned trial Court further observed that merely because the letter (Ext.16) goes to show that the co-accused Basanta Kumar Mohanty had not submitted the records to D.P.C., it cannot be said that the accused persons had caused disappearance of the evidence to screen themselves from punishment and accordingly, it was held that the prosecution has failed to substantiate the charge under section 201 of the Indian Penal Code against all the accused persons.

The learned trial Court, however, held that the petitioner was employed as a Technical Consultant under K. Nuagaon Block and he was issued with M.B. No.144 marked as Ext.3 which was of the D.P.C., S.S.A., Kandhamal and he being employed to enter measurement in the measurement book on behalf of the D.P.C., S.S.A., Kandhamal under whom he was employed, made false entries of inflated measurement by showing excess work done value of Rs.5,440/- willfully with an intent to defraud the government. It was further held that the prosecution has proved all the

essential ingredients of the offence under section 477-A of the Indian Penal Code against the petitioner and accordingly, the learned trial Court found him guilty of such charge. Since the petitioner was found to have been resigned from his service when the charge sheet was submitted, it was held that no sanction order was required to launch prosecution against him.

5. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner strenuously contended that the finding of the learned trial Court in paragraph-16 of the impugned judgment that the petitioner made false entries in the measurement book with an intent to defraud the government is not sustainable when the petitioner was found not guilty under section 120-B of the Indian Penal Code so also under section 13 (2) read with section 13(1)(c) of the 1988 Act after arriving at a conclusion that there was no connivance of the petitioner with the co-accused persons. The alleged act of deceit to obtain an advantage which might relate to some future occurrence or in other words, might be prospective nature is not at all possible. He further contended that the mandate demands to establish beyond all reasonable doubt that false entries were made with intent to defraud, but in absence of any connivance, the petitioner should not have been convicted for making mere wrong entries in the measurement book and as such the intent to defraud government is not made out. It is further argued that the petitioner should have been acquitted by the application of doctrine of preponderance of probabilities as convincing and cogent materials are lacking to indicate that the wrong entries in the measurement book were made with intent to falsify the accounts for defrauding. He further argued that the learned trial Court has failed to appreciate the peculiar facts and circumstances of the case in proper perspective that by the time the petitioner came to the picture, the entire sanctioned amount had already been withdrawn for the purpose of incurring expenditure since long and the co-accused had retired from service much earlier and the measurement book was issued thereafter and therefore, at that stage, there was no scope for connivance or misappropriation or to have an intent to defraud by way of making wrong entries. He further contended that the learned trial Court also took a view that had the petitioner agreed to misappropriate the unutilized amount of Rs.75,798/- with the accused headmaster, he could have inflated the measurement to the tune of such amount. It was further contended that in absence of any acceptable reasoning/findings as to why the petitioner is found guilty under section 477-A of the Indian Penal Code after being acquitted of the charges under sections 409/120-B/201 of the Indian Penal Code so also under section 13(2)

read with section 13(1)(c) of the 1988 Act, the impugned judgment and order of conviction against the petitioner is perverse and suffers from non-application of mind and cannot be sustained in the eye of law. Mr. Mohanty argued that since on the face of the impugned judgment, the petitioner has a very good case for acquittal and the appeal being of the year 2019 is not likely to be taken up for hearing in the near future, unless the order of conviction is stayed, the petitioner would suffer irreparable loss and injury. Reliance was placed on the cases of **Harihar Mishra -Vrs.- Republic of India reported in 2010 (Supp.-I) Orissa Law Reviews 87**, **Dr. Shailendra Kumar Tamotia -Vrs.- Republic of India reported in 2009 (Supp.-II) Orissa Law Reviews 226** and **Bedadyuti Samantaray -Vrs.- State reported in 2013(I) Orissa Law Reviews 1081**.

6. Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department on the other hand vehemently opposed the prayer for stay of order of conviction and also filed his objection to such petition. It is contended that the learned trial Court after going though the evidence on record has rightly found the petitioner guilty and since stay of conviction should be exercised only in exceptional circumstances and in rare cases where failure to stay conviction would lead to injustice and irreversible consequences, nothing having been pointed out by the learned counsel for the petitioner in that respect, no favourable order should be passed in favour of the petitioner. It is further contended that delay in disposal of the appeal and the submission that there are good arguable points by itself are not sufficient to grant stay of order of conviction. It is further contended that the petitioner, who was the Ex-technical Consultant in the office of the D.P.C., D.P.E.P., S.S.A., Kandhamal and was working as the Asst. Executive Engineer under N.H. Division, Berhampur, Ganjam was dismissed from service as per the office order dated 15.10.2019 of Govt. of Odisha, Works Department after he was found guilty by the learned trial Court. The copy of the dismissal order has been annexed as Annexure-A to the objection affidavit filed by the respondent/opposite party. The learned counsel further contended that laxity in corruption cases would encourage corruption and therefore, the misc. case should be dismissed. He placed reliance in the case of **K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in (2001) 21 Orissa Criminal Reports (SC) 325** and **State of Maharashtra through C.B.I. -Vrs.- Balakrishna Dattatrya Kumbhar reported in (2012) 12 Supreme Court Cases 384**.

7. First, let me deal with the cases which were placed by the learned counsel for the respective parties on the ambit and scope of section 389(1) of Cr.P.C. relating to stay of order of conviction by the appellate Court.

In the case of **K.C. Sareen** (supra), it is held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance.

In the case of **Balakrishna Dattatrya Kumbhar** (supra), it is held as follows:-

> "15. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The Court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

In the case of **Harihar Mishra** (supra), it is held as follows:-

> "10. From the discussion as aforesaid, five broad principles emerge, which, in my considered view, is a guide so far as exercise of discretion under section 389(1) Cr.P.C. in relation to stay/ suspension of conviction is concerned. They may be called the 'Panchasheel' for exercise of discretion under section 389(1) Cr.P.C. for suspension of an order of conviction. They are-
>
> (i) The appellant, who seeks interference of the appellate court under section 389(1) Cr.P.C. so far as the order of conviction is concerned, must come with clean hands, and with due frankness and fairness specifically draw attention of the appellate Court to the specific consequences he is going to suffer, if discretion by the Court is not exercised in his favour.
>
> (ii) Such discretion by the appellate Court may be exercised in favour of the appellant only in rare and exceptional cases depending upon the special facts of the case and not as a matter of course.

(iii) Such discretion may be exercised only where failure to stay the conviction would lead to injustice and irreversible consequences. The Court has to examine carefully on the basis of materials supplied and materials available on record as to whether the consequences sought to visit the appellant at present or on a future date is/are real.

(iv) While exercising the discretion, the appellate court has a duty to look at all the aspects including ramification of keeping the conviction in abeyance, and it is under further obligation to support its order for reasons to be recorded by it in writing.

(v) In case of public servants convicted of corruption charges, the discretion should not be exercised.

In the case of **Dr. Shailendra Kumar Tamotia** (supra), it is held that the appellate Court is duly empowered under section 389(1) of Cr.P.C. to grant stay of conviction but only in an 'exceptional case' where 'the ramification and the consequences' are such which may justify the exercise of such authority. Such power is not to be casually exercised and it is necessary for the Court to look into the 'special facts' of the case if any, and not to grant by way of a routine order.

In the case of **Bedadyuti Samantaray** (supra), it is held that the power to stay conviction in terms of section 389 of Cr.P.C. should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences.

8. In view of the ratio laid down in the aforesaid decisions and keeping in view the submissions raised by the learned counsel for the respective parties, it is to be seen whether it is a very exceptional case for grant of stay of order of conviction? What the evil that is likely to befall on the petitioner, if the order of conviction is not stayed? Whether failure to stay the order of conviction would lead to injustice and irreversible consequences?

Law is well settled that possible delay in disposal of the appeal and/or presence of arguable points in the appeal by itself may not be sufficient in staying the order of conviction of the trial Court without assigning any special reasons. An order granting stay of conviction is not the Rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative.

The fact remains that on the basis of impugned judgment and order of conviction, the petitioner has already been dismissed from service since more than two years back. The petitioner has been convicted under section 477-A of the Indian Penal Code which deals with falsification of accounts. The ingredients of the offence are as follows:-

> **(i)** The person coming within its purview must be a clerk, officer, or servant or acting in the capacity of a clerk, officer, or servant
>
> **(ii)** He must willfully and with intent to defraud-
>
> **(a)** destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to, or is in possession of, his employer; or has been received by him for or on behalf of his employer; or
>
> **(b)** make or abet the making of any false entry in, or omit or alter or abet the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security, or account.

'Willfully' means that the act is done deliberately and intentionally, not by accident or inadvertency, so that the mind of the person who does the act goes with it. The term 'with intent to defraud' means either an intention to deceive and by means of deceit to obtain an advantage or an intention that injury should befall some person or persons. Advantage which is intended must relate to some future occurrence or, in other words, must be of a prospective nature. Making false entries in the measurement book in order to conceal fraudulent or bogus acts, falls within the purview of section 477-A of I.P.C. If an accused makes fictitious entries in the measurement book though in fact he had not measured up the work with intent that the contractor's bill might be passed without actual measurement, his act amounts to a 'fraudulent falsification of account'. It is necessary to show not merely false entries in the books of accounts, but that such false entries were made with intent to defraud. Even if the intention with which the false entries were made was to conceal a fraudulent or dishonest act previously committed, the intention will be to defraud. Making a false document with a view to enable the persons who committed misappropriation to retain the wrongful gain which they had secured also amounts to the commission of a fraud and the act brings the case under this section.

The learned trial Court while considering the role played by the petitioner in paragraph 16 of the impugned judgment has been pleased to hold that M.B. No.144 marked as Ext.3 was issued to the petitioner by the

Financial Consultant, SSA, Kandhamal to enter the measurement of the work done. The petitioner measured the work done for Rs.59,642/-. The entries made by the petitioner and his signature in the measurement book were proved by P.W.1. On the other hand, P.W.6, Asst. Engineer at K. Nuagaon Block who along with others technically inspected the additional class room building work and prepared the technical inspection report (Ext.13) and the map with findings (Ext.13/1) stated in his evidence that the final measurement of the work done came to Rs.54,202/-. Thus, the work done value as measured by the petitioner as per Ext.3 did not tally with the work done value as assessed by P.W.6 in Ext.13. The learned trial Court analyzed the evidence of P.W.6 carefully and found that the plinth bent thickness has been given as 6" instead of 4" in M.B. No.144 Page No.05, R.R. stone masonry third footing height has been given as 2' instead of 1' 6" actual in M.B. No.144, page No.04 and Leveling Course with C.C.124 has not been done, but given in item no.07 of M.B. No.144, page no.07 by the petitioner. The learned trial Court accepted the evidence of P.W.6 coupled with the map with findings recorded in Ext.13/1 and held that the petitioner has made false entries in the M.B. Since the work done value ascertained by the petitioner is for Rs.59,642/- against the actual work done value of Rs.54,202/- as opined by the Technical Inspection Team and mentioned in Ext.13, the learned trial Court found that the petitioner had shown excess work done value of Rs.5440/-. If the work doe value entered by the petitioner in M.B. was accepted, there would be loss of Rs.5440/- to the Govt./State Exchequer. The learned trial Court held that the wrong committed by the petitioner cannot be said to be unintentional and result of miscalculation, rather appears to be willful and intentional. Therefore, it was held that with an intent to defraud the Govt., the petitioner made false entries in the M.B. which was received by him on behalf of DPC/SSA, Kandhamal, under whom he was employed as Technical Consultant.

The learned trial Court in paragraph no.22 of the impugned judgment further held that the petitioner was working as Technical Consultant under K. Nuagaon Block. This factum is also proved by his bio-data (Ext.5) proved through P.W.3. Ext.5 goes to show that he was posted as Technical Consultant of K. Nuagaon Block from the period from 17.01.2006 to 30.11.2011. It was also held that the petitioner was issued with the M.B. No.144 marked vide Ext.3, which is of the DCP/SSA, Kandhamal in which he made false entries of inflated measurement and excess work done value willfully with an intent to defraud the government. The Court held that all

the essential ingredients of section 477-A of Indian Penal Code are proved by the prosecution against the petitioner.

After carefully analyzing the finding of the learned trial Court, the submission made by the learned counsel for the respective parties and the evidence on record, at this stage, it cannot be said that it is a case of no evidence against the petitioner. Whether the evidence available on record would be sufficient to uphold the conviction of the petitioner under section 477-A of the Indian Penal Code or on the basis of points raised by the learned counsel for the petitioner particularly in view of his acquittal of other charges, the conviction under section 477-A of the Indian Penal Code would not be sustainable, is to be adjudicated at the final stage when the appeal would be heard on merit. In my humble view, giving finding thereon at this stage is likely to cause prejudice to either of the parties. For the limited purpose of ascertaining whether stay of order of conviction be granted or not, I find that the case is not a very exceptional one for keeping the conviction in abeyance. The consequential order of dismissal of the petitioner from his service having already been passed by the competent authority, the correctness of such order cannot be adjudicated in this petition. The possibility of reinstatement of the petitioner in service in case of staying the order of conviction is not a criteria to grant such interim relief.

Therefore, I am of the humble view that in the facts and circumstances of the case, the relief sought for by the petitioner for staying the order of conviction cannot be granted.

Accordingly, the interim application being devoid of merits, stands dismissed.

By way of abundant caution, I would like to place it on record that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for staying the order of conviction of the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done at the final stage of the hearing of the criminal appeal on merit.

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**2022 (I) ILR – CUT- 163**

**K.R. MOHAPATRA, J.**

W.P.(C) NO. 4542 OF 2002 &189 OF 2020

**MAHANTA BISWAMBAR DASH,**
**CHELLA OF LATE MAHANTA ADHIKARI**
**KRUPASINDHU DAS** …….Petitioner

.V.

**COMMISSIONER, LAND RECORDS AND**
**SETTLEMENT, ODISHA, CUTTACK & ORS**. …….Opp. Parties

**ORISSA SURVEY & SETTLEMENT RULES, 1962 – Rule 34 r/w Section 22(2) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 – Whether the settlement Authority in exercise of power under Rule 34 of Orissa Survey & Settlement Rules can sit over the R.O.R published under section 22(2) of the Orissa consolidation of holdings and fragmentation of land Act, 1972 – Held, No.**

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

1. AIR 1981 SC 1878 : Math Sauna & Ors. .Vs. Kedar Nath @ Uma Shankar & Ors.
2. A.I.R. 1938 PC 195 : Pandit Parma Nand Vs. Nihal Chand & Anr.
3. AIR 1934 Pat 431 : Susil Chandra Sen & Anr. Vs. Gobind Chandra Das & Anr.
4. 1993 (II) OLR 449 : Kusum Jena & Ors. Vs. Nakhi Dei & Ors.
5. 1988 (I) OLR 334 : Sundarmani Bewa & Anr. Vs. Dasarath Parida (dead) and after him Labanya Dei & Ors.

For Petitioner : M/s Mr.N.K. Sahu, B. Swain,M. Das & S.K. Nayak.

For Opp. Parties : M/s P. K.Routray, A. Routray, J. Bhuyan, A. Routray & P.K. Jena (For O.Ps.4 & 5)
Mr. A.K. Nath (For Commr. of Endowments)
Mr. Sarojananda Mishra, Addl. Govt. Adv. (For O.Ps.1 to 3)

ORDER Date of Order : 20.04.2021

***K.R. MOHAPATRA, J.***

These matters are taken up through video conferencing mode.

2. Heard Mr. N.K. Sahoo, learned counsel for the Petitioner, Mr. J. Bhuyan, learned counsel for the Opposite Party Nos. 4 and 5, Mr. A.K. Nath, learned counsel for the Commissioner of Endowments and Mr. S.N. Mishra, learned Addl. Government Advocate for the State-Opposite Party Nos. 1 to 3.

3. The petitioner in these writ petitions seeks to challenge the order dated 24.05.2002 (Annexure-6) passed by the Commissioner, Land Records

& Settlement, Orissa, Cuttackopposite party no.1 in M.R.C. Case Nos.30 and 31 of 1999, wherein the Commissioner exercising power under Section 32 of the Orissa Survey & Settlement Act, 1958 (for short 'the Settlement Act') directed to record the land in question in the name of Sarang Jagannath Matha, (for short 'Matha') represented by the Executive Officer-opposite party no.4.

4. The short question involved in these writ petitions are as to whether the Settlement Authority in exercise of power under Rule 34 of Orissa Survey & Settlement Rules, 1962 (for short 'the Rules') can sit over the R.O.R. published under Section 22(2) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short 'the Consolidation Act').

5. It is submitted by Mr. Sahu, learned counsel for the petitioner that one Kamali Dasi by way of registered sale deeds dated 17.01.1956, 15.01.1969, 12.06.1972 and 09.10.1972 had purchased the land in question from her own source of income. During her lifetime, said Kamali Dasi had executed a registered deed of Power of Attorney and relinquishment in favour of Krupasindhu Das, the original petitioner in W.P.(C) No.4542 of 2002. In the year 1977, said Kamali Dasi died. After the death of Kamali Dasi during settlement operation, the properties left by Kamali Dasi were recorded in the name of Krupasindhu Das under sthitiban status (Annexure-1). During consolidation operation, the land in question was also recorded in the name of said Krupasindhu Das in the R.O.R. published under Section 22 of the Consolidation Act in the year, 1985 (Annexure-2). In the interregnum, the succession of Mahantship of Matha by Krupasindhu Das came to be challenged by the opposite party no.4-Executive Officer of Matha. The matter went up to the Hon'ble Supreme Court and it was decided that said Krupasindhu Das did not succeed as Mahanta of the Matha after death of Nityananda Das. On the basis of the said order passed by the Hon'ble Supreme Court, Mutation Case Nos. 795 and 938 of 1990 were filed by the opposite party no.4 to record the land in the name of Matha. Objection was also filed by said Krupasindhu Das stating that the properties were the exclusive stridhan of Kamali Dasi and after her death the said property was recorded in the name of Krupasindhu Das on the basis of registered Power of Attorney and relinquishment deed executed by Kamali Dasi in favour of Krupasindhu Das. Thus, the Tahasildar, Kendrapara has no jurisdiction to sit over the matter and make any change in the record of right prepared by the

Consolidation Authority. However, Tahasildar, Kendrapara vide his order dated 18.08.1990 (Annexure-4) allowed the mutation case holding as under:

> *"He further contended that the land situated in village Badabaranga and Saranga is his personal property and it has no connection with the Matha. But no document in support of this averment is filed in the Court. The mode of recording of the name of the land owner in Hal Kahata no.27, 55 and 57 is almost same since the O.P. Adhikari Krupasindhu Das has been identified as the disciple of Late Mahanta Nitayananda Das in all the Khatas. Hence, I am not convinced of the fact that the land situated in village Badabaranga and Saranga is the personal property of the O.P."*

6. Assailing the same, said Krupasindhu Das filed Mutation Appeal Nos.9 and 11 of 1990 before the Sub-Collector, Kendrapara, which were allowed vide order dated 28.04.1999 (Annexure-5) holding as under:

> *"The learned Court below has mutated the land in favour of the respondent solely basing on the orders of the learned Additional Assistant Commissioner, Endowment passed in OA No.14 of 1989, Khata No.27 of Mouza-Saranga is separate from other two Khatas of this case as because it stood recorded in favour of Sri Jagannath Mahaprabhu of Puri Marfat Adhikari Krupasindhu Das, disciple of Mahanta Nityananda Das. Nowhere in the cases referred, has the question of succession to late Kamali Dasi been brought to deliberation. The property involved in these two appeal cases are evidently purchased land of Kamali Dasi disciple of Mahanta Nityanada Das. Probably the settlement/consolidation authorities have found the appellant as the successor of Kamali Dasi which is led to preparation of the record of rights in favour of the appellants and publication of the same. There is no rebuttal evidence to the fact of succession of appellant to the properties of Kamali Dasi. The learned Mutation Officer has not appreciated the difference of the property purchased by Kamali Dasi and the property belonged to the Endowment/Institution."*

Being aggrieved, the opposite party no.4 preferred M.R.C. Case Nos.30 and 31 of 1999 before the Commissioner, Land Records & Settlement, Orissa, Cuttack and the impugned order has been passed under Annexure-6 holding as under:

> *" xx xx xx*
>
> *When a holder is a person free from wordly attachment is a celibate and has no family of his own, the presumption is that what he holds or acquires is held or acquired on behalf of the Matha to which his life is entirely devoted.*
>
> *xx xx xx*
>
> *Therefore, the suit properties acquired by Kamali Dasi through the different registered sale deed cited above would belong to the Sarangi Matha on the death of the vendee in view of the decision cited above in absence of any legal heirs."*

7. Mr. Sahu, learned counsel for the petitioner, submits that a Sanyasi can acquire personal property from his/her own source of income and in that event it cannot be said to be the property of Matha, unless it is established otherwise. Reiterating his contention, he further contended that when the property was recorded by the Consolidation Authority in the name of said Krupasindhu Das (original petitioner in W.P.(C) No.4542 of 2002 being substituted by Biswambara Dash pursuant to the order dated 06.08.2007 passed in Misc. Case No.6062 of 2006), the Settlement Authority cannot sit over the same and pass the impugned order. The Settlement Authority being swayed away by the fact that Krupasindhu Das was not the Chela of Nityananda Das and he was not the Mahanta of the Matha after death of Mahanta Nityananda Das, directed to record the property in the name of the Matha. In support of his contention, he relied upon the case of ***Math Sauna and others –v- Kedar Nath @ Uma Shankar and others***¸ reported in AIR 1981 SC 1878, wherein at paragraph-6 it is held as follows:

> "*The Mahants and members of Math Sauna belonged to the Dashnami Sanyasi sect. The material on the record establishes that they could own and possess personal property. They included sanyasis who had formerly been married men and householders, men who had passed through the grihastha ashram. Some of them continued to possess and even to acquire personal property after taking sanyas. It was observed in Sushil Chandra Sen v. Gobind Chandra Das(l) that Dashnami sanyasis mixed freely in the business world and carried on trade and often accumulated property. This Court in Gurcharan Prasad v. Krishnanand (2) affirmed that Nihang Dashnami Sanyasis could pursue money-lending business and could own property as absolute owners, and enjoy them as their personal property. That certain sects of sanyasis could acquire personal property was accepted by that eminent Judge, Dr. B.K. Mukherjee, in his "Hindu Law of Religious and Charitable Trusts",(a) where he says: "A Mohunt, and for the matter of that, any other Sanyasi can acquire personal property of his own...The Pronamis given to a Mohunt are generally his personal property.. The mere fact that a Mohunt is an ascetic does not raise any presumption that a property in his possession is not his personal property. Strictly speaking, there is no presumption either one way or the other, and in each case the burden is upon the plaintiff to establish that the properties in respect of which he is asking for possession are properties to the possession of which he is entitled in the right in which he sues".*

8. He further relied upon the case of ***Pandit Parma Nand –v- Nihal Chand and another***, reported in A.I.R. 1938 PC 195, wherein it is held as follows:

> *"The principal ground upon which the judgment of the High Court proceeds is that the Baghichi and other properties have descended from Guru (religious preceptor)*

> *to Chela (religious disciple); but this circumstance does not necessarily lead to the conclusion that a property, when acquired by a Mahant, loses its secular character and partakes of a religious character. It is common ground that the Mahants of this institution belonged to an ascetic order called Udasi. The Udasis rarely marry, and, if they do so, generally lose all influence, for the dharmsala or Gurdwara soon becomes a private residence closed to strangers: Maclagan's Census Report for the Punjab, Part I., Chap. IV., p. 152. When a person enters the Udasi Order he severs his connection with the members of his natural family. It follows that neither he nor his natural relative can succeed to the property held by the other. There is, however, no reason for holding that an Udasi cannot acquire private property with his own money or by his own exertions. If he does acquire private property, it cannot be inherited by his natural relatives, but passes on his death to his spiritual heir, including his Chela, who is recognized as his spiritual son. The descent of the property from a Guru to his Chela does not warrant the presumption that it is religious property."*

9. It is his contention that by virtue of substitution of Biswambara Dash vide order dated 06.08.2007 passed by this Court, he has stepped into the shoes of Krupasindhu Das and the land should be recorded in his name in the consolidation R.O.R. He, accordingly, prayed for setting aside the impugned order under Annexure-6 and to direct for correction of the R.O.R. in the name of the petitioner in respect of the land in question.

10. Mr. Bhuyan, learned counsel for the opposite party nos.4 and 5 vehemently objected to the same. It is his contention that no doubt, the property was recorded in the name of Adhikari Krupasindhu Das in the consolidation R.O.R., but it was not recorded in his individual capacity. The R.O.R. (Annexure-2) was prepared in the name of Adhikari Krupasindhu Das, as the Chela of Adikari Nityananda Das, the then Mahanta of Saranga Matha. It goes to show that said Krupasindhu Das was claiming to be the owner of property in the capacity of Chela of Adhikari Nityananda Das and not in his individual capacity. He further submits that after the death of said Krupasindhu Das during pendency of W.P.(C) No.4542 of 2002, the situation has completely changed. Although Biswambara Dash has been substituted as the legal representative of said Krupasindhu Das, but it has been made clear in the order dated 06.08.207 passed in Misc. Case No.6062 of 2006 that substitution shall not confer any right on the petitioner to inherit the properties belonging to the institution. He, therefore, submits that the property cannot be inherited or succeeded by Biswambara Dash as such. He further submits that when the claim of Krupasindhu Das was turned down by the Hon'ble Supreme Court vide order dated 19.01.1997 passed in S.L.P. (Civil) No.24805 of 1996, he cannot claim any right, title interest over the

suit property and as such, Biswambara Dash, does not have any right, title and interest over the property in question. He, therefore, prays for dismissal of these writ petitions being devoid of any merit.

11. Mr. Nath, learned counsel for the Commissioner of Endowments, on the other hand, defended the impugned order under Annexure-6 and contended that Nitayananda Das, Krupasindhu Das, Kamali Dasi and Biswambar Dash are all Nihangi Sanyasis and are celibates. As such, they cannot acquire any personal property and all the properties acquired by them belongs to Matha to which they belong. In support of his case, he relied upon the decision in the case of ***Susil Chandra Sen and another-v- Gobind Chandra Das and another***, reported in AIR 1934 Pat 431, wherein it is held as follows:

> *"5. A Nihangi Baisnab is a celibate sanyasi without any worldly attachments, quite unlike the grihastha or house holder class of Mahants found outside the Dasnamis of Sankaracharya or unlike the Paris and other five classes and half out of the Dasnamis who mix freely in the business of the world and carry on trade and often accumulate property: see p. 245 of Jogendra Chandra Ghosh's Tagore Law Lectures on the Law of Hindu Endowments, Vol. 2, Edn. 2, 1923.*

Thus, he submits that there is no infirmity in the impugned order under Annexure-6 and prays for dismissal of the writ petition.

12. Mr. Mishra, learned Additional Government Advocate for the State, on the other hand submits that after closure of the consolidation operation, the Tahasildar is the custodian of the land records. Thus, he has been entrusted with the duty to update the records as per the changed circumstances. When an application was filed by the opposite party no.4-Matha under Rule 34 of the Rules for correction of the R.O.R. in view of the order passed by the Hon'ble Supreme Court, the Tahasildar in exercise of power under Rule 34 of the Rules, only maintained the entries in consonance with the changed circumstances. He has not passed any order, which would amount to sit over the R.O.R. published under the Consolidation Act. As such, the impugned order needs no interference. He further submits that in view of death of said Krupasindhu Das, the recorded tenant, the petitioner has to establish his right in competent court of law to be recorded in place of said Krupasindhu Das in respect of the land in question. Accordingly, he prays for dismissal of the writ petition.

13. Heard learned counsel for the parties and perused the materials available on record.

14. It is the admitted that the R.O.R. under Section 22(2) of the Consolidation Act was published in the name of Adhikari Krupasindhu Das, Chela of Nityananda Das under Annexure-2. It further appears that Krupasindhu Das (original petitioner) had filed OA No.14 of 1989 under Section 41 of the Orissa Hindu Religious Endowment Act, 1951 (for short 'the Endowment Act') to declare him as the Mahanta of Matha after the death of Mahanta Nityananda Das. Learned Additional Assistant Commissioner of Endowments, Cuttack taking into consideration the rival contentions of the parties held that he had no jurisdiction to decide whether the petitioner is the Mahanta or the hereditary trustee of the institution. Challenging the said order, said Krupasindhu Das filed F.A. No.13 of 1990 before the Deputy Commissioner of Endowments, Bhubaneswar, which was subsequently dismissed vide order dated 09.07.1993. Challenging both the orders, said Krupasindhu Das preferred Misc. Appeal No.226 of 1993 before this Court, which was also dismissed vide order dated 16.08.1996. Being aggrieved, the petitioner preferred S.L.P.(C) No.24805 of 1996 before the Hon'ble Supreme Court, which came to be dismissed on 19.01.1997. Thus, the claim of said Krupasindhu Das as the Mahanta of Saranga Matha has been turned down.

15. In the case at hand, the petitioner claims that Kamali Dasi out of her own stridhan had acquired the land in question and the land was recorded as such in her name. During her lifetime, she executed a registered Power of Attorney in the name of said Krupasindhu Das. Said Krupasindhu Das on the basis of the said Power of Attorney got the land recorded in his name during settlement operation as well in consolidation operation and the R.O.R. under Annexures-1 and 2 have been published in his name.

16. Law is well settled that the Settlement Authority cannot go into the correctness of entries in the R.O.R. published under Section 22 of the Consolidation Act. Thus, the Tahasildar, Kendrapara could not have entertained an application under Rule 34 of the Rules and directed for correction of the R.O.R. in the name of Matha. As such, the impugned orders passed by the Settlement Authorities including the Commissioner, Land Records & Settlement, Odisha, Cuttack exercising power under Section 32 of the Settlement Act are not sustainable in the eyes of law. Mr. Sahu, leaned counsel for the petitioner relied upon the case law in the case of ***Govinda Chandra Tripathy and others -v- The State of Orissa represented by the Secretary to Government of Orissa, Revenue Department and others***,

reported in 1989 (I) OLR-367, wherein this Court, while examining the validity of notification under Section 5(1) of the Consolidation Act after publication of R.O.R. under Section 22(2) of the said Act, came to a conclusion that the R.O.R. published under Section 22(2) of the Consolidation Act is a document of title.

17. In view of the above, it is clear that the R.O.R published under the Consolidation Act is the document of title and cannot be varied by the authorities under the Settlement Act.

18. Mr. Sahu, learned counsel for the petitioner further relied upon the decision of this Court in the case of ***Kusum Jena and Others –v- Nakhi Dei and Others***, reported in 1993 (II) OLR 449, wherein at paragraph-6 it is held as follows:

> *"6. The other question which crops up for our consideration is whether the Consolidation Officer as well as the appellate authority was entitled to direct that the possession of opp. party No. 1 be noted after having rejected opp. party No. 1's claim of title in respect of the land in question. There is no manner of doubt that the Consolidation authority after rejecting the title of a dispute is not entitled to direct that the possession alone be noted. The power of the Consolidation authority under the Act is not akin to that of the settlement authority under the Orissa Survey and Settlement Act. Under the Settlement Act, the Settlement authority is required to find out who is in possession on the date the record of rights is prepared, and is in no any concerned with the title of the person concerned, whereas under the Consolidation Act, the Consolidation Officer is required to find out the right, title and interest and pass appropriate orders thereon and is not in any way connerned with the possession on the date of notification under the Consolidation Act."*

19. Mr. Sahu, learned counsel for the petitioner further relied upon the full Bench judgment of this Court in the case of ***Sundarmani Bewa and another-v-Dasarath Parida (dead) and after him Labanya Dei and others*****,** reported in 1988 (I) OLR 334, wherein the view taken in ***Kusum Jena*** (supra) has been affirmed**.**

20. In view of the above, I have no hesitation to hold that the Settlement Authority could not have directed to correct the entries in the R.O.R. published under Section 22 of the Consolidation Act.

21. But the matter does not come to an end here.

22. During pendency of the writ petition, said Krupasindhu Das died and an application was filed by the present petitioner to be substituted in his place. The said application

was registered as Misc. Case No.6062 of 2006 and this Court passed the following order on 06.08.2007, which is as follows:

> "*Heard.*
>
> *2. This is a petition for substitution. It is submitted that the sole petitioner has died in the meantime. The present petitioner claims to be a 'Chela' of the deceased petitioner and also purchaser of the property. In view of the aforesaid fact the petition s allowed. Let Biswambara Dash be added as sole petitioner. The question as to whether he is the 'Chela' of late Mahanta Adhikari Krupasindhu Das, however, remains open to be dcided under the Endowment Act. It is made clear that this substitution shall not confer upon the petitioner any right to inherit the properties belonging to the institution. The Misc. Case is, accordingly, disposed of."*

Thus, it leaves no iota of doubt that although Biswambara Dash was substituted as the legal representative of said Krupasindhu Das to pursue the writ petition, but it has been made clear that on the basis of the said substitution, he cannot inherit the properties in question. It can thus be safely inferred that although the R.O.R. was published in the name of Adhikhari Krupasindhu Das Chela of Nitayananda Das, the substituted petitioner cannot claim title over the land in question by virtue of his substitution in the writ petition. Since there is a rival claim of the party, namely, the petitioner *vis-à-vis* Matha with regard to title of the property after the death of Krupasindhu Das, the same can only be adjudicated by the competent court of law, if moved.

23. In that view of the matter, this Court while setting aside the order passed by the Commissioner, Land Records & Settlement, Odisha, Cuttack under Annexure-6, disposes of these writ petitions with an observation that the parties may seek remedy claiming title over the property in question in a competent court of law, if so advised. Till an arrangement is made for management and protection of the property in question by the competent court of law, the Tahasildar, Kendrapara, shall be the custodian and shall look after, protect and manage the property in question**.** He may put the property in auction in every agricultural year, keep the account and the income therefrom shall be deposited in a separate account to be submitted to the competent court of law as and when directed. The said amount shall be dealt with as per the direction of the Court in seisin of the matter.

24. 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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**2022 (I) ILR – CUT- 172**

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

CRLMC NO.1068 OF 2021

**BIJU @ RANJAN KUMAR SAHOO & ORS.** .....Petitioners

.V.

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Exercise of – Offences alleged are under Sections 147/148/341/323/294/506/379/ 427/149 of the Indian Penal Code, read with Section 3(1)(r)(s) and 3(2)(va) of the SC & ST (PoA) Act – Charge sheet filed, cognizance taken – Application filed seeking quashing of the order of cognizance on the ground of amicable settlement – Principles – Discussed.**

*"Thus the submission of the Petitioners that the disputes between the parties have been settled and the victim Opposite Parties do not want to proceed further against the Petitioners are found admitted and no compulsion or coercion is noticed on the part of the victims to enter into the compromise. Further, all the Petitioners and victim Opposite Parties are youths belong to the same locality and keeping in mind their socio economic status, the over-riding objective of the SC and ST (PoA) Act is not found overwhelmed in case the criminal proceeding is quashed. The allegations made against the Petitioners do not contradict the submissions of the Petitioners that the incident occurred in a fit of rage by some young people. None of the offences alleged are that serious to prescribe imprisonment for more than seven years, and no further dispute between the parties have been reported so far. Thus, having analyzed the averments and submissions made by both parties and considering the law settled on the score of quashing of proceeding on compromise, particularly the principles laid down by the Hon'ble Supreme Court in the case of* ***Gold Quest International Private Limited v. State of Tamil Nadu and Others,***

***(2014) 15 SCC 235,*** *I am of the humble view that further continuance of the criminal case in question would be an abuse of process of law."*

*(Para 8 to 10)*

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

1. (2014) 15 SCC 235 : Gold Quest International Private Limited Vs. State of Tamil Nadu and Ors.
2. (2003) 4 SCC 675 : B.S. Joshi Vs. State of Haryana.
3. (2012) 10 SCC 303 : Gian Singh Vs. State of Punjab and another.
4. (2017) 9 SCC 641 : Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Ors. Vs. State of Gujarat and another.
5. (2014) 15 SCC 235 : Gold Quest International Private Limited Vs. State of Tamil Nadu and Ors.

For Petitioners : Mr. Partha Sarathi Nayak
For Opp. Parties : Ms. S. Mishra, Addl. Standing Counsel
Mr. Dipti Ranjan Bhokta.

JUDGMENT Date of Judgment : 13.12. 2021

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

1. All six Petitioners, who are accused persons in Dhenkanal Town P.S. Case No. 320 dated 9th November, 2016 have prayed to quash the order of cognizance dated 25th August, 2018 of the learned Judge, Special Court, Dhenkanal in CT (Spl.) Case No.99 of 2016.

2. The offences are under Section 147/148/341/323/294/506/379/ 427/149 of the Indian Penal Code, read with Section 3(1)(r)(s) and 3(2)(va) of the SC & ST (PoA) Act on the allegation that the Petitioners assaulted Opposite Party No. 2 & 3 by fist and kick blows in prosecution of their common object and took Rs.3000/- to Rs.4000/- when the Opposite Parties were present in the fast-food shop. Opposite Party No.2 is the informant.

3. Upon completion of investigation, charge sheet was filed for the offences stated above and cognizance has been taken by the Special Court consequently.

4. It is submitted that the parties belong to the same locality and the incident happened in a fit of instant rage. In the meantime, the dispute between the parties has been settled through mutual concession and none of the parties want to pursue the dispute further. All of them are now staying peacefully in the locality having resolved the dispute and differences

between them. So they have prayed for quashing of the order of cognizance as no fruitful purpose would be satisfied by proceeding further.

5. Both the victims as Opposite Party Nos.2 & 3 have filed their affidavits entering appearance through their lawyer. They have tendered their concession that the disputes between them have been settled mutually and they do not want to proceed further against the Petitioners anymore.

6. The law is no more res integra in the matters of quashing of criminal proceeding on compromise between the parties,. The Hon‟ble Supreme Court in the case of ***Gold Quest International Private Limited vs. State of Tamil Nadu and others, (2014) 15 SCC 235***, while relying on several earlier decisions including the case of ***B.S. Joshi v. State of Haryana [(2003) 4 SCC 675] and Gian Singh vs. State of Punjab and another, [(2012) 10 SCC 303***] have held (at para 8) as follows:

> "In view of the principle laid down by this Court in the aforesaid cases, we are of the view that in the disputes which are substantially matrimonial in nature, or the civil property disputes with criminal facets, if the parties have entered into settlement, and it has become clear that there are no chances of conviction, there is no illegality in quashing the proceedings under Section 482 Cr.P.C. read with Article 226 of the Constitution. However, the same would not apply where the nature of offence is very serious like rape, murder, robbery, dacoity, cases under the Prevention of Corruption Act, cases under the Narcotic Drugs and Psychotropic Substances Act and other similar kind of offences in which punishment of life imprisonment or death can be awarded. After considering the facts and circumstances of the present case, we are of the view that the learned Single Judge did not commit any error of law in quashing the FIR after not only the complainant and the appellant settled their money dispute but also the other alleged sufferers entered into an agreement with the appellant, and as such, they too settled their claims."

7. Further, in the case of ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others v. State of Gujarat and another, (2017) 9 SCC 641***, the Supreme Court has broadly, though not exhaustively, discussed the parameters of exercise of inherent powers of High Court under Section 482 of Cr.P.C. on the ground of settlement between the parties. The Supreme Court has held:-

> "15.The broad principles which emerge from the precedents on the subject, may be summarized in the following propositions:-

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility o f a conviction is remote

> and the continuation of a criminal proceeding would cause oppression and prejudice; and
>
> x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

8. In the case of Ramawatar v. State of Madhya Pradesh, (2021) SCC Online SC 966, before the Hon'ble Supreme Court, the Appellant was convicted and sentenced to six months rigorous imprisonment along with fine of Rs.1000/- and his appeal before the High Court was dismissed. He then appealed before the Supreme Court. In the appeal, the appellant prayed for invocation of power under Article 142 of the Constitution to quash the criminal proceeding taking the stand that the matter had been settled between the parties and the complainant had filed an application for compromise. The appeal was allowed and the criminal proceeding was quashed to do complete justice between the parties. The relevant observations of the Supreme Court are reproduced below:-

> 9. Having heard learned Counsel for the parties at some length, we are of the opinion that two questions fall for our consideration in the present appeal. First, whether the jurisdiction of this Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a, non-compoundable offence? If yes, then whether the powerto quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act?
>
> 10. So far as the first question is concerned, it would be ad rem to outrightly refer to the recent decision of this Court in the case of ***Ramgopal & Anr v. The State of Madhya Pradesh, Criminal Appeal No.1489 of 2012***, wherein, a two-Judge Bench of this Court consisting of two of us (N.V. Ramana, CJI & Surya Kant, J) was confronted with an identical question. Answering in the affirmative, it has been clarified that the jurisdiction of a Court under Section 320 Cr.P.C cannot be construed as a proscription against the invocation of inherent powers vested in this Court under Article 142 of the Constitution nor on the powers of the High Courts under Section 482 Cr.P.C. It was further held that the touchstone for exercising the extraordinary powers under Article 142 or Section 482 Cr.P.C., would be to do complete justice. Therefore, this Court or the High Court, as the case may be, after having given due regard to the nature of the offence and the fact that the victim/complainant has willingly entered into a settlement/compromise, can quash proceedings in exercise of their respective constitutional/inherent powers.

11. The Court in ***Ramgopal (Supra***) further postulated that criminal proceedings involving non-heinous offences or offences which are predominantly of a private nature, could be set aside at any stage of the proceedings, including at the appellate level. The Court, however, being conscious of the fact that unscrupulous offenders may attempt to escape their criminal liabilities by securing a compromise through brute force, threats, bribes, or other such unethical and illegal means, cautioned that in cases where a settlement is struck post-conviction, the Courts should, inter-alia, carefully examine the fashion in which the compromise has been arrived at, as well as, the conduct of the accused before and after the incident in question. While concluding, the Court also formulated certain guidelines and held:

"19... Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society;

**ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."** [Emphasis Applied]

12. In view of the settled proposition of law, we affirm the decision of this Court in Ramgopal (Supra) and reiterate that the powers of this Court under Article 142 can be invoked to quash a criminal proceeding on the basis of a voluntary compromise between the complainant/victim and the accused.

13. We, however, put a further caveat that the powers under Article 142 or under Section 482 Cr.P.C., are exercisable in post-conviction matters only where an appealis pending before one or the other Judicial forum. This is on the premise that an order of conviction does not attain finality till the accused has exhausted his/her legal remedies and the finality is sub-- judice before an appellate court. The pendency of legal proceedings, be that may before the final Court, is sine-qua-non to involve the superior court's plenary powers to do complete justice. Conversely, where a settlement has ensued post the attainment of all legal remedies, the annulment of proceedings on the basis of a compromise would be impermissible. Such an embargo is necessitated to prevent the accused from gaining an indefinite leverage, for such a settlement/compromise will always be loaded with lurking suspicion about its bona fide. We have already clarified that the purpose of these extra-ordinary powers is not to incentivise any hollow-hearted agreements between the accused and the victim but to do complete justice by effecting genuine settlement(s).

14. With respect to the second question before us, it must be noted that even though the powers of this Court under Article 142 are wide and far-reaching, the same cannot be exercised in a vacuum. True it is that ordinary statutes or any restrictions contained therein, cannot be constructed as a limitation on the Court's power to do "complete justice". However, this is not to say that this Court can altogether ignore the statutory provisions or other express prohibitions in law. In fact, the Court

is obligated to take note of the relevant laws and will have to regulate the use of its power and discretion accordingly. The Constitution Bench decision in the case of Supreme Court Bar Assn. v. Union of India & Anr., (1998) 4 SCC 409 has eloquently clarified this point as follows:

"48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognized and established that this Court has always been a law maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" (*see* ***K. Veeraswami v. Union of India [(1991) 3 SCC 655 : 1991 SCC (Cri) 734***] but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

15. Ordinarily, when dealing with offences arising out of special statutes such as the SC/ST Act, the Court will be extremely circumspect in its approach. The SC/ST Act has been specifically enacted to deter acts of indignity, humiliation and harassment against members of Scheduled Castes and Scheduled Tribes. The Act is also a recognition of the depressing reality that despite undertaking several measures, the Scheduled Castes/Scheduled Tribes continue to be subjected to various atrocities at the hands of upper-castes. The Courts have to be mindful of the fact that the Act has been enacted keeping in viewhe express constitutional safeguards enumerated in Articles 15, 17 and 21 of the Constitution, with a twin-fold objective of protecting the members of these vulnerable communities as well as to provide relief and rehabilitation to the victims of caste- based atrocities.

16. On the other hand, where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence iscovered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr.P.C.

17. Adverting to the case in hand, we note that the present Appellant has been charged and convicted under the unamended Section 3(1)(x) of the

SC/ST Act (substituted by Act No.1 of 2016 w.e.f. 26th January, 2016), which was as follows:

"3. Punishments for offences of atrocities- (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,— xxxx

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

xxxx"

18. We may hasten to add that in cases such as the present, the Courts ought to be even more vigilant to ensure that the complainant victim has entered into the compromise on the volition of his/her free will and not on account of any duress. It cannot be understated that since members of the Scheduled Caste and Scheduled Tribe belong to the weaker sections of our country, they are more prone to acts of coercion, and thereforeought to be accorded a higher level of protection. If the Courts find even a hint of compulsion or force, no relief can be given to the accused party. What factors the Courts should consider, would depend on the facts and circumstances of each case.

19. Having considered the peculiar facts and circumstances of the present case in light of the afore-stated principles, as well as having meditated on the application for compromise, we are inclined to invoke the powers under Article 142 and quash the instant Criminal proceedings with the sole objective of doing complete justice between the parties before us. We say so for the reasons that:

**Firstly,** the very purpose behind Section 3(1)(x) of the SC/ST is to deter caste-based insults and intimidations when they are used with the intention of demeaning a victim on account of he/she belonging to the Scheduled Caste/ Scheduled Tribe community. In the present case, the record manifests that there was an undeniable preexisting civil dispute between the parties. The case of the Appellant, from the very beginning, has been that the alleged abuses were uttered solely on account of frustration and anger over the pending dispute. Thus, the genesis of the deprecated incident was the afore-stated civil/property dispute. Considering this aspect, we are of the opinion that it would not be incorrect to categorise the occurrence as one being overarchingly private in nature, having only subtle undertones of criminality, even though the provisions of a special statute have been attracted in the present case.

**Secondly**, the offence in question, for which the Appellant has been convicted, does not appear to exhibit his mental depravity. The aim of the SC/ST Act is to protect members of the downtrodden classes from atrocious acts of the upper strata of the society. It appears to us that although the Appellant may not belong to the same caste as the Complainant, he too belongs to the relatively weaker/backward section of the society and is certainly not in any better economic or social position when compared to the victim. Despite the rampant prevalence of segregation in

> Indian villages whereby members of the Scheduled Caste and Scheduled Tribe community are forced to restrict their quartes only to certain areas, it is seen that in thepresent case, the Appellant and the Complainant lived in adjoining houses. Therefore, keeping in mind the socioeconomic status of the Appellant, we are of the opinion that the overriding objective of the SC/ST Act would not be Overwhelmed if the present proceedings are quashed.
>
> **Thirdly**, the incident occurred way back in the year 1994. Nothing on record indicates that either before or after the purported compromise, any untoward incident had transpired between the parties. The State Counsel has also not brought to our attention any other occurrence that would lead us to believe that the Appellant is either a repeat offender or is unremorseful about what transpired.
>
> **Fourthly**, the Complainant has, on her own free will, without any compulsion, entered into a compromise and wishes to drop the present criminal proceedings against the accused. Fifthly, given the nature of the offence, it is immaterial that the trial against the Appellant had been concluded. Sixthly, the Appellant and the Complainant parties are residents of the same village and live in very close proximity to each other. We have no reason to doubt that the parties themselves have voluntarily settled their differences. Therefore, in order to avoid the revival of healed wounds, and to advance peace and harmony, it will be prudent to effectuate the present settlement.

**CONCLUSION:**

> 20. Consequently, and for the aforementioned reasons, we find it appropriate to invoke our powers under Article 142 of the Constitution and quash the criminal proceedings to do complete justice between the parties. As a sequel thereto, judgment and orders passed by the Trial Court and the High Court are set aside. Bail bonds, if any, are discharged. The appeal is allowed in above terms."

9. It is true that the above cited case before the Supreme Court was relating to unamended provisions of the SC & ST (PoA) Act. The said Act has been amended w.e.f., 26th January, 2016 and the offences alleged in theinstant case were committed on 9th November, 2016. Section 3(1)(r)(s) and Section 3(2)(va) after the amendment runs as follows:

> "3. Punishments for offences of atrocities – (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -
>
> xxxxx xxxxx xxxxx
>
> (r) Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;
>
> (s) abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view;

> xxxxxx xxxxx xxxxx
>
> (2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe-
>
> xxxxx xxxxx xxxxx
>
> (va) Commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine."
>
> (Offences under Section 147,148, 323, 341 and 506 are covered in the Schedule)

10. As stated earlier, both Opposite Party No.2 and 3 have filed two separate affidavits stating that the dispute between them has been settled amicably and they do not want to proceed further against the Petitioners in the case anymore. Mr. Bhokta, learned counsel appearing for them submits in support of the stand of the Petitioners stating that the matter has already been compromised between the parties. Thus the submission of the Petitioners that the disputes between the parties have been settled and the victim Opposite Parties do not want to proceed further against the Petitioners are found admitted and no compulsion or coercion is noticed on the part of the victims to enter into the compromise. Further, all the Petitioners and victim Opposite Parties are youths belong to the same locality and keeping in mind their socio economic status, the over-riding objective of the SC and ST (PoA) Act is not found overwhelmed in case the criminal proceeding is quashed. The allegations made against the Petitioners do not contradict the submissions of the Petitioners that the incident occurred in a fit of rage by some young people. None of the offences alleged are that serious to prescribe imprisonment for more than seven years, and no further dispute between the parties have been reported so far. Thus, having analyzed the averments and submissions made by both parties and considering the law settled on the score of quashing of proceeding on compromise, particularly the principles laid down by the Hon'ble Supreme Court in the case *of* ***Gold Quest International Private Limited v. State of Tamil Nadu and Others, (2014) 15 SCC 235,*** I am of the humble view that further continuance of the criminal case in question would be an abuse of process of law. Accordingly, the order of cognizance dated 25th August, 2018 is quashed and consequently the criminal proceeding in C.T. (Spl.) Case No.99 of 2016 pending before the learned Judge, Special Court, Dhenkanal is also quashed.

11. The CRLMC is allowed.

12. An urgent certified copy of this order be issued as per rules.

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**2022 (I) ILR – CUT- 182**

**S.K. PANIGRAHI, J.**

CRLMC NO. 122 OF 2021

**PRAVAT KUMAR TRIPATHY** ……....Petitioner

.V.

**REPUBLIC OF INDIA (CBI)** ……Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Exercise of – Offences alleged under sections 120(B), 406, 409, 411, 420, 468 and 471 of the Indian Penal Code, 1860 read with Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 – Scope and ambit – Held, it would suffice to state that though the powers possessed by the High Court under the said provisions are wide but they should be exercised in appropriate cases, i.e., *ex debito justitiae*, to do real and substantial justice for the administration of which the courts alone exist – The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim and caprice – The powers have to be exercised sparingly, with circumspection and in the rarest of rare cases, where the Court is convinced, that allowing the proceeding to continue would be an affront on the process of the Court or that the ends of the justice beseech that the proceedings be quashed – It is, therefore, the settled position of law that this inherent power should be exercised by the High Court sparingly where parties are not left with any other remedy so as to prevent abuse of process of Court or to give effect to any order under the Code or to secure the ends of justice – Such a power is not be invoked or exercised on the mere asking.**

> *"In the present case, it is not possible to come to the conclusion that there is no prima facie case against the Petitioner for the offences alleged therein. The allegations contained in the FIR are grave and sight cannot be*

*lost of the fact that a substantial amount of hard earned money of innocent people which is at stake. The Petitioner's patronization was sought by the principal accused in order to further the unscrupulous business by striking a sense of confidence in the heart of the investors. Consequently, it becomes imperative that the matter be subjected to the rigor of thorough trial in respect of the alleged offences to meet the ends of justice. Without a trial, it is not possible to fathom or proper to hold whether or not the allegations made against the Petitioner are made out or not. The crime committed by the Petitioner and other co-accused persons is not a crime against any individual but a crime against public at large having wide ramifications over the society at large. The innocent depositors, being lured by the principal accused, invested their money with the AT Group and ultimately lost their hard earned life savings due to the aforesaid acts of the accused persons. Economic offences pose a significant danger to a country's economy at large and threaten to the law of the land. It is but another endeavor to fulfil an individual's avarice over the interest of the society. Economic offences are perpetrated at the cost of the interest of the common man. Considering the nature and gravity of the accusation, the nature of supporting evidence, its serious adverse impact on the fabric of the society and misappropriation of huge sums of public money, this Court finds no ground to interfere under Section 482 of the Cr. P.C. at this stage." (Para 23 to 28)*

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

1. (1992) 4 SCC 305 : Janata Dal Vs. H.S. Chowdhary.
2. (2009) 14 SCC 466 : Shakson Belthissor Vs. State of Kerala.
3. (2006) 6 SCC 736 : Indian Oil Corpn. Vs. NEPC India Ltd.
4. (2011) 12 SCC 437 : Padal Venkata Rama Reddy Vs. Kovvuri Satyanarayana Reddy.
5. (2013) 7 SCC 466 : Nimmagadda Prasad Vs. CBI.
6. AIR 1987 SC 1321 : State of Gujarat Vs. Mohanlal Jitamal Porwal.
7. (2016) 1 SCC 389 : CBI Vs. Maninder Singh.
8. AIR 2008 SC 3077 : Pankaj Kumar Vs. State of Maharashtra
9. 1996) 7 SCC 705 : State of U.P. Vs. O.P. Sharma.
10. (2012) 9 SCC 460 : Amit Kapoor Vs. Ramesh Chander.

For Petitioner : Mr. Siba Sankar Mishra & Mr. A.P. Bose.
For Opp. Party : Mr. Sarthak Nayak, Adv. (CBI)

JUDGMENT Date of Hearing: 30.11.2021 & Judgment: 17.12.2021

***S.K. PANIGRAHI, J.***

**1**. This Petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to "the Cr.P.C." for brevity) has been filed with a prayer to quash the proceedings pending before the Learned Special C.J.M.

(CBI), Bhubaneswar which arises out of SPE case No.42/14 under Sections 120(B), 406, 409, 411, 420, 468 and 471 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) read with Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 (hereinafter referred to as "the PCMCSB Act" for brevity) and all proceedings emanating therefrom.

**2**. The facts leading to the present petition, shorn of unnecessary details, are briefly summarised as under:

(i) One Artha Tatwa Multi-Purpose Co-operative Society Ltd. (hereinafter referred to as "ATMPCSL" for brevity) was registered by the Asst. Registrar, Co-operative Societies, Bhubaneswar on 31.11.2011 under the name and style of "AT Group of Companies" and the said ATMPCSL was purportedly engaged in the multiple businesses which included enrolling members with the promise to provide exorbitant and lucrative rates of interest on their deposits.

(ii) In view of the promise of higher returns in terms of interest and incentives under various schemes floated by AT Group of Companies, the informants along with other depositors invested huge amount with AT Group of Companies for the purchase of cheap flats/plots under various projects/schemes undertaken by the AT Group of Companies represented by its Chief Managing Director, one Pradeep Kumar Sethi.

(iii) However, the said Group of Companies failed to deliver on their promise. Neither did it return the amount due to the depositors/investors as agreed upon nor did it construct the flats as agreed upon.

(iv) When the investors/depositors attempted to contact the representatives of the AT Group of Companies seeking refund of the money, the said Pradeep Kumar Sethi and others so connected to the companies fled from the office, thereby cheating the investors/depositors of their hard earned money and savings.

(v) After collecting such deposits from the innocent depositors for some period, the Company allegedly completely stopped functioning and thus in that process many investors who had invested money with the company were duped.

(vi) Kharvelnagar P.S. Case No.44 of 2013 was instituted on the basis of the First Information Report lodged by one Sri Sukumar Panigrahi on 07.02.2013 and which was registered under Sections 420, 120B and 406 of the I.P.C. against 13 accused persons on 10.07.2013.

(vii) During investigation of Kharvelnagar P.S. Case No. 44 of 2013, it was revealed that a Non-Banking Financial Company under the name of "AT Group of Companies" were running their business with their branch offices in various places in Odisha including Lewis Road, Bhubaneswar, Cuttack, Balasore, Baripada, Dhenkanal, Berhampur etc. and Mr. Pradeep Kumar Sethi (main accused) was the Managing Director of the said Artha Tatwa Multi Co-operative Society Ltd. and Artha Tatwa State Credit Co-operative Society. The registration of the Artha Tatwa Multi Purpose Co-operative Society was granted on 03.11.2011 by the Asst. Registrar of Co-operative Societies, Bhubaneswar Circle, Bhubaneswar. It was also found that the Company was indulging in wide propaganda, multiple awareness programmes, distributed leaflets and circulated brochures through agents to attract investors to deposit money in the different schemes floated by the said Company. The aforesaid Co-operative Society collected funds from the common people through various bodacious schemes. After a few months of such operation, the Company unilaterally stopped paying interest to the depositors on the plea of income tax raid in the Company and cheated the depositors by dubiously duping them of their hard earned money. On 10.07.2013 Inspector-In-Charge, Kharvelnagar Police Station submitted a preliminary charge sheet against the accused persons.

(viii) While the Kharavelnagar P.S. Case No.44 of 2013 was under further investigation, a Public Interest Litigation was filed before the Hon'ble Supreme Court by one Mr. Alok Jena seeking transfer of investigation from the State agencies to the Central Bureau of Investigation (CBI) was filed before the Hon'ble Supreme Court vide Writ Petition (Civil) No.413 of 2013. The Hon'ble Supreme Court vide its order dated 09.05.2014 in W.P.(C) No.413 of 2013, directed that the entire case under investigation by State would be transferred to the CBI for further investigation. Accordingly, the cases like (1) Kharavelanagar P.S. Case No.44 of 2013 (ii) Badambadi P.S. Case No.5 of 2013, (iii) Bhanjanagar P.S. Case No.95 of 2013 (iv) Angul P.S. Case No.282 of 2013 (v) Bargarh Town P.S. Case No.93 of 2013 (vi) Paralakhemundi P.S. Case No.93 of 2013 (vii) Kujanga

P.S. Case No. 262 of 2013 and (viii) Cantonment Road P.S. Case No.76 of 2013 would stand transferred to the C.B.I.

(ix) The investigation of the case was taken up by the C.B.I. on 05.06.2014 against the main accused Pradeep Kumar Sethi and various other co-accused alleging commission of offences under Sections 120B, 406, 409, 411, 420, 468 and 471 of the I.P.C. read with Sections 4, 5, 6 of the PCMCSB Act.

(x) The investigation undertaken by the C.B.I. has since revealed that the main accused Pradeep Kumar Sethi, in furtherance of criminal conspiracy with some other accused persons, floated and registered the said Artha Tatwa Group. The aforementioned Group through various lucrative schemes with promise of fantastic returns, lured the depositors into investing money in what has now been uncovered as illegal money circulation schemes. After verification, it has come to light that approximately a sum total of Rs.201,03,58,295/- was collected by the said AT Group from the public through these schemes and the same is the outstanding amount due to the public as on April, 2012. Investigation has also, allegedly, revealed that the said Pradeep Kumar Sethi and other co-accused associated with the company had also diverted huge amounts to the accounts of many other influential personalities in order to obtain their patronage and to use their influence and clout to gain the trust of the innocent public.

**3**. Mr. Siba Sankar Mishra, learned counsel for the Petitioner submitted that the sum and substance of the allegations against the present Petitioner are limited to the fact that he, in his official capacity, as MLA and President of the Board of the Odisha Co-Operative Union had influenced the registration of the ATMPCSL and has received money as *quid pro quo* for patronizing the main accused to run his illegal business.

**4**. Learned counsel for the Petitioner further contended that it is not the case of the prosecution that the Petitioner made any false or fabricated documents or influenced anyone to get ATMPCSL registered in violation of any law governing the field. The said ATMPCSL has been registered after conforming to the requisite documents required by the authorities and after duly complying with necessary due diligence. Therefore, the allegation that the Petitioner has influenced the registration of the ATMPCSL, even if taken

on its face value, does not constitute an offence and as such no offence is made out against the present Petitioner.

**5**. Insofar as patronizing the main accused is concerned, learned counsel for the Petitioner submitted that the only allegation leveled against the Petitioner is that the Petitioner awarded the Best Youth Co-operators award to the main accused Pradeep Kumar Sethi. This act has nothing to do with the cheating or fraud committed on the public. Moreover, the award was decided in favour of Pradeep Kumar Sethi by a committee meant for award selection. Therefore, singling out the Petitioner and accusing him of the offence of cheating and fraud on public is a sheer misuse of process of law for which the proceedings are liable to be quashed.

**6**. Learned counsel for the Petitioner has also submitted that there is absolutely no evidence of any money trail emanating from the main accused Pradeep Kumar Sethi involving the Petitioner. Hence, even if the allegation of receiving cash is believed, then there is no evidence to show that the so-called money that has been alleged to have been given to the Petitioner is *quid pro quo* for his involvement in the crime. The learned counsel for the Petitioner has also argued that the allegation of demand of financial assistance from accused Pradeep Kumar Sethi for Banki Mahotsav is also untenable because mere demand in itself is not an offence and the prosecution has not brought any material to correlate the demand with any overt act for attracting the charges of cheating and fraud.

**7**. Per contra, Shri Sarthak Nayak, learned counsel for the Opposite Party vehemently opposed the submissions made by the learned counsel for the Petitioner. It was contended that the Petitioner being a member of Odisha Legislative Assembly and also being the President of Odisha Co-operative Union between 2008-2011, has strongly influenced the registration of the "Artha Tatwa Multi-Purpose Co-operative Society Ltd.", through the then Asst. Registrar of Co-operative Society. The Petitioner was instrumental in awarding the main accused Pradeep Kumar Sethi with the "Best Youth Co-operative Award" given by the Odisha Co-operative Union without any real remarkable contribution/achievements of the main accused. He further contended that though there was a committee set up for the selection of the awardees, the present Petitioner being dominant in the committee by virtue of his position of MLA and the President of Odisha Co-operative Union between 2008-2011 strongly recommended his name to receive the said

award. This award and the endorsement of a person of Petitioner's stature has the propensity to influence public as the Petitioner would have contributed to gaining the trust of the public in the activities of the main accused and his counterparts.

**8**. Mr. Nayak, learned counsel for the C.B.I. has further submitted that the Petitioner had received money to the tune of Rs.42.00 lakhs cash in exchange of such patronizing activities for the growth of the organization of the main accused and to run his illegal business. Further, it has been submitted that the Petitioner had demanded financial contribution for Banki Mahotsav from the main accused Pradeep Kumar Sethi which has leveraging effect in patronizing the main accused. It has also contributed to popularising such schemes. He further contended that the allegations against the Petitioner are very serious in nature and the Petitioner has allegedly mis-utilised his power as the MLA of Odisha Legislative Assembly from Banki Constituency. Since the allegations are of the nature of an economic offence and innocent gullible investors were hoodwinked of their life savings. In view of the aforesaid, the present petition deserved dismissed.

**9**. Heard the parties and perused the record. This Court is conscious of the need to view such economic offences having a deep-rooted conspiracy and involving a huge loss of investors' money and its impact on the economy. It is also no more *res integra* that the inherent powers of the Hon'ble High Court have to be utilised cautiously while quashing an FIR. Before adverting to the facts of the case at hand, it becomes imperative that while dealing with a case with respect to Section 482 of the Cr.P.C. it is necessary that this plenary power must be exercised with utmost care and caution.

**10**. The Hon'ble Supreme Court in ***Janata Dal v. H.S. Chowdhary***[1], while dealing with the scope of the power available under Section 482 of the Cr.P.C. held as follows;

> *"131. Section 482 which corresponds to Section 561-A of the old Code and to Section 151 of the Civil Procedure Code proceeds on the same principle and deals with the inherent powers of the High Court. The rule of inherent powers has its source in the maxim "Quado lexa liquid alicui concedit, conceder evidetur id sine quo ipsa, essuonpotest" which means that when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist.*

1. (1992) 4 SCC 305

*132. The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debitojustitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles.*

*133. The Judicial Committee in Emperor v. Khwaja Nazir Ahmad [AIR 1945 PC 18, 22] and Lala Jairam Das v. Emperor [(1945) 47 Bom LR 634] has taken the view that Section 561-A of the old Code gave no new powers but only provided that those with the Court already inherently possessed should be preserved. This view holds the field till date.*

*134. This Court in Dr Raghubir Sharan v. State of Bihar [(1964) 2 SCR 336] had an occasion to examine the extent of inherent power of the High Court and its jurisdiction when to be exercised. Mudholkar, J. speaking for himself and Raghubar Dayal, J. after referring to a series of decisions of the Privy Council and of the various High Courts held thus:*

*"… [E]very High Court as the highest court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice …. Being an extraordinary power it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers …."*

*xx xx xx xx xx*

*136. Thus, the inherent power under this section can be exercised by the High Court (1) to give effect to any order passed under the Code; or (2) to prevent abuse of the process of any Court; or (3) otherwise to secure the ends of justice……."*

**11**. The width and amplitude of the sweep of the power available under Section 482 of the Cr.P.C. necessitates that such exercise should be sparing in nature and should be resorted to only in cases where the Court is of the unambiguous view that continuance of the prosecution would be nothing but an abuse of the process of law. The present case fails to inspire such a thought.

**12**. The principle relating to the nature and scope of exercise of power under Section 482 of the Cr.P.C. has now, by and large, been crystallized by the Hon'ble Supreme Court in the case of ***Shakson Belthissor v. State of Kerala***[2]**,** relying upon its earlier judgment in the case of ***Indian Oil Corpn. v. NEPC India Ltd.***[3] wherein it has been observed as under:

> *"9. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few-- MadhavraoJiwajiraoScindia v. Sambhajirao ChandrojiraoAngre, State of Haryana v. BhajanLal, Rupan Deol Bajaj v. Kanwar Pal Singh Gill, Central Bureau of Investigation v. Duncans Agro Industries Ltd., State of Bihar v. Rajendra Agrawalla, Rajesh Bajaj v. State NCT of Delhi, Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd., Hridaya Ranjan Prasad Verma v. State of Bihar, M. Krishnan v. Vijay Singh and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque. The principles, relevant to our purpose are:*
>
> *(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.*
>
> *For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*
>
> *(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*
>
> *(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*
>
> *(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the*

2. (2009) 14 SCC 466 3. (2006) 6 SCC 736

*complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.*

*(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."*

**13**. In the same vein in the case of ***Padal Venkata Rama Reddy v. Kovvuri Satyanarayana Reddy***[4], the Hon'ble Supreme Court has held that:

*"11. Though the High Court has inherent power and its scope is very wide, it is a rule of practice that it will only be exercised in exceptional cases. Section 482 is a sort of reminder to the High Courts that they are not merely courts of law, but also courts of justice and possess inherent powers to remove injustice. The inherent power of the High Court is an inalienable attribute of the position it holds with respect to the courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. The jurisdiction under Section 482 is discretionary, therefore the High Court may refuse to exercise the discretion if a party has not approached it with clean hands.*

*12. In a proceeding under Section 482, the High Court will not enter into any finding of facts, particularly, when the matter has been concluded by concurrent finding of facts of the two courts below. Inherent powers under Section 482 include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any court subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case. The Court can always take note of any miscarriage of justice and prevent the same by exercising its powers under Section 482 of the Code. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly, carefully and with caution."*

4. (2011) 12 SCC 437

**14**. It is also not in dispute that the present case relates to the commission of an economic offence and the involvement of present Petitioner has a humongous effect on the prospective investors and their temptation to invest in such lucrative schemes. Such type of offences constitute a class apart and need to be visited with a different approach. In the case of ***Nimmagadda Prasad v. CBI***[5] the Hon'ble Supreme Court took an exacting view of economic offences and observed as follows:

> *"26. Unfortunately, in the last few years, the country has been seeing an alarming rise in white-collar crimes, which has affected the fibre of the country's economic structure. Incontrovertibly, economic offences have serious repercussions on the development of the country as a whole. …*
>
> *xx xx xx xx*
>
> *28. …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."*

**15**. In the case of ***State of Gujarat v. Mohanlal Jitamal Porwal***[6], the Hon'ble Supreme Court further held that:

> *"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 colour crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest……..".*

**16**. As poignantly observed by the Hon'ble Supreme Court in ***CBI v. Maninder Singh***[7], while dealing with economic offences the Court must bear in mind that the offence is not a case of simple assault or a theft of a trivial amount; rather these offences are well planned and were committed with a deliberate design with an eye on personal profit regardless of the consequence to the society at large. The Courts, therefore, will do well to be on guard to these kinds of adroit moves. Thus, quashing of prosecution in cases involving economic offences leads to the entire community being aggrieved.

5. (2013) 7 SCC 466, 6. (2016) 1 SCC 389, 7. AIR 1987 SC 1321

**17**. In the facts of the present case, the Petitioner's stance is that he has been falsely implicated and subjected to sheer abuse of the process of law would require a basic level of scrutiny as the depositions made by various persons involved, when brought to this Court's attention by the learned counsel for the Opposite Party, mirrors a completely different story.

**18**. In the note dated 01.11.2010, Shri Satish Prasad Pati, Sub-Assistant Registrar of Co-operative Societies has stated that the main accused had mentioned in his application that the society may raise funds by way of loan from State Cooperative Bank, Central Cooperative Bank, Government Financing Institutions/ Mahila Bikash Samabay Nigam/ SC & ST Finance Corporation, Khadi Board, Small Industries Corporation and National Handicraft Finance and Development Corporation. However, while processing the application of the Society, the said Mr. Pati had raised certain objections as to how the views of the financing bank were not mentioned in this regard. One Ms. Gayatri Patnaik, Assistant Registrar of Co-operative Societies, vide her statement recorded on 27.09.2014 has stated that she was approached by the Petitioner (MLA from Banki Constituency and the President of Odisha State Co-operative Union) several times, through call and also in person, to hasten the process of registration of ATMPCS, following which she was asked to 'handle' and gloss over the objections raised by Shri Satish Prasad Pati, Sub-Assistant Registrar of Co-operative Societies. The same ultimately led to the approval of the registration of ATMPCSL on 03.11.2010. This indicates that the Petitioner was showing an unusual degree of anxiety for the early completion of the process of registration of the Co-operative Society of the principal accused and it was in that context that the Petitioner had reached out to Mrs. Patnaik to hasten up the process of registration. The statement of Mrs. Patnaik, further, indicates that on being so pressurized by the Petitioner, strict compliance of the registration procedure was not followed. It also indicates the fact that the Petitioner was hand in gloves with the main accused in order to get the registration etc. of the AT Group done at any cost even by glossing over the legal requirements and safeguards.

**19**. In the present case, the Petitioner's involvement in felicitation of the main accused with the "Best Youth Co-operator Award" can be traced by scrutinizing the statements of Shri Tareswar Das, Office Superintendent, Odisha State Cooperative Union. Shri Tareswar Das, vide note dated 15.11.2010, has made a deposition to the effect that the Petitioner, who was

officiating as the President of Odisha State Cooperative Union at the relevant point in time, specifically directed that the main accused be awarded with the "Best Youth Co-operator" despite the fact that the bio-data of the main accused had hardly any mention regarding his involvement in any sort of cooperative movement or his contribution to any sort of cooperative activity which was the basic criteria for being eligible for consideration for such a prestigious award. It was out and out a favourable recommendation for such award.

**20**. With respect to Petitioner's plea that he has been falsely implicated for allegedly having received a kickback worth Rs.42.00 lakhs from the main accused as *quid pro quo* for aiding him to run his illegal business/ operations, the depositions made by one Shri Tapan Mohanty, the then Branch Manager, Artha Tatwa Group of Companies is of great significance. Shri Tapan Mohanty, vide his statements dated 05.12.2014 has stated that he was aware that the main accused used to give money in cash to the Petitioner for getting his patronage since the Petitioner was a sitting MLA of the ruling party and an important personality in the coopearative setting and was, therefore, known to be very influential. He further stated that the main accused had confessed in a discussion prior to his arrest that he had given an amount of Rs.42.00 lakhs to the Petitioner. The principal accused had also revealed that he had given kickbacks to the Petitioner in furtherance of early registration of Artha Tatwa Multi-purpose Cooperative Society since there were some unresolved issues due to which the registration of society was getting delayed. In his depositions, Shri Tapan Mohanty has also corroborated the fact that the principal accused had also given in cash to the Petitioner for securing for him and ultimately, felicitating him with the "Best Youth Co-operator" Award.

**21**. Further, the learned counsel for the Opposite Party brought to this Court's notice that the Petitioner's involvement with the main accused can be established by way of the Forensic Voice Examination Report dated 09.10.2014 whereby the Petitioner's voice sample taken from a telephonic conversation with the main accused was subjected to Voice Spectrographic Analysis. The common and clearly audible sentences/words, namely "Sethi Babu", "Vartaman Mota Moti", "Depositor Mane", "Micro-finance" etc. were taken into account for the said analysis. It thus contains something more which also establishes *prima facie* close link between the Petitioner and the principal accused and also Artha Tatwa group. Although this aspects

requires thorough trial to establish the truth, any act of interference by this Court will jeopardize a fair trial.

**22**. This Court is alive to the fact that *mala fides* cannot be proved only by direct evidence. Such issues can be proved or, may be, inferred, by circumstances. It is a well known adage "*men may lie but the circumstances do not*". The entirety of circumstances, as fully detailed above, showcase that the Petitioner was *prima facie* aware of the nature of the business of the principal accused and knowing the background fully well he consciously chose to bless the principal accused with his patronage in exchange for monetary benefits. It is also pertinent to note that when we discuss the psyche of the lay and laity, the mere optics of an elected representative holding public office patronising someone/some business, strikes a wave of confidence and lends immense credence and goodwill to the person/business group concerned.

**23**. It is trite law as laid down by the Hon'ble Apex Court in ***Pankaj Kumar v. State of Maharashtra***[8], that the scope and ambit of powers of the High Court under Section 482 of the Cr.P.C. has been enunciated and reiterated by this Court in a series of decisions. Thus, it would suffice to state that though the powers possessed by the High Court under the said provisions are wide but they should be exercised in appropriate cases, i.e., *ex debito justitiae*, to do real and substantial justice for the administration of which the courts alone exist. The inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim and caprice. The powers have to be exercised sparingly, with circumspection and in the rarest of rare cases, where the Court is convinced, that allowing the proceeding to continue would be an affront on the process of the Court or that the ends of the justice beseech that the proceedings be quashed.

**24**. It is well settled legal position that the High Court should sparingly and cautiously exercise the power under Section 482 of the Code to prevent miscarriage of justice. In ***State of U.P. Vs. O.P. Sharma***[9], a three- Judge Bench of the Hon'ble Supreme Court, reviewed the existing law on the exercise of power by the High Court under Section 482 of the Code to quash the complaint, charge-sheet or the First Information Report and held that the High Court would be loathe and circumspect to exercise its extraordinary

8. AIR 2008 SC 3077, 9. 1996) 7 SCC 705

power under Section 482 of the Code or under Article 226 of the Constitution. The Court would consider whether the exercise of the power would advance the cause of justice or it would tantamount to abuse of the process of the Court. Social stability and order is the *prima donna* which necessitates that all social malaise and evil kneel before her in strict obedience. This cardinal principle should always be kept in mind before embarking upon the exercise of the inherent power vested in the Court.

**25**. It is, therefore, the settled position of law that this inherent power should be exercised by the High Court sparingly where parties are not left with any other remedy so as to prevent abuse of process of Court or to give effect to any order under the Code or to secure the ends of justice. Such a power is not be invoked or exercised on the mere asking. Furthermore, in ***Amit Kapoor v. Ramesh Chander***[10], the Hon'ble Supreme Court has laid down that the Court should apply the test as to whether the uncontroverted allegations as borne from the record of the case and the documents submitted therewith *prima facie* establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach to such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere. Where the factual foundation of an offence has been laid down, the courts must be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied, if there is otherwise substantial compliance with the requirements of the offence. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave errors that might be committed by the sub-ordinate Courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers. The Court is primarily concerned with the allegations taken as a whole whether they will constitute an offence and, if so, whether or not it is an abuse of the process of Court culminating in injustice. The power cannot be invoked to stifle or scuttle a legitimate prosecution.

10. (2012) 9 SCC 460

**26**. In the present case, it is not possible to come to the conclusion that there is no *prima facie* case against the Petitioner for the offences alleged therein. The allegations contained in the FIR are grave and sight cannot be lost of the fact that a substantial amount of hard earned money of innocent people which is at stake. The Petitioner's patronization was sought by the principal accused in order to further the unscrupulous business by striking a sense of confidence in the heart of the investors. Consequently, it becomes imperative that the matter be subjected to the rigor of thorough trial in respect of the alleged offences to meet the ends of justice. Without a trial, it is not possible to fathom or proper to hold whether or not the allegations made against the Petitioner are made out or not.

**27**. The crime committed by the Petitioner and other co-accused persons is not a crime against any individual but a crime against public at large having wide ramifications over the society at large. The innocent depositors, being lured by the principal accused, invested their money with the AT Group and ultimately lost their hard earned life savings due to the aforesaid acts of the accused persons. Economic offences pose a significant danger to a country's economy at large and threaten to the law of the land. It is but another endeavor to fulfil an individual's avarice over the interest of the society. Economic offences are perpetrated at the cost of the interest of the common man.

**28**. Considering the nature and gravity of the accusation, the nature of supporting evidence, its serious adverse impact on the fabric of the society and misappropriation of huge sums of public money, this Court finds no ground to interfere under Section 482 of the Cr. P.C. at this stage. This CRLMC is, therefore, dismissed.

**29**. It is, however, clarified that the learned trial court shall proceed with a fair trial uninfluenced by any of the observations made hereinabove. Ordered accordingly.

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**2022 (I) ILR – CUT- 198**

**MISS SAVITRI RATHO, J.**

CRLMC NO. 2717 OF 2021

**PRAMOD KUMAR SAHOO** .....Petitioner

.V.

**STATE (VIGILANCE)** .....Opp. Party

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 – Application under for seeking recall of the witness for further cross examination – Principles and scope of – Held, there can be no quarrel over the settled proposition of law that the right of cross examination is a valuable right and power under Section -311 of the Cr.P.C to recall a witness for cross examination can be exercised at any stage for a just decision in the case, but it is also to be kept in mind that the application should be bonafide and should not be filed by way of an afterthought or to delay disposal of the case – Such power is not to be exercised for the mere asking, but the Court has to be satisfied that it is in "every respect essential to examine such a witness or to recall him for further cross examination in order to arrive at a just decision".** (Para 5 & 6)

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

1. AIR 2013 SC 3081 : Rajaram Prasad Yadav Vs. State of Bihar & Anr.
2. (2017) 9 SCC 340 : Ratanlal Vs. Prahlad Jat.
3. (2016) 8 SCC 762 : State of Haryana Vs. Ram Meher.
4. (2003) 26 OLR 124: Dara Singh @ Dara Vs. Republic of India.

For Petitioner : Mr. S. Panigrahi & Mr. D.P. Das.

For Opp. Party : Mr. Niranjana Maharana, ASC (Vigilance)

ORDER Date of Order : 03.01.2022

***MISS SAVITRI RATHO,J.***

1. The petitioner has challenged the order dated 07.12.2021 passed in T.R. No. 43 of 2001 by the learned Special Judge (Vigilance), Bhubaneswar rejecting his application filed under Section 311 Cr.P.C., for recalling the witnesses i.e. P.W. 5, P.W.25 and P.W. 32 for their cross-examination.

2. The petitioner is facing trial for a case under Section 13 (2) read with Section 13 (1) (e) of the Prevention of Corruption Act and after prosecution evidence had been closed and the case was posted for examination of the

accused under Section 313 Cr.P.C., the application under Section – 311 Crl.P.C was filed on behalf of the accused praying to recall P.W.5, P.W. 25 and P.W.32 stating that some questions relating to the assets of the petitioner could not be put to these witnesses.

3. Mr. S. Panigrahi, learned counsel appearing on behalf of Mr. Deba Prasad Das, learned counsel for the petitioner places reliance on the decision of the Hon'ble Apex Court in the case of ***Rajaram Prasad Yadav vrs. State of Bihar & Anr r***eported in ***AIR 2013 SC 3081*** and submits that power under Section 311 Cr.P.C. can be exercised by the Court at any stage if it appears to the Court that it is essential for a just decision in the case and in this case it was necessary to cross examine the three witnesses for arriving at a just and correct decision . He has submitted that P.W 32 has been examined on 12.03.2013 and the case was posted for cross examination after lunch .This witness was discharged as the defence was unable to cross examine him on the same day . He was thereafter re -examined by the prosecution on 11.01.2019 as the person who had taken charge of the investigation and submitted chargesheet had died. PW 32 was cross examined on 17.01.2020 and therefore due to the Covid 19 pandemic, the case could not be taken up and when court work was resumed, the application under Section 311 Crl.P.C was filed on 29.11.2021 for summoning him and two others for cross examination.

4. Mr. N. Maharana, learned Additional Standing Counsel (Vigilance) opposes the application and submits that the application had been filed in the learned trial court after long delay in order to delay the trial which is pending since almost twenty years and no explanation has been submitted for the delay in filing such application or how cross examination of the witnesses is necessary for a just decision in the case. Therefore the application had rightly been rejected by the learned trial court. In support of his submission, he relies on the decisions of the Hon'ble Apex Court rendered in the case of ***Ratanlal vrs. Prahlad Jat, (2017) 9 SCC 340 , Swapan Kumar Chatterjee vs Central Bureau Of Investigation dated 04.01.2019 (Crl. Appeal No. 15 of 2019 arising out of SLP (Crl.) No. 7748 of 2017), Anurag Srivastava vrs. State of U.P. & Anr., (2010) (71) AHC 504 (A11) and CRLMC No. 3628 of 2013 dated 16.12.2013, State of Haryana vrs. Ram Meher, (2016) 8 SCC 762*** and ***Dara Singh @ Dara vrs. Republic of India, (2003) 26 OLR 124***.

5. The Apex Court in the case of ***Rajaram Prasad Yadav (*** supra ) has referred to a number of decisions on the scope and ambit of section 311 Crl.P.C and has enumerated the principles to be kept in mind by the Courts while dealing with an application under Section 311 Cr.P.C in paragraph 23 of the judgment which is extracted below:

> *"23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:*
>
> *a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*
>
> *b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.*
>
> *c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.*
>
> *d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*
>
> *e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*
>
> *f) The wide discretionary power should be exercised judiciously and not arbitrarily.*
>
> *g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*
>
> *h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*
>
> *i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

*j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*

*k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

*l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

*m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

*n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."*

6. There can be no quarrel over the settled proposition of law that the right of cross examination is a valuable right and power under Section -311 of the Cr.P.C to recall a witness for cross examination can be exercised at any stage for a just decision in the case , but it is also to be kept in mind that the application should be bonafide and should not be filed by way of an afterthought or to delay disposal of the case . Such power is not to be exercised for the mere asking ,but the Court has to be satisfied that it is in "every respect essential to examine such a witness or to recall him for further cross examination in order to arrive at a just decision" .

7. On careful examination of the impugned order, I do not find any error with respect to rejection of the prayer to recall P.W 5 and 25 as more than ten years have elapsed since they were examined and their cross examination was declined and it has neither been averred nor argued as to how their cross examination is necessary for a just decision in the case and the delay in filing the application has not been explained .

8. But as far as P.W 32 is concerned, the prayer to recall him has been rejected on the ground that the petition is silent as to what questions are to be put to this witness. Although it was not mandatory for the defence to indicate the exact questions which were sought to be asked to this witness but the defence should have at least indicated the points on which it wanted to cross examine P.W 32 . As P.W 32 is one of the I.O.s in this case and had been examined in chief on 12.03.2013 and thereafter re-examined by the prosecution on 11.01.2019 as the original I.O. who had submitted the chargesheet had died in the meanwhile and he has been cross examined on 13.01.2019 and on 17.01.2020 soon after which Covid 19 interefered with the regular functioning of Courts , I am inclined to grant the petitioner the liberty to file a fresh application to recall P.W 32 indicating the points on which he seeks to recall P.W 32 or indicate the questions which he wants to put to P.W 32 , so that the learned trial Court can examine whether his recall for cross examination is essential and necessary for a just decision in the case

9. It is stated by the counsels that the next date in the case is 10.01.2022. As the case is pending in the learned Court below since the year 2000, it is directed that if the application under Section – 311 Cr.P.C to recall P.W 32 is filed on or before 10.01.2022, in the manner aforesaid, it shall be considered in accordance with law on its own merit but expeditiously. It is also directed that the learned trial Court shall make endeavor to dispose of the trial without further delay and preferably by the end of March 2022. It is also clarified that if such application is not filed by the petitioner on or before 10.01.2022 , this order shall not be given effect to and the learned trial Court shall proceed with the trial without granting any adjournment for filing of such application . With the aforesaid observation, the CRLMC is disposed of. Urgent certified copy of the order be granted on proper application.

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**2022 (I) ILR – CUT- 203**

**R.K. PATTANAIK, J.**

CRLMC NO. 340 AND 2002 OF 2017

**MALAYA KUMAR LENKA** …….Petitioner

.V.

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

CRLMC NO. 2002 OF 2017

SUBHASIS BISWAS …….Petitioner

.V.

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power of High court – Petition questions the legality and judicial propriety of the impugned order besides the sustainability of the criminal proceeding on various grounds – Law Vis-a-vis scope of interference on the issue examined – Held, the powers envisaged in Section 482 Cr.P.C. vis-à-vis quashment of criminal proceedings could be exercised in some categories of cases either to prevent abuse of process of court or otherwise to secure the ends of justice, though, it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formula and to give an exhaustive list of myriad kinds of cases, however, the principles can be summarized viz. (i) in cases where considering the FIR or the complaint, even if accepted at their face value, do not constitute any offence; or (ii) where the uncontroverted allegations made therein do not disclose commission of any offence or make out a case against the accused; or (iii) where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach at a just conclusion that there is sufficient ground for proceeding against the accused; or (iv) where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive to wreck vengeance on the accused and with a view to spite him due to private and personal grade; or (v) in case there is any express legal bar or prohibition to the institution and continuation of the proceeding as engrafted in Cr.P.C. or any special Act – To sum up, under any of the circumstances narrated above and in such similar situations, a criminal prosecution, if assailed, inherent jurisdiction may have to be exercised in order to meet the ends of justice.** (Para 13)

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

1. AIR 1992 SC 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
2. (1998) 5 SCC 749 : Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors.
3. (2007) 14 SCC 776 : All Cargo Movers (India) Pvt. Ltd. & Ors. Vs. Dhanesh Badarmal Jain & Anr.
4. (2017) 13 SCC 369 : Vineet Kumar & Ors. Vs. State of U.P. & Anr.
5. (2013) 3 SCC 330 : Rajiv Thapar & Ors. Vs. Madan Lal Kapoor
6. AIR 1969 Orissa 149 : Lakshman Jena Vs. Sudhakar Paltasingh.
7. AIR 1989 SC 885 : India Carat Pvt. Ltd. Vs. State of Karnataka & Anr.

For Petitioner : Mr G.M. Rath.
For Opp. Parties : Mr. D.R.Parida, ASC & Mr. D.Panda

CRLMC No. 2002 of 2017

For Petitioner : Mr. A.N. Das
For Opp. Parties : Mr. D.Panda

JUDGMENT Date of Hearing: 15.12.2021 : Date of Order: 19.01.2022

***R.K. PATTANAIK, J.***

1. In fact, the petitioners by invoking inherent jurisdiction under Section 482 Cr.P.C. have questioned the legality and judicial propriety of the impugned order dated 23.09.2016 i.e.Annexure-1 passed in ICC Case No.259 of 2016 by the learned S.D.J.M., Panposh, Rourkela besides the sustainability of the criminal proceeding itself on various grounds.

2. Since the parties have raised similar grounds, both the applications have, therefore, been taken up together for disposal by a common order.

3. OP No.4 filed ICC Case No.465 of 2015 before the learned court below which was directed to be investigated upon in terms of Section 156(3) Cr.P.C. and accordingly, a case was registered vide G.R. Case No.1449 of 2015 which, however, resulted in submission of a closure report, where after, a protest petition was filed and the same was registered as ICC Case No.259 of 2016 and then, the learned counsel below, after recording the initial statement of its representative and conducting an enquiry as per Section 202 Cr.P.C. passed the order of cognizance under Annexure-1 in respect of offence punishable under Section 408/120-B/34 IPC and summoned the petitioners, which is being questioned at present.

4. As is revealed from the record, the petitioner (in CRLMC No. 340 of 2017) is an ex-employee of OP No.4, whereas, the other petitioner (in CRLMC No. 2002 of 2017) to be a senior official of a company, namely, Heraeus Technologies India Pvt. Ltd. (in short 'HIT') against whom OP No.4 filed ICC Case No.465 of 2015, whereupon, a case was registered by the order of the leaned court below and as stated earlier, it led to the submission of the closure report, where after, ICC Case No.259 of 2016 has been filed. In sum and substance, the petitioner of HIT is alleged of having conspired with OP No.4's said ex-employee in procuring certain confidential documents lying at its disposal and utilized the same in the suit vide C.S. No.1 of 2015 instituted by Heraeus Electro-Nite International N.V. (hence called 'HEN') before the court of learned District Judge, Sundargarh on trade mark infringement vis-à-vis OP No.4, thereby, having committed an offence of criminal breach of trust.

5. As is made to understand, the ex-employee worked with OP No.4 at its Rourkela branch from January, 2004 and resigned on 25th September, 2015 and joined another company by name IFGL Refractories Ltd. where he continued till February, 2018 and again left the job due to ill health and at last, joined HIT. In the meanwhile, HEN instituted CS No.1 of 2015 against OP No.4 and to put forth its claim of infringement of trade mark and passing off relying upon certain invoices. Thereafter, OP No.4 by leveling allegations that the invoices in question being confidential documents had been in custody and entrustment during the service days of its ex-employee, who conspired with the other petitioner and utilized it to institute the suit and hence, committed the breach of trust. In other words, the allegation is that the petitioners managed to secretly procure and pass on the invoices in order to facilitate institution of the suit by HEN, hence, are liable for the offence.

6. The action of the learned court below is claimed to be based on no cogent reason, basis and justification as against the backdrop of a closure report being filed for insufficiency of evidence. In fact, the grounds of challenge are that (i) no case at all has been made out besides dispute being predominantly civil in nature; (ii) the alleged invoices are no property since no value is attached to them and moreover when said documents, which are only the photocopies and not the originals, in no way to be treated as confidential material; (iii) invoices being once issued and delivered, OP No.4, who raised it, cannot lay any claim over the same as its exclusive

property, in order to sustain a charge of entrustment and breach thereof; (iv) the learned court below disregarded the closure report without examining the material on record in order to reach at a conclusion, whether, OP No.4 would be able to succeed in bringing the charge home etc.

7. OP No.4's contention is that the decision under Annexure-1 is absolutely justified and in accordance with law. Further claimed that its ex-employee petitioner being the custodian of the alleged invoices parted with it so as to enable HEN to institute the suit, inasmuch as, such documents are confidential in nature and could not have fallen in the hands of the official of the HEN which did happen on account of breach of trust and a criminal conspiracy. It is alleged that the investigation was not properly conducted which, therefore, led to the submission of the closure report, in reply, OP No.4 filed the protest petition basing upon which the learned court below proceeded to take cognizance of the offence which does not suffer from any infirmity. It is also claimed that the learned court below had to confine itself to the facts alleged in the complaint for the purpose of taking cognizance and rightly, therefore, passed the cognizance order dated 23.09.2016 despite a closure report being received. It has further been claimed that the circumstances under which the alleged invoices were procured through OP No.4's ex-employee in order to institute the suit, prima facie, substantiate an act of criminal breach of trust, the fact which was correctly appreciated by the learned court below. The stand of the State is in line with that of OP No.4 justifying the criminal action vis-a-vis the petitioners.

8. For better appreciation, the law on the powers envisaged in Section 482 Cr.P.C. vis-à-vis quashment of criminal proceedings is required to be precisely stated. There is no tenebrosity in the settled position of law that criminal proceedings, under certain circumstances, may be quashed exercising inherent jurisdiction under Section 482 Cr.P.C. A judgment legal classicus on the above point is the Supreme Court's dictum in ***State of Haryana and others Vs. Ch. Bhajan Lal and others*** reported in AIR 1992 SC 604, wherein, it is held and observed that such power could be exercised in some categories of cases either to prevent abuse of process of any court or otherwise to secure the ends of justice, though, it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formula and to give an exhaustive list of myriad kinds of cases and lastly concluded that (i) in cases where considering the FIR or the complaint, even if accepted at their face value, do not constitute any offence;

or(ii) where the uncontroverted allegations made therein do not disclose commission of any offence or make out a case against the accused; or(iii) where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach at a just conclusion that there is sufficient ground for proceeding against the accused; or(iv) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive to wreck vengeance on the accused and with a view to spite him due to private and personal grade; or(v) in case there is any express legal bar or prohibition to the institution and continuation of the proceeding as engrafted in Cr.P.C. or any special Act. To sum up, under any of the circumstances narrated above and in such similar situations, a criminal prosecution, if assailed, inherent jurisdiction may have to be exercised in order to meet the ends of justice. Referring to the above decision, it is contended for the petitioners that a case of such kind is clearly made out for quashing of the criminal proceeding set in motion at the instance of OP No.4.

9. As already mentioned, cognizance of the alleged offence under Annexure-1 was taken after receiving the protest petition in the shape of a complaint. At this juncture, the learned counsels appearing for the petitioners strongly contended that the learned court below miserably failed to examine the facts of the complaint and without any foundation, proceeded by taking cognizance of offence, which is not in accordance with the law laid down by the Supreme Court in ***Pepsi Foods Ltd. and another Vrs. Special Judicial Magistrate and others*** reported in (1998) 5 SCC 749. In the decision (supra), it has been observed that a Magistrate summoning an accused has to apply his mind to the facts of the case and the law applicable thereto and furthermore to consider the nature of allegations and also oral as well as documentary evidence and then, to take a decision, if the complainant could produce sufficient material to bring home the charges. So to say, there has to have a judicial application of mind and only after carefully scrutinizing the facts and evidence brought on record, a Magistrate to decide as to if cognizance of the offence is to be taken or otherwise. In the present case, the learned court below despite a closure report, on the basis of the complaint by way of a protest petition was apparently satisfied to take cognizance of offence under Annexure-1. It is well established procedure that the view expressed by the police and submission of closure report does not prevent or preclude a court from proceeding by taking cognizance of offence in one of the ways prescribed in law. So, the pertinent question is,

whether, in the instant case, an offence of breach of trust with conspiracy is, prima facie, made out against the petitioners for the purpose of an enquiry and trial?

10. The learned counsels for the petitioners argued that the essential ingredients of Section 408 IPC are to be fulfilled which is conspicuously absent in the case and therefore, the learned court below grossly erred in taking cognizance of the offence. In response, the learned counsel for OP No.4 contended that since the ex-employee petitioner was the in-charge and custodian of the alleged invoices which he parted with the other to enable HEN in instituting the suit, there was indeed a breach of trust and rightly, therefore, the learned court below took cognizance of offence under Section 408/120-B IPC. As understood, the essential elements of Section 408 IPC are that entrustment must be in respect of a property or with any dominion over the property and the person entrusted dishonestly misappropriates or converts the subject to his own use or uses it or disposes of the same either to himself or to somebody. It is contended for the petitioners that the above conditions which are sine qua non to invite a prosecution under Section 408 IPC are not at all in existence. It is further contended that the alleged invoices are no property as no value is attached to them in order to attract Section 408 IPC, since for breach of trust a property which would be something moveable or immoveable must be transferable or consumable or capable of being spent which is a fundamental requirement, a condition which is conspicuously lacking and besides that, such documents cannot be treated as confidential and a valuable property capable of entrustment, moreover, when the originals of it are shown to be in possession of OP No.4. On the contrary, the learned counsel for OP No.4 would contend that an invoice is a property and there was evidence to conclude that the ex-employee petitioner besides a whole lot of materials had been entrusted with two of the alleged invoices which were subsequently handed over to the other petitioner of HIT so as to enable HEN to institute the suit and in such view of the matter, not only entrustment but also the dishonest means in sharing the confidential information was prima facie established and therefore, the order under Annexure-1 is unassailable. No doubt, an invoice is a crucial document for conducting business but it primarily evidences a transaction inter se parties and enforceable by law. It is, indeed, a document whereby payment is requested for the goods supplied or services offered containing details of the information as to the transaction made and at times, in regular course of business, as is experienced, found unsigned which is

also honoured by the buyer without any objection being raised. Question is, whether, an invoice can really be a property for the purpose of Section 408 IPC? The invoices are the extracts of the originals said to have been utilized in a suit which has been instituted by HEN. Since the invoices relate to transactions between the parties involved, in the humble view of the Court, it cannot be treated as an entrusted property for the purpose of a criminal prosecution. That apart, an invoice once issued and delivered to a purchaser for obtaining payment, as is rightly pointed out by the learned counsel for the petitioners, OP No.4 cannot lay any claim over the same as its exclusive property. Since the documents are of such nature, it is always parted with and delivered to the buyers and therefore, it would not be correct to say that the invoices remained the exclusive property of OP No.4 which also do not contain any confidential information, so to speak. To base a claim with the invoices that it was being entrusted to one of the petitioners, who shared it with the company concerned and hence, the trust was breached cannot be the foundation for a criminal prosecution. The extracts of the invoices could be procured from different sources once the transactions are over and therefore, to fix the liability on an ex-employee would be totally unjustified. Perhaps, for the fact that the ex-employee joined HIT and before that, the business tie up between OP No.4 and HEN had been terminated, which was also a subject matter of dispute in C.S. No. 154 of 2013 and thereafter, the suit was filed in 2015 by HEN for infringement of trade mark, under the impression that the alleged invoices and extracts thereof might have been procured through him, the complaint was filed alleging conspiracy but according to the Court, such a criminal action is having no sound basis or foundation to sustain a charge of breach of trust. In other words, it can be said that OP No.4 merely on surmises and conjectures assumed the involvement of the ex-employee. There is also no material, prima facie, to establish the role which has been played by the other petitioner, in so far as the charge of conspiracy is concerned. Having acquaintance with an ex-employee of OP No.4, who later joined HIT, without any adverse conduct and joint mischief being attributed, cannot by itself be sufficient to sustain an allegation of criminal conspiracy. Moreover, on the strength of the alleged invoices, a charge of criminal breach of trust cannot survive and be made to stand.

11. An argument is advanced from the side of the petitioners that all the admitted documents besides the complaint can be gone through while exercising jurisdiction under Section 482 Cr.P.C. as the correct position of law has been laid down by the Supreme Court in ***All Cargo Movers (India)***

***Pvt. Ltd. and others Vrs. Dhanesh Badarmal Jain and another*** reported in (2007) 14 SCC 776. In fact, learned counsel for OP No.4 contended that the learned Magistrate was only required to consider the complaint and not to go through the materials collected during investigation and also the closure report for proceeding with the case. In the aforesaid decision, the Supreme Court held that admitted facts may be taken into account including the pleadings of a suit to form an opinion, whether, the criminal proceeding stands or succumb to any inherent improbabilities. It was observed therein that for the purpose of finding out as to if the allegations, prima facie, made out a case, in exercise of jurisdiction under Section 482 Cr.P.C., the admitted facts on record may be examined with the observation that it is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that exercising the inherent jurisdiction of the Court, it is impermissible also to look to the admitted documents. That being so, for the purpose of proceeding with a complaint, a Magistrate may be required to consider the facts alleged therein and examine the materials produced against the background of a closure report being filed but while exercising jurisdiction under Section 482 Cr.P.C., the authority is not in any way limited or circumvented from considering the admitted facts and documents on record even though it forms a part of a civil suit, the purpose being to ascertain, if the criminal proceeding can withstand the rigor of law. In any case, a court is always required to examine, whether, a case for an offence is made out perusing the facts alleged in the complaint. Looking at the closure report and taking cognizance of the relevant materials on record and even by examining the facts of the complaint, this Court reaches at a logical conclusion that simply by relying upon the extracts of the alleged invoices and that too when, the documents only evidences about some transactions taking place between the parties involved, entrustment and breach thereof cannot be alleged and as a consequence, the petitioners could not have been proceeded with at the instance of OP No.4. It is a case where against a backdrop of a litigation on infringement of trade mark between OP No.4 and HEN that the petitioners have been roped in may be to impact the commercial dispute and/or possibly to wreck personal or professional vengeance, which according to the Court, is not entirely misplaced in the given set of facts and circumstances of the case.

12. Factually, the complaint does not even remotely suggest any kind of conspiracy in sharing confidential information which belonged to OP No.4. On a consideration of the materials on record, the Court finds that there is no

prima facie evidence to show and satisfy existence of any criminal conspiracy being hatched by the petitioners so as to enable HEN to institute the suit. The engagement of an ex-employee with HIT and in the meanwhile, the arrival of the commercial dispute vis-à-vis OP No.4 and HEN seems to have raised some amount of suspicion about conspiracy, which according to the Court, is totally misconceived and moreover when, the alleged documents could be procured from any source. The claim of the petitioners that the prosecution is maliciously instituted with an ulterior motive is on account of absence of any materials is not totally without substance. The learned counsel for the petitioners relied upon a decision of Supreme Court in ***Vineet Kumar and others Vs. State of U.P. and another*** reported in (2017) 13 SCC 369 to contend that where the criminal proceeding is actuated with mala fide or maliciousness, it should be quashed in exercise of High Court's jurisdiction under Section 482 Cr.P.C. Having regard to the facts of the present case especially pendency of a commercial litigation between OP No.4 and HEN and the fact that there is no material to substantiate conspiracy between the petitioners for having shared any such confidential information much less the invoices which could be accessible from number of sources, the Court is of the view that the criminal proceeding is not manifestly attended with any good intention rather seems to have been instituted with some ulterior motives.

13. Another decision of the Supreme Court in the case of ***Rajiv Thapar and others Vs. Madan Lal Kapoor*** reported in (2013) 3 SCC 330 is relied upon from the side of the petitioners. In the decision (supra), it is observed that certain steps are to be followed to determine the veracity of the claim for quashment of a proceeding which are to the effect that (i) whether the material relied upon by the accused appears sound, reasonable and of sterling and impeccable quality; (ii) if the material so relied upon is sufficient to reject and overrule the factual assertion of the complaint, if by such material, it would rather persuade a reasonable person to dismiss and condemn the accusation made; (iii) whether the material as defence has not been refuted by the prosecution and/or the material is such that it cannot justifiably be refuted by the prosecution; (iv) whether the proceeding with the trial would result in abuse of process of the court and not serve the ends of justice; and (v) if the outcome of the decision confirming to the tests is in the affirmative, the judicial conscience of the Court should be in favour of invoking the vested powers under Section 482 Cr.P.C. to quash the criminal proceeding. In the instance case, the proceeding is initiated by OP No.4 on

the strength of alleged invoices, which as earlier discussed, could not be a material to hold entrustment besides being confidential and that apart, to allow the enquiry and trial to continue with such a foundation would certainly be an abuse of process of the court especially when there is no clear assertion as to in what manner the petitioners engaged themselves in a conspiracy and therefore, the Court reiterates that it is a fit case where inherent jurisdiction under Section 482 Cr.P.C. should be exercised.

14. The learned counsel for OP No.4 cited two decisions, namely, ***Lakshman Jena Vs. Sudhakar Paltasingh*** :AIR 1969 Orissa 149 and ***India Carat Pvt. Ltd. Vs. State of Karnataka and another***: AIR 1989 SC 885 while advancing an argument that the learned court below rightly proceeded against the petitioners uninfluenced by the closure report as no any extraneous material could have been examined and gone through for the purpose of taking cognizance since it was to confine to the complaint and not beyond. The above decisions are primarily with regard to the powers of a Magistrate, as has been correctly pointed out by the learned counsel for the petitioners. As earlier discussed, this Court while exercising jurisdiction under Section 482 Cr.P.C. does have the authority to consider all such material which are admitted by the parties even arising out of a civil or commercial litigation to determine as to if a criminal proceeding is to survive or be terminated on the premise that it would lead to abuse of process of the court or necessary to secure the ends of justice. So, therefore, according to the Court, said authorities cited by the learned counsel for the OP No.4 are of no help or render any kind assistance since they do not relate to inherent jurisdiction of the High Court under Section 482 Cr.P.C.

15. So the end result of the above discussions is that the Court is inclined to accept the contentions in favour of quashment and to hold that the criminal proceeding in ICC Case No.259 of 2016 as against the petitioners is not sustainable in law and therefore, it deserves to be terminated so as to do substantial justice and accordingly, it is ordered.

16. Resultantly, applications under Section 482 Cr.P.C. stand allowed for the reasons discussed herein before. As a necessary corollary, ICC Case No.259 of 2016 pending before the court of learned S.D.J.M., Panposh, Rourkela and the proceedings arising therefrom including the impugned order under Annexure-1 is hereby quashed.

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**2022 (I) ILR – CUT- 213**

**SASHIKANTA MISHRA, J.**

CRLMC NO. 112 OF 2020

**BINOD BIHARI SETHY** .....Petitioner

.V.

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 read with Article 21 of the Constitution of India, 1950 – Denial of right to speedy trial – Exercise of inherent power of the court – FIR in 2006 – Final form submitted in 2019 – No protest petition filed in spite of service of notice on Informant – Prayer for quashing of the criminal proceeding – Scope – All circumstances considered – Held, this is a fit case to be quashed.**

*This is a case of a man against whom an FIR was lodged and investigation continued for as long as 15 years to ultimately end in a Final Report being filed. One can only imagine the stress that the petitioner would have undergone during all these years with the "Sword of Damocles" hanging over his head. As highlighted by the Apex Court, pendency of a criminal proceeding, irrespective of the nature of the offence alleged, are sufficient to cause concern, anxiety and apprehension in the mind of the accused not to speak of the expenses that he may have to incur in defending himself. What is a matter of greater concern to note is that there is no explanation whatsoever from the side of the investigating agency as to the reasons for non-completion of investigation for all these years. Be it noted here that save and except the offence under Section 506, all the other offences alleged to have been committed by the accused namely, Sections 447/379/188/294/353 of IPC, are punishable with imprisonment for terms ranging from one year to three years at the most. So even if a Final Form had been submitted, the concerned Magistrate would have been hard put to take cognizance keeping in view the provisions under Section 468 of Cr.P.C. However, that is besides the point. The crux of the matter is inordinate delay in completion of the investigation. In view of the discussion on law laid down by the Apex Court in the cases referred above, this Court has no hesitation whatsoever to hold that the inaction of the investigating agency to conclude the investigation for as long as 15 years, that too, without offering even a semblance of explanation is a direct affront to the cherished principle of right to speedy trial ingrained in the provisions of Article 21 of the Constitution of India.* *(Para 8)*

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

1. (1978) 1 SCC 248 : Maneka Gandhi Vs. Union of India
2. (1992) 1 SCC 225 : Abdul Rehman Antulay Vs. R.S. Nayak.

For Petitioner : M/s. Anirudha Das, A Das,S.C. Mishra, A. Das & A. Sahoo
For Opp. Party : Mr. P.K. Maharaj, Addl. Standing Counsel.

ORDER Date of Order : 03. 01.2022

***SASHIKANTA MISHRA, J.***

An FIR was lodged against the present petitioner on 24.10.2006 by the then Tahasildar, Chhendipada before the Officer-in-Charge, Chhendipada Police Station leading to registration of P.S. Case No. 132 dated 24.10.2006 for the alleged commission of offence under Sections 447/379/188/294/535/506 of IPC. The said P.S. Case corresponds to C.T. Case No. 1962 of 2006, which is presently pending in the Court of learned J.M.F.C., Chhendipada. Final Report was submitted in the case after more than 15 years. The inaction of the investigating agency complied with inordinate delay is cited as a ground by the petitioner for quashment of the FIR and the consequential criminal proceedings in the present application filed under Section 482 Cr.P.C.

2. A reading of the FIR reveals that the petitioner had allegedly encroached upon three government plots measuring an area of Hc.1.8660 in village Kosala, for which Encroachment Case No. 46 of 2005 was instituted against him. Pursuant to show cause issued, he appeared before the Court (Tahasildar) on 06.07.2005 and admitted the fact of encroachment. Subsequently, the Tahasildar, Chhendipada issued prohibitory orders against the petitioner restraining him from going to the government land or from raising any crops thereupon. It is further alleged that the petitioner did not abide by such orders and raised crops, for which the Tahasildar directed the concerned Revenue Inspector to seize the standing crops as per law. Despite such seizure of crops, the petitioner is alleged to have forcefully entered into the plots and after harvesting the crops shifted them to the nearby field. When the Revenue Inspector, after coming to know of such fact rushed to the spot, he found the petitioner in the process of shifting and cutting the crops, and dissuaded him from doing so. It is further alleged that instead of acceding to such request, the petitioner abused the Revenue Inspector in filthy language and also threatened to kill him. The Tahasildar thereafter lodged the complaint before Chhendipada Police Station leading to registration of the case as above. The FIR was forwarded to the Court of learned S.D.J.M., Angul on 28.01.2006, on the basis of which the above mentioned C.T. case was instituted. Since then, the case was adjourned from

time to time till it was transferred to the Court of learned J.M.F.C., Chhendipada. It has come to light, from the instructions obtained by learned Addl. Standing Counsel that in the meantime, Final Report has been submitted basing on which notice has been issued to the informant but till date, he has not responded.

3. Heard Mr. A. Das, learned counsel for the petitioner and Mr. P.K. Maharaj, learned Addl. Standing Counsel for the State.

4. It is contended by Mr. Das that continuance of the case without Final Form being submitted for as long as 15 years by itself is an abuse of the process of Court. It is further argued that the petitioner is presently aged about 72 years and has been going through tremendous mental strain and anxiety because of pendency of the criminal case and the uncertainty attached to it. Since right to speedy trial is also a part of fundamental right under Article 21 of the Constitution of India, it is contended that inaction of the investigating agency for an inordinately long period of time directly violates such right, for which the proceedings need to be quashed.

5. Mr. P.K. Maharaj, learned Addl. Standing Counsel while admitting that the Final Form was not filed for as long as 15 years, however, contends that no time limit being prescribed for conclusion of a criminal proceeding, mere delay in submission of Final Form or Final Report, as the case may be, cannot be a ground to quash the proceedings. On being asked by the Court, however, Mr. Maharaj is unable to cite a plausible reason for the inordinate delay in conclusion of investigation.

6. The facts as laid before this Court are not in dispute inasmuch as the FIR was lodged as far back as on 24.10.2006 and Final Report (FRT) was submitted on 31.12.2019 as informed by learned State Counsel. It is no longer a matter of debate that right to speedy trial flows from Article 21 of the Constitution of India. In the case of ***Maneka Gandhi vs. Union of India*** reported in (1978) 1 SCC 248, the Apex Court interpreting the provisions under Article-21 held that any law has to answer the test of reasonableness and fairness inherent in Articles 19 and 14. In other words, such law should provide a procedure which is fair, reasonable and just. Then alone, would it be in consonance with the command of Article 21. Indeed, wherever necessary, such fairness must be read into such law.

Whether the same can be read into the provisions of the Code of Criminal Procedure is also no longer in dispute in view of the authoritative pronouncement of the Apex Court in the case of ***Abdul Rehman Antulay v. R.S. Nayak***, (1992) 1 SCC 225, wherein this was also more or less the question posed which was answered in the following words:

> *"Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of a criminal case is fair, just and reasonable?*
>
> *If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exoneration of the innocent but this determination (of guilt or innocence) must be arrived at with reasonable dispatch — reasonable in all the circumstances of the case. Since it is the accused who is charged with the offence and is also the person whose life and/or liberty is at peril, it is but fair to say that he has a right to be tried speedily. Correspondingly, it is the obligation of the State to respect and ensure this right. It needs no emphasis to say, the very fact of being accused of a crime is cause for concern. It affects the reputation and the standing of the person among his colleagues and in the society. It is a cause for worry and expense. Xxxxxxxx*
>
> *82. The provisions of the Code of Criminal Procedure are consistent with and indeed illustrate this principle. They provide for an early investigation and for a speedy and fair trial. The learned Attorney General is right in saying that if only the provisions of the Code are followed in their letter and spirit, there would be little room for any grievance. The fact however, remains unpleasant as it is, that in many cases, these provisions are honoured more in breach. Be that as it may, it is sufficient to say that the constitutional guarantee of speedy trial emanating from Article 21 is properly reflected in the provisions of the Code.*

7. Thus, dealing with the right to speedy trial, the Apex Court in ***Abdul Rehman Antulay's*** case supra laid down several propositions of which, the ones that are relevant for the case at hand are extracted herein below.

> *(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.*
>
> *(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.*

*(3) The concerns underlying the right to speedy trial from the point of view of the accused are:*

*(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;*

*(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and*

*(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.*

*xx xx xx*

*(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.*

*xx xx xx*

8. The facts of the case at hand may now be considered in the light of the propositions discussed above. This is a case of a man against whom an FIR was lodged and investigation continued for as long as 15 years to ultimately end in a Final Report being filed. One can only imagine the stress that the petitioner would have undergone during all these years with the "Sword of Damocles" hanging over his head. As highlighted by the Apex Court, pendency of a criminal proceeding, irrespective of the nature of the offence alleged, are sufficient to cause concern, anxiety and apprehension in the mind of the accused not to speak of the expenses that he may have to incur in defending himself. What is a matter of greater concern to note is that there is no explanation whatsoever from the side of the investigating agency as to the reasons for non-completion of investigation for all these years. Be it noted here that save and except the offence under Section 506, all the other offences alleged to have been committed by the accused namely, Sections 447/379/188/294/353 of IPC, are punishable with imprisonment for terms ranging from one year to three years at the most. So even if a Final Form had been submitted, the concerned Magistrate would have been hard put to take

cognizance keeping in view the provisions under Section 468 of Cr.P.C. However, that is besides the point. The crux of the matter is inordinate delay in completion of the investigation. In view of the discussion on law laid down by the Apex Court in the cases referred above, this Court has no hesitation whatsoever to hold that the inaction of the investigating agency to conclude the investigation for as long as 15 years, that too, without offering even a semblance of explanation is a direct affront to the cherished principle of right to speedy trial ingrained in the provisions of Article 21 of the Constitution of India.

9. It goes without saying that the Court can neither be a mute spectator to the whims and fancies of the investigating agency nor be a party to it, which appears to have occurred in the instant case, inasmuch as, the Court below had simply been adjourning the matter for all these years by passing the following order on each date:

"*Record is put up today. FF not received. Put up on …… awaiting FF.*"

10. This amounts to perpetuating the illegal inaction of the investigating agency. In all fairness, the Court below ought to have called for a report from the I.O. as to the status of investigation instead of giving him a free hand to do as he pleases. What is even more disturbing is that after submission of the Final Report on 31.12.2019, notice was supposedly issued to the informant calling upon him to file protest petition but alas, three more years have elapsed in the meantime with the matter being left in a state of suspended animation as it were.

11. The above inaction on the part of the investigating agency as also of the concerned Court is something that cannot be countenanced in law as the same, if allowed to continue indefinitely, would certainly amount to an abuse of the process of Court. This Court is therefore, convinced that this is a fit case to exercise its inherent powers under Section 482 of Cr.P.C. to put an end to the fiasco, once for all, moreso, as the investigation has ended in Final Report True being submitted.

12. Before parting with the case, this Court also deems it proper to observe that the higher police authorities should take note of such inaction on the part of the investigating officer (s) and pass appropriate orders to be followed by all concerned so as to prevent the same from recurring in future.

13. In the result, the CRLMC is allowed. The FIR in Chhendipada P.S. Case No. 132 of 2006 is hereby quashed. Consequentially, the Criminal Proceeding in C.T. Case No. 1962/2006 pending in the Court of learned J.M.F.C., Chhendipada is also quashed.

14. A copy of this order be forwarded to the Director General of Police, Odisha for his information and necessary action.

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**2022 (I) ILR – CUT- 219**

**A.K. MOHAPATRA. J.**

W.P.(C) NO. 41672 OF 2021

**SMRUTI REKHA MISHRA** **.....**Petitioner

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

**SERVICE LAW – Appointment of Hindi Teacher – Qualification of petitioner is Sastri (Hindi) from Orissa Rastrabhasa Parishad – Other persons having similar qualification have been given the benefit of appointment – Petitioner not given the benefit – Discrimination – Held, the law is fairly well settled that in Service Jurisprudence, if a similar benefit has been given to an employee, such benefit should be extended to all similarly situated employees without any discrimination – The authorities are required to act with all fairness as fair play is an integral part of all administrative decision making process.** (Para 21)

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

1. AIR 1988 S.C. 686 : K.I. Shephard and Ors. Vs. Union of India.
2. (2008) 9 SCC 24 : Maharaj Krishna Bhatta and Anr. Vs. State of J.K. and Ors.

For Petitioner : Mr.S.P.Mishra.
For Opp.Partes: Mr.Sangram Jena, Standing Counsel, S & M.E. Deptt.

ORDER Date of Order: 06.01.2022

***A.K. MOHAPATRA.J.***

The present writ application has been filed by the Petitioner after failing to get the desired result from the authorities despite direction issued in

earlier round of litigation by this Court to consider the case of the present Petitioner.

2. In the present writ application, the Petitioner seeks to challenge the order dated 3rd December, 2020 under Annexure-7 and order dated 27th October 2021 under Annexure-11 passed by the Director, Secondary Education, Odisha, Bhubaneswar and the Principal Secretary, Department of School & mass Education respectively. The Petitioner further prays for a direction to the Opposite Parties to appoint her in the post of Contractual Hindi Teacher pursuant to the Government Resolution No.27th October, 2014 under Annexure-2 with all consequential service benefits at par with her counterparts.

3. Heard learned counsel for the Petitioner and Mr.Sangram Jena, leaned Standing Counsel for School & Mass Education department.

4. The factual backdrops of the case, in a nutshell, is that the Petitioner after successful completion of +3 Arts from Utkal University in the year 1999 obtained Sastri (Hindi) from Orissa Rastrabhasa Parishad, Puri in the year 2014. She also successfully completed and obtained the degree of M.A. (Hindi) from Shobhit University, Meerut.

5. The Government of Odisha reviewed Teachers strength in various Schools in the State and found that there is scarcity of teachers in different Schools in the State of Odisha. To resolve the said problem faced by students in the Schools, the Opposite Party No.1 issued a Resolution No.23404/SME dated 27th October, 2014 notifying the recruitment procedure of teaching staff in Government Secondary Schools. Pursuant to the said Government Notification dated 27th October, 2014, the Petitioner submitted her candidature for appointment as a contractual Hindi Teacher as she has the requisite qualification as provided in Clause 3(f) of the Resolution dated 27th October, 2014. The said Clause 3(f) of Resolution dated 27th October, 2014 has been extracted herein below:

> "(f) Hindi Teacher – Bachelor's degree from a recognized University with Hindi as one of the elective subject with minimum 50% marks in aggregate (45% for SC/ST/PH/OBC/SEBC candidates) or with Rastrabhasa Ratna from Rastrabhasa Prachar Samiti, Wardha or with Sastri from Orissa Rastrabhasa Parisada, Puri or with Snataka (Acquired by June-2005, the date up to which the temporary recognition has been granted) f rom Hindi Sikshya Samiti, Orissa, Cuttack or an

> equivalent degree from a recognized institution with at least 50% marks in aggregate (45% for SC/ST/PH/OBC/SEBC candidates) and Hindi Sikshyan Parangat from Kendriya Hindi Sansthan, Agra/B.H.Ed ( a course prescribed by NCTE) from a Institution recognized by NCTE and affiliated to a recognized university/ B.Ed in Hindi (a course prescribed by NCTE) from Dakhin Bharat Hindi Prachar Sabha, Madras, a institution recognized by NCTE and affiliated to a recognized university.
>
> OR
>
> Bachelor's degree with Hindi as one of the optional/Hons subject with minimum 50% of marks in aggregate (45% for SC/ST/PH/OBC/SEBC candidates) and M.A. in Hindi with minimum 50% marks in aggregate from a recognized University.
>
> (The untrained candidates shall have to undergo required training within the timeline as prescribed by Govt.)"

6. As stated hereinabove, the Petitioner submitted her application bearing No.10022288 for selection and appointment as Contractual Hindi Teacher. While the matter stood thus, the authorities published a draft reject list which was uploaded in the website. The said draft reject list reveals that the application of the Petitioner was rejected and her name finds place against Sl. No.264 with remark "Untrained (+3 without Hindi as a subject)". Thereafter the Petitioner had filed an objection to the said rejection on 24th February, 2016. However, the same has not been considered as of now.

7. It is further pleaded in the writ application that the Petitioner has all the requisite qualification for being appointed as Hindi Teacher as per the eligibility norms prescribed in the Resolution dated 27th October, 2014. Further, candidates securing lower marks than the Petitioner have been selected and given appointment, whereas, the case of the Petitioner has not been considered illegally and arbitrarily although she is eligible to be considered for appointment.

8. It is further stated in the writ application that the Petitioner has acquired the degree of Sastri in Hindi from Rastrabhasa Parishad, Puri. The degree of Sastri from Odisha Rastrabhasa Parishad, Puri has been mentioned in Clause 3(f) of the said Resolution to be one of the eligible qualifications for appointment as a Contractual Hindi Teacher. It has also been stated that the Utkal University, Vani Vihar, Bhubaneswar vide Notification dated 31st July, 2012 clarified at Sl.No.168 the degree of Sastri in Hindi from Odisha Rastrabhasa Paishad, Puri is equivalent to Bachelor degree of Utkal University. So far the issue of degree of Sastri by Odisha Rastrabhasa Parishad, Puri is concerned, the same is no more *res-integra*. The Orissa Administrative Tribunal, Principal Bench, Bhubaneswar while adjudicating

O.A.No.1090 of 2016 was also required to adjudicate the above noted issue. Vide Order dated 24th May, 2019 passed in O.A.No.1090 2016 the Orissa Administrative Tribunal has come to a conclusion that the degree of Sastri from Odisha Rastrabhasa Parishad, Puri along with Bachelor Degree and M.A.in Hindi constitutes sufficient eligibility for being appointed to the post of Contractual Hindi Teacher.

9. The order dated 24th May, 2019 passed by Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O.A.No.1090 of 2016 was assailed by the State Government before this Court in W.P.(C) No.10616 of 2020. This Court vide order dated 7th September, 2020 has confirmed the order of the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar.

10. After disposal of the aforesaid writ application, the Petitioner approached the Opposite Party No.1 by filing a representation on 11th September, 2020 with a request to Opposite Party No.1 to appoint her to the post of Contract Teacher. Since the authorities did not act upon her representation, the Petitioner approached this Court by filing W.P.(C) No.24056 of 2020. This Court disposed of W.P.(C) No.24056 of 2020 by order dated 7th Octobr,2020 directing the Opposite Party No.2 to consider and dispose of the representation filed by the Petitioner within a period of eight weeks.

11. After disposal of the aforesaid writ application the Opposite Party No.2 rejected the representation of the Petitioner by order dated 3rd December, 2020 in a very casual manner without considering the representation in the light of the order passed by the Orissa Administrative Tribunal as well as by this Court. The said order dated 3rd December, 2020 under Annexure-7 is under challenge in this writ application.

12. In the meanwhile, the State Government challenged the order dated 7th September 2020 passed in W.P.(C) No.10616 of 2020 before the Hon'ble Supreme Court of India by filing SLP(C) No.195-196 of 2021. The Hon'ble Supreme Court of India by order dated 20th January, 2021 disposed of the SLP thereby the order passed by the Orissa Administrative Tribunal has been confirmed and the said order has attained finality.

13. Challenging the order dated 3rd December, 2020 under Annexure-7 the Petitioner again approached this Court by filing W.P.(C) No.8609 of 2021. This Court disposed of the said writ application by order dated 8th

April, 2021 directing the Opposite Party No.1 to dispose of the representation of the Petitioner dated 24th February, 2021 under Annexure-9 within a period of three months taking into consideration the decision passed by this Court as well as the Hon'ble Supreme Court of India.

14. The learned counsel appearing for the Petitioner submits that despite a specific direction by this Court by order dated 8th April, 2021 her representation pending before the authority was not considered for which she was compelled to approach this Court by filing multiple Contempt Petitions bearing CONTC Nos.4024, 5143 and 5857 of 2021 disposed of on 23.07.2021, 08.09.2021 and 07.10.2021 respectively. However, all these efforts did not yield any fruit. Finally, the Opposite Party No.1 by order dated 27th October, 2021 rejected the representation of the Petitioner in a very mechanical and arbitrary manner. The said order dated 27th October, 2021 under Annexure-11 has also been assailed in the present writ application.

15. Learned counsel for the Petitioner emphatically argued that the case of the Petitioner is similar to the case of the candidate in W.P.(C) No.10616 of 2020. Both the present Petitioner as well as the candidate in W.P.(C) No.10616 of 2020 have the similar qualification. It is submitted that the candidate in W.P.(C) No.10616 of 2020 namely, Aparna Sinha, the decision in whose favour by the Tribunal to give her appointment as Contract Hindi Teacher has already been upheld by the Hon'ble Supreme Court of India and pursuant to such direction she has already been given appointment by the Government as a Contract Hindi Teacher.

16. With regard to the objection of Opposite Party No.1 in its order dated 27th October, 2021 with regard to cut-off mark, learned counsel for the Petitioner submits that such a ground has been raised for the first time by Opposite Party No.1 in its order dated 27th October, 2021. The Petitioner is not aware of any such cut-off mark. In this context, the learned counsel for the Petitioner argues that a lot of posts of Contract Hindi Teachers are lying vacant. Therefore, the Petitioner, who is having the required qualification to be appointed to such post should have been given appointment against such vacant post. Further, it is submitted that persons securing less numbers have already been given appointment by the Opposite Parties as Contract Teacher. It is further stated that the candidate (Aparna Sinha) in W.P.(C) No No.10616 of 2020 had secured a mark of 223.9214 Therefore, the ground of

rejection in letter dated 27th October, 2021 saying that the cut-off mark was 225.9612 is a vague, baseless and imaginary one. It is further stated that many candidates who have secured less mark than the alleged cut-off mark 225.9612 have been given appointment in the meantime.

17. That with regard to vacancy position, learned counsel for the Petitioner submits that as per Resolution under Annexure-2 a total number of 799 posts were required to be filled up. Out of which 400 posts were meant for UR category and only about 200 posts have been filled up and an equal number of posts are still lying vacant. Referring to the information obtained under RTI Act, the learned counsel for the Petitioner submits that there are still a large number of Contract Hindi Teacher posts lying vacant in Cuttack Education District.

18. Per contra, Mr.Jena, learned Standing Counsel for School & Mass Education department while supporting orders under Annexures-7 and 11 passed by the Opposite Party Nos.2 & 1 respectively, submits that the Petitioner was not found eligible by the authorities as she does not possess the requisite qualification as per the Government Resolution dated 27th October, 2014. He further submits that her case was carefully examined by the authorities and the Petitioner was not found eligible to be appointed as a Contract Hindi Teacher. Mr.Jena, further submits that the case of the Petitioner is not covered by the decision rendered by the Orissa Administrative Tribunal as well as by this Court which was confirmed in appeal by the Hon'ble Supreme Court of India in the matter of Aparna Sinha case and the ratio decided in the said case is not applicable to the facts of the present Petitioner's case. Accordingly, he has prayed for dismissal of the writ application.

19. Having heard learned counsel for the parties and upon perusal of records, documents and judgment cited before this Court, I am of the considered view that the authorities have not considered the case of the present petitioner in its proper perspective. Upon perusal of the records and documents filed in the writ application, this Court is of the firm view that the Petitioner possesses the required qualification as prescribed in Government Resolution dated 27th October, 2014 and as such she is eligible to be considered for appointment to the post of Contract Hindi Teacher. Moreover, the qualification of the Petitioner i.e., Sastri degree issued by the Orissa Rastrabhasa Parishad, Puri has not only been declared to be

equivalent to a Bachelors degree by Utkal University, the same has also been accepted by the Orissa Administrative Tribunal in the matter of Aparna Sinha case (supra) which was eventually confirmed by the Hon'ble Supreme Court of India. Rather, it is seen from both the orders under Annexures-7 and 11 that the authorities have failed to appreciate the real issue involved therein and as such have not considered the case of the Petitioner in the light of the judgment rendered in the case of Aparna Sinha (supra).

20. After careful consideration, this Court is of the firm view that the petitioner's case is squarely covered by the decision of the Orissa Administrative Tribunal in Aparna Sinha case (supra) which was ultimately confirmed by the Hon'ble Supreme Court of India. Moreover, the ground that the Petitioner has secured less mark than the cut off mark taken by the Opposite Party No.1 in its order under Annexue-11 appears to be fallacious and whimsical on the first ground that such cut-off mark had never been notified by any authority, consequently persons who have secured less mark than such cut-off mark have been given appointment by the Opposite Parties in the meantime.

21. Law is fairly well settled that in Service Jurisprudence, if a similar benefit is given to an employee, such benefit should be extended to all similarly situated employees without any discrimination. The authorities are required to act with all fairness as fair play is an integral part of all administrative decision making process. In ***K.I. Shephard and others vrs. Union of India,*** reported in **AIR 1988 S.C. 686** it has been held by the Supreme Court of India as follows**;**

> "15. Fair play is a part of the public policy and is a guarantee for justice to citizens. In our system of Rule of Law every social agency conferred with power is required to act fairly so that social action would be just and there would be furtherance of the well-being of citizens. The rules of natural justice have developed with the growth of civilisation and the content thereof is often considered as a proper measure of the level of civilisation and Rule of Law prevailing in the community. Man within the social frame has struggled for centuries to bring into the community the concept of fairness and it has taken scores of years for the rules of natural justice to conceptually enter into the field of social activities. We do not think in the facts of the case there is any justification to hold that rules of natural justice have been ousted by necessary implication on account of the time frame. On the other hand we are of the view that the time limited by statute provides scope for an opportunity to be extended to the intended excluded employees before the scheme is finalised so that a hearing commensurate to the situation is afforded before a section of the employees is thrown out of employment."

> 19. The writ petitions and the appeals must succeed. We set aside the impugned judgments of the Single Judge and Division Bench of the Kerala High Court and direct that each of the three transferee banks should take over the excluded employees on the same terms and conditions of employment under the respective banking companies prior to amalgamation. The employees would be entitled to the benefit of continuity of service for all purposes including salary and perks throughout the period. We leave it open to the transferee banks to take such action as they consider proper against these employees in accordance with law. Some of the excluded employees have not come to Court. There is no justification to penalise them for not having litigated. They too shall be entitled to the same benefits as the petitioners. Ordinarily the successful parties should have been entitled to costs but in view of the fact that they are going back to employment, we do not propose to make orders of costs against their employers. We hope and trust that the transferee banks would look at the matter with an open mind and would keep themselves alive to the human problem involved in it."

22. The judgment of the Hon'ble Supreme Court of India in the matter of ***Maharaj Krishna Bhatta and another vrs. State of J.K. and others,*** reported in **(2008) 9 SCC 24** has been relied upon by the learned counsel for the Petitioner in support of his argument that the Opposite Parties are bound to treat similarly placed persons in an identical manner without resorting to discrimination and arbitrariness. The relevant paragraphs of the said judgment has been quoted here in below;

> "16. In our considered opinion, in the light of the facts and circumstances, the Government ought to have accepted and respected the decision of the learned Single Judge without filing intra-Court appeal. No distinguishing feature had been brought to the notice of the Division Bench, nor the Division Bench set aside the judgment and order passed by the learned Single Judge holding or observing that though Abdul Rashid Rather was granted the benefit and the learned Single Judge ordered extension of those benefits to the writ petitioners, they were not entitled because the case of Abdul Rashid Rather was different. Even before us, nothing special or extraordinary fact or circumstance was shown to distinguish the case of Abdul Rashid Rather and of the present appellants. In our opinion, therefore, the learned Single Judge was wholly justified in allowing the writ petition and the Division Bench ought not to have interfered with the said decision.
>
> 17. It was no doubt contended by the learned counsel for the respondent-State that Article 14 or 16 of the Constitution cannot be invoked and pressed in service to perpetuate illegality. It was submitted that if one illegal action is taken, a person whose case is similar, cannot invoke Article 14 or 16 and demand similar relief illegally or against a statute. There can be no two opinions about the legal proposition as submitted by the learned counsel for the State. But in the case on hand, in our opinion, there was no illegality on the part of the learned Single Judge in allowing Writ petition No. 519 of 1997 instituted by Abdul Rashid Rather and in

issuing necessary directions. Since the action was legal and in consonance with law, the Division Bench confirmed it and this Court did not think it proper to interfere with the said order and dismissed Special Leave Petition. To us, in the circumstances, the learned Single Judge was wholly right and fully justified in following the judgment and order in Writ Petition No. 519 of 1987 in the case of present writ petitioners also. In fairness and in view of the fact that the decision in Abdul Rashid Rather had attained finality, the State Authorities ought to have gracefully accepted the decision by granting similar benefits to present writ-petitioners. It, however, challenged the order passed by the Single Judge. The Division Bench of the High Court ought to have dismissed Letters Patent Appeal by affirming the order of the Single Judge. The Letters Patent Appeal, however, was allowed by the Division Bench and the judgment and order of the learned Single Judge was set aside. In our considered view, the order passed by the learned Single Judge was legal, proper and in furtherance of justice, equity and fairness in action. The said order, therefore, deserves to be restored."

23. In view of the facts and circumstances narrated above, as well as the analysis of legal position involving the case of the present petitioner, this Court is inclined to allow the present writ application and order dated 3rd December, 2020 under Annexurre-7 as well as 27th October 2021 under Annexure-11 passed by the Opposite Party Nos.2 & 1 respectively are hereby quashed. The District Education Officer, Jajpur, Opposite Party No.5 shall give appointment to the Petitioner in the post of Contract Teacher as has been done in the case of one Aparna Sinha, Bandana Sahoo, Manjulata Mallik, Dipak kumar Majhi, Ramakanta Sahoo and many others, within a period of two months from today. The Opposite Party No.5 is further directed to calculate consequential service benefits, if any payable to the Petitioner within a period of one month from the date of her appointment. The writ application is hereby allowed. There shall be no order as to cost.

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**2021 (I) ILR - CUT- 227**

**P.PATNAIK, J.**

CRLMP NOS.164, OF 2018 (WITH BATCHES)

**MAA KUANRI TRANSPORT & ORS.** .....Petitioners

.V.

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

**(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 102 – Whether the police officer has power to seize/freez bank account under this section? – Held, Yes.**

**(B) CONSTITUTION OF INDIA, 1950 – Art.226 – Seize of bank account – Whether quashing of order for freezing/seizing of the bank accounts can be entertained by the Writ court at the first instance without approaching the trial Court? – Held, No.**

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

1. 2009 Vol.(1) Crimes 489 (Orissa): Agrani Exports Pvt.Ltd.Vs. State of Orissa.
2. 2003 Cri.L.J. 1983 : 2003 AIR Karnatak High Court 995 : S.Satyanarayana Vs. State of Karnataka
3. 1994 Crl.L.J. 645 : M/s. Malnad Construction Company, Shimoga and Ors – Vs.State of Karnatak and Ors.
4. (1999) 17 OCR 123 : Sitaram Chayla Vs. Officer-in-charge, Laxmisagar P.S.
5. 1999(7) SCC 685 : State of Maharastra Vs. Tapas D Neogy.
6. 2018(2) SCC 372 : Teesta Atul Setalvad Vs. The State of Gujarat.
7. (2018) 2 Supreme Court Cases 372 : Teesta Atul Setalvad Vs.-State of Gujarat.

For Petitioners : Mr. Dharanidhar Nayak, Sr. Adv.
& H.S.Mishra.

For Opp.Parties: Mr. Dillip Kumar Mishra, A.G.A
Mr. M.K.Das,T.K. Harichandan & N.K.Das.

JUDGMENT Date of Hearing : 15.04.2021 & Date of Judgment: 04.06.2021

***P.PATNAIK, J.***

The aforesaid petitions have been filed for quashing of the order passed by opposite party no.6 in freezing the Bank Account No.200010334681 of Maa Kuanri Transport, Unchabali, A/C No.200010298866 of Jagat Janani Services Private Ltd.,Nambira, A/C.No.200010263648 of Chaturbhuj Development Committee, Balda, A/C No.100022799033, personal Account of Sri Sanatan Mahakud and A/C No.200010352623 of Jagat Janani Services, Nambira and the petitioners have also sought for quashing of the intimation issued by the Bank authority to the petitioners' firm with regard to freezing of the accounts on the instruction received from the Investigating Officer, Sadar P.S., Keonjhar. Since all the aforesaid matters have arisen out of Keonjhar P.S.Case No.12 dated 12.01.2018, the cases have been heard analogously and are being disposed by common order/judgment.

2. The petitioner in CRLMP No.164 of 2018 has inter alia sought for quashing of the order under Annexures-2 & 4 issued by opposite party No.6 with further direction to issue a writ of mandamus to opposite party no.6 to allow the petitioner to operate the Bank Account bearing No. 200010263648. Further prayer has been made for direction to opposite party Nos.4,5 & 6 to produce the order of the Police to the Bank-opposite party no.6 and for quashing of the said order.

3. The petitioner in CRLMP No.165 of 2018 has inter alia sought for quashing of the order under Annexures-1 & 3 issued by opposite party No.6 with further direction to issue a writ of mandamus to opposite party no.6 to allow the petitioner to operate the Bank Account bearing No. 200010352623. Further prayer has been made for direction to opposite party Nos.4,5 & 6 to produce the order of the Police to the Bank-opposite party no.6 and for quashing of the said order.

The petitioner in CRLMP No.166 of 2018 has inter alia sought for quashing of the order under Annexures-2 & 4 issued by opposite party No.6 with further direction to issue a writ of mandamus to opposite party no.6 to allow the petitioner to operate the Bank Account bearing No. 200010263648. Further prayer has been made for direction to opposite party Nos.4,5 & 6 to produce the order of the Police to the Bank-opposite party no.6 and for quashing of the said order.

The petitioner in CRLMP No.167 of 2018 has inter alia sought for quashing of the order under Annexures-1 & 3 issued by opposite party No.6 with further direction to issue a writ of mandamus to opposite party no.6 to allow the petitioner to operate the Bank Account bearing No. 100022799033. Further prayer has been made for direction to opposite party Nos.4,5 & 6 to produce the order of the Police to the Bank-opposite party no.6 and for quashing of the said order.

The petitioner in CRLMP No.168 of 2018 has inter alia sought for quashing of the order under Annexures-2 & 4 issued by opposite party No.6 with further direction to issue a writ of mandamus to opposite party no.6 to allow the petitioner to operate the Bank Account bearing No. 200010298866. Further prayer has been made for direction to opposite party Nos.4,5 & 6 to produce the order of the Police to the Bank-opposite party no.6 and for quashing of the said order.

4. The reasons for freezing of the aforesaid Bank Account is based on Keonjhar Sadar P.S.Case No.12 dated 12.01.2018 which has been registered

under sections 143, 148, 341, 283, 294, 506/149 of the Indian Penal Code and Section 7 of the Criminal Law Amendment Act, 2013. The allegation as has been projected in the F.I.R. lodged on 12.01.2018 is that at about 1.45 P.M., the complainant, Inspector S.Pradhan, I.I.C., Sadar Police Station, Keonjhar drew up a plain paper F.I.R. on N.H.20 near Silisuan to the effect that on the said date at about 1.15 P.M. getting information regarding congregation of huge numbers of supporters of Sana Sena near Railway over bridge at Silisuan, she had been to the spot along with other police staff and found more than 2000 people congregating at the place being armed with lathi and giving provocating slogans against police administration demanding abolishment of Toll Plaza from Banajodi under the leadership of Sudhir Kumar Nanda alias Raja of Nuagarh of Keonjhar and others along with 18 number of leaders. When the complainant along with police staff tried to intervene, they threatened them with dire consequence and they used to give slogans like Sana Sena Jindabad, Police Prasasana Murdabad etc. and continued their road blockage. They also blocked the road on the same issue on 11.12.2017 and 05.01.2018. Due to road block, the impression and suspicion has been created that they had been hired for money to continue prolonged agitational activities. She got a reliable information that huge amount of cash from IndusInd Bank, Joda will be delivered to the leaders for distribution amongst the agitators for continuance of agitation. On the basis of the aforesaid F.I.R. Keonjhar P.S.Case No.12 dated 12.01.2018 has been registered under sections 143, 148, 341,283, 294, 506/149 of the Indian Penal Code read with Section 7 of Crl. Law Amendment Act, 2013.

As a sequel of the aforesaid F.I.R., the opposite party no.6 issued letters dated 23.01.2018 and 31.01.2018 to the petitioner for total freezing of different accounts in the name of petitioner, which are impugned in these applications.

5. Being aggrieved and dissatisfied with the freezing of different accounts, the aforesaid applications have been filed for redressal of grievances.

6. Mr.D.Nayak, learned senior counsel has strenuously urged that there is absolutely no justification for freezing of the aforesaid accounts since no reason has been assigned by the opposite party no.6. Learned senior counsel further submitted that section 102 Cr.P.C. has not been scrupulously followed nor the same is attracted since the account freezing does not have

any direct nexus with the alleged crime and the opposite party-State have failed to produce the materials, reasons for freezing of the accounts. In support of his contention, learned senior counsel for the petitioners has referred ***2012 Criminal Law Journal, Karnatak High Court 3487. 2017 Vol.(2) OLR 452***.

7. Mr.H.S.Mishra, learned counsel for the petitioners vehemently submitted that the petitioner Sri Sanatan Mahakud has not been named in the F.I.R. and he received the notice under section 160 Cr.P.C. to appear before the I.O. On 20.01.2018 since he sustained injury in spinal cord, the petitioner intimated the I.O., B.K.Mallick-opposite party No.5 that he would appear on a later date. But due to the utter surprise and consternation he came to learn that five accounts of Sanatan Mahakud or his firm or company have been frozen. The learned counsel has referred to the decision reported in ***2009 Vol.(1) Crimes 489 (Orissa), Agrani Exports Pvt.Ltd.-vrs.- State of Orissa, 2003 Cri.L.J. 1983 :: 2003 AIR Karnatak High Court 995, S.Satyanarayana-vrs.-State of Karnataka, 1994 Crl.L.J. 645 M/s. Malnad Construction Company, Shimoga and others -vrs. State of Karnatak and others***. Learned counsel for the petitioners further submitted that since the petitioner, Sri Sanatan Mahakud resided outside the jurisdiction of Keonjhar Police Station, notice under section 160 Cr.P.C. issued against any person not within the limits of the Police Station is without jurisdiction as per the decision in ***Sitaram Chayla Vrs.-Officer-in-charge, Laxmisagar P.S. reported in (1999) 17 OCR 123***. Further, it has been contended by the learned counsel for the petitioners that the petitioner Sri Sanatan Mahakud was a MLA of Champua Assembly Constituency as independent candidate during the time of action taken by the Police.

8. Per Contra, a counter affidavit has been filed by opposite party nos.3 and 4 challenging the maintainability of the petition on the ground that the petitioners ought to have approached the learned magistrate by filing appropriate application. It has been further averred in the counter affidavit that the allegation made in the F.I.R. revealed that it was a preplanned and engineered move to paralise the movement of vehicles and persons on the National High Ways thereby harassing the public without any justifiable reason and in an illegal and inhuman manner. On earlier occasion on 11.12.2017 and 05.01.2018 there was road blockage on the same issue at the instigation of Sana Sena which group had been raised by Sri Sanatan Mahakud, MLA, Champua. The activities of the agitators on 12.01.2018

strengthened the suspicion that they had been hired by Sanatan Mahakud, MLA, Champua on payment of money to carry on such demonstration. The complainant drew up plain paper F.I.R. at the spot at 1.15 P.M. under sections 143, 148, 341, 283, 294, 506/149 of the Indian Penal Code read with Section 7 of Crl.Law Amendment Act, 2013. Thereafter the opposite party no.4 got information that the I.I.C., Champua Police Station has detained a white colour Hoonda Santafe Car bearing registration No.OR 02 BV 8007 containing a tin box loaded with cash of different denominations. During verification it was ascertained that cash of Rs.50,00,000/- was transported by Branch Manager, IndusInd Bank, Joda to hand over to Sanatan Mahakud at his Champua Office. Manager, Manas Rout when questioned miserably failed to explain the illegal transportation of huge sum of cash in a private vehicle without any official authority or supporting documents. S.I., B.K.Mallik, Investigating Officer went to Champua and seized the aforesaid cash along with other articles during investigation. Mr.Manas Rout, Manager, IndusInd Bank, Joda admitted to have been carrying the aforesaid cash from IndusInd Bank without any document as per the direction of the MLA, who is having accounts in their branch. Sanatan Mahakud was issued with notice on 16.01.2018 under section 160 Cr.P.C. to appear in person on 20.01.2018 at Keonjhar Sadar Police Station for his examination in the case. On the same day, the I.O. issued a letter to the Branch Manager, IndusInd Bank, Joda Branch to freeze the aforesaid account operated by Sri Sanatan Mahakud in the said Bank i.e. Account No.200010334681 in the name of Kuanri Transport, A/C No.20001263648 in the name of Chhaturbhuj Development Committee, A/C No.100022799033 in the name of Sanatan Mahakud, Account No.200010352623 in the name of Jagat Janani Services and Account No.200010298866 in the name of Jagat Janani Service Ltd. It has been further stated in the counter affidavit that instead of appearing in Keonjhar Sadar P.S. Case No.21 of 2018, Advocate of Mr.Sanatan Mahakud produced a letter for extension of time for his appearance before the Police and Sanatan Mahakud has not appeared in the Police Station. From this it is presumed that Sanatan Mahakud is deliberately avoiding to appear before the Police. Further, in the counter affidavit, it has been submitted that all the accounts have been frozen by the I.O., opposite party no.5 in Keonjhar Sadar P.S.case No.12 of 2018 in exercise of power under section 102 Cr.P.C. during the course of investigation as it was well established that money in the account is directly linked in the commission of the crime. It is further submitted that Bank accounts of Mr. Sanatan Mahakud constitute property within the meaning of Section 102 Cr.P.C. and Police Officer in course of

investigation has the power to freeze the said account if such assets are linked to the commission of offence which the Police Officer is investigating into. The decision rendered in the case of ***State of Maharastra-vrs. Tapas D Neogy reported in 1999(7) SCC 685*** and the decision of the Hon'ble apex Court in the case of ***Teesta Atul Setalvad vrs.-The State of Gujarat reported in 2018(2) SCC 372*** have been referred to.

9. A counter affidavit has also been filed by opposite party no.6 stating therein that the opposite party no.6 being the Bank Officer has no power to investigate into the authenticity than to carry out the instruction of the I.O. and there is no illegality in carrying out the instruction of the I.O. and the present case is not maintainable against opposite party no.6 which may be dismissed against opposite party no.6.

10. A rejoinder affidavit to the counter affidavit filed by opposite party Nos. 3 and 4 has been filed stating therein that a fabricated story has been designed to fit the prosecution case. In fact there is no such organization called "*Sana Sena"* in the district of Keonjhar. Moreover, Mr.Sanatan Mahakud is the MLA of Champua and Keonjhar Sadar Police Station is not within the Champua Assembly Constituency. Road Blockage by the local residents to abolish the Toll Plaza at Banajodi has no relation with the petitioner nor the alleged cash seized by them has any connection with the petitioners. It has been further submitted that due to arbitrary action of opposite party Nos. 3 and 4 the personal liberty of Mr.Sanatan Mahakud and his family members has been infringed. The F.I.R. registered has no connection with the freezing of the accounts and neither there is any material on record to show that the Police has exercised power under section 102 Cr.P.C. nor in the facts of the case, a case is made out even remotely to exercise power under section 102 Cr.P.C. to freeze the accounts of the petitioners. The Investigating Agency has not intimated the magistrate regarding freezing of the accounts under section 102 Cr.P.C. In absence of any intimation to the magistrate and intimation to the Account holder no petition can be filed by the petitioners nor in absence of any intimation of freezing the accounts the magistrate can entertain the petition to release the amount. Hence, there is no alternative to the petitioners.

11. Mr.Dilip Kumar Mishra, learned Additional Government Advocate apart from reiterating the submissions made in the counter affidavit has vociferously submitted that in view of the decision in the case of **Teesta**

**Atul Setalvad (supra)** the present application is not maintainable. Learned counsel for the State submitted that even on suspicion the Investigating Officer can freeze the account and the I.O. gave notice under section 102 Cr.P.C. and the petitioners did not appear. So far as Section 102 Cr.P.C. the same has been scrupulously followed. Learned counsel for the State further submitted that after completion of investigation, the petitioners can approach the learned trial Court.

12. From the rival contentions, the issue which emerges for determination is as to

> (i) Whether the action of the opposite parties in freezing different accounts of the petitioners purportedly under section 102 Cr.P.C. is legally permissible ?
>
> (ii) whether relief sought for by the petitioners invoking Article 226 of the Constitution of India for quashing of the order for freezing of the accounts can be entertained by this Court at the first instance without approaching the learned jurisdictional magistrate ?

13. In order to appreciate issue No.1, it would be apposite to refer to section 102 Cr.P.C. which reads here as under:

> "**102. Power of police officer to seize certain property. (1)** Any Police Officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.
>
> (2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.
>
> (3) Every police officer acting under sub-Section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized in such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same."
>
> Provided that where the property seized under sub section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of Superintendent of Police

> and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

On reading of the aforesaid provisions, there is no doubt or debate that a police officer can seize the property which may be alleged or suspected to have been stolen or commission of the offence. The Bank Accounts which have been seized pursuant to Keonjhar Sadar P.S.Case No.12 of 12.01.2018 is sequel to the complaint lodged by the I.I.C., Keonjhar Sadar P.S. and on the basis of the complaint, the case has been registered under sections 143,148,341,283, 294,506/149 of the Indian Penal Code read with Section 7 of Criminal Law Amendment Act, 2013.

Now, the question arises as to whether the action of the opposite parties in freezing different bank accounts of Mr.Sanatan Mahakud is in compliance to Section 102 Cr.P.C. In support of his contention, learned counsel for the petitioners has referred to **2009(1) Crimes 489 (Orissa), Agrani Exports Pvt.Ltd.-vrs.-State of Orissa** wherein this Court has been pleased to hold that

> "Section 102-Investigating Officer got operation of loan account of the petitioner company stopped- Question whether action under section 102 Cr.P.C. could be taken against the petitioner company by freezing its loan account though neither the Company nor its directors were accused in criminal case being investigated by police-Police found that FDR deposited as security for loan had belonged to a proprietary concern against whom criminal case was being investigated-Nothing on record to show that said loan account had a direct nexus with alleged to have been committed by proprietary concerned- Investigating Officer could not have got account of petitioner freezed and rather could have direct bank authority not to get term deposit encashed-Action of freezing loan account of petitioner company could not be sustained."

Learned counsel for the petitioners has also referred the decision reported in ***2003 Cri.L.J.1983 :: 2003 AIR – KANT. H.C. 995: S.Sathyanarayana –vrs.-State of Karnataka*** wherein it has been held that

> "……Hence, the Police Officer has no authority or power to seize the property when it is neither suspected to be stolen nor found under the circumstances creating any offence having been committed unless discovery of a property leads to a suspicion of offence having been committed…."

Learned counsel for the petitioners has also referred the decision reported in ***1994 CRL.L.J. 645 :: 1993 (3) ALLCRILR 817 Karnataka High***

***Court – M/s. Malnad Construction Company***, ***Shimoga and others-vrs.-State of Karnataka and others*** wherein it has been held in para-16 that

> "16. xx xx xx
>
> Thus a combined and careful reading of Section 102(1) and (3) of the Code shows that a Police Officer is not conferred with any power to issue direction to Banks prohibiting operation of accounts. Any action affecting the rights of the person/citizens cannot be sustained unless they are authorized by law. Undoubtedly, issuing of a direction to Bank prohibiting operation of accounts does not fall within the powers of the Police Officers acting under Section 102 of the Code."

14. Learned counsel for the State on the other hand has referred to the decision reported in ***(2018) 2 Supreme Court Cases 372 (Teesta Atul Setalvad –vrs.-State of Gujarat*** where the Hon'ble Apex Court has illuminatively discussed about the sweep and applicability of Section 102 Cr.P.C. In the aforesaid decision, the Hon'ble Apex Court has been pleased to hold in Paragraphs- 17,18,25,26, 27 & 28 as follows:

> "17. The sweep and applicability of Section 102 of the Code is no more res integra. That question has been directly considered and answered in State of Maharashtra v. Tapas D.Neogy. The Courtexamined the question whether the police officer investigating any offence can issue prohibitory orders in respect of bank accounts in exercise of power under section 102 of the Code. The High Court, in that case, after analyzing the provisions of Section 102 of the Code had opined that bank account of the accused or of any relation of the accused cannot be held to be " property" within the meaning of Section 102 of the Code. Therefore, the investigating officer will have no power to seize bank accounts or to issue any prohibitory order prohibiting the operation of the bank account. This Court noted that there were conflicting decisions of different High Courts on this aspect and as the question was seminal, it chose to answer the same. In para 6, this Court noted thus : (SCC p. 691).
>
> "6. A plain reading of sub-section (1) of section 102 indicates that the police officer has the power to seize any property which may be found under circumstances creating suspicion of the commission of any offence. The legislature having used the expression " any property" and " any offence" have made the applicability of the provisions wide enough to cover offences created under any Act. But the two preconditions for applicability of Section 102(1) are that it must be "property" and secondly, in respect of the said property there must have been suspicion of commission of any offence. In this view of the matter the two further questions that arise for consideration are whether the bank account of an accused or of his relation can be said to be " property" within the meaning of sub-section (1) of Section 102

Cr.P.C. and secondly, whether circumstances exist, creating suspicion of commission of any offence in relation to the same.

"18. After analyzing the decisions of different High Courts, this Court in para 12, expounded the legal position thus : (SCC pp 694-95)

"12. Having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be "property" within the meaning of the said Section 102(1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. We are, therefore persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into…… In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court of Bombay committed error in holding that the police officer could not have seized the bank account or could not have issued any direction to the bank officer, prohibiting the account of the accused from being operated upon."

After this decision, there is no room to countenance the challenge to the action of seizure of bank account of any person which may be found under circumstances creating suspicion of the commission of any offence."

"25. Suffice it to observe that as the investigating officer was in possession of materials pointing out circumstances which create suspicion of the commission of an offence, in particular, the one under investigation and he having exercised powers under section 102 of the Code, which he could, in law, therefore, could legitimately seize the bank accounts of the appellants after following the procedure prescribed in sub-section (2) and subsection (3) of the same provision. As aforementioned, the investigating officer after issuing instructions to seize the stated bank accounts of the appellants submitted report to the Magistrate concerned and thus complied with the requirement of sub-section (3).

26. Although both sides have adverted to statement of accounts and vouchers to buttress their respective submissions we do not deem it necessary nor think it

> appropriate to analyze the same while considering the matter on hand which emanates from an application preferred by the appellants to defreeze the stated bank accounts pending investigation of the case. Indisputably, the investigation is still in progress. The appellants will have to explain their position to the investigating agency and after investigation is complete, the matter can proceed further depending on the material gathered during the investigation. The suspicion entertained by the investigating agency as to how the appellants appropriated huge funds, which in fact were meant to be disbursed to the unfortunate victims of 2002 riots will have to be explained by the appellants. Further, once the investigation is complete and police report is submitted to the court concerned, it would be open to the appellants to apply for defreezing of the bank accounts and persuade the court concerned that the said bank accounts are no more necessary for the purpose of investigation, as provided in sub-section (3) of Section 102 of the Code. It will be open to the court concerned to consider that request in accordance with law after hearing the investigating agency including to impose conditions as may be warranted in the fact situation of the case.
>
> 27. In our opinion, such a course would meet the ends of justice. We say so also because the explanation offered by the appellants in respect of the discrepancies in the accounts, pointed out by the respondents, will be a matter of defence of the appellants.
>
> 28. We clarify that at an appropriate stage or upon completion of the investigation, if the investigating officer is satisfied with the explanation offered by the appellants and is of the opinion that continuance of the seizure of the stated bank accounts or any one of them is not necessary, he will be well advised to issue instruction in that behalf."

On cumulative effect of the aforesaid factual and legal aspect this Court is of the considered view that the opposite parties have invoked the provisions under section 102 of the Code of Criminal Procedure after lodging of the F.I.R. and institution of the criminal cases which is legally permissible.

15. Section 102, Cr.P.C. (Code of Criminal Procedure, 1973) indubitably empowers any police officer to seize the properties which have got any nexus or co-relation with the commission of any offence. In the instant case, on the lodging of the F.I.R. by the IIC, Keonjhar Sadar Police Station, a case has been registered under Sections 143, 148, 341,283, 294, 506/149 of the Indian Penal Code read with Section 7 of Crl.Law Amendment Act, 2013. Therefore, it can be gainsaid that invoking section 102, Cr.P.C. by the opposite party no.4 is not bereft of any jurisdiction nor the scope, ambit and applicability of Section 102, Cr.P.C. is any more res integra.

16. After institution of the criminal case, the petitioner, Sri Sanatan Mahakud was issued with notice under Section 160, Cr.P.C. to appear in person on 20.01.2018 at Keonjhar Sadar Police Station for his examination. But Sri Sanatan Mahakud did not appear before the police on the ground of his ailment. As has been disclosed from the averments in the counter affidavit filed by opposite party nos.3 and 4 that Sri Sanatan Mahakud did not appear before the police station at least till filing of the counter affidavit. Though Sri Sanatan Mahakud has not been specifically named in the F.I.R. as an accused, but the complicity of Mr.Sanatan Mahakud has been well proved during investigation as stated in the counter affidavit. Law is well settled that F.I.R. is an encyclopedia of the fact and details of the crime are unearthed and unraveled during the course of investigation.

17. In order to dilate the rival contentions, it would be appropriate to refer to Section 160 of the Code of Criminal Procedure,1973 which reads as follows :

> "**160. Police officer's power to require attendance of witnesses** –(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to the acquainted with the facts and circumstances of the case; and such person shall attend as so required:
>
> Provided that no male person under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person shall be required to attend at any place other than the place in which such male person or woman resides.
>
> (2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence."

18. On perusal of the aforesaid provision, the power of the police officer to require attendance has been well delineated.Therefore, the notice by the police to Sri Sanatan Mahakud with regard to Keonjhar Sadar Police Station Case No.12 dated 12.01.2018 is in consonance with the aforesaid provision.

19. In respect of relief seeking defreezing of all the accounts of Sri Sanatan Mahakud in the aforementioned applications, this Court is of the considered view that the same is a sequel of the registration of the alleged offence as stated in the foregoing paragraphs. In pursuance of the lodging of

F.I.R., the investigation commenced, but despite notice under Section 160, Cr.P.C. Sri Sanatan Mahakud did not appear on account of his ailment.

20. So far as issue No.2 is concerned, the petitioner Mr. Sanatan Mahakud despite notice being issued under section 160 of the Code has not appeared before the Investigating Officer to put forth his stand. The petitioner is not precluded to raise his claim for defreezing of the bank accounts after completion of investigation. Therefore, in the fitness of things, the petitioners ought to have approached the Investigating Officer for defreezing of the account or else in the event the Investigating Officer fails to accede to the prayer of the petitioner, it was open for the petitioners to have approached the learned magistrate.

21. Considering the facts and circumstances in its entirety and on cumulative appreciation of the decision of the Hon'ble Apex Court in the case of ***Teesta Atul Setalvad*** (supra). While not entertaining these applications, this Court is of the considered opinion that it would be appropriate for petitioner to approach the Investigating Officer or opposite party no.4 for defreezing of all the accounts. In the event, relief sought for by the petitioners is not acceded to either by the I.O. or by the opposite party no.4, it would be open to the petitioners to approach the jurisdictional Magistrate by filing appropriate application with same/ identical prayer. However, it is made clear that this Court has not gone into the merits of the case raised by the contesting parties in the aforesaid applications. Resultantly, all the CRLMPs stand disposed of.

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