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

STREV NOS.6 OF 2005, 25 AND 26 OF 2010

M/s. THE JEYPORE SUGAR CO. PVT. LTD. …….Petitioner

V

STATE OF ODISHA, REPRESENTED BY THE COMMISSIONER OF SALES TAX AND ORS. …….Opp. Parties

STREV NOS. 25 & 26 OF 2010

M/s. C.F.L. CAPITAL FINANCIAL SERVICES LTD. ……..Petitioner

V

STATE OF ODISHA, REPRESENTED BY THE COMMISSIONER OF SALES TAX AND ORS. ……..Opp. Parties

(A) ORISSA SALES TAX ACT, 1947 – Section 2(G) – Whether the furnace permanently embedded to the Earth is liable to tax as sale of machinery – Held, No – The furnace permanently embedded to the earth is an immovable property and is not liable to Sales Tax as sale of machinery. (Para-29)

(B) ORISSA SALES TAX ACT, 1947 – Section 8 – Whether leasing of flameless furnace can be legitimately subject matter of taxation – Held, No.

Case Laws Relied on and Referred to :-

1. 1996 (88) ELT 622 (SC) : Mittal Engineering Works Pvt. Ltd. Vs. CCE, Meerut.
2. 1998 (97) ELT 3 (SC) : Sirpur Paper Mills Ltd. Vs. CCE, Hyderabad.
3. 2000 (88) ECR 19 (SC) : Duncan Industries Ltd. Vs. CCE, Mumbai.
4. 2000 (120) ELT 273 (SC) CCE : Triveni Engineering Industries Ltd. Vs. CCE.
5. 2001 (130) ELT 401 (SC) : Jaipur Vs. Man Structurals Ltd.
6. (2004) 4 SCC 751 : TTG Industries Ltd. Vs. Collector of Central Excise.
7. 2007 (207) E.L.T. 321 (S.C.) : Commissioner of Central Excise, Indore Vs. Virdi Brothers.
8. 2007 (215) ELT 161 (SC) : Ibex Gallaghar Pvt. Ltd. Vs. Commissioner of Central Excise, Bangalore.
9. (2008) 16 VST 193 (Ori) : International Financial Ltd. Vs. State of Odisha.
10. [2009] 119 STC 182 : 20th Century Finance Corpn. Ltd. Vs. State of Maharashtra.

For Petitioner(s) : Mr. Jagabandhu Sahoo, Sr. Adv.
For Opp. Parties : Mr. S.S. Padhy, Addl. Standing Counsel.

JUDGMENT Date of Judgment : 26.10.2021

Dr. S. MURALIDHAR, C.J.

1. These three revision petitions raise similar questions of law for consideration and are accordingly being disposed of by this common judgment.

Background facts in STREV 6 of 2005

2. STREV No.6 of 2005 by Jeypore Sugar Co. Pvt. Ltd. (hereafter 'JSCPL') arises from the order dated 28th September, 2004 of the Sales Tax Tribunal (Tribunal) in S.A. No.439 of 1999-2000 filed by the Petitioner-Assessee JSCPL. In turn the said appeal was directed against an order dated 22nd December 1998 passed by the Assistant Commissioner of Sales Tax (ACST), Koraput Range, Jeypore disposing of Appeal No.AA (KOII) 135/97-98 confirming the order of assessment dated 30th June, 1997 passed by the Sales Tax Officer (STO), Koraput-II under Section 12(4) of the Orissa Sales Tax Act, 1947 (OST Act) relating to the year 1995-96.

3. JSCPL is engaged in business or manufacturing Ferro Manganese, Ferro Chrome and India made Foreign Liquor and it is a registered dealer under the OST Act. JSCPL entered into a financial arrangement with M/s. CFL Capital Financial Services Limited (earlier known as "Ceat Financial Services Limited") (hereafter 'CFL') by virtue of which all accessories of JSCPL, including the flameless furnaces in question, were sold to CFL on as-is-where-is basis on 30th March, 1996. On that very date, the flameless furnaces were leased in favour of JSCPL on monthly lease rental basis. It is stated that the furnaces in question were not dismantled for delivery to CFL. It was sought to be contended that this kind of a sale of the furnace situated in the factory premises of JSCPL does not satisfy the definition of sale under Section 2(g) of the OST Act. It is contended by JSCPL that it was mistakenly disclosed as sales and a declaration form obtained from CFL was submitted claiming deduction.

4. The Assessing Authority (AA) while assessing JSCPL for the year 1995-96 referred to a notification dated 22nd December, 1989 of the Finance Department which held that machineries were subject to levy of sales tax at the first point in a series of sales. Accordingly, the AA held that furnace sold to CFL was 'machinery' exigible to sale tax at the first point. Accordingly, the declaration form produced was disallowed and the said turnover was subjected to sales tax @ 16% and a demand was accordingly raised by the assessment order dated 30th June, 1997.

5. Initially JSCPL challenged the said assessment order in this Court by filing a writ petition, OJC No.10664 of 1997 contending that the AA no jurisdiction to assess the said transaction as a transaction of sale of goods.

This Court disposed of the said writ petition on 13th August 1997 permitting JSCPL to file an appeal before the appellate authority.

6. JSCPL's appeal, STA No.135 of 1997-98, was dismissed by the ACST by an order dated 22nd December, 1998 thereby affirming the order of the AA. According to JSCPL although the ACST took note of the mode of construction of the furnace, he erroneously held that the accessories sold by JSCPL to CFL were in fact 'machinery'.

7. JSCPL then filed a further appeal, S.A. No.439 of 1999-2000, before the Tribunal and raised the following two issues:

> (a) Whether furnace in not a machinery liable to sales tax as such under the Orissa Sales Tax Act?
>
> (b) Whether furnace being an immovable property the sale price of it is not liable to tax under the Act?

8. The Tribunal by order dated 28th September, 2004 in S.A. No.439 of 1999-2000 held that the furnace was in fact 'machinery' was liable to sales tax. The Tribunal rejected the contention of JSCPL that the furnace was an immovable property, embedded to the earth, and therefore not amenable to sales tax.

9. In STREV No.6 of 2005, while admitting the revision petition on 16th July, 2009 this Court framed the following substantial questions of law for consideration:

> "(1) Whether in the facts and circumstances of the case, the furnace permanently embedded to the earth and being an immovable property as such can still be liable to Orissa Sales Tax as sale of machinery?
>
> (2) Whether in the facts and circumstances of the case the "Furnace" is covered under machinery under Entry-70 (List-C) of the Schedule of rates?"

Background facts in STREV 25 and 26 of 2010

10. As far as STREV Nos.25 and 26 of 2010 are concerned, the background facts are that CFL is a registered dealer under the OST Act located at Bhubaneswar and is engaged in the business of lease financing capital assets which is a new financing concept to tide over financially difficulty of industrial units.

11. CFL purchased the flameless furnaces belonging to JSCPL through a lease agreement entered into on 30th March, 1996. CFL received Rs. 27,48,712 from JSCPL and under bona fide impression the said transaction was subject to levy of tax @ 4% against the declaration Form –IV furnished by JCSPL which was also paid by CFL. Subsequently, the CFL realized that the transaction was not amenable to levy of sales tax and filed a refund return to claim refund of the tax paid.

12. The STO, i.e. the AA by the assessment order dated 27th August 2001 for the year 1998-99 held that Form IV was not permissible and accordingly disallowed the claim of CFL. The AA raised an extra tax demand of Rs.1,20,819/- for the assessment. The prayer for refund was negatived. The appeal against the aforementioned order, i.e. S.A. No. AA 263/BH-II-2001-02 filed by CFL was disposed of by the ACST by order dated 27th February, 2002 partly reducing the assessment completed by the STO Bhubaneswar-II Circle.

13. Thereafter CFL filed S.A. No.380 of 2002-03 in the Tribunal which by an order dated 8th August 2007 set aside the order of the ACST. The two questions that arose for consideration by the Tribunal were as follows:

(a) Whether or not tax under the OST Act can be imposed on the lease consideration involving transfer of the right to use the goods when the goods so hired out have suffered tax at the time of their purchase in the State of Orissa?

(b) Whether such deemed sales involving the transfer of the right to use the goods can be taxed @ 4% against the declaration in Form IV?

14. In its judgment dated 8th August 2007, the Tribunal considered the earlier order dated 30th October, 2006 passed by the Full Bench of the Tribunal in SA 1323 of 2006 in the case of the CFL itself for the year 1995-96 which in turn had followed the decision dated 28th September, 2004 of the Tribunal in S.A. No.439 of 1999-2000 (being the case of JSCPL and which is the subject matter of STREV No. 6 of 2005). It also took note of another decision dated 28th June 1999 of the Full Bench of the Tribunal in *M/s. Kotak Mahindra Finance Corporation Ltd. v. State of Orissa* which had held that transfer of the right to use goods is a separate transaction distinct from the

sale of goods and therefore even if the goods had suffered tax at the first point of sale, again lease rentals received on account of the goods subsequently can be taxed as a separate transaction. It was further held by the Tribunal in *M/s. Kotak Mahindra Finance Corporation Ltd. v. State of Orissa* that since there is no specific entry in the schedule of rate of tax for leasing transactions, the rate would be that applicable to unspecified goods in terms of the decision of the High Court of Orissa in OJC No. 2414 of 1985 (*M/s. Rajshree Pictures (P) Ltd.*). The Tribunal in the impugned order dated 8th August 2007 chose to follow the decision in *M/s. Kotak Mahindra Finance Corporation Ltd. v. State of Orissa* and answered question (a) in the affirmative i.e. in favour of the department and against the Assessee CFL.

15. As regards question (b), the Tribunal in its order dated 8th August 2007 chose to follow the earlier order dated 28th September, 2004 of the Tribunal in S.A. No.439 of 1999-2000 (being the case of JSCPL and which is the subject matter of STREV No. 6 of 2005) which had held that machinery in question though embedded to the earth was not immovable property and further that the surcharge was leviable under Section 5A of the OST Act. The Tribunal accordingly held that no Form IV is applicable to leasing transactions and that the rate of tax should be 12% in all cases. Thereafter CFL filed STREV No.25 of 2010 in this Court.

16. Turning now to STREV No.26 of 2010 filed again by CFL, it arises out of an order dated 27th May, 2008 of the Tribunal dismissing SA No. 89 of 2005-06 filed by CFL, thereby affirming an order dated 25th January 2005 passed by the ACST in AA 121/BWBH-II/04-05 which in turn affirmed the demand raised by the STO by assessment order dated 23rd March, 2004 for the year 2000-01. The Tribunal came to the same conclusion as it had for the earlier years viz., that the lease rental for the flameless furnace was amenable to tax notwithstanding that it may have suffered tax at the first point of sale and that Form IV declaration cannot be accepted in respect of such transaction.

17. In both the STREV Nos. 25 and 26 of 2010, since the issues involved were interlinked with the outcome of STREV No. 6 of 2005, this Court directed the two petitions to be listed with STEV No.6 of 2005 for hearing.

18. Accordingly, while admitting STREV Nos. 25 and 26 of 2010, this Court frames the following questions of law for consideration:

> "1. Whether the contract involving receipt of lease rental for leasing of flameless furnaces constitutes sale or deemed sale of goods within the meaning and definition of 'sale' under Section 2(g) of the Orissa Sales Tax Act, 1947?
>
> 2. Whether leasing of flameless furnaces can be legitimately subject matter of taxation when the same has suffered Orissa Sales Tax at the interior stage in view of Section 8 of the Orissa Sales Tax Act?
>
> 3. Whether concessional rate of tax against declaration Form IV is allowable against deemed sale transaction constituting lease of furnaces?"

19. This Court has heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Counsel appearing for the Petitioners in all these cases and Mr. S.S. Padhy, learned Additional Standing Counsel for the Opposite Parties (Department).

20. As regards the first question whether the furnace embedded to the earth is to be considered immoveable property, there are a series of judgments of the Supreme Court beginning with ***Quality Steel and Tubes (P) Ltd. v. Collector of Central Excise (1995) 75 ELT 17.*** In that case the Appellant was engaged in manufacture of welded steel pipes and tubes which were classified before 1st August 1983 under Item No.28AA of the first Schedule to the Central Excises and Salt Act, 1944 ('CE Act'). Later on, the said items were classified under Tariff Item 25 of the Schedule. The steel tubes and pipes produced by the Appellant were exempt from duty as they were produced out of duty paid raw material. For the manufacture of the items the Appellant had set up plant and machinery at its factory site. The expansion project consisted of acquiring the items and components and installing them for making a complete unit for production of steel tubes. Certain items of the plant and machinery such as uncoiler, looper, etc. were purchased from the market and embedded to earth and installed to form a part of the tube mill. There were certain other components like motors, coupling, gear boxes, bearing, castings etc. which were also purchased from the market and also covered in the process of welding facility. The tube mill, therefore, according to Appellant, was thus not a specific machine and component but consisted of several machines and components which after the installation got embedded to the earth and formed part of the plant. A question arose about the exigibility of the above goods to excise duty. According to the Appellant, since the items and components the market were embedded to the earth they were immovable goods therefore, not transportable and could not be sold and

therefore could not be deemed to be excisable goods within the meaning of the CE Act. The Supreme Court agreed with the contention and held that "erection and installation of a plant cannot be held to be excisable goods. If such wide meaning is assigned it would result in bringing in its ambit structures, erections and installations. That surely would not be in consonance with the accepted meaning of excisable goods and its exigibility to duty."

21. The next decision for consideration is ***Commissioner of Central Excise v. Silical Metallurgic Ltd. (1999) ELT 858 (SC).*** The Supreme Court in the said decision confirmed the order of the CEGAT dated 15th May, 1998 ***(Silical Metallurgic Ltd. v. Commissioner of Central Excise, Cochin) 1999 (106) E.L.T. 439 (Tribunal)***. In that case, just as in the present one, the electric arc furnace had not been manufactured in any factory in an assembled form and taken to the site for erection. The electric arc furnace was constructed and installed at the site. It consisted of (i) a central pillar bolted to the foundation embedded to the earth by civil works at a depth of 15 feet, (ii) the axis with rotation mechanism and the wheels and rail arrangements etc. and (iii) the furnace constructed brick by brick in a steel shell and rammed with carbon paste. The foundation, the bolting arrangements to the foundation, the railings as well as the wheels formed an integral part of the submerged electrical arc furnace. The entire mass was baked by burning and heating for 20 days. It was held by the Supreme Court that the construction of the electric arc furnace had taken place simultaneously with the civil work and "the foundation has not acted as a base for laying the machinery." The item had come into existence along with civil work. It could not be dismantled and on such dismantling only spare parts were recoverable. It was accordingly held that it was not exigible to excise duty.

22. The later decisions including those in ***Mittal Engineering Works Pvt. Ltd. v. CCE, Meerut 1996 (88) ELT 622 (SC), Sirpur Paper Mills Ltd. v. CCE, Hyderabad 1998 (97) ELT 3 (SC), Duncan Industries Ltd. v. CCE, Mumbai 2000 (88) ECR 19 (SC), Triveni Engineering Industries Ltd. v. CCE 2000 (120) ELT 273 (SC) CCE, Jaipur v. Man Structurals Ltd. 2001 (130) ELT 401 (SC)*** and ***TTG Industries Ltd. V. Collector of Central Excise (2004) 4 SCC 751*** have reiterated the above legal position vis-à-vis different kinds of plant and machinery that on account of their nature of being embedded to the earth cannot be considered moveable properties or goods.

23. In this context, it is necessary to refer to a circular No.58/1/2002-CX, dated 15th January, 2002 issued by the Government of India clarifying the question of excisability of plant and machinery assembled at site. It was *inter alia* clarified in para 4 as under:

> "4. The plethora of such judgments appears to have created some confusion with the assessing officers. The matter has been examined by the Board in consultation with the Solicitor General of India and the matter is clarified as under:-
>
> (a) For goods manufactured at site to be dutiable they should have a new identity, character and use, distinct from the inputs/components that have gone into its production. Further, such resultant goods should be specified in the Central Excise Tariff as excisable goods besides being marketable i.e. they can be taken to the market and sold (even if they are not actually sold). The goods should not be immovable.
>
> (b) Where processing of inputs results in a new products with a distinct commercial name, identity and use (prior to such product being assimilated in a structure which would render them as a part of immovable property), excise duty would be chargeable on such goods immediately upon their change of identity and prior to their assimilation in the structure or other immovable property.
>
> (c) Where change of identity takes place in the course of construction or erection of a structure which is an immovable property, then there would be no manufacture of "goods" involved and no levy of excise duty.
>
> (d) Integrated plants/machines, as a whole, may or may not be 'goods'. For example, plants for transportation of material (such as handling plants) are actually a system or a net work of machines. The system comes into being upon assembly of its component. In such a situation there is no manufacture of 'goods' as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement).
>
> (e) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods."

24. In its judgment in ***Commissioner of Central Excise, Indore v. Virdi Brothers 2007 (207) E.L.T. 321 (S.C.)*** the Supreme Court while dealing with the correctness of the order passed by the CEGAT holding that refrigeration plant/cold storage plant which were fabricated out of duty paid materials

would be subject to excise duty, held that these plants are basically systems comprising of various components and are thus in the nature of systems and are not machines as a whole. Therefore, they could not be considered to be excisable goods. The Supreme Court accordingly dismissed the Department's appeal.

25. A similar view was held in ***Commissioner of Central Excise, Indore v. Cethar Vessels Ltd. 2007 (212) E.L.T. 454 (S.C.)*** and ***Ibex Gallaghar Pvt. Ltd. v. Commissioner of Central Excise, Bangalore 2007 (215) ELT 161 (SC).*** This Court followed the above decisions and held likewise in ***Srei International Financial Ltd. v. State of Odisha (2008) 16 VST 193 (Ori)***.

25.1 The last-mentioned judgment requires a detailed discussion as the facts therein were similar to the facts of the present case. SREI was a non-banking finance company carrying on business in leasing as well as hire purchase of plant, machinery and other equipments. On 31st July, 1995 a tripartite agreement was entered between SREI and Indian Metal Ferro Alloys Ltd. (IMFA) and Isgee John Thompson (IJT). Under the agreement IMFL was referred to as "the user", IJT was referred to as "supplier/contractor" and SREI as "the purchaser". IMFA wanted to install a 90 Ton Per Hour (TPH) Spreader Stoker Water Tube Boiler at its Choudwar Power Plant of Indian Charge Chrome Ltd. (ICCL) a sister concern of IMFA. For the installation, IMFA negotiated with IJT for designing, supplying, erecting and commissioning the said 90 TPH plant and its Choudwar power plant.

25.2 After the terms were settled between IMFA and IJT, IMFA approached SREI for the purpose of erection and installation of the said plant and then to lease it out to IMFA. The said lease was a bipartite contract between IMFA and SREI. Lease rent was agreed at Rs. 23 lakh per year. Both the tripartite agreement and the lease agreement were executed in Calcutta on the same date i.e. 31st July, 1995.

25.3 Pursuant to the said agreements, IJT fabricated and supplied the boiler and delivered it to the IMFA plant at Choudwar where it was installed and commissioned by IJT. Whereafter the lease rental was paid by IMFA to SREI.

25.4 The STO, Cuttack-II Circle, Cuttack passed an assessment order raising a demand of sales tax on the lease rent paid by IMFA to SREI on the ground that the boiler is located in Odisha and was delivered in Odisha and was being used in Odisha. Reliance was placed on the Explanation to Section 2(g)(iv)(a)(i) of the OST Act which stipulates that the sale or purchase of goods shall be deemed to take place inside the State if the goods are within the State at the relevant time.

25.5 The Assessee-Petitioner relied on the judgment in ***20th Century Finance Corpn. Ltd. v. State of Maharashtra [2009] 119 STC 182*** and contended that the lease rental was not exigible to sales tax. It became payable on account of an inter-state lease agreement which was disclosed in the gross turnover. Further it was contended that payment of lease rental would arise only after erection, and commissioning of the boiler plant i.e. only after the plant was embedded to the earth. This being a lease of immovable property, the transaction was not exigible to sales tax under the OST Act. The third contention was that the agreement of lease was signed in West Bengal and the Assessing Officer in Odisha has no jurisdiction to tax the lease rental.

25.6 Reliance was placed before this Court on a decision in ***ITC Classic Finance and Services v. Commissioner of Commercial Taxes (1995) 97 STC 330 (AP)*** which was affirmed by the Supreme Court dismissing the appeal filed by the State of Andhra Pradesh.

25.7 In ***Srei International Financial Ltd. v. State of Odisha***, this Court examined the following questions:

> "(i) Whether the exhaustion of statutory remedy can be a bar in this case for this Court to exercise its jurisdiction under Article226 of the Constitution?
>
> (ii) Whether a dealer is liable to pay tax on the ground that he admitted to pay tax on a certain transaction even if the said transaction is not taxable within the provisions of the OST Act?
>
> (iii) Whether the-lease rental received by the Petitioner from IMFA is exigible to tax under the provisions of the OST Act?"

25.8 As regards question (i), this Court held that the writ petition was maintainable even though the statutory remedy has not been exhausted. As

regards question (ii) it was held that there was no estoppel against the statute. In other words, the liability to pay tax had to be imposed by law, "it cannot be imposed on admission".

25.9 As regards question (iii), after discussing the decisions in ***Gannon Dunkerley and Co. v. State of Rajasthan (1993) 88 STC 204*** and ***ITC Classic Finance Services v. Commissioner of Commercial Taxes (1995) 97 STC 330***, this Court held that the foundation of all the transactions was the lease agreement dated 31st July, 1995 entered into between SREI and IMFA at Calcutta. It was also held that the transaction was clearly an inter-state transaction falling within the meaning of Section 3 of CST Act. It is accordingly, held that the interstate lease cannot be subjected to tax in the State of Odisha under the OST Act.

25.10 It was further held as under:

> "…the contention of the Revenue that as the payment of lease rental commenced after the boiler in question was installed, erected and commissioned at IMFA's plant at Choudwar, the State of Orissa acquires jurisdiction to levy tax on such lease rental cannot be sustained. The further case of the Revenue that after installation, erection and commission of the boiler, the goods in question cease to be the same goods for which agreement was executed at Calcutta on 31.7.1995 is equally misconceived. As a matter of fact, the boiler which was transported from Haryana to Orissa pursuant to the lease agreement was the same boiler which was installed, erected and commissioned in IMFA's plant at Choudwar. It is only if the said erected and commissioned boiler is considered to be immovable property because of value addition, it may be regarded as different from the boiler which was transported from Haryana to Orissa pursuant to the lease agreement executed in Calcutta. ***But then if the said erected, commissioned boiler is regarded as immovable property, no tax under Section 2(g) of the OST Act can be charged on the lease rental, as tax can only be charged on transfer of right to use goods and not in respect of lease of immovable property***." (emphasis supplied)

Accordingly, the order of assessment and the orders affirming it were quashed.

26. Mr. Padhy, learned Additional Standing Counsel for the Department referred to the decisions of the Supreme Court in ***Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad (1998) 1 SCC 400.*** The said decision was already taken note of in the circular issued by the Department in 2002 which has been extracted hereinbefore. The said circular thereafter accepted the proposition advocated by the Petitioners in these cases.

27. Mr. Padhy, learned ASC also referred to the decision of the Supreme Court in ***Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works (2010) 5 SCC 122***. There the question was about exigibility to excise duty on the ground that assembling, installation and commissioning of asphalt drum/hot mix plants "amounted to manufacture inasmuch as the plant that eventually came into existence was a new product with a distinct name, character and use different from what went into its manufacture." On the facts of that case it was held that "what is attached can be easily detached from the foundation and therefore, that need not be said to be "attached to the earth" within the meaning of Section 3 of the Transfer of Property Act. It was held to the fact of that case that "the machine is fixed by nut and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine." It was again held in the fact of the case that an attachment of that kind "without the necessary intent of making the same permanent cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently".

28. The position as far as the present case is concerned is different. Here the flameless furnace was never intended to be dismantled or moved. It continued to remain in the premises of JSCPL. The facts of the present case are akin to those in the decisions referred to hereinbefore i.e. ***Virdi Brother*** *(supra)*, ***Cethar Vessels Ltd.*** *(supra) and* ***Ibex Gallagher Pvt. Ltd.*** *(supra).* Incidentally the Supreme Court in ***Solid and Correct Engineering Works*** *(supra),* does not refer to the said decisions, or to the 2002 circular referred to therein.

29. Consequently, the Court accepts the plea of present Petitioners and answers the questions in STREV No.6 of 2005 as under:

> (i) The furnace permanently embedded to the earth is an immovable property and is not liable to Orissa Sales Tax as sale of machinery.
>
> (ii) The furnace in question is not covered under "machinery" under Entry 70 List-C of Schedule of rates and therefore, is not exigible to sales tax.

30. In STREV Nos. 25 and 26 of 2010 the questions framed therein are answered as under:

(i) The contract involving receipt of lease rent for leasing of the flameless furnace does not constitute sale or resale of goods within the meaning of sale under Section 2(g) of the OST Act.

(ii) Leasing of flameless furnace cannot be the subject matter of taxation since it has suffered Orissa Sales Tax at an interior stage in view of Section 8 of the Orissa Sales Tax Act.

(iii) The question of concessional rate of tax in declaration Form IV does not arise in view of the answers at (i) and (ii) above.

31. The impugned orders which hold to the contrary shall stand set aside accordingly. The consequential orders shall be issued within a period of eight weeks by the Department in accordance with law.

32. The revision petitions are disposed of in the above terms.

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2021 (III) ILR - CUT- 429

Dr. S.MURALIDHAR, C.J & BISWAJIT MOHANTY, J.

CRLA NO. 445 OF 2014

SARATHI MAHANANDA .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence under section 302 of Indian Penal Code – Conviction based on circumstantial evidence – On an analysis of the evidence, the Court is satisfied that each of the above links form a continuous chain of circumstances and each of them has been sufficiently proved, beyond reasonable doubt by the prosecution – Taken together, they unerringly point to the guilt of the appellant and are inconsistent with his innocence – Held, No ground made out for interference.

Case Law Relied on and Referred to :-

1. (2006) 10 SCC 681: Trimukh Maroti Kirtan Vs. State of Maharashtra.

For Appellant : Mr. Nityananda Mohapatra

For Respondent : Mrs. S. Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 27.10.2021

Dr. S.MURALIDHAR, C.J.

1. This appeal is directed against the judgment and order dated 12th November, 2013 passed by the learned Additional Sessions Judge, Titilagarh (hereinafter 'the trial Court') in Sessions Case No.15 of 2011 convicting the Appellant for the offence under Sections 302 IPC and sentencing him to rigorous imprisonment (RI) for life and to pay a fine of Rs.25,000/- and in default of payment of fine, to further undergo RI for one year.

2. At the outset, it must be noted that the present Appellant along with his parents (Accused Nos.2 and 3) faced trial having been charged for the offence under Sections 498A, 304B, 302 and 34 IPC. By the same impugned judgment of the trial Court Accused Nos.2 and 3 were acquitted from the charges. The present Appellant was acquitted of the offence under Section 498A, 304B/34, IPC but was convicted for the offence under Section 302 IPC.

3. The case of the prosecution was that the Appellant was married to the deceased Harabati Besra in 2005 and soon thereafter the family members of the Appellant commenced ill-treating and torturing the deceased. The deceased then came to her father's house and remained there for a period of one year. Thereafter, the mother of the deceased left her in the house of the accused persons requesting them not to ill-treat her in future.

4. Six-seven months later, on 22nd July 2010, one Padu Mahananda informed Lakhpati Besra, father of the deceased over phone that his daughter was in a serious condition. On getting the said information, Lakhpati Besra along with his other family members went to the house of the accused persons and found that his daughter was lying dead. The broken bangles and 'Mangal Sutra' of the deceased were lying near her dead body. Accordingly, Lakhpati Besra lodged an F.I.R. at Sindhekala Police Station where P.S. Case No.84 was registered for the offences under Section 498A, 302/34 IPC.

5. After completion of the investigation, a charge sheet was submitted against three accused persons for the offences under Sections 498A, 304B, 302, 406 and 34 IPC read with Section 4 of Dowry Prohibition Act. The accused persons faced trial having been charged under Sections 498A, 304B, 302 and 34 IPC. 21 witnesses were examined by the prosecution whereas the defence adduced no evidence. Several witnesses turned hostile including PWs 1 and 2 who were supposed to have called the Police to the house of the accused and are supposed to have found the dead body of the deceased lying in the verandah of their house. Likewise, PWs 3, 4, 5, 6, 10 and 18 were declared hostile and were cross-examined by the prosecution.

6. Sri Satyanarayan Behera (PW 21), the then Officer-in-Charge of Sindhekala PS seized two plastic ropes after visiting the spot and prepared an inquest report. On 24th July, 2010 he arrested the present Appellant. According to the prosecution, the Appellant made a disclosure in the presence of the witnesses that the plastic ropes and kendu stick used in the killing had been kept concealed in his house and he offered to get them recovered. The aforementioned relevant portion of the disclosure statement of the Appellant was marked as Ext. 2/2. The Appellant led the I.O. and the witnesses to the place of concealment of the aforementioned objects which were then seized under Seizure List Ext. 3/2. The wearing apparels of the deceased were seized.

7. On 25th July, 2010 PW 21 received the post-mortem examination report and on 7th November, 2010 he sent the seized articles to the Regional Forensic Science Laboratory (RFSL), Sambalpur. Thereafter the charge sheet was submitted in the trial Court.

8. The medical officer (PW 11) who conducted the post-mortem on 23rd July, 2010 found inter alia one ligature mark in the neck, which was transverse continuous low down in the neck, below the thyroid, extending from left side of the neck into right side of the neck. There were injuries found on larynx and trachea. Fracture of hyoid bone was present. The cause of death was opined to be asphyxia, resulting from strangulation. The death was opined to be homicidal in nature.

9. On an analysis of the evidence, the learned trial Court came to the conclusion that although PW 16, father of the deceased reported that the accused had subjected to his daughter torture, PW 16 was completely silent

regarding any demand of dowry by the accused at any point in time. Likewise, mother of the deceased (PW 15) and maternal uncle (PW 19) spoke of the deceased being subjected to cruelty. However, they were silent on cruelty or harassment by the accused persons soon before her death. It was held that the PWs 15, 16 and 19 did not inspire confidence to prove that the deceased was subjected to cruelty and harassment by the accused in connection with any demand for dowry soon prior to her death.

10. The evidence of PW 11 regarding the death being homicidal went unchallenged. Although the prosecution successfully proved that the death of the deceased had occurred in otherwise than normal circumstances and was homicidal in nature and within seven years of marriage yet the basic ingredients of the offence under Section 498A and 304B/34 IPC were held by the trial Court to be not fulfilled. Accordingly, it was held that the prosecution had failed to prove the charge under the aforementioned provisions against the accused beyond all reasonable doubt.

11. As far as the charge under Section 302/34 IPC was concerned, the trial Court held that although there were minor discrepancies in the evidence of the PWs 15, 16, 17 and 19 and they were related to each other, their evidence could not be completely ignored. The credibility of their evidence regarding the death of the deceased inside the house of the accused persons could not be shaken. Apart from this, the Appellant admitted in his examination under Section 313 Cr PC that the I.O. (PW 21) had conducted inquest on the dead body of the deceased. Accordingly, it was proved that the death of the deceased took place in the house of the accused. From the evidence of PWs 1, 4, 6, 7 and 18, it was held by the trial Court to be proved that the Appellant was alone present in the house where the death took place; therefore, the cause of the death of the deceased was within the special knowledge of the Appellant.

12. The trial Court held that the evidence regarding recovery of the weapon of offence was also proved. When it was put to the accused during his examination under Section 313 Cr PC, except denying the seizure itself, he had no satisfactory explanation as to how the seized weapons came into his possession. That apart the chemical examination report (Ext.15) of the Appellant contained faded patches of human blood. The explanation of the Appellant even in this regard in his statement under Section 313 Cr.P.C. was not found convincing.

13. In terms of Section 106 of the Evidence Act, the fact of the death of the deceased which occurred in his house was within the knowledge of the Appellant and he was unable to offer a satisfactory explanation except a vague denial. For all of the aforesaid reasons, the trial Court held the circumstances proved formed a continuous chain and pointed unerringly to the guilt of the Appellant and his innocence was inconsistent with the evidence.

14. This Court has heard the submissions of Mr. Nityananda Mohapatra, learned counsel for the Appellant and Mrs. S. Patnaik, learned Additional Government Advocate for the State (Respondent).

15. This was a case based on circumstantial evidence. The following circumstances have been convincingly proved by the prosecution:

(i) That, the accused and his wife were not living a happy conjugal life. This stood proved from the evidence of PWs 15, 16, 17 and 19.

(ii) That the death of the deceased took place in the dwelling house of the accused and he alone was present with the deceased. This stands proved by the evidence of PWs 1, 4, 6, 7 and 18.

(iii) Prior to death of the deceased, she was residing separately from her parents.

(iv) The death of the deceased was homicidal in nature and resulted from strangulation. This is proved by evidence of PW 11, the medical officer.

(v) The disclosures made by the Appellant while in custody about knowledge of the weapons of offence and their seizure pursuant to the statement made by him under Section 27 of the Evidence Act stood proved beyond reasonable doubt.

(vi) The accused could offer no satisfactory explanation as to how he came into possession of the weapon of offence and therefore, an adverse inference could be drawn. The explanation offered while making statement under Section 313 Cr PC, as to the human blood in his pant, was unconvincing.

(vii) There was no evidence to indicate that other than the Appellant anyone else entered into the house at the relevant point in time. The Appellant also could not offer a satisfactory explanation as regards any of the incriminating circumstances against him.

16. As regards the deceased being found dead in the dwelling house of the Appellant and his not offering any convincing explanation as to the cause of the death, the following observations in ***Trimukh Maroti Kirtan v. State of Maharashtra (2006) 10 SCC 681*** are relevant:

> "If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties."

17. On an analysis of the evidence the Court is satisfied that each of the above links form a continuous chain of circumstances and each of them has been sufficiently proved, beyond reasonable doubt by the prosecution. Taken together, they unerringly point to the guilt of the Appellant and are inconsistent with his innocence.

18. The Court finds no grounds made out for interfering with the impugned judgment and order of the trial Court. The appeal is accordingly dismissed.

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2021 (III) ILR - CUT- 434

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

W.P.(C) NO.3687 OF 2002, F.A.NOS.88, 89, 96, 98, 103, 121, 124 OF 2002 AND CMP NOS. 224 & 225 OF 2020

STATE OF ORISSA ……..Petitioner

.V.

MANTA KRISHNA SETHI & ORS. ……..Opp. Parties

IN F.A. NO.88 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK ……..Appellant
.V.
BIDULATA DEI & ORS. …….. Respondents

IN F.A. NO.89 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK ……..Appellant
.V.
BIDULATA DEI & ORS. ……..Respondents

IN F.A. NO.96 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK ……..Appellant
.V.
BIJAY KUMAR SAMANTARAY & ANR. ……..Respondents

IN F.A. NO.98 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK ……...Appellant
.V.
SMT. SANTILATA MOHANTY AND ANR. ……Respondents

IN F.A. NO.103 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK. ……..Appellant
.V.
BIDULATA DEI AND ORS. ……..Respondents

IN F.A. NO.121 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK ……..Appellant
.V.
SMT. BASANTA MANJARI LENKA & ORS. …….. .Respondents

IN F.A. NO.124 OF 2002

LAND ACQUISITION COLLECTOR, CUTTACK ……..Appellant
.V.
SMT. JAYASHREE DAS AND ANR. ……Respondents

IN CMP NOS.224 AND 225 OF 2020

LAND ACQUISITION COLLECTOR, CUTTACK ……Petitioner
.V.
SMT. BASANTA MANJARI LENKA & ORS. ……..Opp. Parties

ORISSA ESTATE ABOLITION ACT, 1951 – The land in question stood vested with government vide notification dt. 27.04.1963 "free from all encroachment" – All the intermediary interest were also vested with the state – What effect does the said notification have on all the sales that took place subsequent there to? – Held, all subsequent actions of transfer of properties of those very land in favour of the third parties or even the proceedings to acquire the land under the land acquisition Act are null and void. (Para-51)

LAW OF ESTOPPEL – Whether it applies to the statutory provisions? – Held, there is no question of estoppel against the statutory provisions. (Para-58)

Case Laws Relied on and Referred to :-

1. AIR 1974 Orissa 120 : Jagabandhu Senapati Vs. Bhagu Senapati.
2. 38 (1) 1972 CLT 1323 : Sri Madan Mohan Das Babaji Vs. Brundaban Pal.
3. (2003) 7 SCC 146 : State of Orissa Vs. Nityananda Satpathy.
4. (2009) 12 SCC 378 : State of Orissa Vs. Harapriya Bisoi.
5. AIR 1968 SC 1045 : Special Land Acquisition and Rehabilitation Officer Vs. M.S. Seshagiri Rao.
6. (1995) Supp (3) SCC 249 : State of Orissa Vs. Brundaban Sharma.
7. (2013) 9 SCC 319 : State of Andhra Pradesh Vs. Star Bone Mill and Fertiliser Company.
8. (1997) 5 SCC 166 : Sewa Ram Vs. Union of India.
9. AIR 1962 SC 554 : Dr. H.S. Rikhy Vs. The New Delhi Municipal Committee.
10. AIR 1993 SC 2414 : Bengal Iron Corporation Vs. Commercial Tax Officer & Ors.
11. (1996) 6 SCC 634 : I.T.C. Bhadrachalam Paperboards Vs. Mandal Revenue Officer, A.P.
12. AIR 1962 SC 1912 : Kumar Bimal Chandra Sinha Vs. State of Orissa.
13. AIR 1951 Orissa 60 : Narayan Behera Vs. Ch. Narsingh Ch. Mohapatra.
14. (2018) CLT 125 : State of Orissa Vs. Purushottam Barik.
15. AIR 1984 Ori 77 : Radhamani Dibya Vs. Braja Mohan Biswal.
16. AIR 2000 SC 671 : Municipal Council, Ahmednagar Vs. Shah Hyder Beig.
17. (1968) 2 SCR 892 : Special Land Acquisition & Rehabilitation Officer Vs. M.S. Seshagiri Rao and Anr.
18. (1972) 2 SCC 532 : Ram Narain Singh Vs. State of Bihar.
19. (1979) 3 SCC 4 : (1979) 2 SCR 229 : Union of India Vs. Prafulla Kumar Samal.
20. AIR 2008 SC 901 : Gurunath Manohar Pavaskar & Ors. vs. Nagesh Siddappa Navalgund & Ors.
21. AIR 1968 SC 1165 : Nair Service Society Ltd. Vs. K.C. Alexander & Ors.
22. AIR 2003 SC 1805 : Chief Conservator of Forests, Govt. of A.P. Vs. Collector & Ors.
23. AIR 1962 SC 554 : Dr. H.S. Rikhy Vs. New Delhi Municipal Committee
24. AIR 1997 SC 482 : Municipal Corporation of Greater Bombay Vs. Industrial Development Investment Co. Pvt. Ltd.

IN W.P.(C) NO.3687 OF 2002

For Petitioner : Mr. Subir Palit, Addl. Govt. Adv.
For Opp. Parties: Mr. Kishore Kumar Jena

In F.A. No.88 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Sanjib Swain.

In F.A. No.89 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Sanjib Swain.

In F.A. No.96 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Sanjib Swain.

In F.A. No.98 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Sanjib Swain.

In F.A. No.103 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Sanjib Swain.

In F.A. No.121 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Kishore Kumar Jena, Mr. Sanjib Swain

In F.A. No.124 of 2002

For Appellant : Mr. Subir Palit, Addl. Govt. Adv.
For Respondents : Mr. Sanjib Swain.

In CMP Nos.224 and 225 of 2020

For Petitioner : Mr. Subir Palit, Addl. Govt. Adv.
For Opp. Parties: Mr. Kishore Kumar Jena

JUDGMENT Date of Judgment : 27.10.2021

Dr. S.MURALIDHAR, C.J.

1. Writ Petition (Civil) No.3687 of 2002 and the connected First Appeals and CMPs arise out of the common set of facts and accordingly they are disposed of by this common judgment.

Background Facts

2. The present case concerns acquisition of land measuring Ac.288.89 decimals in mouza Bidyadharpur in 12 numbers of different blocks under Khewat Part 3(1), which was a 'Nijadakhal' land of Raja Radhanath Bebarta Pattnaik under the Beheldars (intermediaries) Radhakrishna Bharati and others. The rent for the lands were purportedly paid by Raja Radhanath Bebarta Pattanaik to the three Beheldars (intermediary/ zamindars) excluding the fourth Beheldar Sri Chintamani Behera.

3. It is claimed by the Opposite Parties in the writ petition/ Respondents in the appeals, that the said land were not within the territorial jurisdiction of Athagarh Estate. It is claimed that in the instrument of merger of Athagarh Estate, the lands have not been included.

4. Due to non-payment of rents, the Beheldars Chintamani Behera and Bhagaban Das filed Rent Suit No.80 of 1958-59 in the Revenue Court against Raja Radhanath Bebarta Pattnaik for realization of rent for the years 1955-56, 1956-57 and 1957-58. The said suit was decreed on 20th January, 1959.

5. After the death of Chintamani Behera, his sons Jayaram Behera and Bhagaban Das filed Execution Case No.680 of 1958-59 against Raja Radhanath Bebarta Pattnaik for realization of rent as per the decree in their favour. In the said Execution Proceedings the aforementioned land to the extent of Ac.288.89 decimals was put to sale by public auction.

6. One Sri Baishnaba Charan Sethi of Deulasahi of Cuttack Town emerged as the highest bidder in that public auction held on 15th October, 1960 and purchased the aforementioned extent of Ac.288.89 decimals. The sale was confirmed in his favour after the statutory period. A Sale Certificate was issued in his favour on 11th April, 1961 under Order 21, Rule 94, C.P.C. On application of the auction purchaser, the Executing Court passed an order for delivery of possession under Order 31, Rule 95, C.P.C.

7. In terms of the order of the executing court, the process-server of the court delivered possession of the aforementioned land in favour of Baishnaba Charan Sethi on 17th May, 1961 in presence of the witnesses, affixing the certificate of sale of the said land and proclaiming it by drum beat that the right, title, interest and possession of the aforementioned land of Ac.288.89

decimals was transferred to the auction purchaser Sri Baishnaba Charan Sethi. A report to that effect was submitted to the executing court.

8. Thereupon Baishnaba Charan Sethi cultivated the lands and paid rents to the Tahsildar, Sadar, Cuttack with effect from 1960-61. The first payment was made in November, 1962 for the year 1960-61, 1961-62, and he kept paying rents thereafter till 1970.

9. It is stated that the property sold in the auction sale was Nijadakhal land (own possession) of Raja Radhanath Bebarta Pattnaik situated in the CDA and was not within the territorial jurisdiction of Athagarh.

10. Under the Orissa Estate Abolition Act, 1951 (OEA Act), the land in question stood vested with the Government of Odisha on 27th April, 1963 vide Notification No.27478-EA1-T/63-R, "free from all encumbrances". All the intermediary interests were also vested with the State. It was the State who then became the owner of the lands. No application for assessing rents thereafter was filed by Sri Baishnaba Charan Sethi, the auction purchaser.

11. It appears that, on 4th April, 1970 said Baishnaba Charan Sethi applied for permission to sell a portion of the land measuring Ac.185.00 decs. for his own interest. On 31st May, 1971 permission was granted by the then Sub-Divisional Officer, Cuttack Sadar under Section 22 of the Orissa Land Reforms Act (OLR Act) permitting Sri Sethi to sell land of the extent of Ac.185.00 decs.

12. It appears that a local enquiry was conducted, and in the course of settlement proceedings the Assistant Settlement Officer prepared a draft record of rights (RoR) under Section 12 of the Orissa Survey and Settlement Act, 1958 (OSS Act) on 12th March, 1971 inviting objections against the draft RoR. In the draft RoR the number of plots were increased to 17, but the area of the land was reduced to Ac.283.98 decs. as against Ac.288.89 decs., as per the C.S. RoR. It is stated that, in the absence of any objection, the final RoR was published on 10th November, 1973 showing Baishnab Charan Sethi as tenant.

13. O.L.R. Ceiling Case No.346 of 1975 was initiated against Baishnab Charan Sethi, to which he filed his objection in Form-12 of the OLR Act. After due enquiry, the Tahsildar, Cuttack Sadar held that Ac.171.98 decs. is

ceiling surplus land which was then taken over by the State to distribute to landless persons. The R.I., Sadar, Cuttack received possession of the said extent of Ac.171.98 decs. land and submitted his report on 28th April,1976 in the Ceiling Proceedings. For the said ceiling surplus land, said Baishnab Charan Sethi received compensation in terms of the OLR Act.

14. On 15th May, 1976 Ac.10.00 decs. of land was purchased by one Jagannath Lenka and others by executing Registered Sale Deed, after receiving permission from the competent authority on 1st May, 1976.

15. In connection with Bidanasi Triangular Project, an enquiry was undertaken in respect of the ownership of the land. It is claimed that, after due verification of the documents, the Government of Odisha in the Revenue Department in consultation with the Advocate General, Orissa, declared that Sri Sethi had acquired Stitiban tenancy. A notification dated 28th July, 1983 was issued under Section 4 (1) of the Land Acquisition Act, 1894 (LA Act) for acquisition of the aforementioned remaining portion of land. This was done unmindful of the fact that under the OEA Act, the entire extent of land already stood vested with the State. In the meanwhile, Sri Sethi appears to have sold the balance area of Ac.112.00 decs. of land to different persons with the prior permission of the S.D.O., Cuttack and in turn those purchasers sold it to others.

16. Pursuant to the aforementioned Notification, on 28th December, 1984 the possession of land was taken over by the State and an Award was passed by the Land Acquisition Collector, which was then challenged by the landholders seeking enhancement of compensation by filing petitions under Section 18 of the LA Act.

17. Initially, the Reference Case was disposed of on 12th July, 1986 by the Reference Court. Appeals were filed by the claimants in this Court against the said order. The High Court by a common order dated 23rd August, 2001 set aside those orders and remanded the matter to the Reference Court for re-determination of compensation based upon certain guidelines. In the second round, by orders dated 24th November, 2001, the learned Reference Court/Civil Judge confirmed the enhanced compensation earlier awarded. All the First Appeals and the CMPs in the present Batch Matters have been filed by the State against the said order.

18. One Sri Damodar Rout, a former MLA filed a Public Interest Litigation being O.J.C. No.9886 of 1996 in this Court seeking to challenge the entire proceedings. This PIL was heard along with F.A. Nos.88, 89, 102, 103, 121 and 124 of 2002. On 16th August, 2002 this Court stayed all the execution cases in the First Appeals but did not stay execution case pertaining to F.A. No.121 of 2002, i.e. Execution Case No.105 of 2002, which arose out of LA Case No.3 of 1994.

Registering of W.P. (C) 3687/2002

19. When the matter stood thus, on 16th August, 2002 the Court entertained Misc. Case No.7136 of 2002 in O.J.C. No.9886 of 1996 for impleading Cuttack Development Authority (CDA) as an Opposite Party in O.J.C. No.9886 of 1996. That application was allowed. On the same day, i.e. on 16th August, 2002 another Misc. Case bearing No.7626 of 2002 was entertained as a PIL and subsequently registered as Writ Petition No.3687 of 2002. The said order reads as under:

> "Misc. Case No.7626 of 2002
>
> Heard learned counsel on all sides, and especially in vehemence, Mr. Indrajeet Mohanty for the main contesting parties.
>
> The writ petition has been entertained by this Court as a Public Interest Litigation at the instance of a responsible citizen and in public interest as the allegation was that a scheme was devised to swindle the State exchequer. The charges made therein are very serious in nature. In the writ petition, the Cuttack Development Authority filed an application for impleading itself which we allowed today. In this application, the Cuttack Development Authority which has been impleaded as an opposite party, submits that the execution of the award decrees under the Land Acquisition Act secured by the contesting parties be kept in abeyance until disposal of the writ petition.
>
> 2. Mr. Indrajeet Mohanty rightly pointed out that challenging the award decrees the State has filed First Appeals before this Court and the proper course is to seek a stay of execution of the decrees in those First Appeals. He submits that, even if the frontiers of procedure have been pierced by the concept of Public Interest Litigation, things have not reached such a stage that we can dispense with all procedure in dealing with a Public Interest Litigation. Therefore, he submitted that the present application by the Cuttack Development Authority, an opposite party in the writ petition, is misconceived and should not be entertained. The learned Additional Government Advocate submits that the first appeals are to be moved and they will be moved expeditiously. We think that it would be proper to hear those First Appeals along with the present writ petition and hence we order that First

Appeal Nos.88, 89, 102, 103, 121 and 124 of 2002 be listed with this writ petition at the next hearing.

3. It is true, as submitted by Mr. Indrajeet Mohanty, that the proper course to take for the State or the Cuttack Development Authority is to seek a stay of execution of the amounts decreed, in the First Appeals filed against the decrees by the State, in this Court. At the same time, we find that what is involved is a matter of public importance, since serious allegations are made and countered in this proceeding, and this proceeding requires a careful examination for arriving at a conclusion one way or the other. The opposite parties are also entitled to have their say in the matter before the final judgment is pronounced by this Court. In that situation, notwithstanding the weighty submissions of Mr. Indrajeet Mohanty on the procedural aspects, we think it proper to keep in abeyance the execution for the amounts decreed under the Land Acquisition Act against the State and the Cuttack Development Authority, until the writ petition is disposed of. Therefore, we direct a stay of Execution Case Nos.99, 100, 101 and 102 of 2001 pending in the court of Civil Judge (Senior Division), First Court, Cuttack for a period of two months.

4. During the course of hearing, it is brought to our notice that the Commissioner of Land Records and Settlement, Orissa has finally disposed of R.P. Case No.2351 of 1998. Considering that the entire matter has to be scrutinized and to be disposed of by this Court, to ensure that complete justice is done in the case, we also take up the order in R.P. Case No.2351 of 1998 dated 5.4.2002 suo motu for scrutiny in exercise of our jurisdiction under Articles 226 and 227 of the Constitution of India. This will enable this Court to scrutinize the entire matter in controversy untrammelled by any order right or wrong, attaining finality. The Registry will treat that as a writ petition, number it and issue notices therein to (1) Manta Krishna Sethi, s/o. late Baishnab Ch. Sethi of Deulasahi, Cuttack, (2) Sushana Sethi, w/o. Naran Sethi, D/o. late Baishnab Charan Sethi, village – Urali, P.S. Sadar, District – Cuttack, (3) Kusum Sethi, w/o. Sanatan Sethi, D/o. late Baishnab Charan Sethi, village – Anantapur, P.S. Gurudijhatia, District – Cuttack, and (4) Jhuna Sethi, D/o. late Baishnab Charan Sethi, of Deulasahi, Cuttack.

5. Place this matter along with the First Appeals referred to above, and the suo motu proceeding, we have initiated, on 4.10.2002. The Registry will immediately call for the records of the First Appeals as also the entire records of R.P. Case No.2351 of 1998 from the Commissioner of Land Records and Settlement, Orissa, Cuttack. The Registry will also call for the records of Execution Case Nos.119 and 120 of 1995 from the Subordinate Judge, First Court, Cuttack and Rent Suit No.80 of 1958-59 and Execution Case No.680 of 1959-60 from the said Court. The learned Additional Government Advocate assures the Court that necessary steps will be taken in the First Appeals filed in this Court before the next posting.

Post this matter on 1.10.2002."

20. It should be mentioned at this stage that, the said R.P. Case No.2351 of 1998 had been filed by the State of Orissa against the legal heirs of Baishnab Charan Sethi, i.e. Manta Krishna Sethi and three others, which was under Section 15 (a) of the OSS Act, against the recording of all the 17 Hal Plots measuring Ac.283.98 decs. under the impugned Hal RoR under Khata No.220 located in mouza Bidyadharpur under Cuttack Sadar P.S. of Cuttack district. By the order dated 5th April, 2002, the Commissioner dismissed the revision petition, holding that the State had admitted the title of Baishnaba Charan Sethi and his vendees over the suit lands and was estopped from challenging the same in view of the decision of this Court in ***Jagabandhu Senapati v. Bhagu Senapati, AIR 1974 Orissa 120*** and ***Sri Madan Mohan Das Babaji v. Brundaban Pal, 38 (1) 1972 CLT 1323.***

21. After the Writ Petition (Civil) No.3687 of 2002 was registered, on 27th September, 2004, the following order was passed:

> "OJC 9886 of 1996 has been listed for orders on various interim applications as noted in the cause list. W.P. (C) 3687 of 2002 and a batch of First Appeals have also been listed for orders because they are analogous to the dispute under consideration in this writ petition (OJC 9886 of 1996).
>
> Mr. Indrajit Mohanty, learned counsel for one batch of opp. party members presses into service two applications, i.e. Misc. Case No.8668 of 2002 and Misc. Case No.643 of 2004. In the first application he has prayed to issue a direction to the C.D.A. to deposit the amount awarded by the Civil Court under reference and alternatively in the second application he has sought for an order for vacating the stay order by which execution proceeding has been stayed. Mr. Swain, learned counsel appearing for C.D.A. states that the said authority would file a counter and an adjournment may be granted for that purpose.
>
> It is also stated at the Bar that the ultimate decision in the writ petition may have a bearing on the decision which has been passed/would be passed in the connected First Appeal. Therefore, considering the importance of the writ petition, we direct for its early listing for expeditious disposal. A couple of weeks after the Puja Vacation intervened and therefore it is agreed upon at the Bar that the writ petition be listed for hearing in the date assigned for hearing on the first week of November, 2004. All the parties including the appellant and respondent in the First Appeal agree to cooperate for hearing and disposal of the writ petition on that date. Accordingly, we direct to list all the First Appeals except L.A.A. 43 of 2002 and L.A.A. 44 of 2002. The learned Standing Counsel for the State undertakes to prepare compulsory paper books in the meantime so that there would not be any impediment for hearing of the First Appeal which will follow conclusion of hearing of argument in the writ petition."

22. Thereafter, all the writ petitions along with all the F.As were listed intermittently for a few days in 2004 and 2005. They were ultimately listed on 24th March, 2021, 16 years later.

23. It may be mentioned here that, on 3rd November, 2014, in Misc. Case No.940 of 2002 in F.A. No.121 of 2002 this Court directed the Appellant State to deposit 50% of the awarded amount and on such deposit, the recovery of the balance amount would be stayed. On 27th January, 2015 an application was filed in F.A. No.121 of 2002 for modification of the said order dated 3rd November, 2014. The said application was dismissed. However, the Court granted the Appellant four weeks' time to deposit 50% of the awarded amount in Execution Case No.105 of 2001. On 7th April, 2015 the Appellant State deposited Rs.10,55,000/- in the said Execution Case. On 18th May, 2016 a further sum of Rs.5,85,850/- over and above Rs.10,55,000/- was deposited by the Appellant. On 22nd August, 2016, in Misc. Case Nos.65 and 66 of 2016, by a common order, this Court directed the Executing Court to make a fresh calculation of the 50% awarded amount subject to the Appellant depositing a further sum of Rs.10,00,000/-. It is contended by the Respondents in the said F.A. that the said order has not yet been complied with.

24. On 27th April, 2021 a detailed order was passed by this Court framing the following questions of law for determination in the writ petition and first appeals:

(i) What is the effect of the vesting of the entire land in the State, free from all encumbrances, under the OEA Act by the notification dated 27th April, 1963? What effect does the said notification have on all the sales that took place subsequent thereto?

(ii) Is the order of the Commissioner dated 5th April, 2002 in R.P. No.2351 of 1998 valid?

(iii) Depending on the answer to (i) and (ii) above, what is the status of validity of the subsequent orders passed in the land acquisition proceedings including the order passed by this court in the first appeals on 23rd August, 2001?

(iv) What is the status of the consequential order passed by the Civil Court on remand of the matter by this Court by its order dated 23rd August, 2001?

(v) Whether the execution cases should not proceed in accordance with law?

25. This Court heard Mr. Subir Palit, learned Additional Government Advocate (AGA) and Mr. Kishore Kumar Jena, learned counsel appearing for the Opposite Parties in the writ petition as well as the Respondents in the connected First Appeals.

Submissions on behalf of the State

26. The submissions of Mr. Subir Palit, learned A.G.A. are as under:

(i) The notification dated 27th April, 1963 under the OEA Act had the effect of automatically vesting the entire land in the State free from all encumbrances. Thereby the vendor (the ex-intermediary) and Sri Sethi who had stepped into his shoes lost all the right, title, interest over the land by operation of the mandatory provisions of the OEA Act. Further, no claim had been lodged under Section 6 and 7 of the OEA Act by the vendees for any right that could have been claimed over a portion of the lands and therefore such right also got extinguished.

(ii) Therefore, the sale deeds executed by Sri Sethi are ab initio void documents and do not confer any right on the vendees. Since Sri Sethi did not have any right, he could not have passed on any title by virtue of those Registered Sale Deeds. Reliance is placed on the decision in ***State of Orissa v. Nityananda Satpathy, (2003) 7 SCC 146*** *and* ***State of Orissa v. Harapriya Bisoi, (2009) 12 SCC 378***, to urge that upon a notification issued under Section 3 & 3-A of the OEA Act, the entire estate free from all encumbrance vests in the State. The intermediary ceases to have any interest in such estate other than the interest expressly saved under the OEA Act.

(iii) OEA Act provides an exception to the general rule of vesting of the estate insofar as possession of lands are concerned. With Sri Sethi not having filed application under Sections 6 & 7 of the OEA Act, asking to remain as tenant under the State by paying rents, all the lands to the extent of Ac.288.89 decs. vested with the State, without exception, free from all encumbrance by virtue of operation of the law.

(iv) The State is not bound to acquire its own land but it can only acquire restrictive interests. Reference is made to the decisions in ***Special Land***

Acquisition and Rehabilitation Officer v. M.S. Seshagiri Rao, AIR 1968 SC 1045 and ***State of Orissa v. Brundaban Sharma, (1995) Supp (3) SCC 249***.

(v) In support the submission that Sri Sethi was not competent to enter into any such transaction vis-à-vis the land of an extent of Ac.288.89 decs. in the teeth of the notification dated 27th April, 1963, due to the bar under Sections 54 & 55 of the Transfer of Property Act, 1882 (TP Act), reliance is placed on the decision in ***State of Andhra Pradesh v. Star Bone Mill and Fertiliser Company, (2013) 9 SCC 319***. In this context reference is also made to the decision in ***Sewa Ram v. Union of India, (1997) 5 SCC 166***.

(vi) It is submitted that the revenue records do not create any title but only a presumption in regard to possession. Therefore, the entry in the RoR in favour of Sri Sethi cannot be said to be bestow any title on him when in fact it stood vested with the State.

(vii) On issue (ii), it is submitted that the order dated 5th April, 2002 of the Commissioner in R.P. No.2351 of 1998 is unsustainable in law, because that can be no estoppel against the statute. Reliance is placed on the decisions in ***Dr. H.S. Rikhy v. The New Delhi Municipal Committee, AIR 1962 SC 554 and Bengal Iron Corporation v. Commercial Tax Officer and Others, AIR 1993 SC 2414***.

(viii) It is then contended that, Sri Sethi had committed a fraud when despite the lands being vested with the State, he projected himself as the titleholder of the lands and first applied for permission under Section 22 of the OLR Act and thereafter participated in the case of Ceiling Proceeding No.346 of 1975 and thereafter sold the land to the extent of Ac.112.00 decs. Relying on the decision in ***I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer, A.P., (1996) 6 SCC 634***, it is submitted that, promissory estoppel cannot defeat the law and the said rule is not available against a statutory provision. It is pointed out that the sanctity of the law cannot be allowed to be defeated by the rules of estoppel.

(ix) As regards Issue No.(iii), it is submitted that since the Land Acquisition Proceedings are subsequent to the vesting notification under the OEA Act, they are ab initio void. It is accordingly submitted in response to Questions (iv) and (v) that since all the consequent proceedings are also null and void,

the compensation already paid to the claimants should be returned to the State exchequer and all the execution cases quashed.

Submissions of the Opposite Parties/Respondents

27. In reply, it is submitted by Mr. Jena, learned counsel, that Baishnab Charan Sethi had purchased the land before the date of vesting on 27th April, 1963. Therefore it was not necessary for him to file any application under Section 6 & 7 of the OEA Act, because he was the tenant/raiyat in respect of the purchased property. He was not an intermediary. It is submitted that the OEA Act was enacted only for abolition of intermediaries and the interest of the raiyat/tenant was not touched. Reliance is placed on the decision in ***Kumar Bimal Chandra Sinha vs. State of Orissa, AIR 1962 SC 1912***.

28. It is stated that Sri Baishnab Charan Sethi purchased right, title and interest of the land put for auction and he had not purchased the intermediary right. Relying on the decision in ***Narayan Behera v. Ch. Narsingh Ch. Mohapatra, AIR 1951 Orissa 60***, where it was held that a sale held in execution of a decree against an estate holder does not pass the estate itself to the purchaser, it is submitted that, the purchaser of an auction sale only purchases the right, title and interest of the land, and does not purchase the estate of the intermediary. Referring to the definition of "Raiyat" under Section 2(n) of the O.E.A. Act, 1951, it is submitted that Radhanath Bebarta Pattnaik was the 3rd part Khewat who was cultivating the lands. Under Section 4 (2) of the Orissa Tenancy Act, 1913('OT Act') Raiyats are tenants. Reference is also made to Section 3 (23) of the OT Act. It is submitted that Radhanath Bebarta Pattnaik was paying rents to Radhakrishna Bharati and others, as the lands were not within the territorial areas of Athagarh. Reliance is also placed on Section 4 of the OT Act to claim that Raiyats have a right of occupancy of lands. Reference is also made to the decision in ***State of Orissa v. Purushottam Barik, (2018) CLT 125***.

29. The submission on behalf of the Opposite Parties /Respondents is that, the OEA Act was enacted only to abolish the intermediary right and not the Raiyat/Tenancy right. It is submitted that, after accepting rent for a period of 26 years from Baishnab Charan Sethi, the plea by the State that it was government land cannot be accepted. Reliance is also placed on the decision in ***Radhamani Dibya v. Braja Mohan Biswal, AIR 1984 Ori 77***.

30. Mr. Jena submits that, the State has recorded the "Stitiban status" in favour of Baishnaba Charan Sethi in 17 plots in the Hal R.O.R. published on 2nd November, 1973, which is presumed to be correct unless it is proved to be incorrect by adducing evidence. It is stated that the following circumstances show that the State has admitted the tenancy of Sri Baishnab Charan Sethi:

(a) Rent was collected by the Tahsildar with effect from 1961.

(b) SDO, Cuttack Sadar granted permission under Section 22 of the OLR Act on 30.05.1971 in favour of Baishnab Charan Sethi to sell the land after due inquiry.

(c) In Ceiling Case No.345 of 1975 the ceiling surplus lands were taken by the State leaving Ac.112.00 dec. of land for cultivation of Baishnab Charan Sethi under Section 37 of the OLR Act.

(d) Ceiling surplus lands were distributed to landless persons and same was confirmed by this Court in different proceedings.

(e) Admitting the land, i.e. Ac.112.99 as lands of Baishnab Charan Sethi, the said lands were acquired from the purchasers of Baishnab Charan Sethi and compensation were paid under the provisions of the Land Acquisition Act, 1894.

(f) Before payment of the compensation amount, the opinion of the then Advocate General was taken.

(g) Admitting the ownership of the purchasers in the High Court, the reference petitions were also sent back to the Court under Section 18 of the LA Act for re-determination of fair market price of the lands.

(h) Before the executing court or before this Court in the First Appeal, the State has not challenged the ownership of the purchasers. In the First Appeal only the quantum granted by the executing court was challenged.

31. Reliance is placed on the decision of the Supreme Court in ***Municipal Council, Ahmednagar v. Shah Hyder Beig, AIR 2000 SC 671*** to urge that when an Award is passed and possession taken under the LA Act, the High Court should not interfere, several years thereafter, with the acquisition proceedings. It is submitted that the PIL is highly belated as it was registered

in 2002, after a long gap of 40 years after the cause of action arose on 11th September, 1961.

32. It is submitted that despite the OEA Act, rent was accepted from Sri Sethi, not as a landlord but as a tenant. It is submitted that he has not committed any fraud. The settlement of this land in his favour could be said to be voidable but it cannot be void. On the same analogy it is submitted that Basanta Manjari Lenka and others through the purchaser Jagannath Lenka and others have not committed any fraud. They purchased the land on verification of the RoR and after ceiling surplus land was taken by the State from the land of Sri Sethi. So, it is submitted that if any mistake has been committed, it was committed by the State Authorities.

33. It is submitted that Sri Sethi would not suffer as he sold it at the same price of the land and is now no more. Innocent persons, who purchased the land after due verification, ought not to be punished. It is urged that justice should be complete justice in all respects. It is pointed out that while the Court stayed all the execution cases, it did not stay the case of Jagannath Lenka. The applicability of the decisions in ***Nityananda Satpathy*** (supra) and ***Harapriya Bisoi*** (supra) are questioned on the basis that they are distinguishable on facts. Likewise, the decisions are in Special Land ***Acquisition & Rehabilitation Officer*** (supra) and ***Brundaban Sharma*** (supra), are also sought to be distinguished.

Analysis and reasons

34. The above submissions have been considered. In the first place it is seen that the vesting of the entire extent of land in favour of the State by virtue of the notification dated 27th April, 1963 under the OEA Act has not been able to be disputed by the Respondents/Opposite Parties. To appreciate this aspect, one needs to first understand what the effect of the vesting is.

35. Section 5 of the OEA Act reads as under:

> "5. **Consequences of vesting of an estate in the State** – Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of the notification in the Gazette under Sub-section (1) of Section 3 or Sub-section (1) of Section 3-A or from the date of the execution of the agreement under Section 4, as the case may be, the following consequences shall ensue namely:

(a) Subject to the subsequent provisions of this Chapter the entire estate including all communal lands and porambokes, other non-raiyati lands, waste lands, trees, orchards, pasture lands, forests mines and minerals (whether discovered or inclusive of rights in respect of any lease of mines and minerals quarries, rivers and streams, tanks and other irrigation works, water channels, fisheries, ferries, hats and bazars, and building or structures together with the land on which they stand shall vest absolutely in the State Government free from all encumbrances and such Intermediary shall cease to have any interest in such estate other than the interests expressly saved by or under the provisions of the Act;

Explanation – 'Encumbrance' means a mortgage of or a charge on any estate or part thereof and includes any right in land or other immovable property comprised in an estate, but does not include an intermediary interest or the interest of a raiyat or an under-raiyat.

(b) All rents, cesses, royalties and other dues accruing in respect of lands comprised in such estate on or after the date of vesting shall be payable to the State Government and not to the outgoing intermediary and any payment made in contravention of this clause shall not be valid discharge, and all such rents, cesses, royalties and other dues shall be recoverable as arrears of land revenue. Provided that where the date of vesting falls within the period to which the dues relate only such proportion of the dues shall be payable as the period beginning with the said date and ending with the period aforesaid bears to the whole of that period.

Provided further that, any part of such dues appropriated by the intermediary beyond what may be found due to him in accordance with the provisions of this clause may be recovered by the State Government as arrears of land revenue or by the deduction of the amount from the compensation payable to such Intermediary.

Provided also that, the payment of any amount on account of any such rents, cesses, royalties and other dues made to the outgoing intermediary in pursuance of the orders of any Court of law shall constitute a valid discharge.

(c) – (k) xx xx xx xx"

36. Vesting is automatic under the OEA Act. In terms of the Explanation to Section 5 (a), encumbrance does not include an intermediary interest or the interest of a raiyat or an under-raiyat. It is for this reason that a desperate argument is sought to be advanced by Mr. Jena that Sri Sethi was in fact a raiyat. However, this was never his case. The fact of the matter is that if indeed Sri Sethi was a raiyat as defined under Section 2 (n) of the OEA Act, he could have never conveyed valid title in respect of the Ac.112.00 dec., which was sold by him to several persons as a land-owner. Section 2(n) of the OEA Act, which defines 'Raiyat', reads as under:

> "Raiyat means any person holding the land for the purpose of cultivation and who has acquired the right of occupancy according to the Tenancy Law or Rules for the time being in force in that area or in absence of such law or rules, the custom prevalent in that area."

37. Section 4 (2) of the OT Act defines a "Tenant" as under:

> "Tenant means a person who holds land under another person and is, or but a special contract would be liable to pay rent for that land to that person."

38. Under Section 4, the class of Tenants includes occupancy raiyats, i.e. raiyats having right of occupancy over the land held by them. The relevant passage in ***State of Orissa v. Purushottam Barik*** (supra), reads thus:

> "The word 'raiyat' has been defined in Sec.5(2) of Orissa Tenancy Act. It means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest or persons who have acquired such a right. Sec.23(1) of the Act provides that every person who, for a period of twelve years whether wholly or partly before or after the commencement of Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village. Sec.24(1) postulates that every person who is a settled raiyat of a village within the meaning of Sec.23 of the Act shall have a right of occupancy in all land for the time being held by him as a raiyat in that village."

39. All of the above arguments do not advance the case of the Respondents that Sri Sethi had, notwithstanding the vesting in the State under the OEA Act, valid title to convey by projecting himself as the owner of the properties in terms of the registered sale deeds. In fact, it was never the case of Sri Sethi that at any point of time he was a raiyat. So, even when he applied under the OLR Act, he did not do so in his capacity as a raiyat. The fact of the matter is he did not even file an application under the OEA Act seeking protection under any of the exceptions of Sections 6 & 7 and seek to be declared as a tenant under the State. While he may have paid rent initially for a few years he stopped doing so after 1970.

40. The decision in ***Nityananda Satpathy*** (supra) makes it clear that in order to take the benefit of Section 7(1)(a) of the OEA Act, the intermediary

must be in cultivating possession either by himself with his own stock or by his own servants or by hired labour or with hired stock. The relevant portion of the said judgment reads as under:

> "6. Once a Notification under Section 3 of the Act is issued, the lands of the intermediaries vested in the State of Orissa. Section 5 provides for the consequences of the vesting of an estate in the State in terms whereof all the rights of the nature specified therein shall stand transferred to the State. As vesting takes place free from all encumbrances, the intermediaries ceased to have any rights there under. ….Under Section 5 of the Act, the intermediaries although might not have physically dispossessed, but they would be deemed to go out of possession and it was open to the State to exercise its right of possession.
>
> 7. Section 7 of the Act provides for an exception. It, thus, must be construed strictly. In terms of the aforementioned provision, only the lands specified therein can be retained by the intermediaries as a raiyat, but such a right can be exercised only in the event an order is passed by the appropriate authority on an application filed in this behalf. In terms of sub-section (1) of Section 7, only the land used for cultivation and horticultural purposes which were in khas possession of an intermediary on the date of such vesting would be conceived. The expression 'khas possession' has been defined in Section 2(j) which too means 'land used for agricultural or horticultural purposes'. The possession of an intermediary of any land used for agricultural or horticultural purposes means the possession of such intermediary by cultivating such land or carrying horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock. A bare perusal of the aforementioned provision show that for the purpose of taking benefit of the provisions of Section 7(1)(a) of the Act, the intermediary must be in cultivating possession of the said land either by himself, with his own stock or by his own servants or by hired labour or with hired stock. The nature and character of the land being non-agricultural, the same evidently was not in cultivating possession of the intermediaries and, thus, an application for settlement of such land by the intermediaries purported to be in terms of Section 7 of the Act was not maintainable. Furthermore, the land being not used either for cultivation or for horticulture purposes on the date of vesting did not attract the provisions of clause (a) of sub-section (1) of Section 7."

41. The concept of vesting has been explained by the Supreme Court of India in ***Harapriya Bisoi*** (supra), as under:

> "18. Upon a notification being issued under the provisions of Sections 3, 3A or 4 of the Act, the entire estate vests in the State free from encumbrances and the intermediary ceases to have any interest in such estate other than the interests expressly saved under the Act…."

42. The Court is for the aforementioned reasons not able to accept the submission of the Respondents that the intermediary/raiyati right of Sri Sethi did not stand extinguished upon the notification being issued under the OEA Act.

43. Mr. Jena referred to the decision in ***Radhamani Dibya v. Braja Mohan Biswal*** (supra), the relevant portion of which reads as under:

> "20. In view of our above discussions, we hold that Pravakar was a tenant as defined in Section 3(23) of the O.T. Act by the date of vesting on 1.4.1954 and as a tenant he would fall within the class of non-occupancy raiyats. Under section 8 of an estate in the State Government was in possession of any holding as a tenant under an intermediary shall, on and from the date of vesting be deemed to be a tenant of the State Government and such person shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting. Thus, on and with effect from 1.4.1954, Pravakar became a non-occupancy raiyat under the state government. He continued in possession of the lands as before under the State Government until his death on 4.12.1954. As a raiyat he was in continuous possession for a period of twelve years from 17.4.46 to 17.4.1958. Thus he became a settled raiyat under section 23 of the O.T. Act and by virtue of the status, he acquired occupancy right.
>
> 21. Even otherwise he acquired occupancy right by virtue of Section 234, O.T. Act. Land with which we are concerned is chur land. Section 234 provides that a raiyat shall not acquire a right of occupancy in chur land until he has held that land in question for twelve continuous years. According to Sub-section (2) of this section, Chapter VI dealing with the non-occupancy raiyats is made non-applicable to utbandi lands and not to chur lands. It follows, therefore, that Chapter VI is applicable to the case of chur lands. In the present case, Pravakar held the chur lands prior to the vesting. His right to continue possession of the lands as a non-occupancy raiyat under the State Government was maintained under section 8(1), O.E.A. Act being in continuous possession as a raiyat for 12 years he acquired occupancy right by virtue of Section 234(1)(b) of the O.T. Act."

44. Clearly the above case turned to its own facts. The subsequent conduct of the parties in the present case reveals that Sri Sethi did not continue as a tenant under the State Government. In fact, he stopped paying rent to the Government after 1970. In other words, he thereafter started projecting himself as the owner of the land and not a tenant or a raiyat. Therefore, the above decision in ***Radhamani Dibya v. Braja Mohan Biswal*** (supra) is of no assistance to the Respondents/Opposite parties.

45. The grant of permission under Section 22 of the OLR Act in favour of Sri Sethi was totally contrary to the legal vesting of entire land in favour of the State. The question of government acquiring its own land did not arise. The legal position in this regard has been explained in ***Special Land Acquisition & Rehabilitation Officer v. M/s. Seshagiri Rao*** (supra), in the following terms:

> "4. The High Court also placed reliance upon the judgment of the ***Madras High Court in State of Madras v. A.Y.S. Parisutha Nadar, 1961(2) Mad LJ 285***. In that case the main question decided was whether it was open to a claimant to compensation for land under acquisition to assert title to the land notified for acquisition as against the State Government when the land had become vested in the Government by the operation of the Madras Estates (Abolition and Conversion into Ryotwari) Act 26 of 1948. On behalf of the State it was contended that once an estate is taken over by the State in exercise of its powers under the Estates Abolition Act, the entire land in the estate so taken over vested in the State in absolute ownership, and that no other claim of ownership in respect of any parcel of the land in the estate could be put forward by any other person as against the State Government without obtaining a ryotwari patta under the machinery of the Act. The High Court rejected that contention observing that the Government availing itself of the machinery under the Land Acquisition Act for compulsory acquisition and treating the subject-matter of the acquisition as not belonging to itself but to others, is under an obligation to pay compensation as provided in the Act, and that the Government was incompetent in the proceeding under the Land Acquisition Act to put forward its own title to the property sought to be acquired so as to defeat the rights of persons entitled to the compensation. The propositions so broadly stated as, in our judgment, not accurate. The Act contemplates acquisition of land for a public purpose. By acquisition of land is intended the purchase of such interest outstanding in others as clog the right of the Government to use the land for the public purpose. Where the land is owned by a single person, the entire market value payable for deprivation of the ownership is payable to that person; if the interest is divided, for instance, where it belongs to several persons, or where there is a mortgage or a lease outstanding on the land, or the land belongs to one and a house thereon to another, or limited interests in the land are vested in different persons, apportionment of the compensation is contemplated. The Act is, it is true, silent as to the acquisition of partial interests in the land, but it cannot be inferred therefrom that interest in land restricted because of the existence of rights of the State in the land cannot be acquired. When land is notified for acquisition for a public purpose and the

> State has no interest therein, market value of the land must be determined and apportioned among the persons entitled to the land. Where the interest of the owner is clogged by the right of the State, the compensation payable is only the market value of that interest subject to the clog.
>
> 5. We are unable to agree with the High Court of Madras that when land is notified for acquisition, and in the land the State has an interest, or the ownership of the land is subject to a restrictive covenant in favour of the State, the State is estopped from setting up its interest or right in the proceedings for acquisition. The State in a proceeding for acquisition does not acquire its own interest in the land, and the Collector offers and the Civil Court assesses compensation for acquisition of the interest of the private persons which gets extinguished by compulsory acquisition and pays compensation equivalent to the market value of that interest. There is nothing in the Act which prevents the State from claiming in the proceeding for acquisition of land notified for acquisition that the interest proposed to be acquired is a restrictive interest."

46. Likewise, in ***State of Orissa v. Brundaban Sharma*** (supra), it was observed as under:

> "5. In view of the diverse contentions, the first question that arises for consideration is whether the applicants are bound to acquire the land in question. In the ***Collector of Bombay v. Nusserwanji Rattanji Mistri, (1955) I SCR 1311, 1223***, this Court while approving the ratio of Madras High Court in ***Dy. Collector, Calicut Division v. Aiyeru Pillay, (1911) 9 IC 341: (1911) 2 MWN 367***, that the Act does not contemplate or provide for the acquisition of any interest belonging to the Government in the land on acquisition, but only it acquires such interest in the land as does not already belong to the Government held that :
>
> "When Government possesses an interest in land which is the subject of acquisition under the Act, that interest is itself outside such acquisition, because there can be no question of Government acquiring what is its own. An investigation into the nature and value of that interest will no doubt be necessary for determining the compensation payable for the interest outstanding in the claimants, but that would not make it the subject of acquisition."
>
> This principle was followed in a catena of decisions, viz. ***Special Land Acquisition & Rehabilitation Officer v. M.S. Seshagiri Rao and Another, (1968) 2 SCR 892; Ram Narain Singh v. State of Bihar, (1972) 2 SCC***

532; Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4 : (1979) 2 SCR 229, etc. Therefore, it is settled law that the Government, being an owner of the land, need not acquire its own land merely because on an earlier occasion proceedings were mistakenly resorted to acquire the land and later on while realizing its mistake obviously withdrew the same and published a fresh notification in which admittedly the land was omitted for acquisition and thereafter proceeded to lay the road on its land. However, the High Court found that the respondent as a tenant under the Act and Government unauthorisedly took possession from him and directed the Government to pay compensation."

47. The fact that Sri Sethi had no valid title to convey through the registered sale deeds in favour of the persons who were vendors of these lands, are now claiming compensation is undisputed. In ***State of Andhra Pradesh v. Star Bone Mill and Fertiliser Company*** (supra), the legal position in this regard is explained as under:

"17. No person can claim a title better than he himself possess. In the instant case, unless it is shown that M/s. A. Allauddin & Sons had valid title, the respondent/plaintiff could not claim any relief whatsoever from court.

18. In ***Gurunath Manohar Pavaskar & Ors. vs. Nagesh Siddappa Navalgund & Ors., AIR 2008 SC 901***, this Court held as under:

"12. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act."

19. In ***Nair Service Society Ltd. v. K.C. Alexander & Ors., AIR 1968 SC 1165***, dealing with the provisions of Section 110 of the Evidence Act, this Court held as under:

"15… …Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession along decides."

20. In ***Chief Conservator of Forests, Govt. of A.P. v. Collector & Ors. AIR 2003 SC 1805***, this Court held that:

"20… … Presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title."

xx xx xx

22. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property."

48. The same decision also supports the plea of the State that mere entries in the revenue records cannot confer title, because they only show possession. Relevant observation in this regard is as under:

"22. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property.

23. The trial court has recorded a finding to the effect that the name of one Raja Ram was shown as Pattadar in respect of the land in dispute and the respondent/plaintiff is in possession. Therefore, the burden of proof was shifted on the government to establish that the suit land belonged to it. Learned counsel for the respondent/plaintiff could not furnish any explanation before us as to who was this Raja Ram, Pattadar and how respondent/plaintiff was concerned with it. Moreover, in absence of his impleadment by the respondent/plaintiff such a finding could not have been recorded.

24. The courts below erred in holding that revenue records confer title, for the reason that they merely show possession of a person. The courts below further failed to appreciate that the sale deed dated 11.11.1959 was invalid and inoperative, as the documents on record established that the vendor was merely a lessee of the Government."

49. There is merit in the contention of Mr. Palit appearing on behalf of the State that, in the present case there appears to have been a massive fraud committed involving several persons, perhaps even the authorities, over the years in overlooking the fact that the lands in question already stood vested with the State under the OEA Act. In somewhat similar circumstances, in ***State of Orissa v. Harapriya Bisoi*** (supra), it was observed by the Supreme Court as under:

"8. In *Brundaban's case (supra)* this Court held that even in a case where the OEA Collector "decides not to set aside the lease, he should have referred the case to the Board of Revenue. The object of conferment of such power on the Board of Revenue appears to be to prevent collusive or fraudulent acts or actions on the part

> of the intermediaries and lower level officers to defeat the object of the Act." This Court further held that even if the OEA Collector decides that a lease was purported to have been granted before 1.1.1946 and is not liable to be set aside, without reference or confirmation by the Board of Revenue, such lease would not attain finality. The judgment finally concludes that, "the order passed by the Tehsildar (exercising powers as the OEA Collector) without confirmation by the Board is not est. A non-est order is a void order and it confers no title and its validity can be questioned or invalidity be set up on any proceeding or at any stage."

50. Therefore, the plea of the Opposite Parties/Respondents that the PIL is time-barred, or that the actions taken in that regard by the State are belated, cannot stand legal scrutiny.

51. Consequently, as far as the answer to Issue No.(i) posed by the Court in its order dated 27th April, 2021 is concerned, it is clear that the effect of vesting of the entire land in the State free from all encumbrances under the OEA Act by the Notification dated 27th April, 1963 is that all subsequent actions of transfer of properties of those very lands in favour of the third parties or even the proceedings to acquire the land under the LA Act are null and void.

52. Now turning to Issue No.(ii), namely the order of the Commissioner dated 5th April, 2002 in R.P. No.2351 of 1998, it is seen that the order proceeds on the basis that the State is estopped from denying the title of Sri Sethi notwithstanding the aforementioned notification under the OEA Act. In the considered view of the Court, this is contrary to the legal position as has been explained in ***Dr. H.S. Rikhy v. New Delhi Municipal Committee AIR 1962 SC 554***, in the following passages:

> "The question was there was the provision of Section 8 of the Delhi in Azmer Rent Control Act, 1952 would apply to the transactions between the appellants and the New Municipal Committee. This arose in the context of the question that framed in the trial court whether the amounts paid by the occupants of the shops in the Central Municipal Market Complex, Lodhi Colony was 'rents' within the meaning of 1952 Act. The committee had raised objection that there was in fact no relationship of landlord connect between the applicants in the Committee. The High Court reversed the trial court's finding that they were in fact tenants. It was held that there was no letting of the property and the doctorate of part- performance is not attracted in the facts and circumstances of the case. In the Supreme Court this judgment was upheld and it was held that there was no question of estoppel against the Committee. The following passages in the said judgment are relevant in this regard.

> "12. The same argument was advanced in another form, viz. that the effect of Section 47 of the Municipal Act is not to render the transactions in question between the parties entirely void, but it was only declared to be not binding on the Committee. In other words, the argument is that a distinction has to be made between acts which are ultra vires and those for the validity of which certain formalities are necessary and have not been gone through. This distinction assumes an importance where the rights of third parties have come into existence and those parties are not expected to know the true facts as to the fulfillment of those formalities. That it is so becomes clear from the following statement of the law in Halsbury's Laws of England (3rd Edn., Vol.15) para 428 at p.227:
>
> "Distinction between ultra vires and irregular acts. – A distinction must be made between acts which are ultra vires and those for the validity of which certain formalities are necessary. In the latter case, persons dealing without notice of any informality are entitled to presume Omnia rite esse acta. Accordingly a company which possessing the requisite powers, so conducts itself in issuing debentures as to represent to the public that they are legally transferable, cannot set up any irregularity in their issue against an equitable transferee for value who has no reason to suspect it."
>
> 13. In this connection, it is also convenient here to notice the argument that the Committee is estopped by its conduct from challenging the enforceability of the contract. The answer to the argument is that where a statue makes a specific provision that a body corporate has to act6 in a particular manner, and in no other, that provision of law being mandatory and not directory, has to be strictly followed. The statement of the law in para 427 of the same volume of Halsbury's Laws of England to the following effect settles the controversy against the appellants:
>
> "Result must not be ultra vires. – A party cannot by representation, any more than by other means, raise against himself an est6oppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do…"

53. In ***Harapriya Bisoi*** (supra), the Supreme Court had the occasion to deal with the aspect of fraud, and explained that a void order confers no title and that its validity can be questioned in any proceeding at any stage.

54. In conclusion, as far as Issue (ii) is concerned, the order dated 5th April, 2002 in R.P. No.2351 of 1998 is held to be unsustainable in law and is hereby set aside.

55. As a result of the answers to Issues (i) and (ii) above, the subsequent orders passed in the LA proceedings including the orders passed by this

Court in the First Appeals on 23rd August, 2001 cannot be upheld. They are accordingly set aside

56. The submission of Mr. Jena that, after a long number of years the proceedings under the LA Act should not be interfered with, is based on the observation by the Supreme Court in Municipal Council, Ahmednagar v. Shah Hyder Beig (supra), which was in an entirely different context. There, reliance was placed on the decision in ***Municipal Corporation of Greater Bombay v. Industrial Development Investment Co. Pvt. Ltd., AIR 1997 SC 482***. That did not involve the question of fraud as is involved in the present case. As explained in numerous other decisions, there can be no estoppel against law. The fact that vesting of the entire land in the State took place way back in 1963 gives a completely different complexion to the entire proceedings. Once it is clear that all the further proceedings are null and void, the further order passed in November, 2001 by the Civil Court on remand by this Court also cannot be sustained in law. That is therefore, no need for the execution proceedings to continue any further. Issues (iii), (iv) and (v) are answered accordingly.

57. While Mr. Jena did submit that the justice that is done should be the justice for everyone, the fraud of this extent can by no means be condoned. This is a fraud not just against the State but against the people. Innocent persons may have been lured into parting with valuable consideration, but that cannot be the reason to condone, what is plainly unsustainable in law.

58. There is no question of estoppel against the statute. As explained in I***.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer, A.P***. (supra):

> "If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where

> the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution). The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel."

59. For all the aforementioned reasons, this Court allows the writ petition and sets aside the order dated 5th April, 2002 passed by the Commissioner in R.P. Case No.2351 of 1998. Also all the First Appeals and the CMPs are allowed and the orders of the learned Civil Judge (Senior Division), First Court, Cuttack, which are the subject matter of the Appeals and CMPs, are hereby set aside. The State is directed to take all possible steps to recover the amount paid as compensation to the claimants, in accordance with law.

60. The amount deposited in this Court or in the Executing Court be returned forthwith by the Registry to the State together with the interest which may have accrued thereon.

61. All the sales of lands in question subsequent to the Notification dated 27th April, 1963, Land Acquisition Awards and the corresponding orders in reference under Section 18 of the LA Act are declared null and void, and all the Execution Proceedings arising there from are hereby declared closed. On the strength of this judgment, the concerned Courts will pass corresponding orders accordingly.

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2021 (III) ILR - CUT- 462

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

W.P.(C) NO. 6166 OF 2010

DINABANDHU PRUSTY AND ORS. ……..Petitioners

.V.

SECRETARY TO GOVERNMENT OF INDIA, MINISTRY / DEPARTMENT OF SCIENCE AND TECHNOLOGY AND ORS. ……Opp. Parties

SERVICE LAW – Grant of Assured Career Progression (ACP) – Period of service – Whether the regular service period or training period shall be counted towards grant of ACP? – Held, the regular period shall be counted towards grant of ACP.

For Petitioners : Mr. K.C. Kanungo.

For Opp. Parties : Mr. Aurobinda Mohanty, CGC.

JUDGMENT Date of Judgment : 02.11.2021

B. P. ROUTRAY, J.

1. The order dated 23rd December, 2009 of the Central Administrative Tribunal, Cuttack Bench, Cuttack (in short 'the Tribunal') in OA No.277 of 2007 is under challenge.

2. The grievance of the Petitioners is relating to count their services from the date of their initial entry for grant of Assured Career Progress (ACP) benefits. The Petitioners were initially appointed as Topographical Trainees Type B Draughtsman (TTT "B" draughtsman) on 1st November, 1974 in terms of the Recruitment Rules prescribed in Circular Order No.435(Administrative), dated 1st August, 1950 of Survey of India under the Ministry of Science and Technology, Government of India. On successful completion of training they were classified as Draughtsman, Grade-V with effect from 1st January, 1976. Then they were re-designated as Draughtsman, Grade-IV with effect from 1st July, 1977 and further re-graded as Draughtsman, Grade-III with effect from 1st January, 1980 and then Draughtsman Grade-II with effect from 1st January, 1982, after clearing required trade tests.

3. The ACP scheme was introduced on 9th August, 1999.

4. The Petitioners were promoted to the post of Draughtsman, Division-I from the post of Draughtsman, Grade-II of Division-II with effect from 24th December, 2004 which is their first regular promotion.

5. As the Petitioners were not granted benefits of the ACP Scheme, they initially filed OA No.643 of 2002 before the Tribunal and during pendency of the same, the Opposite Parties granted the benefits of ACP Scheme, 1999 in favour of the Petitioners with effect from 1st January, 1982. Accordingly, OA No.643 of 2002 was disposed of by order dated 26th July, 2004 with observation that nothing survives for further adjudication as full relief has been made available to the applicants. In the subsequent order dated 12th August, 2004 the Tribunal further observed that, it is always open to the applicants to seek the remedy at the departmental level for redressal of their grievances if they are aggrieved in implementation of the benefits of the ACP Scheme. The Petitioners then submitted the representation dated 3rd April, 2006 and for non-response of the Opposite Parties in disposal of their representation, they came up in OA No.277 of 2007.

6. The question arose before the Tribunal, as observed at para-4 of the impugned order, was that, "what is the crucial date for reckoning regular service or residency period for the purpose of granting ACP in line with regular promotion? In other words, whether the induction training period will be taken into account for counting the regular service or residency period for promotion or ACP, as the case may be?"

The Tribunal rejected the claim of the Petitioners by holding that the induction training period will not be taken into account for counting the regular service for promotion or ACP, as the case may be, and accordingly, the Respondents have rightly reckoned the regular service of the applicants with effect from 1st January, 1982, when they are placed as Draughtsman, Grade-II.

7. It is submitted on behalf of the Petitioners that the Tribunal has erred in law by treating the service period of Petitioners from the date of their initial entry till 1st January, 1982 as residency period not counted towards regular service. According to them, on completion of training of one year two months as prescribed in the Recruitment Rules, they were classified as Draughtsman, Grade-V with effect from 1st January, 1976 and therefore counting of their services as training period up to 1st January, 1982 is

erroneous. The clarification dated 29th June, 2004 regarding ACP scheme issued by the Department of P&T, Government of India speaks that, in-so-far as the requirement of 'eligibility service' is concerned, the only requirement is that, the incumbent should have completed the prescribed 12 or 24 years regular service, as the case may be, counted from the direct entry grade. Since the Petitioners are the direct recruits with effect from 1st November, 1974 their services should accordingly be counted for grant of benefit of ACP scheme.

8. Learned Central Government Counsel submits on the contrary that the services of the Petitioners for the period from 1st November, 1974 to 1st January, 1982 cannot be counted as regular service as the same was their training period. Their status during the said period was in-house trainees after which only they were classified in the posts of Grade-II, Division-I eligible for counting their services as regular. Amongst five cadres of services, the Petitioners belong to Draughtsman cadre in Group "C" category when their services became eligible to be counted for regular promotion.

9. The initial date of appointment of the Petitioners on 1st November, 1974 and their re-grading as Draughtsman, Grade-II with effect from 1st January, 1982 are not disputed. As seen from the ACP Scheme, 1999 the requirement for grant of the benefits of two financial up-gradations is successful completion of 12 years of regular service for 1st financial upgradation and 24 years of regular service for 2nd financial up-gradation, subject to fulfillment of other prescribed conditions. 'Regular service' for the purpose of ACP is interpreted to mean the eligible service counted for regular promotion in terms of Recruitment Rules. Clause 3.1 of the ACP Scheme dated 9th August, 1999 stipulates completion of 12 years and 24 years (subject to condition No.4 in Annexure-I) of regular service respectively for Group "C" employees. Clause 4 of Annexure-I appended to the Scheme stipulates that, "the first financial up-gradation under the ACP Scheme shall be allowed after 12 years of regular service and the second up-gradation after 12 years of regular service from the date of the first financial up-gradation subject to fulfillment of prescribed conditions. In other words, if the first up-gradation gets postponed on account of the employee not found fit due to departmental proceedings or otherwise, it would have consequential effect on the second up-gradation which would also get deferred accordingly."

10. The crux of the issue is what is to be counted as 'Regular Service'. Rule 8 of the Recruitment Rules in CEO No.435 of 1950 speaks that after completion of the stipulated course of training, a trainee may be trade tested wherever necessary and to be classified for the purpose of fixing his trade and grade. Rule 4 stipulates that all personnel covered under the Rules will, on classification, be allotted trades and grades according to their qualification and aptitude. A detailed perusal of 1950 Rules does not specifically reveal what a regular service is meaning. But the ACP Scheme 1999 at clause 3.2 prescribes that regular service for the purpose of ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in terms of the relevant Recruitment / Service Rules. The Petitioners nowhere pleaded that their services up to 1st January, 1982 have been counted for their regular promotion. At this juncture a thorough perusal of 1950 Rules reveals under Rule 12 that a man will receive grade promotion from time to time on attainment of standards required for higher grades and all candidates for promotion to higher grades will be called upon to pass the trade test. As per the pleadings of parties, the Petitioners upon passing of the required trade test were posted in Grade-II, Division-II with effect from1 st January, 1982. Recruitment Rules lay down transfer to permanent establishment after attaining the eligibility period as prescribed for each grade upon recommendation of the Departmental Promotion Committee. Thus, it reveals on whole that till reaching to Grade-II, the employee has to undergo series of trainings required to attain the standards for different grades. Thus, the contention of the Opposite Parties that the Petitioners were in-house trainees till 1st January, 1982 when they reached to the post in Grade-II cannot be termed unjustified. Their service period prior to 1st January, 1982 though have been counted for pensionary benefits, but is not counted for any promotional purpose. So the finding of the learned Tribunal that the Petitioners have failed to produce any material for counting their residency period up to 1st January, 1982 for promotional purpose cannot be disagreed. As such no infirmity is seen in the impugned order for interference.

11. Accordingly, the writ petition is dismissed.

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2021 (III) ILR - CUT- 466

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

W.P.(C) NO. 34100 OF 2020

SUBHASHREE MISHRA & ORS. .....Petitioners

.V.

REGISTRAR GENERAL OF INDIA & CENSUS COMMISSIONER AND ORS. .....Opp. Parties

(A) PAY – Financial upgradation – Assured career progression – Petitioner claim 2nd financial upgradation under ACP scheme – The Authority by letter dated 29.04.2015 fixed certain educational qualification as eligible criteria for grant of such benefit – Whether such benefit can be claimed as a matter of right without fulfilling the eligible criteria? – Held, No.

(B) CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ of Certiorari – When warranted? – Discussed.

Case Laws Relied on and Referred to :-

1. 2018 SCC OnLine Ker 16238 : Union of India represented by Secretary, Ministry of Agriculture, Department of Animal Husbandry & Dairying and Anr. Vs. K. Vijayabhanu and Ors.
2. Civil Review No.343 of 2017 & Civil Writ Jurisdiction Case No.6154 of 2017: Amrendra Kumar Sinha and Ors Vs.The Union of India and Ors.
3. 2006 (1) SLJ SC 54 : Jagdish Kumar Vs. State of HP and Ors.

For Petitioners : Mr. Nirmal Ranjan Routray,Mr. J. Pradhan, Mr. T.K. Choudhury and Mr. S.K. Mohanty

For Opp. Parties: Mr. Prasanna Ku. Parhi, ASGI and Mr. Chhayakant Pradhan, CGC

JUDGMENT Date of Hearing: 17.3.2021 & 11.06.2021: Date of Judgment: 11.06.2021

S.K. MISHRA, J.

Admit.

02. The petitioners, in this writ application, have challenged the order dated 12.02.2020 passed in O.A. No.260/698./2017 by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the Tribunal" for brevity) rejecting their prayer to grant 2nd financial up-gradation under Assured Career Progression (ACP) Scheme and order dated

24.11.2020 passed in R.A. No.10 of 2020 (arising out of O.A. No.260/698/2017) refusing to review and recall the order passed in the said Original Application.

03. The Government of India, Ministry of Home Affairs, Office of the Registrar General, India issued Circular dated 18.03.1980 regarding method(s) of recruitment to temporary Group 'B' and Group 'C' posts to be created for manning Units of the Direct Data Entry System to be installed at different stations in India, under the Plan Scheme "Computerization of 1981 Census Data". The said Circular stipulated educational qualification for the post of Operator i.e. "Degree with Statistics or Mathematics or Economic (with Statistics) as a subject, of a recognized University or equivalent". In August, 1981, the Government of India, Ministry of Home Affairs, Office of the Registrar General, India issued another Circular regarding method(s) of recruitment of temporary Group 'B' and Group 'C' posts created/ to be created for manning the Units of the Direct Data Entry System installed/ to be installed at different stations in India under the Plan Scheme "Computerization of 1981 Census Data". As per the August, 1981 Circular, the educational qualification for the post of Operator was "degree of a recognized University or equivalent".

04. To fill up the posts of Direct Data Entry Operators Grade-B under the Opposite Party No.3- Director, Census Operations of Odisha, Bhubaneswar, District- Khordha, candidates were called for through Offices of Employment Exchange of Cuttack and Bhubaneswar. On being selected, the Petitioners were appointed as Operators of D.D.E. Unit on ad hoc basis with effect from 01.06.1982/ 07.05.1984/ 11.05.1984 on regular capacity. Further, vide order dated 22.08.1985, the then Deputy Director of Census, Office the Director of Census Operations, Orissa, Bhubaneswar, the Petitioners were appointed on regular basis in temporary capacity with effect from 01.06.1992/ 07.05.1984/ 11.05.1984.

While the Petitioners were discharging their duties, the Fifth Central Pay Commission in its Report made certain recommendations relating to the Assured Career Progression (ACP) Scheme for the Central Government Civilian Employees in all Ministries/ Departments with a view to provide 'Safety Net' to deal with the problem of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. To that effect Office Memorandum dated 9th August, 1999 was issued by the

Government of India, Ministry of Personnel, Public Grievance and Pensions (Department of Personnel and Training).

The ACP Scheme provides two financial up-gradations to the employees on completion of 12 years and 24 years of qualifying service. The Petitioners and others have been granted 1st financial up-gradation with effect from 09.08.1999 and placed in the scale of 5,000-8000/- vide order dated 13.06.2000.

05. After completion of 24 years of regular service, the Petitioners claimed that they are entitled to 2nd financial up-gradation under the ACP Scheme. The Opposite Party No.4-Assistant Director, Office of the Registrar General of India, New Delhi vide letter dated 15.04.2015 requested all the Directors of Census Operations of different States to send the fresh/ revised proposals of the officials i.e. D.E.Os. Grade 'B' and Senior Supervisors for grant of 2nd financial up-gradation under ACP Scheme in PB-III with GP of Rs.5,400/- with effect from their respective dates. Further, the Opposite Party No.4- Assistant Director, Office of the Registrar General of India, New Delhi vide letter dated 29.04.2015 requested all the Directors of Census Operations of different States to furnish the documents relating to educational qualification of all the DEOs/ Senior Supervisors who have completed 24 years of regular service from 01.01.2006 to 31.08.2008. In the said letter dated 29.04.2015 the educational qualification sought for was "possessing a degree in Statistics/ Mathematics/ Operation Research/ Physics/ Economics/ Commerce/ Computer Application of a recognized University or equivalent". The Opposite Party No.4- Assistant Director, Office of the Registrar General of India, New Delhi also requested all the Directors of Census Operations to furnish two lists i.e. those who have the required qualification and lack of required qualification of DEOs Grade 'B' for consideration of their cases for grant of 2nd financial up-gradation under ACP Scheme.

06. The further case of the Petitioners is that the Opposite Party No.2-Under Secretary, Office of the Registrar General of India, New Delhi vide Office Order date 18.01.2016 granted 2nd up-gradation under ACP Scheme in favour of 231 Data Entry Operators Grade 'B'/ Senior Supervisors after completion of 24 years of regular service in the Pay Band 3 with Grade Pay Rs.5,400/-. On being aggrieved by the letter dated 29.04.2015 of the Opposite Party No.4- Assistant Director, Office of the Registrar General of India, New Delhi, an application was submitted on dated 13.06.2016 to the Opposite

Party No.5- Secretary, Ministry of Personnel, Public Grievance and Pension, Department of Personnel & Training, North Block, New Delhi by the President of All India Census EDP Staff Association (AICEDPSA), C/o-DCO, Odisha, Bhubaneswar ventilating their grievances regarding imposition of certain qualification for grant of 2nd financial up-gradation under ACP Scheme in the hierarchal cadre. It is further pleaded by the Petitioners that due to amendment of Recruitment Rules in the year 1981, the Petitioners were given appointment as Direct Data Entry Operators Grade 'B' and the same was very much within the knowledge of the authority. It was also pleaded that insisting upon certain qualification meant for direct recruitment to the post of Assistant Director amounts to denial of actual financial up-gradation under ACP Scheme.

07. The Opposite Party No.2-Under Secretary, Office of the Registrar General of India, New Delhi vide letter dated 02.09.2016 communicated the decision taken on the representations submitted by the President and Secretary General of AICEDPSA to all Controlling Officers under his/ their control. From the communication dated 02.09.2016 it appears that the Opposite Parties/ Authorities have insisted upon paragraph-6 of Annexure-1 to the Office Memorandum relating to Assured Career Progression Scheme for the Central Government Civilian Employees issued on 9th August, 1999 by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) as well as paragraph-53 of the clarification dated 18.07.2001 regarding possession of necessary qualification meant for the post of Assistant Director under direct recruitment quota. It is the case of the Petitioners that while considering their representation, the Opposite Party No.2-Under Secretary, Office of the Registrar General of India, New Delhi has neither taken the latest clarification issued by the Opposite Party No.5- Secretary, Ministry of Personnel, Public Grievance and Pension, Department of Personnel & Training, North Block, New Delhi vide Office Memorandum dated 29.06.2004 wherein it is specifically clarified that 12/24 years of qualifying service is the only criteria for grant of 1st / 2nd financial up¬ gradation under ACP Scheme.

08. Being aggrieved by the letter dated 29.04.2015 issued by the Opposite Party No.4- Assistant Director, Office of the Registrar General of India, New Delhi and the letter dated 02.09.2016 issued by the Opposite

Party No.2-Under Secretary, Office of the Registrar General of India, New Delhi, the Petitioners approached the learned Central Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No.260/698/2017. The Opposite Party Nos.1 to 4 after receiving notices in the said Original Application entered appearance and filed counter reply supporting the claim of the Petitioners for grant of 2nd financial up-gradation on the ground that once relaxation granted at the time of initial appointment to the grade of Operators were relaxed for ever.

Though it is pleaded by the Petitioners that the Opposite Party Nos.1 to 4 filed their counter affidavit supporting the claim of the Petitioners for grant of 2nd financial up-gradation on the ground that once relaxation granted at the time of initial appointment to the grade of Operators were relaxed for ever with the quotation of paragraphs-6, 7, 10 and 11 of the counter affidavit, we find that in reality such facts are not pleaded in the counter affidavit filed by the Opposite Party Nos.1 to 4 before the learned Central Administrative Tribunal, Cuttack Bench, Cuttack in the said Original Application which is annexed as Annexure-10 to the writ petition. So, it appears that the Petitioners' averments especially at paragraph-12 of the writ petition is misleading and erroneous one. When the learned Central Administrative Tribunal, Cuttack Bench, Cuttack dismissed the Original Application on 12.02.2002, at paragraph 12, has observed that "*in the case in hand, there is no such relaxation in the matter of educational qualification in the initial entry grade of the applicants as DEOs. The facts of the above mentioned decision by CAT, Principal Bench being different and distinct from the facts herein, the decision so relied upon by the applicants is of no help'*. The Petitioners after going through the order dated 12.02.2020 passed by the learned Tribunal in O.A. No.260/698/2017 filed review application bearing RA No.10 of 2020 which was also dismissed on 24.11.2020.

09. In assailing the orders dismissing the Original Application and also the Review Application, the Petitioners put forth the following grounds in the present writ petition to set aside the orders of the learned Tribunal. Those are: "(i) As the Opposite Party Nos.1 to 4 have not only admitted that the Petitioners have been given relaxation for ever at the time of initial recruitment by amending the Recruitment Rule but also relied upon the judgment of the Hon'ble Supreme Court passed in the case of Jagdish Kumar –vrs.- State of HP and Others: reported in 2006 (1) SLJ SC 54, the learned Tribunal committed error on record by dismissing their Applications; (ii) the

second ground of challenge is that the ratio decided in the judgment by a High Court cannot be ignored by the Tribunal on the ground that a Full Bench of the Tribunal has since taken a contrary view. On such grounds, the Petitioners prayed that the writ petition may be allowed and they may be granted 2nd financial up-gradation under ACP Scheme.

10. The Opposite Parties have filed their counter affidavit in this case, *inter alia*, submitting that on the recommendation of the 5th Central Pay Commission, the Government introduced Assured Career Progression (ACP) Scheme for Central Government Civilian Employees vide Department of Personnel and Training's O.M. dated 09.08.1999 to mitigate hardship in case of stagnation in promotion. As per the ACP Scheme, two financial up-gradations in the hierarchy post were to be given to the Central Government Civilian Employees on completion of 12 and 24 years of regular service subject to fulfillment of all conditions/ norms for promotion prescribed in the relevant Recruitment Rules in which the financial up¬ gradation is to be given under the above scheme. It is further submitted that as per the recommendation of the 6th Central Pay Commission, the posts of Junior Supervisor and Senior Supervisor have been merged due to same Grade Pay of both the posts. After merger of both the posts, the promotion of DEOs Grade 'B' has been considered as a single promotion either in the grade of Junior Supervisor or in the grade of Senior Supervisor. So, the Department of Personnel and Training approved this office's proposal for granting 2nd financial up-gradation under the above Scheme to DEOs Grade 'B' of EDP cadre in the grade of Assistant Director (DC) after completion of 4 years of regular service to those have completed 24 years between 01.01.2006 to 31.08.2008. It is also submitted that as per Paragraph-6 of the Annexure of Department of Personnel and Training O.M. dated 09.08.1999, in ACP Scheme, an official has to fulfill all the promotional norms for granting the financial up-gradation under ACP Scheme. In compliance of it, the 2nd financial up-gradation under ACP Scheme has been granted in the promotional grade of Assistant Director (DC) to those DEOs Grade 'B'/ Senior Supervisors who have completed all the promotional norms for the post of Assistant Director (DC). The Petitioners claimed for grant of 2nd financial up-gradation under ACP Scheme in the Pay Scale of the post of Assistant Director (DC). However, it is further submitted that as per the Recruitment Rules (RRs) for promotion to the post of Assistant Director (DC), an employee has to be a graduate in the subject of Mathematics/ Commerce/ Statistics/ Economics/ Operation Research/ Physics/ Computer

Application. But the Petitioners do not have any graduate degree in any of the above subjects. It is further submitted that the request for relaxation in educational qualification in Recruitment Rules for the post of Assistant Director (DC) was taken up with the Department of Personnel and Training twice, but in both the occasions Department of Personnel and Training did not find it fit to grant relaxation in educational qualification. Therefore, the 2nd financial up-gradation in the Grade Pay of Assistant Director (DC) is denied to those DEOs Grade 'B'/ Senior Supervisors who do not fulfill educational qualification required for promotion to the post of Assistant Director (DC). However, such employees have already been granted 2nd and 3rd financial up-gradation under the Modified Assured Career Progression (MACP) Scheme where fulfilling of the aforesaid promotional norm is not a pre-requisite. The Opposite Parties further submitted that similar question arose before the Patna Bench, Patna which was decided against the employees. The said order of the Central Administrative Tribunal, Patna Bench, Patna was upheld by a Division Bench of the Patna High Court in CWJC No.6154 of 2017. Therefore, the Opposite Parties prayed to dismiss this writ petition.

11. The Petitioners have challenged the impugned orders passed by the Tribunal on the ground that the Opposite Party Nos.1 to 4 at paragraphs, 6, 7, 10 and 11 of the counter affidavit filed in the Original Application have admitted the facts of relaxation, this is an erroneous and false statement on the face of record which has been noted earlier in the preceding paragraph. We have carefully examined the record and found that at page 54 of the brief a part of some documents purported to be an Office Memorandum appears in which at paragraph-4, it has been mentioned "as per Para-6 of Annexure-1, annexed to DOP & T's O.M. dated 09.08.1999 vide which the ACP scheme was introduced states that". However, such plea has not been taken in the counter affidavit by the Opposite Party Nos.1 to 4 in the Original Application before the Tribunal and as such the submission of the Petitioners is not only erroneous but also misleading. If at all the Petitioners wanted to take advantage of any inter office memo or office memorandum, they should have called for the same or should have produced the complete copy of the same. The very nature of the part of the document which appears at page 54 of the brief cannot be taken into consideration. Moreover, the same is an inadmissible piece of document. The other Annexures mentioned at serial nos.3, 4 and 5 of the Index of the counter affidavit stated to have been filed by the Opposite Party Nos.1 to 4 in the Original Application under Annexure-

10 at page 40 of the brief have not been annexed to the writ petition which creates a doubt regarding genuineness of the documents filed. In any case, the very plea of the Petitioners that it was admitted in the counter affidavit is erroneous and misleading and on the basis of such plea, a finding cannot be given in favour of the Petitioners. On further examination of the record, it appears that the Opposite Party Nos.1 to 4 have also relied on this document. But, it was brought to our notice that this is an Office Memorandum prepared by the Census Operations, Odisha, Bhubaneswar. A note was put up before the Authorities at Bhubaneswar and the Authorities recommended for grant of 2nd ACP to the DEOs who do not have requisite educational qualification and their appointments have been made in pursuance of the relaxation in educational qualification to the DoP & T for approval. The response of the DoP & T appears at page 192 of the brief is quoted as follows:

> "Department of Personnel & Training Establishment (D)
>
> Dy. No.1103199/15CR.
>
> F.No.13/9/2013-Ad.IIII (pt) of O/o RGI
>
> Reference notes on pre-pages.
>
> 2. The matter has been examined in consultation with Estt. (RR). As per the provisions of the ACP Scheme, the financial upgradations are allowed in the promotional hierarchy on fulfillment of normal promotional norms prescribed under relevant RRs including educational qualification, if prescribed in the RRs for the promotional post. No relaxation clause is available under the Scheme. Further, Dop & T as a policy do not grant relaxation in educational qualifications prescribed in the RRs. Therefore, the proposal of O/o RGI for relaxation in educational qualification for financial upgradation under ACP Scheme cannot be agreed to.
>
> 3. This issue with the approval of Joint Secretary (DC) in this Department.
>
> Sd/-
>
> Section Officer
>
> xx xx xx xx"

This being the real facts situation, the plea of the Petitioners that the Opposite Party Nos.1 to 4 have admitted their claim in their counter affidavit cannot be acceded to. In fact, they are relying upon some inter office memo or office

memorandum in which the Office of the Director, Census Operations, Odisha, Bhubaneswar proposed for grant of 2nd financial up┐ gradation under ACP Scheme in favour of the Petitioners. But the matter was referred to the DoP&T and the DoP&T did not accede to such proposal. It therefore, cannot be held that by preparing this document the claim of the Petitioners has been accepted by the Opposite Party Nos.1 to 4.

12. The second contention of the Petitioners is that in a similar case i.e. in the case of Union of India represented by Secretary, Ministry of Agriculture, Department of Animal Husbandry and Dairying and Another –vrs.- K. Vijayabhanu and other batch of cases: reported in 2018 SCC OnLine Ker 16238, the High Court of Kerala at Ernakulam has taken a view that the Petitioners therein are entitled to get the benefit of ACP Scheme and they shall not be held ineligible to get the benefit of ACP Scheme on the ground that they did not possess the qualification for promotional post. This judgment was pronounced on 30th October, 2018.Another judgment has been relied upon by the Petitioners that was passed by a Division Bench of the High Court of Judicature at Patna in the case of Amrendra Kumar Sinha and others –vrs.- The Union of India and others (in Civil Review No.343 of 2017 in Civil Writ Jurisdiction Case No.6154 of 2017) decided on 01.08.2017. The Patna High Court has come to the conclusion which reads as follows:

> "Further, from culling out the facts and provisions, it is evident that these petitioners are basically looking for replacement scale, which is available to an Assistant Director, which was a temporary post, created due to exigency of service, sometime in the year 2001 with a different pay-scale as well as eligibility having higher qualification and technical competence, which were provided for in the Rules.
>
> From a discussion made by the Tribunal, it is evident that in terms of the financial upgradation due to stagnation, these petitioners have earned the next grade pay available to them. But that does not satisfy them, because they want replacement scale of the next higher post, for which they do not have eligibility in the very first place.
>
> Even for grant of upgradation under the A.C.P. scheme, promotional norms of the next higher post has to be ingrained into such claimants. They cannot claim benefit of the next higher post as a replacement scale as a matter of right. This fact is evident from the reading of the scheme itself. Some of which has been extracted and reproduced by the Tribunal and quoted by us in the earlier part of the order.
>
> xx xx xx xx xx

> But these are the persons, who do not fulfill the requirements to hold the next higher post, but they surely have wish and aspirations to beget, if not, try to demand the pay-scale, which is available to the next higher post of Assistant Director."

13. In that view of the matter, we are in agreement with the views of the Patna High Court and also the view taken by the Central Administrative Tribunal, Cuttack Bench, Cuttack in its orders i.e. the orders impugned before us. Accordingly, the second ground is also not accepted by us in view of the judgment rendered earlier to the judgment rendered by the High Court of Kerala at Ernakulam. Both the said judgments were delivered by the Division Bench of their respective High Court. However, the ratio arrived at by Patna High Court has not been taken into consideration or distinguished in the later judgment rendered by the High Court of Kerala at Ernakulam. Moreover, the facts are also similar to that of the case of Patna High Court, as it was also a case of D.E.Os. of Registrar General of India and Census Commissioner. Whereas in the reported judgment passed by the High Court of Kerala at Ernakulam, the employees of the National Institute of Fisheries Post Harvest Technology and Training (NIFPHT & T) have challenged the authorities' decision denying grant of benefit of ACP Scheme on the ground that they do not possess the qualification for promotional post concerned. The reported case of the High Court of Kerala at Ernakulam is distinguishable in this case. The applicants therein were not given employment in relaxation of educational qualification for the based post. Secondly, the Additional Director post is a temporary post in the establishment of the Registrar General of India and Census Commissioner.In that case, no such plea has been raised regarding temporary nature of the post and the promotional post.

14. In all fitness of the things, the judgment referred by us i.e. the judgment rendered by the Patna High Court is more befitting to the present case. So we rely on it. In addition, it being at an earlier point of time.

15. A writ of certiorari is generally issued to correct the error of jurisdiction. If the Tribunal under the supervision of the High Court exercises jurisdiction not conferred on it, fails to exercise jurisdiction conferred on it or exercises jurisdiction in a patently illegal and irregular way, then the High Court should exercise its jurisdiction under Article 226 read with Article 227 of the Constitution of India to correct the error of jurisdiction. Moreover, a writ of certiorari should not be allowed, unless it is shown to the Court that such conclusion regarding factual aspect of the case is based on inadmissible

evidence or is based on clear ignorance of admissible and relevant materials on record. A writ of certiorari should not also be issued or exercised in a case of erroneous judgment on the question of law unless it is shown that such error of law is patent on the face of the record, an error which has been demonstrated before the Court without any lengthy and complicated argument. But, by simply perusing the judgment, and that such error of law has caused a grave miscarriage of justice.

16. In this case, the learned counsel appearing for the Petitioners could not establish before the Court that finding of fact arrived at by the Tribunal is in ignorance of admissible materials available on record or that it is based on materials which are not existence or admissible. Similarly, the learned counsel for the Petitioners could not establish a patent error of law, apparent on the face of the record, which has caused a grave miscarriage of justice. This being so, we are not inclined to allow this writ petition.

17. Hence, this writ petition is dismissed.

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

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2021 (III) ILR - CUT- 476

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

DSREF NO. 05 OF 2019
WITH
JCRLA NO. 97 OF 2019

STATE OF ODISHA .....Complainant

.V.

SUNIL NAYAK .....Condemned Prisoner /Accused

JCRLA NO.97 OF 2019

SUNIL NAYAK .....Appellant

.V.

STATE OF ODISHA .....Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 366 – Reference for confirmation of death sentence – Offences under sections 363,376(2)(f), 376(2)(i),302 and 201 of the Indian Penal Code,1860 r/w section 6 of the POCSO Act – Plea taken by the condemned / prisoner that the investigating agency did not take any appropriate step for getting the biological sample collected from the dead body of the deceased and from the prisoner tested by DNA profiling, for which prosecution should not be believed in this case – Effect of – Held, we are of the opinion that this is not a fit case to award death sentence, mainly because of latches of the investigating agency in not getting the DNA profiling carried out, the death sentence is not appropriate – Death sentence of the prisoner converted to imprisonment for life and further direction issued that he shall not be given any premature relief of release on bail or any parole for next 20 years. (Para 17)

Case Law Relied on and Referred to :-

1. (2008) 13 SCC 767: Swami Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka.

DSREF No.05 of 2019

For Complainant : Mr. Janmejaya Katikia, AGA

For Accused : Mr. Milan Kanungo, Sr. Adv., Amicus Curie

JCRLA No.97 of 2019

For Appellant : Mr. Milan Kanungo, Sr. Adv., Amicus Curie

For Respondent : Mr. Janmejaya Katikia, AGA.

JUDGMENT Date of Hearing: 04.03.2021 & 07.10.2021:Date of Judgment: 07.10.2021

S.K.MISHRA. J.

1. The death reference under Section 366 of the Code of Criminal Procedure, 1973 (hereinafter referred to as " the Code" for brevity) was taken up for hearing on different dates. The death reference was submitted by the learned Additional Sessions –Cum-Special Judge, Keonjhar in Special Case No.11 of 2017 arising out of G.R. Case No.13 of 2017 relating to Champua P.S. Case No.05 of 2017 for commission of offences under Sections 363,

376(2)(f), 376(2)(i), 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the Penal Code" for brevity) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO' Act for brevity). The reference made by the learned Additional Sessions Judge-Cum-Special Judge, Keonjhar has been registered as DSREF No.05 of 2019 and the Jail Criminal Appeal preferred by the Appellant, in which Mr. Milan Kanungo, learned Senior Advocate appeared as Amicus Curie on the request of the Court, has been registered as JCRLA No.97 of 2019.

2. Learned Additional Sessions Judge-Cum-Special Judge, Keonjhar vide the Judgment and Order dated 19.12.2019 passed in Special Case No.11 of 2017 convicted the Condemned-Prisoner-Appellant (hereinafter referred to as "the Appellant" for brevity), namely, Sunil Nayak under Sections 302, 363, 376 (2)(f), 376(2(i) and 201 of the Penal Code read with Section 6 of the POCSO Act. He proceeded to sentence the Appellant with capital punishment for the offence under Section 302 of the Penal Code; and to undergo imprisonment for life i.e. the remaining period of the natural life and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to suffer further rigorous imprisonment for one year for the offences under Sections 376(2)(f) and 376(2)(i) of the Penal Code; and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further rigorous imprisonment for six months for the offence under Section 201 of the Penal Code; and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further rigorous imprisonment for six months for the offence under Section 363 of the Penal Code. No separate sentence has been awarded for the offence under Section 6 of the POCSO Act as per the provision under Section 42 of the POCSO Act. Learned Additional Sessions Judge-Cum-Special Judge, Keonjhar submitted the records to this Court under Section 366 of the Code.

3. It is alleged by the prosecution that on 14.01.2017 at about 3 P.M. the Informant (name withhold) lodged a written report before the Inspector-In-Charge, Champua Police Station, Keonjhar stating therein that his younger daughter, aged about three years was playing near to his house. While he returned to house found that she was absent in the house, but on thorough search, she could not be traced out, for which a missing report was filed before the Champua Police Station on 14.01.2017. While the Informant

returned from Police Station to village got information that the dead body of his younger daughter was lying in the kitchen of the Village School. Suspecting that someone had committed the murder of his daughter, the informant lodged written report before the Police Station on the same day. On receipt of the report of the informant, the Inspector-In-Charge, Champua Police Station registered Champua P.S. Case No.05 of 2017 and the investigation was taken up.

During the course of investigation, the Investigating Officer examined the informant and other witnesses; visited the spot; made inquest over the dead body of the deceased; sent the dead body to Sub-Divisional Hospital, Champua for postmortem examination; sent requisition for deputation of Dog squad and scientific team; seized the sample earth, blood stained earth and one pair of chapal, on production by the Scientific Officer, who collected the same from the spot. During the course of investigation, the Investigating Officer also seized the wearing apparels of the deceased and two numbers of vials containing the biological samples of the deceased, received information from sources that the accused Sunil Nayak has committed the crime, apprehended him, who confessed his guilt. The Investigating Officer, during the course of investigation, arrested the accused, seized his wearing apparels and one cycle from him, sent him for medical examination, seized three numbers of vials containing the biological samples of the accused, sent the exhibits to State Forensic Science Laboratory, Rasulgarh, Bhubaneswar (hereinafter referred to as "RFSL, Bhubaneswar" for brevity) chemical examination, seized immunization register of Sasang Anganwadi Center to ascertain the date of birth of the deceased and on completion of investigation, submitted charge sheet under Sections 363, 376(2)(i), 302 of the Penal Code read with Section 4 of the POCSO Act.

4. The Appellant took a plea of complete denial to the allegations leveled by the prosecution against him and also took the plea of false implication in the case.

5. In order to bring home the charge against the Accused/ Appellant, the prosecution examined 28 witnesses and tendered documents marked as Exts.1 to 23, and material objects marked as M.Os. I to X. Out of them, P.W.1 (name withhold) is the Informant as well as father of the deceased. P.W.2 (Durga Charan Mahakud) is the scribe of the F.I.R. P.Ws.3 (Pratap

Naik), 4 (Chaitanya Nayak), 5 (Raghumani Naik) and 26 (Choudhury Nayak) are the inquest witnesses. P.W.6 (name withhold) is the mother of the deceased and wife of P.W.1. P.Ws.7 (Nami Mahakud), 8 (Suban Mahakud), 11 (Satyaranjan Naik), 12(Binod Mahakud @ Ieha) and 22 (Dinesh Nayak @ Dilu) are the witnesses to circumstances. P.W.9 (Sarat Chandra Nayak) is the elder brother of P.W.1. P.Ws.14 (Prafulla Nayak) and 16 (Ratnakar Nayak) are the witnesses to confessional statement of the Accused. P.Ws.10 (Rajat Kumar Nayak @ Turu), 15(Raju Nayak), 24(Bibhuti Nayak @ Pukulu) and 25(Kumari Nayak) are the independent witnesses. P.Ws.13 (Goutam Nayak), 17(Basanti Manjari Mahakud) and 23(Labanyamayee Nayak) are the seizure witnesses. P.W.21 (Jasobant Dehury) is a Scientific Officer. P.Ws.19 (Dr. Jogendranath Acharya) and 20 (Dr. Madhusudan Baliarsingh) are the Doctors. P.W.18 (Bhajaman Karta) is the Investigating Officer.

On the other hand, the defence examined one witness as D.W.1 (Sunil Nayak), who is the accused himself. No document is adduced on behalf of the defence.

6. After analysis of the evidence on records, the learned trial judge held that the following circumstances have been established in this case:

> (i) P.W.1 and his wife P.W.6 along with their elder daughter had been to Champua market at 2.00 to 2.30 P.M. 13.01.2017 leaving the deceased in the house with P.W.7;
>
> (ii) P.W.7 disclosed to P.W.1 that the accused Sunil had taken the victim on his cycle for roaming;
>
> (iii) P.W.1 searched for the accused and his daughter and at 9.00 P.M. he met the accused on the village road and on being asked, the accused told him that he had left the deceased girl at village Chhak;
>
> (iv) On 14.01.2017 at 10.00 A.M. to 11.00 A.M. P.W.8 (Suban Mahakud) informed P.W.1 that the dead body of the deceased was lying in the kitchen room of Sasanga U.P. School;
>
> (v) Dead body of the deceased was lying in the corner of the kitchen of the aforesaid School;
>
> (vi) During course of inquest, the informant disclosed before the Investigating Officer that his daughter has been murdered in the kitchen of the School;

(vii) P.W.7 stated in court that on the fateful day about 4.30 P.M. to 5.00 P.M. the accused had taken the victim from her possession, but did not bring the deceased to their house;

(viii) P.W.12 testified that on the occurrence day, Sunil came to the playground with the deceased on his cycle and he played with them. Thereafter, Sunil took the deceased towards Sala (village Deity) on his cycle;

(ix) It is amply established and also not disputed by the defence that the date of birth of the deceased was 12.08.2013;

(x) The death of the deceased was due to forceful sexual penetration resulting in shock due to pain and haemorrhage and there was wide spread lacerated injury extending up to rectum and abdomen which led the doctor to conclude that there was forcible sexual intercourse;

(xi) The Condemned/ Prisoner in presence of the witnesses gave discovery statement under Section 27 of the Indian Evidence Act, 1872 and led to a straw stack and gave recovery of pant belonging to himself which was seized by the police; and

(xii) The Chemical Examination of the wearing apparels of the deceased and the Condemned/ Prisoner produced by the Investigating Officer reveals that the blood stain and semen stain of human origin were found on the pant of the deceased and blood stains of human origin were found on the Banion and Niker of the Condemned/ Prisoner.

7. P.W.1 is the father of the deceased as well as the Informant in this case. According to P.W.1, on 13.01.2017, he along with his wife (P.W.6) and elder daughter had been to Champua market at 2.00 to 2.30 P.M. leaving the deceased, who is his younger daughter aged about three years, in the house with Nami Mahakud (P.W.7). As per the version of P.W.1, while they returned to house at 5.00 P.M. found the deceased was absent in the house, P.W.7 disclosed that the accused Sunil had taken the victim in his cycle for roaming. It is the evidence of P.W.1 that he searched the accused and his daughter and that at 9.00 P.M., he met the accused on the village road and on being asked, the accused told that he had left the deceased girl at village Chhak. According to P.W.1, as he could not trace out his daughter, he informed the fact orally to Champua Police Station on 14.01.2017. Further evidence of P.W.1 is that on 14.01.2017 at 10.00 to 11.00 A.M., one Suban Mahakud (P.W.8) of their village informed him that the dead body of the deceased was lying in the kitchen room of Sasanga Upper Primary School. As per the evidence of P.W.1, he lodged F.I.R. at Police Station on the same

day and police came to the spot. He proved the F.I.R. marked as Ext.1 and his signature on it marked as Ext.1/1. P.W.1 further deposed that police conducted inquest over the dead body of his daughter in his presence and prepared inquest report. He proved the inquest report marked as Ext.2 and his signature on it marked as Ext.2/1. According to P.W.1, the dead body was lying in the corner of the kitchen and her back was leaning against the wall and there was a black mark on the waist of the dead body.

7.1. This witness stated in his cross-examination that the accused is his agnate. It is elicited from P.W.1 during cross-examination that he has not mentioned in the F.I.R. that on 13.01.2017 at 9.00 P.M. the accused disclosed that he had left the victim at village Chhak and he has not disclosed the name of the accused at the time of preparation of inquest.

7.2. Besides the above, no other material is elicited from P.W.1 by the defence to discredit his testimony. The inquest report is prepared at 3.45 P.M. on 14.01.2017 and the dead body was recovered on the same day at about 2.00 P.M. The F.I.R. was lodged on the same day at 3.00 P.M. F.I.R. does not reveal the name of the accused. The inquest report (Ext.2) reveals that the Informant has disclosed at the time of inquest that someone has committed murder of his daughter in the kitchen of the School. Since by that time the Informant had not known the involvement of the accused in the said crime, non-disclosure of name of the accused at the time of inquest by the Informant and non-mentioning the name of the accused in the F.I.R. is not fatal to the prosecution case in the background that the accused is a close relative.

7.3. P.W.6 supported the version of P.W.1 and deposed that on being asked, P.W.7 disclosed that about 5.00 P.M. on 13.01.2017 the accused had taken the deceased with him from their house for roaming. She also testified that she along with her husband went to Champua Police Station on the next day morning to lodge a missing report of their daughter and after their return to the village, Suban Mahakud (P.W.8) informed them that the dead body of the deceased was lying in the kitchen of Sasang UGUP School. According to P.W.6, they suspected the accused as he had taken the deceased from their house, but he had not brought back her. This witness stated in her cross-examination that we did not go for searching their victim daughter in the night of the occurrence with an impression that she might have gone to the house of her maternal uncle.

Except giving some suggestions, nothing is brought from the mouth of P.W.6 during cross-examination to discredit her testimony.

7.4. P.W.7 supported the version of P.Ws.1 and 6 and deposed that on the day of occurrence P.W.1, P.W.6 and their eldest daughter had gone to Champua market and the deceased was with her in their house. P.W.7 testified that on that day at about 4.30 P.M. to 5.00 P.M. the accused had taken the victim from her possession for roaming but he had not brought the deceased to their house. According to P.W.7, she disclosed this before the parents of the deceased after their return and on the next day, they got information from Suban (P.W.8) that the dead body of the deceased was lying in the kitchen of Sasang School. As per the version of P.W.7, he went to the spot and found the dead body of the victim was lying in the corner of the kitchen of the School. During cross-examination, this witness stated that on being asked, the accused disclosed that he had left the victim-deceased near a shop.

The defence did not bring any material from P.W.7 to break her testimony that the accused had taken the deceased from her and thereafter, the victim had not returned to the house.

7.5. P.Ws.11, 12 and 22 are the teenage boys of that village.

P.W.11 in his examination-in-chief stated that he heard that the deceased died during the time of Makara. The prosecution declared this witness hostile.

7.6. P.W.12 testified that in the morning of the date of occurrence he had taken the cattle for grazing and after return he took his meal with the deceased in his house and went to play chaka in the playground at about 4.00 to 5.00 P.M. Further evidence of P.W.12 is that while they were playing, Sunil came to the playground with the deceased in his cycle and played with them. P.W.12 stated that after sometime, Sunil took the deceased towards Sala (Village Deity) in his cycle. P.W.12 deposed that while he returned to his house, he did not find the deceased in her house and on the next day, he heard that the deceased had died, and her dead body was lying in the kitchen of School. This witness stated in his cross-examination that the house of deceased is about 50 meters away from Sala of their village. The village School where the dead body of the deceased was lying is 300 meters away from Sala. Two roads from Sala, one is leading towards School and other is

towards the house of deceased. He could not say in which direction Sunil had gone with the deceased from Sala.

The evidence of P.W.12 is that the accused Sunil along with the deceased had come to the field where they were playing remained unchallenged. Further evidence of P.W.12 is that the accused left the field with the victim remained unchallenged. From the version of P.W.12 it is also found that the accused went with the victim (deceased) towards Sala and from that Sala a road is leading to the School, where the dead body of the deceased was lying.

7.7. P.W.22 deposed in his evidence that the deceased died just one day prior to Makara in the year of 2017. P.W.22 stated that he had been to Makara Yatra and on his return, he heard the death of the victim.

7.8. P.W.8 deposed in his evidence that the occurrence took place on 13.01.2017 and on 14.01.2017 at about 2.00 P.M. he had gone to Sasang UGUP School to take bath in the tube well and after keeping the bucket near the tube well, he went to the nearby hillock to attend call of nature. According to P.W.8, while he returned to the tube well, he found that the door of the kitchen of the school was half open, and anxiously he went near to the door and found the deceased was in sitting position inside the kitchen resting her back against the wall and she was not moving. P.W.8 stated that immediately he made hulla calling "Babula Kaka and Turu Bhai". P.W.8 stated that previously he had heard in the night of 13.01.2017 that the victim girl was missing from her house. P.W.8 stated that immediately Babula and Turu came to the spot and thereafter police came and declared the victim was dead. Nothing material is elicited by the defence during cross-examination, which will create any doubt in the testimony of P.W.8.

7.9. Said Babula and Turu were examined as P.Ws.9 and 10. P.W.9, the elder brother of the Informant, supporting the evidence of P.W.1, deposed that being informed by P.W.8 at about 2.00 P.M. on 14.01.2017, he along with the Informant and other persons had been to the spot and found the dead body of the victim girl was there inside the kitchen. According to P.W.9, blood and urine soaked at the spot. P.W.10 deposed that on 13.01.2017 he heard that the victim was missing from her house and on 14.01.2017 being called by P.W.8, he along with others went to the School and found the dead body of the deceased inside the kitchen.

7.10. P.W.9 stated in his cross-examination that the floor of the kitchen the School was cement floor and police had brought the dead body of the victim from the kitchen. Nothing material is brought from the mouth of P.W.10 during cross-examination to demolish his testimony that on 14.01.2017 at about 1.00 to 2.00 P.M. Suban Mahakud called them to the School and they went to the School and found the dead body of the deceased inside the kitchen.

7.11. P.W.2 deposed that he has written the F.I.R. on 14.01.2017 as per the version of the father of the deceased. He proved the F.I.R. marked as Ext.1 and his signature along with his endorsement marked as Ext.1/2. The testimony of P.W.2 remained unchallenged.

7.12. P.Ws.3, 4, 5 and 26 supported the version of P.W.1 regarding missing of the deceased from the house and recovering her dead body from the kitchen of Sansang U.P. School. According to them, police conducted inquest over the dead body of the deceased in their presence. They proved their signatures marked as Ext.2/2, Ext.2/3, Ext.2/4 and Ext.2/5 respectively in the inquest report (Ext.2). The evidence of these witnesses remained unshaken so far as inquest on the dead body of the deceased is concerned.

7.13. P.Ws.13, 27 and 28 are the seizure witnesses. P.W.13 stated in his evidence that the dead body of the victim was lying in the kitchen of Sasanga U.P. School. According to P.W.13, he had been to the spot and the police seized two chapals of the victim, sample earth and blood stain earth from the spot and seizure list is prepared in his presence. He proved the seizure list marked as Ext.3 and his signature on it marked as Ext.3/1. P.W.27, a Police Constable, deposed that on 15.01.2017 he had taken the dead body of the deceased to Sub-Divisional Hospital, Champua for post-mortem examination and after post-mortem examination, the doctor handed over to him the wearing apparels, bangles, Paunji and biological samples of the deceased. According to P.W.27, he produced the same before the Investigating Officer, who seized those articles. He proved the seizure list marked as Ext.12 and his signature on it marked as Ext.12/1. P.W.28, a Police Constable, supporting the version of P.W.27 stated that in his presence, the Investigating Officer seized the above articles. He proved his signature marked as Ext.12/2 in the seizure list (Ext.12). The evidence of these witnesses remained unchallenged so far as seizure is concerned.

7.14. P.W.21, the Scientific Officer, DFSL, Keonjhar stated in his evidence that on 15.01.2017, on police requisition, he visited the spot at village Sasang and the scene of crime was an abandon kitchen of Sasang UGUP School. According to P.W.21, prior to his arrival, the dead body was dispatched by the Investigating Officer for autopsy. P.W.21 deposed that the abandon kitchen room is a single room building having cement flooring, having one window without door only window grill, one entrance door having old tin door, one sky light. According to P.W.21, the measurement of entrance door is 6 feet x 3 feet, kitchen room 10.4 feet x 10.4 feet x 8.4 feet and window 3 feet x 2.7 feet. He further stated that he collected blood stained earth from the floor of the kitchen, sample earth, one pair green colour relaxo chapal and one metallic round ring from the spot, sealed, signed and handed over to the Investigating Officer. He proved his report marked as Ext.23 and his signature on it marked as Ext.23/1. According to P.W.21, the Investigating Officer seized those articles in his presence. He proved his signature marked as Ext.3/2 in the seizure list (Ext.3). He also identified the seized samples viz. a pair of chapal, sample earth, blood stained earth and a metallic ring marked as M.Os. V, VI, VII and X respectively. It is elicited from the cross-examination of P.W.21 that if a spot would not have disturbed prior to arrival of Scientific Team, then absence of any mark of violence on the floor shall negate the entry of a person in the room. This opinion of the Scientific Officer is merely an opinion and no way demolishing the testimony of P.W.9 who had seen the dead body first, whose evidence remained unchallenged that the deceased child was found in a sitting condition inside the kitchen resting her back against the wall. It is highly improbable that a three years old girl child having severe rupture injury on her private part will go to an abandoned kitchen room of the School suo motu or any one had thrown her into the kitchen from outside.

7.15. P.W.17 is an Anganwadi worker and P.W.23 is a Teacher in Sasang UGUP School. According to P.W.17, Police had come to their centre on 08.03.2017 and seized the immunization register relating to the date of birth or the deceased and after seizure it was given to her zima. She proved the seizure list and zimanama marked as Ext.7 and Ext.8 respectively and her signature thereon marked as Ext.7/1 and Ext.8/1 respectively. P.W.23 supported the version of P.W.17 and proved her signature marked as Ext.7/3 in the seizure list (Ext.7). According to P.W.17, the date of birth of the deceased is 12.08.2013.

7.16. P.Ws.19 and 20 are the doctors. P.W.19 stated that on 20.01.2017 on police requisition at 1.50 P.M. he examined the accused Sunil Nayak and prepared report. P.W.19 further stated that he collected the biological samples of the accused and handed over to the police. P.W.19 opined that in spite of all negative findings, sexual intercourse could not be ruled out. He proved the medical report of the accused marked as Ext.21 and his signature on it marked as Ext.21/1. P.W.20 deposed that on 15.01.2017 at 10.15 A.M. he conducted post-mortem examination on the dead body of the deceased at Sub-Divisional Hospital, Champua and prepared the report. According to the doctor, the cause of death was due to possible forceful sexual penetration resulting in shock due to pain and haemorrhage. According to the doctor, the nature of death is homicidal and time since death was around 34 hours of PM examination. He proved the PM report marked as Ext.22 and his signature on it marked as Ext.22/1. During cross-examination, P.W.20 stated that he found the vagina admits two fingers and there was wide spread lacerated injury extending up to rectum and abdomen, from which he came to the conclusion that there was forcible sexual intercourse. P.W.20 stated in his cross examination that he found two fingers opening in the vagina as there was rupture injury. The doctor denied the suggestions of the defence that the injuries are possible in case of falling from a cycle or due to accidental digital penetration or if a child sit on the front rod of a cycle hanging both legs to both the sides.

7.17. P.Ws.14 and 16 are the witnesses to the confessional statement of the accused. They proved the confessional statement of the accused under Section 27 of the Indian Evidence Act marked as Ext.4 and their signatures on it marked as Ext.4/1 and Ext.4/2 respectively. According to P.W.16, the accused led them to a straw stack from where he recovered his pant and the police seized the same in his presence. He proved the seizure list marked as Ext.5 and his signature on it marked as Ext.5/2. According to P.W.16, police seized a cycle of the accused being produced by himself in his presence. He proved the seizure list marked as Ext.6 and his signature thereon marked as Ext.6/2. P.W.14 stated during cross examination that the accused had brought his ganji and pant from the stacked straw in the courtyard of his house and handed over the same to police, who seized the same in his presence. He proved the seizure list marked as Ext.5 and his signature on it marked as Ext.5/1. According to P.W.14, police seized the cycle of the accused being produced by himself from his house in his presence. He

proved the seizure list (Ext.6) and his signature on it marked as Ext.6/1. However, during cross-examination, this witness stated that he has not seen as to who had brought the pant and ganji of the accused and from which place it was recovered. As such, the evidence of P.W.14 cannot be relied upon.

7.18. P.W.15 did not support the prosecution case and deposed that he has not knowledge about the occurrence. The prosecution declared P.W.15 hostile.

7.19. P.W.18, the Investigating Officer, deposed in his examination-in-chief that on the written report of the Informant Rajat Kumar Nayak on 14.01.2017, the Inspector-In-Charge, Debendranath Pingua, registered a case vide Champua P.S. Case No.05 of 2017 and directed him to take up investigation. He proved the endorsement along with signature of Inspector-In-Charge Debendranath Pingua marked as Ext.1/3 in the FIR (Ext.1). According to P.W.18, prior to registration of the case, one missing report was entered in the Station Diary vide SD Entry No.6 dated 14.01.2017. He proved the extract of the said SD Entry marked as Ext.13. The evidence of the Investigating Officer is that during course of examination, he examined the Informant and the scribe of the F.I.R., visited the spot on the same day, made inquest on the dead body of the deceased in presence of witnesses, prepared spot map and proved the inquest report and spot map marked as Ext.2 and Ext.20 respectively. The Investigating Officer deposed that he sent the dead body to Sub-Divisional Hospital, Champua for post-mortem examination, directed C/745 Duryodhan Mahant and C/638 Lipi Sahoo to guard the spot till arrival of scientific team and dog squad, and made requisition to Superintendent of Police, Keonjhar for sending scientific team and dog squad. He proved the requisition marked as Ext.11 and his signature on it marked as Ext.11/1. This witness stated that on 15.01.2017, the scientific team and dog squad arrived at the spot and the Scientific Officer collected blood stained earth, sample earth, one pair of Hawai Chapal and one metallic ring from the spot and handed over to him which he seized. He proved the signature list marked as Ext.3 and his signature on it marked as Ext.3/2. P.W.18 stated that he seized the wearing apparels of the victim, two numbers of bangles, one pair of paunji, one mali, one red colour cotton thread, two numbers of sealed vials after collecting the same from hospital after post-mortem examination of the deceased. He proved the seizure list marked as Ext.12 and his signature on it marked as Ext.12/1. He proved the said seized blue colour ladies pant of the deceased marked as M.O.I and pink colour

dress of the deceased marked as M.O.II. He further stated that on 18.01.2017, he received post-mortem examination report from Sub-Divisional Hospital, Champua. He also stated that he tried to apprehend the accused Sunil Nayak, but he could not be traced till 20.01.2017 and on 20.01.2017 he got information about his presence in his house at village Sasanga, went there and apprehended the accused. According to P.W.18, on interrogation, the accused confessed his guilt. He recorded the confessional statement of the accused in presence of witnesses. He proved the confessional statement of the accused marked as Ext.4 and his signature on it marked as Ext.4/2. He further stated that the accused led himself and the witnesses to the place at village Sasanga where he had concealed his wearing apparels and in their presence, the accused recovered his sky colour half nikar having red white strips, one old red colour half ganji, one old green colour hero cycle from the straw heap within his house courtyard. He seized those articles in presence of the witnesses and prepared seizure lists. He proved the seizure lists marked as Ext.5 and Ext.6 and his signature thereon marked as Ext.5/3 and 6/3 respectively. He proved the said seized half nikar marked as M.O.III, seized ganji marked as M.O.IV, seized chapal marked as M.O.V, seized sample marked as M.O.VI, seized blood stained earth marked as M.O.VII, seized sealed vials marked as M.O.VIII and M.O.IX and seized metallic ring marked as M.O.X. P.W.18 further stated that on the same day he sent the accused for medical examination on requisition to Sub-Divisional Hospital, Champua and the same day he seized the biological samples of the accused after collecting the same from Sub-Divisional Hospital, Champua. He proved the requisition and seizure list marked as Ext.14 and Ext.15 respectively and the signature thereon marked as Ext.14/1 and 15/1 respectively. This witness further stated that on 28.01.2017, he received the medical report of the accused and on 02.02.2017 he made a prayer before the court for sending the exhibits to SFSL, Rasulgarh, Bhubaneswar for chemical examination. He proved the letter containing his prayer and the copy of forwarding report marked as Ext.16 and 17 respectively and his signatures thereon marked as Ext.16/1 and Ext.17/2 respectively. He proved the CE report marked as Ext.18. The CE report reveals as follows:

Ext.A	Blood stained earth	Blood stain of human origin is found.
Ext.E	Pant of the deceased	Blood stain and Semen Stain of human origin are found
Ext.F	Banion of the accused	Blood stain of human origin is found.
Ext.1	Niker of the accused	Blood stain of human origin is found

The further evidence of the Investigating Officer is that on 08.03.2017 he seized the immunization register of Anganwadi Center of Sasang to ascertain the age of the deceased and after seizure, gave it to the zima of P.W.17. He proved the seizure list and zimanama marked as Ext.7 and Ext.8 respectively and his signatures thereon marked as Ext.7/2 and Ext.8/2 respectively. Thereafter, he gave the zima of the seized paunji, mali and red thread of the deceased to the Informant (father). He proved the zimanama marked as Ext.19 and his signature on it marked as Ext.19/1. The further evidence of P.W.18 is that on completion of investigation, he submitted the charge-sheet against the accused. This witness stated in his cross-examination that:-

> "The accused was working under the Informant prior to the occurrence. The accused was in frequent visiting terms to the house of the Informant. The accused was also roaming the deceased on many occasions. The said School is about 300 to 350 meters away from the house of the deceased. His investigation reveals that the accused along with the deceased had gone to the field where the other boys were playing. That field and the School boundary is intervening by a pitch road of width about 200 feet."

8. The accused (D.W.1) stated in his examination-in-chief that the Informant is his agnate. He admitted in his evidence that he was working in the tractor of the Informant and he was in visiting term to the house of the Informant. D.W.1 stated that on the relevant day, he had taken the deceased for roaming in his cycle at 3.00 to 4.00 P.M. and on that day he left the deceased at their village Chhaka and saw from the Chhaka that the deceased had entered into their house. He further stated that till arrest he was in his house. In his cross-examination the accused D.W.1 stated that "no one was present with him or at the Chhaka while he saw the deceased had entered into her house. No one had seen when the deceased was leaving with him at the Chhaka."

9. On an analysis of the entire evidences on records, it is not disputed at this stage that the victim girl was a minor aged about 3 years at the time of the occurrence. It is also not disputed that she died of sexual assault. The doctor's opinion is very clear in this regard that the death occurred due to forceful sexual penetration in the vagina resulting rupture and haemorrhage.

10. Mr. Milan Kanungo, learned Senior Advocate appearing as Amicus Curie had also not highlighted any point to disbelieve this aspect of the case.

On the other hand, he had submitted that there is no evidence connecting the crime with the Appellant or that prosecution has established its case beyond all reasonable doubt.

11. Having gone through the materials on records, it is clear that the last seen theory has been established in this case. The evidences of P.Ws.1 and 7 are clear which have not been assailed in this case. Moreover, the Appellant himself admitted in his evidence recorded as D.W.1 that on the fateful day, he took the victim girl on his bicycle for roaming and after sometime, as per his version, he left her near the Chhaka.

12. We are of the opinion that in that view of the matter the last seen of the deceased along with the Appellant has been brought home conclusively in this case. The second important aspect in this case is that the Appellant has admitted in his examination under Section 313 of the Code that on his discovery statement and leading to the place of concealment, his pant was recovered from a straw stack. It is settled principle of law that under Section 313 (4) of the Code, the answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. Thus, the statement of the Appellant/ Accused that his pant was recovered from a straw stack on his statement has been established in this case. Another piece of material is that on chemical examination, the pant of the deceased was found to be stained with blood stain and semen stain of human origin. Secondly, the banion of the Appellant/ Accused was also stained with human blood. Lastly, the niker of the Appellant/ Accused was also stained with human blood. The Appellant has not explained how blood stain and semen stain of human origin were found on chemical examination?

13. Mr. Kanungo, learned Senior Advocate appearing for the Condemned/ Prisoner as Amicus Curie submitted that the case of the prosecution should not be believed in this case, in view of the fact that the Investigating Agency did not take any appropriate steps for getting the biological sample collected from the dead body of the deceased and from the person of the Condemned/ Prisoner tested by DNA profiling. It is correct that the Investigating Agency has faulted in not getting the DNA profiling done in this case.

14. However, we are of the opinion that for the mistake committed by the Investigating Agency the case of the prosecution should not throw away, if the prosecution has otherwise proved its case.

15. Thus, keeping in view the fact that the last seen theory has been established, recovery of the wearing apparels of the accused has been established and there was blood stain on his wearing apparels which was not explained by the Condemned/ Prisoner, we are of the opinion that the same has formed a complete chain of events leading to the conclusion that it is the Condemned/ Prisoner who has committed the crime.

16. Coming to the question of sentence, we are of the opinion that death sentence has a unique aspect. It is irrevocable. In the cases based on circumstantial evidence, death sentence should be awarded only in case the prosecution has established its case by the evidence of such sterling quality that the Court is absolutely clear about his guilt. It should be for higher standard than the normal "beyond reasonable doubt principle", as applied to criminal cases.

17. Hence, we are of the opinion that this is not a fit case to award death sentence. Mainly because of the laches of the Investigating Agency in not getting the DNA profiling carried out, the death sentence is not appropriate. However, keeping in view the fact that the Condemned/ Prisoner has committed a very gruesome offence of committing rape of a minor girl that led to her death, we considered it appropriate to convict the Condemned/ Prisoner to undergo imprisonment for life with a stipulation that for next 20 years the Condemned/ Prisoner shall not be given any parole, following the principles laid down by the Hon'ble Supreme Court in the case of ***Swami Shraddananda @ Murali Manohar Mishra –vrs.- State of Karnataka***, reported in (2008) 13 SCC 767. Accordingly, we convert the conviction of the Condemned/ Prisoner to a conviction for imprisonment for life under Sections 302, 363, 376(2)(f), 376(2)(i) and 201 of the Penal Code and further direct that he shall not be given any pre-matured relief of release or that he shall not be given any parole for next 20 years.

18. With such observations, the DSREF is answered and the JCRLA is allowed in part.

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2021 (III) ILR - CUT- 493

BISWAJIT MOHANTY, J.

W.P.(C) NO. 32134 OF 2020

BHABANI PRASAD MAJHI .....Petitioner

.V.

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

(A) ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 32 – Supersession of committee of society beyond the statutory period i.e. beyond one year – The District Collector appointed as 'Administrator' and hold the office – The appointment of the collector questioned – Conduct of election of the committee pleaded – Held, an elected Committee plays an important role in a Co-operative society and maximum period of supersession of committee of a society carrying banking business cannot exceed more than one year and before such maximum period; election is bound to be held.

(B) ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 – Section 28-A – Election of the members of the committee – Whether simultaneous election of all the societies are mandatory? – Held, No.

Case Laws Relied on and Referred to :-

1. 2015 (13) SCC 401 : Rajkot District Co-operative Bank Limited Vs. State of Gujrat and Ors.
2. W.P(C) No.23504 of 2011: Ranjita Kahali Vs. State of Orissa.
3. AIR 1952 S.C. 12 : State of Orissa Vs. Madan Gopal Rungta.
4. (2013) 4 S.C.C. 465: Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and Ors.
5. (2005) SCC Online All 1554: Committee of Management, District Co-operative Bank Limited and Anr Vs. State of U.P. & Ors.
6. (2011)7 S.C.C. 616 : A.Subash babu Vs. State of Andhra Pradesh.
7. (2002)1 SCC 33 : Ghulam Qadir Vs. Special Tribunal.
8. AIR 1955 S.C. 830 : Tirath Singh Vs. Bachittar Singh & Ors.

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

For Opp. Parties : Mr. S.K. Samal, Addl. Govt. Adv. (Party 1 to 3)
Mr. H.M. Dhal (Opp. Party No. 4)

JUDGMENT Date of Hearing: 08.10.2021:Date of Judgment: 01.11.2021

BISWAJIT MOHANTY, J.

This writ petition has been filed by the petitioner with prayer to quash order No.9253 dated 01.05.2020 under Annexure-3 issued by the Registrar, Cooperative Societies, Odisha (opposite party No.2) appointing opposite partyNo.3 to manage the affairs of Sundargarh District Central Co-operative Bank Ltd. for short, "the Bank" and with a further prayer to direct opposite party Nos.1 to 4 to complete the process of election in respect of Committee of "the Bank" and Primary Agricultural Co-operative Societies affiliated to it in the district of Sundargarh within a stipulate time.

2. The case of the petitioner is that, he is an Ex-President of "the Bank" and a member of Large-sized Adivasi Multipurpose Co-operative Societies (LAMPCS) at Karamadihi in the district of Sundargarh. The petitioner in the capacity of member of the above noted LAMPCS was elected to the Committee of "the Bank". The tenure of Committee of which the petitioner was the President came to an end on 30.04.2020. Instead of holding election to constitute the new Committee, the Registrar, Cooperative Societies, Odisha passed the impugned order dated 01.05.2020 under Annexure-3 appointing the Collector & District Magistrate, Sundargarh as Administrator of "the Bank" to manage the affairs of the said bank in exercise of powers under Sub-Section (1) of Section 32 of Odisha Cooperative Societies Act, 1962, for short, "the Act". It is the case of the petitioner that in the background of the language used in Section 32 of "the Act", the Collector of the district cannot remain in charge of the management. His further case is that since the impugned order under Annexure-3 is legally unsustainable, the authorities should immediately hold elections to the Committee. Accordingly, the present writ petition has been filed with the above noted prayers.

3. The opposite party Nos.1 & 2 have filed their counter affidavit on 08.01.2021 taking stand that the impugned order has been passed properly taking into account the Explanation appended to Sub-Section-1 of Section 32 of "the Act" and accordingly, the management consequent upon supersession stood vested with the Registrar, who in turn has appointed the Collector of the district as Administrator in consonance with the provisions of "the Act" and the same cannot be faulted. The case of opposite party No.1 in its affidavit dated 09.08.2021 is that, vide notification dated 01.08.2017 under Annexure-B/1, the Government of Odisha in Cooperation Department in exercise of the powers conferred by Sub-Section (1) of Section 3 of "the Act"

read with Rule-5 of the Odisha Cooperative Societies Rules, 1965, for short "the Rules" have appointed the Collectors of all the revenue district of the State as Additional Registrars of Co-operative Societies to assist the Registrar of Co-operative Societies, Odisha and as per Section 2(i) of "the Act", the Registrar has been defined to mean the person appointed to perform the functions of the Registrar of Co-operative Societies under this Act, and includes any person appointed to assist the Registrar when exercising all or any of the powers of the Registrar. Further, it is the case of the State that all the Additional Registrars have been conferred with powers of Registrar under Sections 6, 7, 8, 10(2), 12, 14, 14-A, 16(2-a) 17, 28, 30, 30A, 32, 33, 35(3), 59(1), 63, 64, 65, 66, 68, 70, 72, 73, 75, 76, 77, 90, 102 to 105, 106 (1)(b), 108, 114, 116(3), 120, 123-A(2), 128(3) of "the Act" by the State Government in the Co-operation Department in exercise of powers under Sub-Section(2) of Section 3 of "the Act" vide Order No.II-Legal-26/98-19992 dated 21.09.1999. Accordingly, for all practical purposes as the Collector has been appointed as Additional Registrar to assist the Registrar of Co-operative Societies and since the Additional Registrar exercises several powers of Registrar, Collector can clearly be treated to be a Registrar as per Section 2(i) of "the Act". Thus, no wrong has been committed by appointing the Collector as Administrator under Annexure-3 to manage the affairs of "the Bank" as he is functioning as a Registrar.

With regard to the prayer of the petitioner for conducting election by quashing the impugned order under Annexure-3, it is the case of opposite party Nos.1 & 2 that due to spread of Covid-19 Pandemic, it has not been possible to conduct elections. Though lockdown has been lifted in the mean time and though there is decline in trend of infection however, the fear of Covid-19 still persists. This stand was taken by opposite party No.1 in their counter affidavit dated 08.01.2021. However, therein, it was made clear that the State Government is committed to formation of democratically elected Committees of the Co-operative Societies and accordingly, the State is committed to hold election no sooner the situation returns to normalcy. Further in their affidavit dated 09.08.2021 filed before this Court on 10.08.2021, the opposite party No.1 has made it clear that as per Section 28-AA of "the Act", the superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to a Co-operative Society vest in the State Co-operative Election Commission and as per Rule-3 (1-a) of the Odisha Co-operative Societies (Elections to the Committees) Rules, 1992, for short "1992 Rules" the State Co-operative

Election Commission has to recommend the date to the Government for issuance of notification calling upon the Co-operative Societies to elect members of the committee of the society and on receipt of such recommendation, the Government is only to notify the same in the Odisha Gazette and on 24.04.2020, the State Co-operative Election Commission (opposite party No.4) has intimated the Commissioner-cum-Secretary, Co-operation Department that due to pandemic situation in the State, the Commissioner is not in a position to suggest the tentative date for holding of election. Further in the affidavit dated 07.09.2021 filed by the opposite party No.l, it reiterated that opposite party No.4 has to recommend the date to the Government for issuance of notification calling upon the Co-operative Societies to elect members and the Government is only to issue notification indicating the said date for election and Government has no power to suggest any date or to suggest for holding of election under the provisions of "the Act" and the Rules framed there under.

4. The stand of opposite party No.4 as per the counter affidavit dated 07.04.2021 is that the tenure of the Committee of "the Bank" came to an end on 30.04.2020. By that time, the entire State was under lockdown due to spread of Covid-19 Pandemic for which the Commission vide letter dated 01.07.2020 under Annexure-A/4 addressed to the opposite party No.1 sought for its views in the matter of holding of election and the response of the State Government is still awaited. It is their further case that, in the meantime, the opposite party No.4 has written to the Registrar, Co-operative Societies on 02.11.2020 under Annexure-B/4 requiring him to supply the requisite consolidated information in the enclosed prescribed format for assessment for the upcoming co-operative election. That apart vide letter dated 04.01.2021 under Annexure-C/4 series, the opposite party No.4 has written to all the Divisional DRCSs requesting them to instruct the Chief Executive of the Societies under their control to take immediate steps for preparation of list of members of the Societies. Further on 25.02.2021 under Annexure-D/4, the opposite party No.4 had written to all the DRCSs for supply of information on deployment of election officers during cooperative election 2015-16 for assessment of man power for the forthcoming election in the State.

5. Heard Mr. P.K. Rath, learned counsel for the petitioner, Mr. S.K. Samal, learned Additional Government Advocate and Mr. H.M. Dhal, learned counsel appearing for opposite party No.4.

6. Mr. Rath, learned counsel for the petitioner submitted that the impugned order under Annexure-3 appointing the Collector, Sundargarh as Administrator is bad in law because the pre-requisites for exercising power under Sub-Section (1) of Section 32 of "the Act" dealing with supersession of Committee did not exist in the present case. According to him, the four circumstances given at Clauses (i) (ii) (iii) & (iv) under Sub-Section 1 to Section 32 of "the Act" were non-existent in the present case. Secondly, even if help is taken of the Explanation to Sub-Section (1) of Section 32 to justify the impugned order, then also an illegality has been committed by appointing the Collector as Administrator as there exists no concept of Administrator in the Explanation. It speaks of vesting of Management only in Registrar. Thirdly, he submitted that even if appointment of District Collector as Administrator is accepted, then also his engagement cannot go beyond one year. In this context, he submitted that as per the language of Sub-Section (1) of Section 32 of "the Act", Committee of a Society carrying on the business of banking cannot be superseded for a period exceeding one year. Accordingly, he submitted that since one year period expired on 30.04.2021, therefore, the authorities are duty bound to hold election immediately. In this context, he also submitted that the direction in the impugned order under Annexure-3 that the Collector will act as an Administrator till constitution of new Committee or until further order is bad in law as this is not permitted under Sub-Section (1) of Section 32 of "the Act".

With regard to his second prayer i.e. for a direction to hold election, he submitted that as per Section 28(1-a) of "the Act", the tenure of the Committee is five years and as per Clause (b) of Sub-Section (1-b) of Section 28 of "the Act", an election to constitute a Committee shall be completed before expiration of a period of one year from the date of its supersession in case of society carrying on banking business. Since the present society is carrying on banking business, therefore, in case of action taken under Sub-Section (1) of Section 32 of "the Act", election is bound to be held before expiry of period of one year as per Clause (b) of Sub-Section (1-b) of Section 28 of "the Act". Here, though the period of one year expired on 30.04.2021, however, till date no election has been held for constituting a Committee. He further submitted that though vide Annexure-6 to the rejoinder, opposite party No.4 directed for preparatory arrangements for election to the Committee of Co-operative Societies in the State for which the process was to begin from October, 2019 however, nothing was done. Relying on Sub-Rule (1-a) of Rule-3 of the "1992 Rules", he submitted that in such

circumstance when the maximum time limit of supersession is over, the opposite party No.4 has gone wrong in not suggesting the date of election to the Government and accordingly submitted that a direction be issued to the opposite party No.4 to suggest the date to the Government for holding of election immediately. He also highlighted that in the meantime, many assembly elections have been held in the country and recently by-election has been held in Pipli Constituency to elect an M.L.A. for Odisha Legislative Assembly. Therefore, the authorities should be directed to hold election following Covid protocols, when epidemic has shown a declining trend. Lastly, Mr. Rath fairly submitted that since during pendency of this petition, major portion of Part IXB of the Constitution of India has been struck down as ultra vires by the Supreme Court, the pleadings relating to same in the writ petition and rejoinder be ignored. He also did not press the pleadings vis-à-vis Section 28(1-b) (ii) of "the Act". He further submitted that in view of the changed circumstances, he is no more relying on the decision of the Supreme Court as rendered in Rajkot District Co-operative Bank Limited Vrs. State of Gujrat and others reported in 2015 (13) SCC 401 and the decision of this Court dated 21.12.2011 in the case of Ranjita Kahali Vs. State of Orissa in W.P(C) No.23504 of 2011. He also made it clear that the documents filed along with memo dated 11.01.2021 have already been filed along with the rejoinder of the petitioner and that the term of Committee of Karamadihi LAMPCS has also expired.

7. Mr. S.K. Samal, learned Additional Government Advocate raised a preliminary objection relating to the locus standi of the petitioner to challenge the impugned order under Annexure-3 as according to him, he is in no way personally affected. In this context, he submitted that the petitioner has not explained anywhere in the writ petition as to what right of his, has been violated. In this context he relied on the decisions of the Supreme Court rendered in the case of ***State of Orissa Vrs. Madan Gopal Rungta***, reported in AIR 1952 S.C. 12 and ***Ayaaubkhan Noorkhan Pathan Vrs. State of Maharashtra*** and others reported in (2013) 4 S.C.C. 465. Accordingly, he prayed that the writ petition should be dismissed. On the impugned order under Annexure-3, he submitted that the same has been issued on expiry of the term of the Old Committee as per the Explanation to Sub-Section (1) of Section 32 of "the Act" as no election could be held to elect the new Committee. According to him since vide Annexure-B/1, the Collector has been appointed as Additional Registrar of Co-operative Societies to assist the Registrar of Co-operative Societies and since the word "Registrar" as per its

definition under Section 2(i) of "the Act" includes any persons who has been appointed to assist the Registrar, therefore, it should be taken that though appointed as an Administrator, the Collector, Sundargarh is in fact functioning as the Registrar and thus there has been no violation of the Explanation. Accordingly, he submitted that the writ application is without any merit and should be dismissed.

8. Mr. H.M. Dhal, learned counsel appearing for opposite party No.4 confined his submission to the second prayer of the petitioner for a direction to the authorities to hold election. He submitted that as per Section 28-A of "the Act", if the election is to be held, it has to be held for all the Co-operative Societies functioning in the State and it is to be held simultaneously for connected Primary Societies, Central Societies & Apex Society. It cannot be held for one Society like "the Bank" and its affiliated societies and secondly, he submitted that for holding election, the State Government has to make available officers and staff to the Election Commission (opposite party No.4) for discharging its functions.

9. In reply to submissions made by Mr. Samal & Mr. Dhal, Mr. Rath submitted that the petitioner is a member of Karamadihi LAMPCS, which is affiliated to "the Bank". In the capacity as a member of LAMPCS, he was elected to the Committee of "the Bank". Later on, he was elected as President of "the Bank". During his tenure, he has performed and worked for the larger interest of the poor farmers of the district and for such work; he has been awarded successively at National Level as indicated under Anenxure-2 series. Petitioner is aggrieved by the arbitrary State action particularly relating to non-holding of election of Committees of "the Bank" and its affiliated societies, one of which, he is a member. According to him appropriate averments have been made in paras-1, 5, 6 & 7 of the writ petition. He further submitted that since the petitioner is a member of a Primary Society, which is affiliated to "the Bank", any attempt to impose an Administrator to look after the management of "the Bank" instead of holding election to elect democratic Committees affects the petitioner's right to have an elected Committee within the time as prescribed under law and his right to elect such committees. Thus he has every right to challenge such action as he cannot be described as a stranger having no interest in the functioning of "the Bank" and its affiliated societies. He reiterated that the petitioner cannot be described as stranger vis-à-vis the issues involving blatant violation of Sub-Section (1) of Section 32 of "the Act" which speaks of supersession of Committee not exceeding one

year of a Society carrying on business of banking and Clause (b) of Sub-Section (1-b) of Section 28 of "the Act" mandating completion of election to Committee before expiry of one year period from the date of supersession in case of such society carrying on business of banking. Here though one year period expired on 30.04.2021, since no election has been conducted, he as a member of Primary Society i.e. Karamadihi LAMPCS has every right to assail the same as his right to elect Committees has been affected by not holding elections and by continuing the illegal arrangement under Annexure-3 beyond the maximum period of supersession. In this context, he relied on a decision of the Allahabad High Court in the case of ***Committee of Management, District Co-operative Bank Limited and another Vrs. State of U.P. & others*** reported in (2005) SCC Online All 1554. With regard to the two decisions of the Supreme Court cited by Mr. Samal, he submitted that both the decisions are factually distinguishable and have no application to the case at hand. He reiterated that the petitioner cannot be described as total stranger to the issues involved in the present case. With regard to other submission of Mr. Samal defending Annexure-3, while reiterating his earlier submissions, he again submitted that the arrangement under Annexure-3 cannot be continue beyond maximum period of one year.

With regard to submissions of Mr. Dhal, he submitted that language of Section 28-A of "the Act" nowhere requires that elections should be held simultaneously for all societies viz. Primary, Central and Apex or not at all. With regard to the second submission of Mr. Dhal on availability of officer of State, he submitted that State has nowhere taken a plea that it cannot spare its officials to opposite party No.4 for discharge of its function. He reiterated that direction be issued to the authorities to hold election immediately.

10. Before entering into the merits of this case, this Court wishes to take up the issue of locus standi of the petitioner to maintain the present writ petition as raised by Mr. Samal, learned Additional Government Advocate. As indicated above he submitted that there is nothing to show that the petitioner has been personally affected and there exists no explanation in the writ petition as to what right of the petitioner has been affected and in this context, he has relied on two decisions of the Supreme Court viz. ***Madan Gopal Rungta (Supra) and Ayaaubkhan Noorkhan Patha*** (Supra).

In this context, it may be noted here that it is not disputed that the petitioner is a member of a Primary Society i.e. Large-sized Adivasi

Multipurpose Co-operative Societies (LAMPCS) at Karamadihi. It is also not disputed that the said society is affiliated to "the Bank" and the petitioner was elected as President to the Committee of "the Bank". Since the petitioner happens to be a member of the LAMPCS affiliated to "the Bank", it cannot be said that the petitioner has no interest in the matter if "the Bank" as alleged is allowed to be managed by a person who is not authorized under law to be in-charge of "the Bank" or if such a person is allowed to continue beyond the maximum period of supersession as fixed under law expires or if the election is not held in due time as required under the provisions of "the Act", thereby affecting the petitioner's right to elect members of Committees of Societies and right to have democratically elected Committee.

In this context, it may be noted here that as per Section 27 of "the Act" final authority in a Co-operative Society vests in general body of members. As per Sub-Section (1) of Section 28, management of a Co-operative Society vests in a Committee as constituted in accordance with the provisions of "the Act" & Rules made there under and Bye-Laws. This Committee exercises a number of important functions and performs a number of duties as delineated in Sub-Section (1) of Section 28. Sub-Section (1-aa) of Section 28 makes it clear that every committee unless superseded shall have a tenure of five years. Clause (b) of Sub-Section (1-b) of Section 28 lays down that an election to constitute a committee shall be completed before expiry of its term or before expiry of a period of one year from the date of supersession in case of society carrying on the business of banking. Relevant provisions of Section 28-A deals with election of members, President and Vice-President of the Committee. The said Section is quoted hereunder:

> ***"28-A. Election of members of Committee*** *– (1) (i) The President of the Committee of every Society shall be indirectly elected in the manner prescribed, by and from among the members of the Committee, and*
>
> *(ii) Other members of the Committee of a Primary Society shall be elected in such manner by and from among the General Body of members of the Society qualified for the purpose organized into such different constituencies as may be prescribed.*
>
> *(ii-a) Other members of the Committee of a Central Society and an Apex Society shall be elected in such manner by and from among the qualified members of the Electoral College formed in such manner organized into such different constituencies as may be prescribed.*

(iii) The Vice-President of the Committee shall be elected by and from among the elected members of the Committee in the prescribed manner.

Provided that where the President of the Committee of such a Society elected under this section is not a woman, the office of the Vice-President of the Committee shall be reserved for woman.

XXX XXX XXX"

Sub-Section (1) of Section 32 of "the Act" makes it clear that Committee of a Co-operative Society carrying on business of banking can be superseded for a maximum period of one year. (*Empasis supplied*)

All the above discussions make it clear that an elected Committee plays an important role in a Co-operative Society and that maximum period of supersession of Committee of a society carrying on banking business cannot exceed more than one year and before such maximum period; election is bound to be held. Here, admittedly the maximum period of supersession of one year as provided under law has expired on 30.04.2021. In such background, continuing with the arrangement under Annexure-3 without holding election clearly violates statutory provisions and affects the democratic functioning of "the Bank" and its affiliated societies. Since the petitioner is a member of an affiliated society, it cannot be said that in no way he has been affected. Nobody can dispute that the petitioner has a vital interest in proper running of LAMPCS as well as "the Bank". He cannot be described as a stranger to the issues involved. Further his right to vote/elect and right to have a democratically elected Committees have been affected. In **Madan Gopal Rungta** case (Supra) the issues were different. There the Supreme Court laid down that Article 226 cannot be used for the purpose of giving interim relief as the only and final relief and an appeal to Supreme Court against such an order is maintainable. No doubt in the said case, the Supreme Court has made it clear that existence of the right is the foundation for exercise of jurisdiction under Article 226 of the Constitution of India. In the present case as indicated above continuation of the arrangement under Anenxure-3 beyond one year of its promulgation without election clearly affects the functioning of "the Bank" and its affiliated societies thereby making it arbitrary inviting the mischief of Article 14 of the Constitution of India. On account of such continuation, the petitioner's right to have a democratically elected Committees and his right to elect such Committees directly or indirectly as a member of Society is clearly affected.

With regard to **Ayaaubkhan Noorkhan Pathan** case (Supra) it may be noted here that there the Supreme Court has made it clear that a stranger cannot be permitted to meddle in any proceeding under Articles 226 of the Constitution of India unless he falls within the category of aggrieved persons and a writ petition is maintainable either for the purpose of enforcing a statutory/legal right or when there is a breach of statutory duty on the part of the authorities. In the above noted case, the Supreme Court also referred to its own decision rendered in **A. Subash babu Vs. State of Andhra Pradesh**, reported in (2011) 7 S.C.C. 616, wherein it has also been made clear that expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which the contravention is alleged, the specific circumstances of the case, the nature and extent of complaint's interest and the nature and the extent of prejudice or injury suffered by the complainant. There also Supreme Court quoted with approval its own decision rendered **in Ghulam Qadir Vrs. Special Tribunal** reported in (2002)1 SCC 33, wherein it has been made clear that "The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea-change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant merely on hyper-technical grounds. XXX XXX XXX In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi." Here as indicated earlier as a member of LAMPCS, the petitioner cannot be described as stranger to the issues involved. In fact his right to have a democratically elected Committee after expiry of maximum period of supersession and his right to elect such a Committee has been affected.

Moreover the Allahabad High Court in a Division Bench has clearly laid down in **Committee of Management, District Co-operative bank Ltd. case** (Supra) that outgoing Committee of its office bearer, or its member or members of general body of Co-operative Society are interested in the welfare of the Co-operative Society. They are aggrieved persons if there is any arbitrary or unreasonable exercise of power affecting the Co-operative Society. Therefore, it cannot be said that they don't have the standing to file the writ petitions, wherein the appointment of private persons as Administrators or in the Committees were challenged. Here as indicated

earlier, the petitioner has enough interest to maintain the present writ petition for proper management of "the Bank" as per law.

Keeping in mind the above discussions, this Court has no hesitation in rejecting the contention of Mr. Samal, learned Additional Government Advocate with regard to locus standi of the petitioner to maintain this writ petition. It may be noted here that in their counter affidavit filed by opposite party Nos.1 & 2 this point of locus has not been raised. Rather at para-9 of the counter affidavit, the State has admitted that it is committed for formation of democratically elected Committee of the Co-operative Societies and is also committed to hold election sooner the situation returns normalcy. In such background, this Court holds that the petitioner has locus standi to maintain this writ petition.

11. Now let us deal with various contentions raised by Mr. Rath, learned counsel for the petitioner on various points and the counter contentions.

Mr. Rath's first contention was that the impugned order under Sub-Section (1) of Section 32 of the Act in appointing District Collector as Administrator is illegal as the four circumstances given thereunder at Clauses (i) to (iv) to warrant such action were non-existent in the present case. In this regard, Mr. Samal's submission was that the impugned order has been passed as per Explanation to Sub-Section (1) of Section 32 of "the Act" as no election could be held to elect a new Committee after expiry of the term of the Old committee. In such background, contention of Mr. Rath cannot be accepted. A perusal of impugned order under Anenxure-3 would show that the said order has been passed in view of the expiry of the term of Committee of "the Bank". Obviously, the said order was passed in tune with the Explanation appended to Sub-Section (1) of Section 32 of "the Act" as election could not be conducted to elect fresh Committee. Therefore first contention of Mr. Rath fails.

Mr. Rath's second contention was that even if help is taken of the Explanation attached to Sub-Section (1) of Section 32 of "the Act" to justify the impugned order, then also an illegality has been committed by appointing Collector as Administrator as there exists no concept of Administrator in the Explanation. Explanation only speaks of vesting of management in Registrar Co-operative Societies, Odisha and none else. This contention of Mr. Rath cannot be accepted for the following reasons. Section 2(i) of "the Act" makes

it clear that Registrar includes any person appointed to assist the Registrar when exercising all or any of the powers of the Registrar. As per Annexure-B/1, Collectors of revenue district of the State have been appointed as Additional Registrars of Co-operative Societies to assist Registrar of Co-operative Societies, Odisha. Further vide Order No.II/Legal-26/98-19992/Co-op dated 21.09.1999 issued by the Government of Odisha in Co-operation Department, the State Government in exercise of powers conferred under Sub-Section (2) of Section 3 of "the Act" have conferred on Additional Registrar Co-operative Societies, the powers of the Registrar under Sections 6, 7, 8, 10(2), 12, 14, 14-A, 16(2-a) 17, 28, 30, 30A, 32, 33, 35(3), 59(1), 63 to 66, 68, 70, 72, 73, 75 to 77, 90, 102 to 105, 106 (1)(b), 108, 114, 116(3), 120, 123-A(2), 128(3) of "the Act". After issuance of the above order dated 21.09.1999; vide Office Order No.XLV-1/2012-12219/legal-4 dated 20.07.2012, the opposite party No.2 in exercise of powers conferred upon him under Sub-Section (2) of Section 3 of "the Act" has made it clear that the Additional Registrar can exercise his power for whole State of Odisha. A cumulative reading of all these notifications makes it clear that Collectors have been appointed as Additional Registrars of Co-operative Society to assist the Registrar of Co-operative Societies, Odisha and by virtue of order dated 21.09.1999 indicated above; the Additional Registrars have been conferred with jurisdictions to the exercise many powers of the opposite party No.2. Thus in the background of definition of Registrar given at Section 2(i) of "the Act", it can be safely said that the definition "Registrar" certainly includes Collectors of revenue district of Odisha. Therefore, vide impugned order Annexure-3 since the Collector has been appointed as Administrator to manage the affairs of "the Bank", it can be safely said that in a way Registrar, Co-operative Societies, Odisha is looking after the management of "the Bank". Therefore, the second contention of Mr. Rath also fails.

Third contention of Mr. Rath vis-à-vis the impugned order was that even if appointment of District Collector as Administrator is accepted then also he cannot continue beyond one year as the maximum period of supersession as per Sub-Section (1) of Section 32 of "the Act" under which the impugned order has been passed has already expired on 30.04.2021. According to him, as the Society was doing banking business, the maximum period of supersession is one year as per law. Therefore, the impugned order dated 01.05.2020 cannot continue beyond 30.04.2021, when one year period came to an end. In the opinion of this Court, this contention of the petitioner has got sufficient force. It is not disputed that the society involved in this case

carries on business of banking. A perusal of impugned order under Anenxure-3 shows that the same has been passed in exercise of power conferred under Sub-Section (1) of Section 32 of "the Act" which deals with supersession of committee. The same Sub-Section makes it clear that Committee of a society carrying on business of banking can be superseded for a maximum period of one year. Further Clause (b) of Sub-Section (1-b) of Section 28 of "the Act" makes it clear that in case of supersession of a Committee of Society carrying on business of banking, an election to constitute a Committee shall be completed before expiry of a period of one year from the date of its supersession. In such background since one year period vis-à-vis the impugned order dated 01.05.2020 under Annexure-3 has expired long back and since the society in question carries on banking business, the order under Annexure-3 passed under Sub-Section (1) of Section 32 of "the Act", dealing with supersession of the Committee cannot be allowed to continue beyond 30.04.2021 as the same has become legally vulnerable. Accordingly, the same is quashed.

Natural corollary of quashing of Annexure-3 would have been to direct the authorities to hold election to Committee of Societies affiliated to "the Bank", whose terms have already expired & thereafter for "the Bank" itself. But before that let us apply our mind to the contentions raised by Mr. Dhal, learned counsel representing opposite party No.4. Relying on Section 28-A of "the Act", Mr. Dhal has contended that if election is directed to be held, it has to be held for all the Co-operative Societies of the State and it is to be held simultaneously for connected Primary, Central and Apex Societies. A reading of Section 28-A does not support such a contention as it nowhere says that elections of all the Co-operative Societies operating in the State or election of the connected Primary, Central and Apex Society should be held simultaneously. Further Clause-(ii) of Sub-Section (1) of Section 28-A clearly permits election of members of the Committee of a Primary Society in such manner by and from among the General Body of members of the society qualified for the purpose organized into such different constituencies as may be prescribed. Similarly clause-ii(a) of Section 28-A permits election of members of the committee of a Central Society and an Apex Society in such manner by and from among the qualified members of the Electoral College formed in such manner organized into such different constituencies as may be prescribed. "1992 Rules" lay down the procedure for election to the Committees of Societies .Sub Rule (1) of Rule 3 of "1992 Rules" permits election of Members, President & Vice-President of the Committee of a

Society to be held in the manner specified thereinafter. Rule (1-a) of Rule 3 of "1992 rules" permits the State Government to issue one or more Gazette Notifications publishing the date or date as recommended by the State Co-operative Election Commission calling upon the Co-operative Societies to elect members of the Committee of Society as per the provision of "the Act" and Rules made thereunder. Rule 4A of "1992 rules" also permits an Electoral College to elect members of a Central or Apex Society. An analysis of the above provisions would show that different provisions of Section 28-A as well as Rules (1) & (1-a) of Rule 3 of "1992 Rules" & Rule 4A of the above Rules permit election of Committee of a Society - be it Primary, Central or Apex. Therefore, the contention of Mr. Dhal that if election is to be held, it should be held for all the Societies functioning in the State cannot be accepted. Further his submissions that if election is to be held it should be held simultaneously for connected Primary, Central & Apex Societies also can be not accepted as election of Committees of an Apex Society and Central Society are dependent upon election of Committees of Central Societies and Primary Affiliated Societies respectively forming respective Electoral Colleges. Further, Sub-Rule (1) of Rule 3 of "1992 Rules" also permits State Co-operative Election Commission to recommend date or date and on the basis of such recommendation State Government may publish such date or date in one or more Gazette Notifications. With Regard to phrase "date or date" used in Rule (1-a) of Rule 3 of "1992 Rules", it has to be interpreted to mean "date or dates" in the background of preceding phrase "one or more notifications" used therein. Any other interpretation of the said phrase would lead to absurdity as otherwise the later word "date" in the phrase "date or date" would become meaningless. Such a consequence has to be avoided. It is well settled that where language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words or even the structure of the sentence. (**See Tirath Singh Vs. Bachittar Singh and others, AIR 1955 S.C. 830**) Considering all these things, it is reiterated that there exists no such requirement of holding simultaneous election to all cooperative societies of State or the connected Primary, Central and Apex Societies. In fact the use of phrases "one or more notifications" Rule 3 of "1992 Rules" as referred above negatives the contention of Mr. Dhal, learned counsel for opposite party No.4 -Commission that election at all level to all Co-operative Societies should be held simultaneously. Had it been so, then the requirement

of more than one notification and provision for recommending of more than one date would not have been there.

12. Mr. Dhal has also contended relying on Sub-Section (6) of Section 28-AA of "the Act" that the State Government should make available its officer and staff so that the State Co-operative Election Commission (opposite party No.4) can discharge its functions. But there exists no material on record to show that the State Government is reluctant to render such assistance. Rather in the counter affidavit dated 08.01.2021, it has made clear that the State Government is committed for formation of democratically elected Committee of the Co-operative Societies and it is committed to hold election no sooner the situation returns to normalcy. Further in its affidavit dated 10.08.2021 and 07.09.2021, the State has made it clear that as per Rule 3(1-a) of the "1992 Rules", the opposite party No.4 has to recommend the date to Government for issuance of notification calling upon the Co-operative Societies to elect the members of the Committee of the Society and Government is to only issue notification indicating the date. No argument has been made to the effect that Corona Pandemic still holds out a problem now for holding election to the Committees of "the Bank" and its affiliated societies.

13. Considering all these things, particularly when normalcy to a large extent has been restored and By-election has been held in the State in the recent past and keeping in mind the statutory requirements as discussed above, this Court directs the authorities to go ahead with electing Committees of "the Bank" as well as its affiliated societies where the terms of Committees have already expired. For the said purpose, the opposite party No.4 is directed to make the necessary recommendation as per provisions of Rule 3(1-a) of "1992 Rules" within a period of four weeks from the date of receipt of certified copy of this order and should complete the process of election to the above noted societies in accordance with law within a reasonable period. Opposite parties 1, 2 & 3 are directed to extend full cooperation to opposite party No.4. Accordingly, writ petition is allowed. No cost.

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2021 (III) ILR - CUT- 509

BISWAJIT MOHANTY, J.

W.P.(C) NO. 34499 OF 2020

SUNITA JANI .....Petitioner

.V.

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

ORISSA GRAMA PANCHAYATS ACT, 1964 – Section 24 – No confidence motion against the Sarapancha – Resolution passed – Form/format/Proforma of such resolution questioned – Held, there is no form or proforma has been prescribed for the proposed resolution to be moved – If the intention of the requisite number of members is clear then said intention is to be accepted as indicative of the fact that requisite number of members wants to, move a No-confidence motion – The so called proposed resolution to be moved need not be on a separate sheet or document.

Case Laws Relied on and Referred to :-

1. 2015 SCC OnLine Ori 395 : Prahallad Dalei Vs. State of Odisha and Ors.

For Petitioner : Mr. L.K. Mohanty

For Opp. Parties : Mr. R.P. Mohapatra, Addl. Govt. Adv.

ORDER Date of Hearing: 26.11.2021: Date of Order:29.11.2021

BISWAJIT MOHANTY, J.

Heard Mr.L.K.Mohanty, learned counsel for the petitioner and Mr.R.P.Mohapatra, learned Addl. Government Advocate.

According to Mr.Mohanty the petitioner who happens to be the elected Sarpanch of Sudukumpa Grama Panchayat in the district of Kandhamal has filed this writ application challenging the notice dated 24.11.2020 under Annexure-2 notifying the date of holding of No Confidence Motion on the ground that such notice is illegal being a product of arbitrary exercise of power. According to him the petitioner has been discharging her duties sincerely all throughout without any allegation of corruption and shehas been undertaking many developmental works of the Gram Panchayat and not a single complaint has ever been raised by the local public before the authorities against her. However all on a sudden, the petitioner received

impugned notice dated 24.11.2020 under Annexure-2 issued by Sub┐ Collector, Phulbani (opposite party No.3) indicating therein that a representation has been submitted by the Ward Members of Sudukumpa Gama Panchayat for holding a special meeting for discussing No Confidence Motion against her along with a resolution. Along with the said notice, representation dated 14.9.2020 and resolution dated 10.9.2020 signed by the Ward Members were enclosed. According to Mr. Mohanty the resolution dated 10.9.2020 submitted by the Ward Members cannot be described as the proposed resolution as required under law to be moved at the meeting. Accordingly, he submitted that since no proposed resolution has been enclosed, the impugned notice dated 24.11.2020 under Annexure-2 is liable to be quashed as there is clear violation of Section 24(2)(a) of the Orissa Grama Panchayats Act, 1964, for short, "the Act".

Mr. Mohapatra, learned Addl. Government Advocate submitted that a perusal of impugned notice under Annexure-2 would show that the same clearly referred to the requisition as well as the resolution and a perusal of resolution dated 10.9.2020 under Annexure-2 filed by the petitioner herself clearly indicated the views of 15 Ward Members that they have lost confidence in the petitioner on account of her corrupt and arbitrary activities and accordingly they resolved to request opposite party No.3 to bring No Confidence Motion against her. In such background, he strongly disputed the submissions of Mr.Mohanty that proposed resolution as required under law has not been enclosed to Annexure-2. In this context,relying on the case of ***Prahallad Dalei Vrs. State of Odisha*** and others reported in ***2015 SCC OnLine Ori 395***, he submitted that no form or proforma has been prescribed for the requisition to be sent by 1/3rd members of the Grama Panchayat or for the proposed resolution to be moved. If the intention of the requisite number of members is clear from the resolution adopted in the meeting held to prepare the requisition and the proposed resolution, then the said intention is to be accepted as indicative of the fact that requisite number of members want to move a No Confidence Motion and that resolution adopted in such meeting is to be accepted as the proposed resolution. The said decision also makes it clear that the so called proposed resolution to be moved need not be on a separate sheet or document. In such background, he submitted that the present writ petition is without any merit and should be dismissed.

In order to assess the rival contentions, it would be appropriate to refer to the relevant provisions of Section 24 of "the Act".

"24. Vote of no confidence against Sarpanch or Naib Sarpanch-

(1) Where at a meeting of the Grama Panchayat specially convened by the Sub-divisional Officer in that behalf a resolution is passed, supported by a majority of not less than two-thirds of the total membership of the Grama Panchayat, regarding want of confidence in the Sarpanch or Naib-Sarpanch the resolution shall forthwith be forwarded by the Sub-Divisional Officer to the Collector, who shall immediately on receipt of the resolution publish the same on his notice-board and with effect from the date of such publication the member holding the office of Sarpanch or the Naib¬ Sarpanch, as the case may be, shall be deemed to have vacated such office.

(2) In convening a meeting under Sub¬ section(1) and in the conduct of business at such meeting the procedure shall be in accordance with such rules, as may be prescribed, subject however to the following provisions, namely;

(a) no such meeting shall be convened except on a requisition signed by at least one-third of the total membership of the Grama Panchayat along with a copy of the resolution proposed to be moved at the meeting;

(b) the requisition shall be addressed to the Sub-Divisional Officer;

(c)the Sub-Divisional Officer on receipt of such requisition shall fix the date, hour and place of such meeting and give notice of the same to all the members holding office on the date of such notice along with a copy of the requisition and of the proposed resolution, at least fifteen clear days before the date so fixed;

(d)xxx	xxxx	xxxx
(e) xxxx	xxxxx	xxxx
(f)xxxx	xxxxx	xxxxx
(g)xxxx	xxxxx	xxxxx
(h)xxxx	xxxx	xxxx
(i)xxxx	xxxxx	xxxxx
(j)xxxx	xxxx	xxxx
(k)xxxx	xxxx	xxxx
(3)xxxxx	xxxx	xxxx
(4)xxxx	xxxx	xxxx"

A reading of Sub-section(1) of Section 24 along with Clause(a) of Sub-Section(2) of Section 24 of the Act makes it clear that no meeting should be convened for the purpose of vote of No Confidence except on a requisition signed by one third members of the total membership of the Grama Panchayat along with a copy of the resolution proposed to be moved at the meeting. Therefore, the starting point leading to a No Confidence Motion is the resolution proposing to make a request for such motion. According to Mr. Mohanty the resolution dated 10.9.2020 cannot be described as a proposed

resolution as required under law to be moved at the meeting. Thus the only thing that is to be seen in the present case is whether the resolution dated 10.9.2020 can be described as a proposed resolution. A perusal of the resolution dated 10.9.2020 shows that on that date 15 Ward Members including the Naib Sarpanch discussed about the activities of the petitioner, which according to them were dictatorial and smacked of arbitrariness and corruption. Further, it indicates that they have lost their confidence in her and accordingly they decided to request the Sub-Collector, Phulbani to bring No Confidence Motion against her. It is not disputed that Sudukumpa Grama Panchayat has got 16 Ward Members and out of which, 15 signed/passed the resolution dated 10.9.2020 under Annexure-2. Pursuant to said resolution, it appears that on 14.9.2020 the requisition was sent to Sub-Collector, Phulbani again by 15 Ward Members under Annexure-2 requesting him to take appropriate steps in the matter. In such background the impugned notice dated 24.11.2020 under Annexure-2 fixing the date, time and place of No Confidence Motion was issued. This Court in ***Prahallad Dalei (supra)*** has held that no form or proforma has been prescribed for the proposed resolution to be moved. If the intention of the requisite number of members is clear then the said intention is to be accepted as indicative of the fact that requisite number of members want to move a No Confidence Motion. The so called proposed resolution to be moved need not be on a separate sheet or document. In the present case a perusal of resolution dated 10.9.2020 under Annexure-2 would clearly show that fifteen out of sixteen Ward Members have clearly expressed their lack of confidence in the petitioner and accordingly resolved to request opposite party No.3 to bring No Confidence Motion against her. This clearly reflected the intention of the majority. Intention being more important than the form, this Court is of the opinion that resolution dated 10.9.2020 under Annexure-2 can safely be described as the proposed resolution required under law to be moved at the meeting. In such background, this Court does not find any illegality in issuing the notice dated 24.11.2020 under Annexure-2 indicating the date, time and place for convening the No Confidence Motion. Accordingly, the writ petition is dismissed and the interim order dated 9.12.2020 restraining publication of result of No Confidence Motion is hereby vacated. The authorities are directed to publish the result of No Confidence Motion forthwith and take consequential action in accordance with law. No cost.

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2021 (III) ILR - CUT- 513

Dr. B.R.SARANGI, J.

WPC (OAC) NOS. 1074 &1956 OF 2017

NIRANAJAN DAS & ORS. …….. Petitioners

.V.

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

WPC (OAC) NO. 1956 OF 2017

BIJAY KUMAR SAHOO & ORS. ……Petitioners

.V.

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

SERVICE LAW – Regularization – Claim of Anti-date Regularization – Petitioners initially appointed as part time resource person in the year 1991, subsequently they were appointed as full time resource person w.e.f 2001 – The petitioners seek regularization of their service from the date of their joining (initial appointment) but not from 03.07.2016, the date of passing of the order of regularization of service – Effect of – Held, this Court directs the opposite parties to regularize the service of the petitioners from the date of their joining as full time Resource persons as they have discharged the duty against the sanctioned post of Junior Lecturer.

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 1607: Direct Recruit ClassII Engineering Officers' Association Vs. State of Maharastra.
2. W.P. No.2046 of 2010: Sachin Ambadas Dawale Vs. State of Maharashtra.
3. AIR 1986 SC 1571: Central Inland Water Transport Corporation Ltd. Vs. Tarun Kanti Sengupta.
4. (2011) 2 SCC 429 : State of Rajasthan Vs. Dayalal.
5. (2014) 4 SCC 769 : Secretary to Government, School Education. Department,Chennai Vs. R. Govindaswamy.
6. (2017) 4 SCC 113 : State of Tamil Nadu through Secretary to Government,Commercial Taxes and Registration Department Vs. A.Singamuthu.
7. AIR 1975 SC 1709 : Pasupuleti Venkateswarlu Vs. The Motor & General Traders.
8. AIR 1992 SC 700 : Ramesh Kumar Vs. Kesho Ram.
9. (2010) 3 SCC 470 : Sheshambal (dead) through LRs Vs. Chelur Corporation Chelur Building.
10. (2018) 17 SCC 203 : Samir Narain Bhojwani Vs. Aurora Properties and Investments.
11. 2015(II) OLR 214 : Premalata Panda Vs. State of Odisha.
12. AIR 1988 SC 1621 : (1988) 3 SCC 449:State of Rajasthan Vs. M/s. Hindustan

Sugar Mills Ltd.
13. 2020 (I) OLR 5 : Ganesh Chandra Behera Vs. Berhampur University.

WPC (OAC) NO. 1074 OF 2017

For Petitioners : Mr. B. Routray, Sr. Adv, M/s. S. Das, S.K. Samal, S.P. Nath & S.D. Routray.

For Opp. Parties: Mr. S. Jena, Standing Counsel for S &M.E. Department

WPC (OAC) NO. 1956 OF 2017

For Petitioners : M/s. K.P. Mishra,S. Mohapatra, T.P. Tripathy, L.P.Dwivedy & M. Das.

For Opp. Parties : Mr. S. Jena, Standing Counsel for S & M.E. Department.

JUDGMENT Date of Hearing: 29.09.2021 : Date of Judgment: 07.10.2021

Dr. B.R.SARANGI, J.

Of the two writ petitions, as mentioned above, WPC (OAC) No.1074 of 2017, in which petitioners are twenty-two in number, has been filed for the following reliefs:-

> *"i) Admit the original application,*
>
> *ii) Call for the records,*
>
> *iii) Issue appropriate order/orders, direction/directions directing the respondents to regularize the services of the applicants from the admitted date of their joining and extend all consequential service benefits including the leave and pensionary benefit along with promotional benefits as per the terms of the provisions of the Pension Rules within a reasonable time to be fixed by this Hon'ble Tribunal."*

And WPC (OAC) No.1956 of 2017, in which petitioners are twelve in number, has been preferred seeking following reliefs:-

> *"(i) Direct/order the Respondent No.1 to grant benefit(s) of past service like continuing of service and notional pay fixation to the Applicants taking into account their dates of joining as mentioned in the Order No.XVI-HE-37/2016 18066/HE, dated 03.07.2016 and/or anti-date the date of regularization from the date of the Order passed in O.A. No.15(C) of 2010;*
>
> *(ii) Pass such other order(s) or issue direction(s) as may be deemed fit and proper in the bona fide interest of justice."*

In both the writ petitions, reliefs sought being similar to each other, they were heard together and are disposed of by this common judgment.

2. The factual matrix giving rise to filing of both the cases, in a nutshell, is that the National Policy on Education, 1986 introduced vocational stream at +2 stage to provide alternative source of income. On 27.07.1988, 31 number of Higher Secondary Vocational Schools were opened by the State Government under the centrally sponsored Scheme "Vocationalisation of Secondary Education" vide GO No.33291/EYS during the academic session 1988-89. The staffing pattern of those schools consisted of a Principal in the junior class-I scale of pay and four vocational teachers (PGT) in the class-II scale of pay. The State Government issued a circular on 17.03.1989 vide letter no.13513/NEP 2/89 EYS of Secondary Education for appointment of qualified PG teacher against vacant post on contract basis since regular recruitment through OPSC was not possible. The candidate having educational qualification at par with that of regular Junior Post Graduate Lecturers were decided to be appointed in all those 31 colleges. Accordingly, applications were invited and the petitioners, having requisite qualification of that of the post of Post Graduate Teacher, offered their candidature and were selected and engaged in the vacant posts of Junior Lecturer.

2.1 In the second phase, the State Government opened 150 numbers of Higher Secondary Vocational Schools in the year 1990-91. On 10.12.1990, the Deputy Director of Vocational Education, Odisha addressed letter to all the Principals I/C of Higher Secondary Vocational Schools for giving appointment of part time resource persons on contract basis to teach vocational subjects. On 28.01.1991, the Government decided to separate +2 classes from degree colleges and to appoint 220 number of Junior Lecturers in Higher Secondary Vocational Schools vide notification No.3839 of Education Department. Accordingly, on 01.04.1991, an advertisement was published in local daily the "Sun Times" by the Directorate of Secondary Education, Odisha wherein applications were invited from the eligible candidates for the posts of Junior Lecturer in Vocational Institutions of the State. Creation of teaching and non-teaching posts for vocational institutions opened under the centrally sponsored scheme where the salary of the staff of vocational schools is reimbursed to the extent of 75% by the Government of India. Therefore, unless the posts were filled up, the State Government could not claim any reimbursement. Those posts were held by the petitioners having requisite qualifications of that of Junior Lecturers.

2.2 A gazette notification bearing No.40779 dated 06.06.1996 was issued by the Government of Orissa in Department of Higher Education, regarding engagement of Part Time Resource Person (PTRP) in Government Higher Secondary Vocational Schools prescribing therein the educational qualification. On 21.08.1996, another gazette notification bearing no.58230 was issued regarding engagement of Full Time Resource Person (FTRP) in Government Higher Secondary Vocational Schools prescribing therein the educational qualification. Accordingly, an advertisement was issued by the Director, Secondary Education, Odisha in local daily "The Samaj" on 13.07.1999 for recruitment of Full Time Resource Persons on contract basis. Even though petitioners were continuing as Part Time Resource Persons on contract basis, but their appointment was never regularized by the opposite parties as Junior Lecturers, though their services were being utilized against the vacant posts of Junior Lecturer. Being aggrieved by such action/ inaction, they approached this Court by filing OJC No.9392 of 1999 praying therein for regularization of their service. During pendency of the said writ petition, the petitioners, after undergoing a rigorous selection process conducted by the state level selection board with the Director Vocational Education as Chairperson, and taking into consideration their past service as part time PG Teachers continuing on contract basis against the vacant posts of the Junior Lecturers, were appointed as Full Time Resource Persons.

2.3 In 2010, this Court transferred OJC No.9392 of 1999 to the Odisha Administrative Tribunal for adjudication, which was registered as T.A. No.15(C) of 2010. The tribunal, vide order dated 10.07.2014, disposed of the said T.A. No.15(C) of 2010 directing the State opposite parties to regularize the services of the petitioners keeping in view the judgment passed by the tribunal in O.A. No.2399(C) of 2008 and batch disposed of on 13.09.2011 wherein direction was given to formulate a scheme for regularization of services of contractual resource persons, according to the resolution dated 04.11.1996, as lecturers within six months from the date of receipt of the order. As the judgment of the Odisha Administrative Tribunal was not implemented, C.P. No.543(C) of 2014 was filed and when the said C.P. was pending, the State Government in Higher Education Department filed compliance affidavit reflecting therein the regularization of 201 number of Full Time Resource Persons working in different vocational Junior Colleges re-designated as Junior Lecturers in the scale of pay of Rs.9300-34800/- with grade pay of Rs.4600/- w.e.f. the date of issue of the order i.e. 03.07.2016. In view of such order, the contempt proceeding was dropped, but the tribunal

granted liberty to the petitioners for claiming any benefits, consequent upon the order passed, by approaching the legal forum. Hence, the petitioners approached Odisha Administrative Tribunal by filing O.A. Nos. 1074 (C) of 2017 and O.A. No. 1956 (C) of 2017 claiming regularization of their services from the date of their initial appointment. But on abolition of the tribunal the said Original Applications have been transferred to this Court and registered as above.

3. Mr. B. Routray, learned Senior Counsel appearing along with Mr. S.K. Samal, learned counsel for the petitioners in WPC (OAC) No.1074 of 2017 contended that the petitioners, having requisite qualification for the post of Junior Lecturers, were initially appointed as Part Time Resource Persons in the year 1991 and subsequently, they were appointed as Full Time Resource Persons w.e.f. 2001 and have been working uninterruptedly against the substantive vacant posts of Junior Lecturer from the date of their initial appointment. Therefore, they seek regularization of their services from the date of their initial appointment, but not from 03.07.2016, the date of passing of the order of regularization of services. It is contended that the order of regularization of their services w.e.f. 03.07.2016 is arbitrary, unreasonable and contrary to the provisions of law. Therefore, the petitioners seek interference of this Court. It is further contended that the petitioners, having requisite qualification for the posts of Junior Lecturer, have discharged their duties as Junior Lecturer against the vacant posts in Vocational Government Secondary Schools and rendered continuous service for more than 20 years, which cannot be wiped out while opposite parties decided to regularize their services w.e.f. 03.07.2016. That itself is contrary to the provisions of law.

To substantiate his contentions, reliance is placed on the judgments of the apex Court in ***Direct Recruit Class-II Engineering Officers' Association v. State of Maharastra***, AIR 1990 SC 1607 and ***Sachin Ambadas Dawale v. State of Maharashtra*** (W.P. No.2046 of 2010 disposed of on 19.10.2013 by the Bombay High Court and confirmed by the apex Court by dismissing SLP (C) No.39014 of 2013 vide order dated 06.01.2015).

4. Mr. K.P. Mishra, learned counsel for the petitioners in WPC (OAC) No.1956 of 2017 supported the contentions raised by Mr. B. Routray, learned Senior Counsel appearing for the petitioners in WPC (OAC) No.1074 of 2017. He further contended that even though the petitioners were allowed to continue as Part Time Resource Persons w.e.f. 1991 and thereafter as Full

Time Resource Persons from 2001 by paying consolidated remuneration pursuant to agreement executed between the parties and that contract itself is opposed to public policy. It is further contended that if there is no head of public policy which covers a case, then the Court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Even in deciding any case which may not be covered by authority, Courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in the Constitution.

To substantiate his contention, he has relied upon ***Central Inland Water Transport Corporation Ltd. V. Tarun Kanti Sengupta***, AIR 1986 SC 1571.

5. Per contra, Mr. S. Jena, learned Standing Counsel appearing for School and Mass Education Department raised preliminary objection with regard to maintainability of the writ petition and referring to the relief sought by the petitioners contended that similar prayer was made in the Original Applications and that having been with the self-same prayer, the petitioner cannot approach this Court by filing the present writ petitions. Referring to paragraph-5 of the counter affidavit, he contended that the petitioners were initially appointed as Part Time Resource Persons in the year 1990-91 in various trades prevailed at that time in a centrally sponsored scheme, namely, "Vocationalisation of Higher Secondary Education" in a consolidated honorarium. Thereafter, the Government published a resolution to engage the vocational teachers in the nomenclature as "resource teacher on full time basis" on a consolidated remuneration of Rs.3,000/- per month. Therefore, the petitioners were engaged under the temporary scheme and their post may be treated as schematic post. By virtue of order dated 14.07.2014 passed by the Tribunal in T.A. No.15(C) of 2010, when their services were regularized vide order dated 03.07.2016 from the date of issuance of such order in the scale of pay Rs.9300-34,800/- with grade pay of Rs.4600/-, the petitioners cannot claim that the benefit should be extended retrospectively from the date of their initial appointment or as Part Time Resource Persons from 1991 or from the date they have been continuing as Full Time Resource Persons from 2001 as they claim that they have been discharging their duty of Junior Lecturers against sanctioned posts. Thereby, he contended that the writ petition has to be dismissed both on the question of maintainability and on merits.

To substantiate his contention, he has relied upon ***State of Rajasthan v. Dayalal***, (2011) 2 SCC 429; ***Secretary to Government, School Educatin Department, Chennai v. R. Govindaswamy***, (2014) 4 SCC 769; and ***State of Tamil Nadu through Secretary to Government, Commercial Taxes and Registration Department v. A. Singamuthu***, (2017) 4 SCC 113.

6. This Court heard Mr. B.Routray, learned Senior Counsel appearing along with Mr. S.K. Samal, learned counsel for the petitioners in WPC (OAC) No.1074 of 2017; Mr. K.P. Mishra, learned counsel for the petitioners in WPC (OAC) No.1956 of 2017 and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department. Pleadings have been exchanged between the parties and with their consent, both the writ petitions are being disposed of finally at the stage of admission.

7. On the basis of factual matrix as discussed above, the only question to be decided by this Court is, whether the petitioners' services can be regularized from 1991, i.e. the date of their initial appointment to the post of Part Time Resource Persons or from the dates they were regularized as Full Time Resource Persons, as indicated in Annexure-A to the order impugned dated 03.07.2016 issued in compliance of the order dated 14.07.2014 passed by the tribunal in T.A. No.15(C) of 2010 or w.e.f. 03.07.2016?

8. Before effectively answering the above question, it is of relevance to deal with the preliminary objection raised by Mr. S. Jena, learned Standing Counsel for School and Mass Education Department with regard to maintainability of the writ petition, relying upon the order dated 10.07.2014 passed by the Odisha Administrative Tribunal in T.A. No.15(C) of 2010, wherein prayer quoted in paragraph-2 reads thus:

> *"The applicants have come up with this T.A praying for regularization of their services as FTRPs (to be re-designated as Jr. Lecturers) in view of the long period of service rendered by them as contractual employees since 1996."*

Since the petitioners had filed T.A. No.15(C) of 2010 praying for regularization of services as Full Time Resource Persons (to be re-designated as Jr. Lecturers) in view of long period of service rendered by them as contractual employees since 1996, it is contended that similar prayer has been made in the present writ petitions, for which they are not maintainable. But on careful perusal of the prayer made in both the writ petitions, this Court

finds that the same has been couched in different manner, that is to say the petitioners seek for regularization of services from the admitted dates of their joining and to extend all consequential benefits including leave and pensionary benefits along with promotional benefits as per the terms of the provisions of the Pension Rules within a reasonable time to be fixed by the court. Thereby, the relief sought in these cases cannot be treated as same so as to render the writ petitions as not maintainable. Otherwise also, after abolition of the tribunal, these two matters have been transferred to this Court for adjudication under Article 226 of the Constitution of India, but originally they were registered as Original Applications before the tribunal under Section 19 of the Administrative Tribunal Act, 1985, which no more remains. Now, they are to be construed as applications filed under Article 226 of the Constitution of India. If that be so, the objection with regard to maintainability of the writ petitions raised by learned Standing Counsel for School and Mass Education Department on the ground of self-same relief cannot sustain in the eye of law because this Court can mould the relief sought by the petitioners.

9. "Moulding of relief" principle was recognized by the Supreme Court in ***Pasupuleti Venkateswarlu v. The Motor & General Traders***, AIR 1975 SC 1709. It was observed therein that though the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding, the principle that procedure is the handmaid and not the mistress of the judicial process is also to be noted. Justice ***VR Krishna Iyer*** observed:

> *"If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decrotal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.*

10. In ***Ramesh Kumar v. Kesho Ram***, AIR 1992 SC 700, the Supreme Court again following this principle, i.e. "moulding of relief", observed as follows:

> *"6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief."*

11. In ***Sheshambal (dead) through LRs v. Chelur Corporation Chelur Building***, (2010) 3 SCC 470, the apex Court laid down the conditions in which the relief can be moulded:

> *"(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;*
>
> *(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and*
>
> *(iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."*

12. In ***Samir Narain Bhojwani v. Aurora Properties and Investments***, (2018) 17 SCC 203 the apex Court observed that principle of moulding of relief could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage.

13. In ***Premalata Panda v. State of Odisha***, 2015 (II) OLR 214, relying upon ***State of Rajasthan v. M/s. Hindustan Sugar Mills Ltd***., AIR 1988 SC 1621 : (1988) 3 SCC 449 where the apex Court held that the High Court which was exercising high prerogative jurisdiction under Article 226 could have moulded the relief in a just and fair manner as required by the demands of the situation, this Court, in exercise of such power under Article 226 of the Constitution of India even though no specific prayer was made in the writ petition, taking into consideration the facts and circumstances of the case, was inclined to mould the relief and passed order/direction as deemed fit and proper as prayed for by the learned counsel for the petitioner in the writ petition.

14. In view of the law laid down by the apex Court, so far as "moulding of relief" is concerned, this Court is of the considered view that even if there is no such specific prayer made in the writ application, this Court can grant such relief, as has been sought before this Court in course of hearing, even at the final stage by "moulding the relief".

This Court has also moulded the relief in ***Ganesh Chandra Behera v. Berhampur University***, 2020 (I) OLR 5.

15. In view of such position, the preliminary question raised with regard to maintainability of the writ petitions by the learned Standing Counsel for School and Mass Education Department is being negatived and is answered accordingly.

16. Now, answering to the core question involved in these writ petitions, it is admitted by the learned Standing Counsel for School and Mass Education Department, referring to paragraph-5 of the counter affidavit, that initial appointment of the petitioners as Part Time Resource Persons was made in the year 1991 in various trades prevailed at the relevant point of time in a centrally sponsored scheme, namely, "Vocationalisation of Higher Secondary Education" in a consolidated honouraruim. Thereafter, the Government published a resolution to engage the vocational teachers in the nomenclature as "resource teacher on full time basis" in a consolidated remuneration of Rs.3,000/- per month, pursuant to which the petitioners were engaged as Full Time Resource Persons by following due procedure of selection in the year 2001 and subsequent thereto they started discharging their duties and responsibilities of Junior Lecturers.

17. So far as claim made by the petitioners, that regularization of their services should relate back to the date of their initial engagement as Part Time Resource Persons from 1991, cannot sustain in the eye of law because part time engagement cannot be construed to be an engagement to discharge the duty of a particular post. More so, Part Time Resource Persons were engaged for a particular period and particular nature of duty to be discharged by them. Therefore, they can stand apart from the persons, who are discharging duty as Full Time Resource Persons. But, pursuant to gazette notification issued on 21.08.1996, by following regular process of advertisement, if they were engaged as Full Time Resource Persons on contract basis to discharge the duties and responsibilities against regular posts

of Junior Lecturers and their services have been utilized against the vacant posts, they cannot be denied the benefits of regularization of their services from their initial appointment as Full Time Resource Persons.

18. Mr. S. Jena, learned Standing Counsel for School and Mass Education Department has placed much reliance on paragraph-12 (iv) and (v) of ***Daya Lal*** (supra), which are extracted below:

> *"12. xxx xxx xxx*
>
> *(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent conti8nuance of part-time temporary employees.*
>
> *(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute."*

19. In ***R. Govindaswamy*** (supra), the apex Court in paragraph-7 observed as follows:

> *7. In* ***Union of India v. A.S. Pillai****, this Court dealt with the issue of regularization of part-time employees and the Court refused the relief on the ground that part-timers are free to get themselves engaged elsewhere and they are not restrained from working elsewhere when they are not working for the authority/employer. Being the part-time employees, they are not subject to service rules or other regulations which govern and control the regularly appointed staff of the department. Therefore, the question of giving them equal pay for equal work or considering their case for regularization would not arise.*

In paragraph-8 the apex Court referred to ***Daya Lal*** (supra) and in paragraph-9 held as follows:

> *"9. The present appeals are squarely covered by Clauses (ii), (iv) and (v) of the aforesaid judgment in Daya Lal case. Therefore, the appeals are allowed. However, in light of the facts and circumstances of the case as Shri P.P. Rao, learned Senior Counsel has submitted that the appellant has already implemented the impugned judgments and does not want to disturb the services of the respondents, the services of the respondents which stood regularized should not be affected."*

20. In ***A. Singamuthu*** (supra), the apex Court in paragraph-16 referred to ***Daya Lal*** (supra) and held that Part Time Lecturers are not entitled to seek regularization, as they are not working against any sanctioned posts and they cannot be directed for absorption, regularization or permanent continuance of part-time temporary employees. It is further held that part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full-time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

21. In view of law laid down by the apex Court, this Court holds that the claim of the petitioners, that regularization of their services should relate back to the date when they were engaged as Part Time Resource Persons, i.e., from the year 1991, cannot be granted.

22. In ***Sachin Ambadas Dawale*** (supra), the Bombay High Court in paragraphs-18 and 19, taking into consideration the facts of that case, observed as follows:

> *"18. Xxxxx The Lecturers who are appointed in the Private Polytechnic Institutions after selection through the School Committee are appointed on contractual basis as "Shikshan Sevak" for the period of three years as per the policy of the Government of Maharashtra incorporated in the resolution dated 27th April, 2000. It is not in dispute that the selection process through which the petitioners are selected is much less stringent than the selection process of the 38 wp2046.10 Private Polytechnic. We see no reason as to why the petitioners, who are otherwise eligible and qualified for the posts and who are selected by a duly constituted Selection Committee appointed by the Government of Maharashtra and who are appointed in sanction posts after the issuance of advertisement and following regular procedure of selection should not be treated at par with their counterparts in the Private Polytechnic Institutions. We are of the view that the petitioners cannot be discriminated vis-a-vis their counter parts working in the Private Polytechnic Institutions. We are conscious that the Lecturers working in the Government Institutions form a different class than the Lecturers working in the Private Institutions. However, when all other service conditions are similar, we are of the view that the petitioners are also entitled for the same benefits as their counterparts working in the Private Polytechnic Institutions are entitled as far as the conferment of regularization and permanency are concerned.*

> *19. One more fact needs to be taken into consideration is that even according to the respondent-State there are more than 5000 teaching posts which are still vacant and the advertisement issued by the MPSC is only 39 wp2046.10 for 400 posts. It can, thus, be clearly seen that even after the candidates who would be selected through the selection process conducted by the MPSC are available, more than 4500 posts will be vacant. It is, therefore, clear that the petitioners' absorption would in no way affect the candidates who would now be selected through the MPSC. It is, thus, clear that the petitioners' continuation in service would not adversely affect the fundamental right guaranteed under Article 16 to the citizens. We are of the considered view that the respondent-State having extracted the work from the petitioners for years together, the petitioners cannot be deprived of the right of regular employment particularly when their entry can neither be termed as "illegal" nor "back door".*

Having so observed, in paragraph-22 of the said case, the Bombay High Court issued following directions:-

> *"22. The respondents are directed to regularize the services of such of the petitioners and confer permanency on such petitioners who have completed 40 wp2046.10 three years' service with technical breaks. The respondents shall absorb the petitioners within a period of six weeks. Needless to state that the petitioners who are in continuous employment till 15.10.2013 shall be continued in service as regular employees. However, in the facts and circumstances of the case, we direct that the petitioners shall be entitled to regular salary from 1st November, 2013 and would not be entitled to claim any monetary benefits for the past services rendered by them in spite of their regularization. Needless to state that since the petitioners' services are regularized, they shall be entitled to the continuity in service for all other purposes except monetary purposes from the date of their first appointment."*

Against the said judgment of the Bombay High Court, the State of Maharashtra preferred SLP (C) No.39014 of 2013 and the apex Court vide order dated 06.01.2015 dismissed the said SLP. Thereby, the order passed by the Bombay High Court has been confirmed.

23. If the factual matrix of the aforementioned judgment is taken into consideration, it is squarely applicable to the present case. There is no dispute that the petitioners were working as Full Time Resource Persons by following a due process of selection pursuant to advertisement, but they were paid a consolidated remuneration on contract basis and put into service against regular vacancy of Junior Lecturers. Instead of giving them regular appointment, a camouflaged approach has been made allowing the petitioners to discharge their duty with a consolidated amount on the basis of contract, that itself opposes to public policy.

24. Mr. B. Routray, learned Senior Advocate appearing for the petitioners in WPC (OAC) No. 1074 of 2017 fairly states that he has relied upon the judgment of the apex Court in the case of ***Direct Recruit Class-II Engineering Officers' Association*** (supra) has no application to the present context, as the said case relates to promotions of direct recruits vis-à-vis promotees.

25. Admittedly the Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expression "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public Policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. Therefore, when the petitioners were engaged as Full Time Resource Persons against sanctioned post of Junior Lecturers with paltry consolidated contractual amount, that itself amounts to exploitation and opposed to public policy.

26. In ***Central Inland Water Transport Corporation Ltd***. (supra), the apex Court in paragraph-90 observed as follows:

> *"90. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply*

> *where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."*

In the aforementioned paragraph, though the apex Court dealt with the issue concerning to the fact of that case, but taking the present case into consideration and types of contract which have been forced to utilize against the petitioners by allowing them to join as Full Time Resource Persons to discharge the duty against the sanctioned posts of Junior Lecturers, which is unfair, unreasonable and shocks the conscience of this Court and as such, they are opposed to public policy and require to be adjudged void.

27. In view of the aforesaid facts and circumstances, this Court directs the opposite parties to regularize the services of the petitioners from the date of their joining as Full Time Resource Persons, as indicated in Annexure-A to the impugned order dated 03.07.2016 in Annexure-10. Since the petitioners' services are regularized from the date of their joining as indicated in Annexure-A to the impugned order dated 03.07.2016 in Annexure-10, they shall be entitled to continuity in service for all other purposes except monetary benefits. Consequentially, the office order dated 03.07.2016 under Annexure-10 is modified to the extent that the services of the petitioners shall be regularized with effect from "the date of their joining" instead of "date of issuance of the letter".

27. In the result, both the writ petitions are allowed to the extent indicated above. However, there is no order as to costs.

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Dr. B.R.SARANGI, J.

W.P(C) NO. 7635 OF 2019

BANI BHUSAN DASH …….. Petitioner

.V.

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

ODISHA CIVIL SERVICE (Classification, Control And Appeal) RULE, 1962 – Rules 12 and 13 – Disciplinary authority imposed punishment treating the suspension period as leave due and admissible – Whether the decision of the disciplinary authority to treat the period of suspension as leave due, is permissible in absence of any provision under 1962 Rule – Held, Not permissible – Such punishment cannot sustain in the eyes of law.

Case Laws Relied on and Referred to :-

1. 2012 (5) SCC 242: AIR 2012 SC 2840 : Vijay Singh Vs. State of U.P. & Ors.
2. W.P.(C) No.20827 of 2016 : Samir Kumar Mitra Vs. State of Orissa & Ors.
3. AIR 2010 SC 3196: S. Khushboo Vs. Kanniammal and Anr.

For Petitioner : Mr. S.N. Pattnaik,G.R. Sethy, C.S. Panda, P. Mohapatra,S. Mohapatra and A.A. Mohanty.

For Opp. Parties: Mr. A.K. Mishra,A.K. Sharma, S. Mishra and A. Mishra. [Opp. Party Nos. 2 & 3]

JUDGMENT Date of Hearing & Judgment: 28.10.2021

Dr. B.R.SARANGI, J.

The petitioner, who is working as Assistant Project Director (Finance) under the District Rural Development Agency, Puri, has filed this writ application seeking to quash the order dated 15.09.2018 under Annexure-8, on the ground that the same has been passed in gross violation of the principle of natural justice as well as Rule-15 (10)(i)(a) and Rule 16 (b) of the Orissa Civil Service (Classification Control and Appeal) Rules, 1962.

2. The factual matrix of the case, in brief, is that the District Rural Development Agency (DRDA) is a Society registered under the Societies Registration Act, and is being financed by the State Government and Central Government. DRDA is visualized as a specialized and professional agency capable of managing the anti poverty programme of the Government and to

watch over and ensure effective utilization of funds intended for anti poverty programme in different districts. DRDA in every district of the State functions under the administrative control of the Panchyati Raj & Drinking Water Department. Due to creation of posts of Assistant Project Director (Finance) in DRDA by the Government in Panchyati Raj Department in the year 1996, an advertisement was published for filling up of the said post under DRDA, Dhenkanal. Pursuant thereto, the petitioner applied for and he was duly selected and appointed by the order of the Collector & Chairman. Accordingly, he joined in his duty and while he was so continuing, one post of Assistant Project Director (Finance) fallen vacant under Puri DRDA. Thereby the petitioner made a representation before opposite party no.1 for his transfer to Puri DRDA under Regulation 15 of The Odisha District Rural Development Agency Employees (Recruitment and Conditions of Service) Regulation, 1989, with a condition that he will forgo his seniority since the post in question is a district cadre. Accordingly, vide order dated 06.11.2002, he was appointed as Assistant Project Director (Finance) in the DRDA Puri with a stipulation that in the cadre the seniority of the petitioner will be counted from the date of joining in the DRDA, Puri as Assistant Project Director (Finance). Pursuant to such order, he joined in the said post and during his continuance, the petitioner along with similarly situated persons approached this Court by filing W.P.(C) No.32335 of 2011 with a prayer to create promotional avenues for them and to grant higher scale of pay at par with Class-I (Junior Branch) of the State Government. But thereafter, he was transferred from Puri to Sambalpur DRDA in gross violation of the provisions contained in DRDA Service Regulation vide order dated 16.02.2015, which was challenged before this Court in W.P.(C) No. 2955 of 2015. After due adjudication, vide order dated 06.08.2015, the order of transfer dated 16.02.2015 was quashed, as the same was passed without complying the provisions contained in Rule-15 of the DRDA Regulation, 1989. Consequentially, the petitioner was allowed to continue where he was posted earlier, i.e. at Puri, vide order dated 01.10.2015.

2.1 While he was continuing at Sambalpur as Assistant Project Director (Finance), on 07.07.2015 one memorandum of charge was issued to him by the Collector, Puri, opposite party no.2 with regard to gross negligence in Government duty, misappropriation of government money, disregard to the order of the higher authority and for violation of the conduct rules. On receipt of such memorandum, the petitioner submitted his reply denying all the charges, since same are vague and without any basis. Again, on self-same

ground another additional memorandum of charge was issued to the petitioner on 24.08.2015, to which the petitioner also filed his reply denying all the charges. But from the date of joining on 09.12.2015 at Puri, he was placed under suspension by opposite party no.2 on the ground of serious financial irregularities committed by the petitioner without any audit report.

2.2 Consequent upon the memorandum of charge filed against the petitioner and reply submitted by him, the ADM, Nabakalebar was appointed as the inquiry officer to enquire into the charges and the Additional P.D (Admn), DRDA, Puri was nominated as the Marshalling Officer to produce the evidence before the inquiry officer. But subsequently, the Secretary, P.K.D.A., Puri was appointed from 29.02.2016 as the inquiry officer, who had submitted his enquiry report indicating that the charges are unsubstantiated and there was no misappropriation of money of the department and suggested that the delinquent officer should be reinstated in service and posted to a DRDA other than the DRDA, Puri and the period of suspension be treated as leave and that the pay perks and other entitlement be released, and that apart he will not lose his seniority and will be given a fitment which the petitioner so deserves. In the said enquiry report, it was also stated that additional charges framed will be taken up for enquiry by his successor. On the basis of the self-same allegation, additional memorandum of charge was submitted on 24.08.2015 under Rule-15 of the OCS (CCA) Rules, 1962 for the irregularities and misconduct committed by the petitioner during his incumbency as APD (Finance), Puri in the said office in continuation of the charges drawn on 07.07.2015. The petitioner submitted his reply denying all the charges level against him. The inquiry officer submitted his report with regard to additional charges, where charge Nos. 1, 2, 3 (with regard to misappropriation of facts), 5, 6, 7, 9 and 10 were not established and Charge Nos. 3 (with regard to negligence in duty), 4 and 8 were established. Therefore, the inquiry officer suggested for punishment for the charge Nos. 3, 4 and 8 for stoppage of one increment, which may be withheld without cumulative effect as per Rule-13 (iii) and Rule 15 of the OCS (CCA), Rules, 1962. Opposite party no.2, being the disciplinary authority, issued a show cause notice on 08.08.2018 to the petitioner in contemplation of imposing punishment on the basis of findings of the inquiry officer that one increment be stopped without cumulative effect, the delinquent officer be reinstated in service and be posted to any DRDA other than DRDA, Puri and suspension period be treated as due on leave as admissible under the rules. The petitioner was called upon to show cause on

the findings of the inquiry officer on the charges, as required under Rule-13 (iii) and Rule 15 of the OCS (CCA) Rules, 1962, within 15 days from the date of receipt of the show cause notice. It was clearly indicated therein that if no reply is received within the stipulated period, it will be presumed that the petitioner has no reply to offer anything and the matter will be decided on its own merit. After receipt of the 2nd show cause notice under Annexure-6 on 16.08.2018, the petitioner submitted a detailed and exhaustive reply on 21.08.2018 which was received on 24.08.2018 by the opposite party no.2 as per the postal tracking report, i.e. within the stipulated time. Without considering the same in its proper perspective, on the strength of the enquiry report submitted on the additional charges, the opposite party no.2 passed the final order confirming the proposed punishment submitted by the inquiry officer, i.e. stoppage of one increment without any cumulative effect, the petitioner be posted to any DRDA other than DRDA, Puri and the period of suspension be treated as leave due and admissible.

3. Challenging such order of punishment dated 15.09.2018, the petitioner approached this Court by filing W.P.(C) No. 17977 of 2018 seeking to quash the order of punishment, which was disposed of vide order dated 03.12.2018 with a direction to file appeal before the appellate authority, which would be disposed of within six months from the date of receipt of the appeal. In compliance of the order dated 03.12.2018, the petitioner preferred an appeal on 18.12.2018 before opposite party no.1, but the same was refused to be entertained on the ground that the appeal provision is not available for the post held by the petitioner. Hence this writ petition.

4. Mr. S.N. Patnaik, learned counsel for the petitioner, at the outset, referring to the order of punishment imposed by opposite party no.2 vide order dated 15.09.2018 in Annexure-8, contended that so far as the 1st punishment of stoppage of one increment without any cumulative effect is concerned, the petitioner has no grievance, as the same has already been implemented. But so far as 2nd punishment, namely "the Delinquent Officer be posted to any DRDA other than DRDA, Puri and the 3rd punishment, namely, "the period of his suspension be treated as leave due and admissible" are concerned, he contended that these two punishments are not prescribed under the law and, thereby, the same cannot sustain. To substantiate his argument, he has relied upon the judgment of the Apex Court in ***Vijay Singh V. State of U.P. and others***, 2012 (5) SCC 242: AIR 2012 SC 2840 and the

judgment of this Court passed in ***Samir Kumar Mitra v. State of Orissa and others*** (W.P.(C) No. 20827 of 2016 disposed of on 25.08.2016).

5. Mr. A.K. Mishra, learned counsel appearing for the opposite party Nos. 2 and 3 argued with vehemence that since the petitioner had committed some irregularities steps were taken against him by initiating proceeding and consequentially the imposition of penalty is well justified and may not be interfered with by this court. It is further contended that the disciplinary authority has passed the final order, on the basis of the records of the departmental proceeding, against the petitioner by granting reasonable opportunity in terms of issuing show cause notice as per the provisions contained in OCS (CCA) Rules, 1962. As there is no provision for appeal by the Assistant Project Director (Finance) as per the Orissa District Rural Development Agency Employees (Recruitment and conditions of Service) Regulations, 1989, rightly the appellate authority held that the appeal is not maintainable. Accordingly, he contended that the writ application should be dismissed.

6. This Court heard Mr. S.N. Patnaik, learned counsel for the petitioner and Mr. A.K. Mishra, learned counsel for opposite party Nos. 2 and 3 by hybrid mode, and perused the record. Pleadings have been exchanged between the parties and with their consent, the writ petition is being disposed of finally at the stage of admission.

7. As has been already indicated, impugning the order of punishment passed by the disciplinary authority, vide Annexure-8 dated 15.09.2018, the instant writ petition has been filed. The punishments, which have been imposed are extracted hereunder:-

> *"1. One increment of Sri Bani Bhusan Dash is stopped without any cumulative effect.*
>
> *2. The delinquent officer posted to any DRDA other than DRDA, Puri.*
>
> *3. Period of his Suspension is treated as leave due and admissible."*

So far as 1st punishment is concerned, Mr. S.N. Patnaik, learned counsel appearing on behalf of the petitioner very fairly states that he is not pressing the same, as the same has been defined as a minor penalty in terms of the penalties prescribed under Rule-13 of the OCS (CCA) Rules, 1962, which is

applicable to the employees of DRDA in Orissa. Therefore, he has no grievance with regard to imposition of that penalty on the petitioner particularly when such punishment has been implemented.

8. In view of the above, now it is to be seen whether 2nd and 3rd punishment imposed by the disciplinary authority be construed s punishment in the eye of law and if not, whether the order passed to that extent can sustain or has to be given a go-bye.

9. So far as the 2nd punishment is concerned, with regard to restricting the posting of the petitioner from DRDA, Puri rather to post him in any other DRDA, is not only arbitrary and irrational, but also amounts to misuse of official power bestowed with opposite party no.2. Imposition of such restriction in the name of penalty in a departmental proceeding is violative of the service rules and it can be safely construed that such restriction has been put with an ulterior motive especially when the same has not been prescribed as a penalty under Rule-13 of the OCS (CCA) Rules, 1962. Furthermore, Regulation-15 of The Orissa District Rural Development Agency Employees (Recruitment and Conditions of Service) Regulations, 1989 deals with "Transfer" and Regulation 25 thereof deals with "Discipline". While there is a clear provision for applicability of OCS (CCA) Rules, 1962 to the employees of the Agency in the matter of disciplinary control, as per Regulation-25 and Regulation 15 puts a clear bar on transferring of an employee from one agency to another, with exception to consider such transfer only in case of willingness made by the concerned employee and on consent of both the agencies and that too forgoing seniority etc. in new place of posting and taking into account the same, this Court had passed an order on 06.08.2015 in W.P.(C) No. 2955 of 2015 and as such, the 2nd punishment imposed in the order impugned vide Annexure-8 does not come within the purview of "penalty" prescribed under Rule-13 of the OCS (CCA) Rules, 1962, and more so to give a posting to the petitioner to any other DRDA, other than DRDA Puri cannot be construed to be a punishment within the framework of law, the same cannot be anyway held to be sustainable.

10. Coming to the 3rd punishment, as imposed in the impugned order dated 15.09.2018 under Annexure-8, i.e. treating the period of suspension as leave due and admissible, no doubt the authorities are empowered to place an employee under suspension in contemplation or pending drawal of a proceeding exercising their power under Rule-12 of the OCS (CCA) Rules,

1962. Accordingly, they have to give a conclusion the manner to treat the period of suspension at the time of passing final order in the departmental proceeding. The authorities are to keep the suspension as such or to revoke the said suspension order by revising the period of suspension as duty, as because honouring non-engagement certificate for the relevant period, the authorities have sanctioned subsistence allowance to the delinquent during the period of suspension. In the instant case, the authority, after taking a decision not to treat the period of suspension as such, is not empowered to take a decision to treat the period of suspension as leave due and admissible, when the petitioner did not ask for any leave during the said period of suspension. Regularization of a particular period treating as leave period of different kinds of leave, as provided under Orissa Leave Rules, can be considered only when the petitioner/employee concerned seeks leave from the competent authority for certain period under certain circumstances. The authority cannot initiate a proposal from its side in assumption of leave application from the delinquent or employee concerned to treat the period as leave due and admissible affecting the delinquent by way of consuming accrued leave in favour of the employee concerned without any fault on his part. As the authority has come to a conclusion to punish the petitioner only with a minor penalty, the decision of the competent authority to place the petitioner under suspension on the allegation of grave misconduct does not appear to be satisfactory, rather it seems that the order of suspension was issued without application of mind or in a routine or mechanical manner. As such, no review of suspension was held, as per the guidelines. Under such circumstances, after concluding the departmental proceeding by imposing minor penalty of stoppage of one increment without cumulative effect, the authority should not have treated the period of suspension in any manner other than the duty affecting the service condition of the petitioner.

11. In ***Samir Kumar Mitra*** (supra), the Division Bench of this Court categorically held that in absence of any provision under OCS (CCA) Rules, 1962, the decision of the authorities to treat the period of suspension as leave due is not permissible. In paragraph-12 of the said judgment, this Court held as follows:-

> *"It is not in dispute that treating the period of suspension as leave due is not prescribed under the Statute and when the period of suspension has been treated to be leave due, it also amounts to punishment, but since it is not prescribed under the statute and we are also not in agreement with the argument advanced on behalf of*

> *the Government before the learned Tribunal that even if it is not prescribed under Rule 13, but as per Rule 12(6) of the Rules, the disciplinary authority, while passing the final order of punishment or of release in the disciplinary proceedings against a Govt. servant, shall give directions about the treatment of period of suspension, which is passed not as a measure of substantive punishment, but as suspension pending enquiry and indicate whether the suspension would be the punishment or not. The reason for deciding the said view is that the authorities have not reflected in the order as to whether the order of suspension is by way of punishment or not. Hence, passing the order regarding suspension cannot be said to be in terms of the provisions of Rule 12(6) of the Rules. Accordingly, that part of the order, which related to treating the period of suspension as leave due, is not sustainable and accordingly quashed.*

In view of the aforesaid analysis, this Court is of the considered view that the alleged 3rd punishment imposed in the impugned order Annexure-8 dated 15.09.2018 cannot sustain in the eye of law.

12. It is of relevance to note here the well made principle enshrined in criminal jurisprudence extending legal maxim "***nulla poena sine lege***", which means that a person should not be made to suffer penalty except for a clear breach of existing law. In ***S. Khushboo v. Kanniammal and An***r, AIR 2010 SC 3196, the apex Court held that a person cannot be tried for an alleged offence unless the legislature has made it punishable by law and it falls within the offence as defined under Sections 40, 41 and 42 of the Indian Penal Code, 1860, Section 2 (n) of Code of Criminal Procedure, 1973 or Section 3 (38) of the General Clauses Act, 1897.

13. Even though the aforementioned principle has been laid in connection with a criminal case, but the analogy can also be applicable to the present context, which has been referred to of the judgment of the apex Court in ***Vijay Singh*** (supra). Thereby, on this score only the 2nd punishment imposed vide order impugned under Annexure-8, having not been contemplated in any of the provisions of the service rules applicable to the employees of DRDA or even in the OCS (CCA) Rules, 1962, such punishment is not maintainable in the eye of law.

14. Consequentially, 2nd and 3rd punishment imposed in the impugned order dated 15.09.2018 under Annexure-8 is not sustainable in the eye of law and the same is liable to be quashed and, hereby quashed.

15. The writ petition is allowed to the extent indicated above. No order as to costs.

2021 (III) ILR - CUT- 536

Dr. B.R. SARANGI, J.

MACA NO. 54 OF 2019

NATIONAL INSURANCE COMPANY LTD. .....Appellant

.V.

SMT. GITANJALI MAHANTA AND ORS. .....Respondents

THE MOTOR VEHICLES ACT, 1988 – Section 166 (1) – Application for compensation – Who can claim? – Whether a retired govt. employee can be considered as dependant and claim compensation? – Held, Yes.

Case Laws Relied on and Referred to :-

1. (2015) 2 SCC 764 : Kalpanaraj Vs. Tamil Nadu State Transport Corporation.
2. 2020 (1) T.A.C. 675 (S.C.) : National Insurance Company Ltd. Vs. Birendra and Ors.
3. (2007) 10 SCC 643 : Manjuri Bera (Smt) Vs. Oriental Insurance Co. Ltd.

For Appellant : Mr. Goutam Mishra, Sr. Adv.
M/s A. Dash, J.R. Deo and A. Khandal

For Respondents: M/s. B. Singh, P.B. Singh and A.K.Panda.

JUDGMENT Date of Hearing & Judgment: 05.11.2021

Dr. B.R.SARANGI, J.

The appellant-insurance company has filed this appeal challenging the award/judgment dated 07.08.2018 passed by the Motor Accident Claims Tribunal-I, Balasore in M.A.C. Case No. 153 of 2016. In the said award, the Tribunal has directed the appellant-insurance company to pay an amount of Rs.61,07,518/- along with interest @ 7.5 % per annum to the claimant-respondents from the date of filing of the claim petition, i.e. from 12.04.2016 till its actual payment within two months from the date of award. It was also directed that out of the compensation amount, as awarded, the claimant-respondent no.1-wife of the deceased shall get a sum of Rs.31,07,518/-, out of which a sum of Rs.25,00,000/- shall be kept as fixed deposit in her name in a nationalized bank for a period of six years and the balance amount of Rs.6,07,518/- along with accrued interest over the entire compensation amount of Rs.61,07,518/- be paid to her in cash. The claimant-respondents 2 and 3, who are the daughters of the deceased, shall get a sum of Rs. 12,50,000/- each and the entire amount be kept as fixed deposit in their

names separately in a nationalized bank for a period of six years in respect of respondent no.3 and till attaining majority in respect of respondent no.2. The respondent no.4, who is the father of the deceased, shall get a sum of Rs.5,00,000/-, out of which a sum of Rs.3,00,000/- shall be kept as fixed deposit in his name in a nationalized bank for a period of six years and the balance amount of Rs.2,00,000/- be paid to him in cash. It was also observed by the Tribunal that there shall not be any premature withdrawal of the above fixed deposits without the permission of the Tribunal. However, respondent no.1 for self and on behalf of her minor daughters, i.e. respondents nos. 2 and 3, so also respondent no.4, is at liberty to withdraw the quarterly interest on the fixed deposits for their sustenance.

2. The brief fact, as delineated in the impugned judgment, tends to reveal as follows:-

On 04.04.2016 around 12.45 p.m., while the deceased was standing near Dwarasuni Thakurani temple, on the left side of the road and waiting for a bus in order to proceed to Baripada, at that time, the offending vehicle coming from backside, being driven in excessive speed with rash and negligent manner, dashed the deceased from his backside and the front wheel of the offending vehicle ran over the deceased, thereby causing grievous injuries on vital organs of the deceased. The deceased became senseless at the spot. Immediately, the local people, fire brigade personnel rescued the deceased and shifted him to Bangiriposi Government Hospital for treatment, where he succumbed to the injuries. In connection with the accident, Bangiriposi P.S. Case No. 40 of 2016 was registered and investigation was taken up. Inquest as well as post mortem over the dead body of the deceased was conducted. The vehicular papers of the offending vehicle were valid and effective on the date of accident so also the driving license of the driver. It was equipped with valid permit and fitness. The deceased was 40 years of age on the date of accident and he was serving as Police Constable and earning Rs.30,122/- per month. For the premature death of the deceased, the respondents pleaded to have sustained pecuniary and non-pecuniary loss and accordingly filed the MAC Case No. 153 of 2016, wherein the award/judgment as indicated above has been passed.

3. Mr. G.Mishra, learned Senior Advocate for the appellant-insurance company vehemently contended that the award made by the Tribunal is exorbitant and grossly high for which interference of this Court is warranted.

According to him, while passing the award, the Tribunal has not taken into consideration the materials available on record in as much as, the Tribunal has not excluded the personal allowances paid, along with the monthly salary while computing the amount of compensation. He further contended that though several grounds have been set out in the memo of appeal, but he mainly relied upon ground nos. 'B' and 'C' on account of which the award impugned is liable to be modified. In support of his contention with regard to ground No. 'C' pertaining to personal allowances, learned Senior Advocate, Mr. Mishra, relied on the decision of the apex Court in the case of ***Kalpanaraj v. Tamil Nadu State Transport Corporation***, (2015) 2 SCC 764.

4. Mr. B. Singh, learned counsel appearing for the respondents, defending the award passed by the Tribunal, contended that the respondents are entitled to get the benefits and as such no error has been committed by the Tribunal in awarding such amount. However, so far as personal allowance is concerned, the respondents may not be entitled to such benefit as directed by the Tribunal, and there may be some arithmetical error committed by the Tribunal while computing the compensation. He contended that so far as personal living expenses of deceased is concerned, it should be 1/4th and not 1/3rd, as claimed by the appellant, and thereby the assessment so made has to be re-assessed and amount should be paid to the respondents, those who have suffered a mishap due to the death of the earning member of the family. To substantiate his contention, learned counsel for the respondents relied on the judgment of the apex Court in the case of ***National Insurance Company Ltd. Vs. Birendra and others***, 2020 (1) T.A.C. 675 (S.C.).

5. This Court heard Mr. Goutam Mishra, learned Senior Advocate assisted by Mr. A. Dash, learned counsel for the appellant and Mr. B. Singh, learned counsel for the respondents through hybrid mode, and perused the record. Pleadings having been completed, with the consent of both the parties the MACA is being disposed of finally at the stage of admission.

6. Having heard learned counsel for the parties and after going through the records, this Court finds that the main plank of argument of the appellant centers round ground nos. 'B' and 'C' as set out in the appeal memo. For the sake of convenience, ground nos. 'B' and 'C' are extracted hereunder.

> *"B. For that in the present case, the learned Tribunal failed to take note of the fact P.W.1 wife of deceased deposed in her cross examination that the petitioner*

No.4 is the father of the deceased and is getting monthly pension after retirement from service. Hence the petitioner no.4 cannot be considered as the dependant on the income of the deceased in the eye of law and accordingly the number of actual dependent is reduced to three for which the appropriate deduction towards personal living expenses of deceased should be @ 1/3rd instead of 1/4th as decided by the learned Tribunal. Thus, the impugned award is liable to be modified.

C. For that the learned Tribunal failed to appreciate that the law is well settled as decided by the Hon'ble Supreme Court in the case of ***Kalpana Raj v. Tamilnadu State Transport Corporation [2014 (2) TAC 44]*** *that the personal allowance paid along with monthly salary are to be excluded from the component of compensation. In this case, salary slip of deceased (Ext.7) shows Rs.1180/- was being paid on various personal allowances which should have been excluded from the monthly income of the deceased for calculation of the award amount. But the learned Tribunal erred in doing so and taken all type of allowances which are personal in nature for calculating the compensation. Thus, the impugned award is excessive and liable to be reduced substantially."*

So far as ground no.'B' is concerned, it has been emphatically contended by the learned counsel for the appellant that the father of the deceased was a government employee and after retirement he is getting monthly pension, therefore, he cannot be considered as a dependent on the income of the deceased in the eye of law and accordingly the number of actual dependant is reduced to three for which the appropriate deduction towards personal living expenses of deceased should be @1/3rd instead of 1/4th as decided by the Tribunal. In the said context, reliance has been placed by the appellant on the evidence of respondent No.1, who was examined as D.W.1. She in her cross examination has stated as follows:-

"The petitioner No.4 is my father in law. My deceased husband was only son of his parent. Petitioner No.4 was an employee of DHH, Baripada. Since after retirement, petitioner No.4 is getting pension"

According to the appellant-insurance company, respondent No.4 may not be entitled to get compensation as awarded by the Tribunal. Mr. Singh, however, relying on the judgment in the case of ***National Insurance Company*** (supra) contended that the father of the deceased is also a legal representative and he can make application under Section 166 of the Motor Vehicles Act, 1988, and, as such, clause (c) of Section 166 (1) envisages that where death has resulted from the accident, by all or any of the legal representatives of the deceased, application for compensation can be made. For a just and proper adjudication of the case, clauses-'c' and 'd' of sub-Section (1) of Section-166 of the Motor Vehicles Act, 1988 are quoted herein below:-

"Section 166. Application for compensation. (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased;"

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be :

Relying upon such provisions, the apex Court in the case of ***National Insurance Company*** (supra) held that, even the major married son, who is also earning and not fully dependent on the deceased, would be still covered by the expression "legal representative" of the deceased. Reliance has also been placed on the case of ***Manjuri Bera (Smt) v. Oriental Insurance Co. Ltd, (2007) 10 SCC 643***, which expounded that liability to pay compensation under the Act does not cease because of absence of dependency of the concerned legal representative. It is also further contended that the legal representatives of the deceased have a right to apply for compensation and it must necessarily follow that even the major married and earning sons of the deceased, being the legal representatives, have a right to apply for compensation and it would be bounden duty of the Tribunal to consider the application irrespective of the fact whether the concerned legal representative was fully dependent on the deceased and not to limit the claim towards conventional heads only.

7. The submission of Mr. G. Mishra, learned Senior Advocate appearing for the appellant to the above context is that the relied case is distinguishable from the fact of the present case, as in the instant case, respondent No.4 is a government employee and getting pension, for which, he is not entitled to get such benefit. Such submission of Mr. Mishra is not acceptable, in view of the fact that there is no dispute that respondent No.4 is the legal representative of the deceased. In view of the provisions contained in Section 166 (1) (c) (d) of the Motor Vehicles Act, 1988 as quoted above, even though respondent No.4 is an employee receiving pension, he can be construed as a legal representative of the deceased and also can make an application for compensation. On that basis, if he has made an application for compensation

and the same has been considered by the Tribunal, on the basis of the materials available on record, by awarding compensation, it cannot be said that any error has been committed by the Tribunal, so as to cause interference by this Court. Therefore, the ground taken that the calculation of compensation is to be made taking living expenses of deceased @ 1/3rd instead of 1/4th cannot sustain in the eye of law.

8. The next ground of challenge of the appellant-insurance is company with regard to exclusion of the personal allowances, which has been calculated at Rs.1180 as per Ext.7. In view of the judgment of the apex Court in the case of **Kalpanaraj** (supra), this amount has to be excluded and this fact has not been disputed by Mr. B. Singh, learned counsel for the respondents. Mr. G. Mishra, learned Senior Advocate appearing for the appellant contended that if ground nos. 'B' and 'C' of the appeal memo are considered in favour of the appellant-insurance company, then the amount of compensation will come down to Rs.52,22,053/-. However, since this Court has not accepted ground no. 'B', taking into consideration ground no. 'C' a calculation was made by Mr. B. Singh, learned counsel for the respondents, according to which the extent of compensation comes to Rs.58,68, 567/-.

9. At this point of time, this Court called upon the parties to agree on a particular amount, so that the matter can be settled for all times to come. Learned counsel for both the parties contended that if the compensation amount is settled at Rs.55,00,000/- along with the other directions of the Tribunal, then the dispute can be resolved.

10. In view of such position, this court disposes of the appeal directing the appellant-insurance company to pay a sum of Rs.55,00,000/- (rupees fifty five laks), along with interest @ 7.5 % per annum to the respondents from the date of filing of the claim petition, i.e. from 12.04.2016 till its payment, within a period of two months from today. As agreed to by the parties, out of the compensation amount, as awarded by this Court, the claimant-respondent no.1-wife of the deceased shall get a sum of Rs.28,00,000/-, out of which a sum of Rs.22,00,000/- shall be kept as fixed deposit in her name in any nationalized bank for a period of six years and the balance amount of Rs.6,00,000/-, along with accrued interest over the entire compensation amount of Rs.55,00,000/- shall be paid to her in cash. The claimant-respondents 2 and 3, who are the daughters of the deceased shall get a sum of Rs. 11,00,000/- each and the entire amount shall be kept as fixed deposit in

their names separately in any nationalized bank for a period of six years in respect of respondent nos. 2 and 3. The respondent no.4, who is the father of the deceased, shall get a sum of Rs.5,00,000/- out of which a sum of Rs.3,00,000/- shall be kept as fixed deposit in his name in any nationalized bank for a period of six years and the balance amount of Rs.2,00,000/- shall be paid to him in cash. It is observed that there shall not be any premature withdrawal of the above fixed deposit amount without the permission of the Tribunal. However respondent no.1 for self and on behalf of her minor daughters, i.e. respondents nos. 2 and 3 so also the respondent no.4, is at liberty to withdraw the quarterly interest on the fixed deposits for their sustenance. The court fee amount, if not paid, shall be realized from the respondents at the time of disbursement of the amount. After deposit of the awarded amount before the Tribunal and on production of proof thereof, the appellant-insurance company shall apply for refund of the statutory deposit, which shall be dealt with in accordance with law.

11. In view of the above observations and directions, the MACA is allowed in part. LCR be sent back to the Court below immediately.

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2021 (III) ILR - CUT- 542

DEBABRATA DASH, J.

SECOND APPEAL NO. 265 OF 1987

LINGARAJ MOHAPATRA & ORS. .....Appellants

.V.

DEITY SRI GRAMADEVATI THAKURANI & ORS. .....Respondents

THE ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 41 – Jurisdiction of Civil Court – Whether the Civil Court has jurisdiction to decide a deity as public or private? – Held, No.

For Appellants : Mr.S.K. Padhi, Sr.Adv.,Mr.S.S. Das & Mr.P.K.Mishra-2
For Respondents : Miss. P. Naidu, For Commissioner of Endowments

JUDGMENT Date of Hearing & Judgment: 25.10.2021

DEBABRATA DASH, J.

1. The Appellants, by filing this Second Appeal filed under Section 100 of the Civil Procedure Code (for short, 'the Code') have assailed the judgment and decree dated 17.08.1987 and 01.09.1987 respectively passed by the learned Subordinate Judge, Parlakhemunid (as then it was) in Title Appeal No.01 of 1985.

These Appellants were the Defendants in T.S. No.15 of 1978 in the Court of the learned Munsif, Parlakhemundi (as then it was). The Respondents, as the Plaintiffs, claiming to be the hereditary trustees of the Deity, Sri Gramadebati Thakurani Bije at village-Budura, PS-Kasinagar in the district of Ganjam, had filed the Suit seeking the relief of a declaration that the Deity is and has been the owner-rayat of the suit lands at all relevant times and now entitled to possession of the suit land which is under attachment in a proceeding under section 145 of the Code of Criminal Procedure.

The Suit having been dismissed, those unsuccessful Plaintiffs have filed the Appeal under Section 96 of the Code. The First Appellate court has allowed the Appeal and accordingly the judgment and decree passed by the Trial Court have been set aside.

It is pertinent to state here that the Respondent No.1 who had been arraigned as Defendant No.1 in the Trial Court having died during pendency of this Appeal, his legal representatives have come to be substituted and some other parties having also died during the currency of the litigation uptil now, their names have been so expunged.

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 arraigned in the Suit.

3. The Plaintiffs' case is that the Deity Sri Gramadebati Thakurani Bije at Village-Budura, PS-Kasinagar in the district of Ganjam is the private Deity and they are the hereditary trustees. According to them, about a century ago, their ancestors had installed the Deity endowing some lands, houses and

other properties as better described in the schedule of the plaint in favour of the Deity. It is stated that seven members of the family as the hereditary trustees were exercising the rights of management of the Deity. They used to remain in cultivating possession of the land owned by the Deity while looking after the sevaา puja and performance of all other rituals and special functions. It is also stated that the Deity has acquired the rayati status in respect of the suit land and land revenue for those lands is being paid to the State for those land regularly.

The allegation against the Defendant No.1, namely, Laxman Mohapatra, stands on the score that he being the Archak had been removed from his service as it was found that he misappropriated the funds of Deity and attempting to interfere with the possession of the suit land by the Deity through its trustees.

4. The Defendants, in their written statement, while traversing the plaint averments have averred that the Plaintiffs are styling themselves as the hereditary trustees of the Deity, which is not a fact. It is also said that they have not been appointed as the trustees by any Authority or the villagers. The Defendant claiming their status as hereditary Archakas of the Deity state that such duty attached to the Deity was being exercised by their ancestors since long. The Defendants have also disputed the claim of the Plaintiff that their ancestors had installed the Deity endowing the suit property which were being managed by them. It is their case that they are in khas possession of the suit land and it is in lieu of the service that they are rendering to the Deity.

5. On the above rival pleadings, the Trial Court in all has framed 18 issues. Taking up Issue Nos.1, 4, 13, 14 and 18 together as those are interlinked, the court below has first of all held that it lacks the jurisdiction to entertain the Suit for the reliefs claimed. Further saying that the jurisdiction for the main relief claimed in the Suit remains with the Statutory Authorities as per the provisions of Hindu Religious Endowments Act, 1951 (for short, 'the OHRE Act'), the other findings rendered by the Trial Court which run are also against the Plaintiffs.

6. The lower Appellate Court being moved by the unsuccessful Plaintiffs has gone to allow the Appeal in passing the order as under:-

> "that the appeal is allowed on contest without cost in the peculiar circumstance of this case. The judgment and decree of the learned Munsif is set aside. Lawyer's fee is assessed at Rs.30/- "

As required under Order 41 Rule 35 of the Code, the lower Appellate Court, while passing the order that the Appeal is allowed and the judgment and decree passed by the Trial Court are set aside has not given any indication as to the relief(s) thereby to the Plaintiffs.

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

> "(a) Whether the appellate court had the jurisdiction to give the finding that the deity is not a public one. Whether the this issue is to be decided under Section-41 of the Endowment Act or by the Civil Court; and
>
> (b) If the plaintiffs 1 to 7 are not competent to file the suit, can the suit be still maintainable as the deity is perpetual heir."

8. I have heard Mr.L. Panigrahi, learned counsel for the Appellants. I have also heard Miss.P.Naidu, learned counsel who has entered appearance on behalf of the commissioner of Endowments pursuant to the order passed by this Court on 24.02.2018. None appears on behalf of the Respondents despite the opportunities right from the year 1987.

9. Keeping in view the submissions made and in the backdrop of the rival case of the parties, the judgments of the Courts below being completely gone through, it stands clear that only in the event the substantial question of law as at (a) is answered in the affirmative, then only this Court would be called upon to answer the other substantial question of law.

10. Learned counsel for the Appellants submits that taking into account the rival case of the parties and the main relief as prayed for by the Plaintiffs, the Trial Court having analyzed the provision of statutory provision as contained in the OHRE Act, had rightly held that it lacks jurisdiction to adjudicate the main issue upon which the fate of the Suit depends. It is submitted that the First Appellate court has been confused in the matter and having arrived at two conclusions which are in conflict with one another, has ultimately committed the mistake in setting aside the said finding which according to him, is unsustainable. It is submitted that in view of the

provisions contained in section 41 of the OHRE Act, the Civil Court lacks the jurisdiction to decide as to whether the Deity private Deity or not. He further submits that said jurisdiction exclusively lies with the Authority created under that special statute, i.e, the OHRE Act and the jurisdiction of the Civil Court has been completely outstated thereby. In this connection, he has placed reliance upon the decisions in cases of reported in Bhramarbar Santra & Others –V- State of Orissa & Others; AIR 1970 Orissa 141 and Brundaban Samartha & Others –V┐ Shiba Samartha & Others AIR 1999 Orissa 185.

11. Miss. P.Naidu, learned counsel for the Commissioner of Endowments standing to support the finding recorded by the Trial Court, submits that the Trial court has rightly dismissed the Suit having arrived at the right conclusion that it had no jurisdiction to entertain the Suit for the reliefs claimed.

12. The Plaintiffs, by filing the Suit, have prayed for grant of a decree declaring that the plaintiff-Deity is and has been the owner-rayat of the suit lands, at all relevant times and now entitled to possession of the suit lands from the Court of Sub-Divisional Magistrate, Paralakhemundi attached and kept under Revenue Inspector's receivership in Misc. Case No.61 of 1978 in the proceeding under section 145 of the Code of Criminal Procedure being under attachment in exercise of power under section 146 of the Code of Criminal Procedure.

The above noted prayer if at all to be allowed has to be preceded by a conclusive finding that Deity in question is a private Deity and the Plaintiffs being the descendents of the founder ancestors are the hereditary trustees.

13. The Provision of Section 41 of the OHRE Act reads as under:-

> "41. **Assistant Commissioner to decide certain disputes and matters :–**
>
> (1) In case of a dispute the Assistant Commissioner shall have power to enquire into and decide the following disputes and matters:–
>
> (a) whether an Institution is a Public or Religious Institution;
>
> (b) whether an Institution is a Temple or a Math;
>
> (c) whether a Trustee holds or held Office as a hereditary Trustee;

(d) whether any property or money is of a Religious endowment or specific endowment;

(e) whether any person is entitled, by custom or otherwise, to any honour, emolument or perquisite in any Religious institution and what the established usage of a Religious Institution is in regard to any other matter;

(f) whether any institution or endowment is wholly or partly of areligious or secular character, and whether any property or money has been given wholly or partly for religious or secular uses; and

(g) where property or money has been given for the support of an institution or the performance of a charity, which is partly of Religious and partly of a secular Character or when any property or money given is appropriated partly to Religious and partly to secular uses, as to what portion thereof shall be allocated to Religious uses:

Provided that the burden of proof in all disputes or matters covered by Clauses (a) and (d) shall lie on the person claiming the institution to be private or the property or money to be other than that of a Religious endowment or specific endowment, as the case may be."

The case in hands concerns with the above provision contained in clauses (a), (c) and (d).

The next provision as to the bar of suits as provided in Section 73 of the OHRE Act reads as under:-

"73. Bar of suits in respect of administration of Religious Institutional:–

(1) No suit or other legal proceeding in respect of the administration of a Religious institution or in respect of any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any court of law, except under, and in conformity with, the provision of this Act.

(2) Nothing contained in this Section shall affect the right of the Trustee appointed under the Act of a Religious institution to institute a suit to enforce the pecuniary or property rights of the institution or the rights of such institution as a beneficiary."

The lower Appellate court at page-10 of its judgment has first of all said that the Plaintifff-Deity is a public one. Having said so, it has next said that the Plaintiffs are the hereditary trustees of the Deity and as such being in possession of the suit land are entitled to possess the same.

Placing the factual settings of the case as projected in the rival pleadings to test in the touchstone of the above provisions of law, this Court is of the considered view that the Suit as laid for the reliefs claimed had been rightly dismissed by the Trial Court by not entertaining the same on the ground of lack of jurisdiction and the lower Appellate Court has erred in law by annulling the said finding and further proceeding to decide the status of the Plaintiffs vis-à-vis the Deity as also their right of possession over the property in question.

14. The above discussion thus provides answer to the substantial question of law in favour of the Defendants in finally holding that the Suit is liable to be dismissed.

15. Having held as above, this court finds no further necessity to touch upon the other two substantial questions of law as those would merely be of academic interest. While parting, it is, however, made clear that whatever have been observed or stated in all the judgments concerning the rival claims as placed although in the present lis, would have no bearing in the proceeding before the Competent Authority under the OHRE Act, if it so arises in future.

16. Resultantly, the Second Appeal stands allowed. The judgment and decree passed by the First Appellate Court in Title Appeal No.01 of 1985 are hereby set aside and accordingly, those passed by the Trial Court in Title Suit No.15 of 1978 dismissing the Suit stands restored. In the peculiar facts and circumstances of the case, the parties are directed to bear their respective cost all throughout

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2021 (III) ILR - CUT- 548

BISWANATH RATH, J.

O.J.C. NO.10148 OF 2000

RABINDRANATH PATI ……..Petitioner

.V.

THE VICE-CHANCELLOR, UTKAL UNIVERSITY & ORS. ……Opp. Parties

(A) SERVICE LAW – Disciplinary Proceeding – Disciplinary authority acted as the enquiry as well as marshalling officer – Act of the Authority challenged – Held, the procedure which was followed is unknown to law and against the service jurisprudence, unless condemned would lead to a bad precedent.

(B) SERVICE LAW – Disciplinary Proceeding – Show cause notice – Form of such notice – In the said notice, disclosure of proposed punishment revealed – Impugned notice challenged – Held, such notice is bad in the eyes of law and accordingly quashed.

Case Laws Relied on and Referred to :-

1. AIR 1998 (S.C) 2713 : Punjab National Bank and Ors. Vrs. Kunj Behari Misra.
2. AIR 1999 (S.C.) 3734: Yoginath D. Bagde Vrs. State of Maharashtra and Anr.
3. 2020 (Supp.) OLR 561 : (Shri) Ashok Kumar Mishra V.Industrial Development Corporation of Orissa Ltd. & Ors.

For Petitioner : Ms. S.Mohapatra

For Opp. Parties : Mr. T.N. Pattanaik

JUDGMENT Date of Judgment: 17.09.2021

BISWANATH RATH, J.

1. This writ petition involves the following prayer:

> "In view of the submissions set forth above, your lordship may be graciously pleased to admit the writ petition, call for the records and issue "Rule NISI" in the nature of Certiorari or any other appropriate writ(s) or direction(s) calling upon the Opposite Parties to show cause as to why Annexure – 1 shall not be quashed and in the event, the opposite parties fail to show cause, the said Rule be made absolute and the impugned order notice vide Annexure-1 be quashed.
>
> AND
>
> Be further pleased to quash the entire enquiry due to manifest illegality and irregularity."

2. Short background involved in this case is that the Petitioner while working as an Assistant Director in the Population Research Centre attached to the Utkal University, Vanivihar, was proceeded against and consequently, a charge-sheet was drawn and forwarded vide Annexure-2 on the allegations mentioned therein. It appears, upon receipt of the charge-sheet the Petitioner submitted show cause denying all the allegations made therein. The Opposite Party No.1 being not satisfied vide Annexure-4 appointed the Joint Director

of Health, Family Welfare, Govt. of Orissa as the Enquiry Officer and the Opposite Party No.3 as the Marshaling Officer. Petitioner alleged that while he was expecting the Disciplinary Authority undertaking a regular inquiry process under the provisions of Rule 15(4) of OCS (CCA) Rules, 1962, but in a development through paper publication the Opposite Party Nos.1 & 2 asked the Petitioner to submit show cause within fifteen days as to why he shall not be dismissed / removed from service. It is claimed that the said publication came to the notice of the Petitioner on 18.05.2000. Being apprehensive of order of dismissal already indicated in the show cause notice itself, the Petitioner rushed to this Court in filing O.J.C. No.5138 of 2000 challenging the show cause notice. This writ petition was entertained, however, with an interim order for no coercive action against the Petitioner till disposal of the writ petition. During course of hearing of the O.J.C. No.5138 of 2000, considering the commitment by the University and recording the commitment of the Opposite Parties therein particularly of the University to undertake an exercise of inquiry involving the Petitioner, the writ petition appears to have been disposed of with vacation of the interim order vide Annexure-6. It appears, after disposal of the O.J.C. No.5138 of 2000 a proceeding was initiated and the Petitioner was asked therein to appear before the Opposite Party No.1 on the scheduled date to participate almost in an oral inquiry proceeding. Upon entering into the oral inquiry process the departmental inquiry was concluded even in absence of any consideration of the representation at the instance of the Petitioner submitted in the meantime. It is alleged that firstly; the University has adopted a procedure involving a disciplinary proceeding which is unknown to law. Secondly, the matter of show cause notice at Annexure-1 was issued with clear indication of the punishment to be imposed therein, such show cause notice is claimed to be not maintainable in the eye of law. A challenge is also made to the manner of conducting inquiry and submitting inquiry report on the premises that both the events have been done without even providing minimum natural justice of supply of documents relied on and also without providing opportunity of cross examination to the Petitioner to any such documents relied on and referred to therein. Petitioner also challenged the inquiry involving the disciplinary proceeding being undertaken and marshaled by the Disciplinary Authority i.e. the Vice Chancellor itself.

3. Drawing the attention of this Court to the development taken place through the previous round of litigation, Ms. Mohapatra, learned counsel for the Petitioner attempted to establish that while issuing show cause notice,

punishment was already inflicted therein. Further taking this Court to the report enclosed to the show cause notice, Ms. Mohapatra, learned counsel for the Petitioner submitted that not only the whole inquiry report is an outcome of the oral inquiry, but the Vice Chancellor being the disciplinary authority had assumed the role of Enquiry Officer as well as Marshaling Officer himself. It is, in the above background of the matter, taking support of the decisions vide AIR (1998) (SC) 2731, AIR 1999 (SC) 3734, 2020(Supl.) OLR 561 and an unreported decision in W.P.(C) No.10071 of 2021 decided on 9.04.2021 learned counsel for the Petitioner attempted to justify her submissions through the support of law. Learned counsel for the Petitioner also taking reliance of further decisions vide (2009) 2 SCC 570, 2001 SCC (Labour & Services) 189 and an unreported decision in Civil Appeal No.4531 of 2007, attempted to satisfy the case of the Petitioner. Finally Ms. Mohapatra, learned counsel submitted that even if the process is declared as bad, there is no purpose in reopening the inquiry as in the meantime the Petitioner has already superannuated and no punishment can be inflicted.

4. Mr. Pattanaik, learned counsel for the Opposite Party, while not disputing the serious allegation that the show cause is already a indicator of punishment aspect and that the Vice Chancellor being the Disciplinary Authority not only became the Enquiry Officer but also functioned as Marshaling Officer and that too there was no appointment of either Enquiring Officer or Marshaling Officer. Further Mr. Pattanaik, learned counsel did not dispute that the Petitioner has retired long since. But however, in an attempt to support the impugned action on the other hand, drawing the attention of this Court to the response of the Opposite Party in the counter affidavit Mr. Pattanaik, learned counsel contended that for entering into a disciplinary proceeding as per the commitment of the Opposite Parties in O.J.C No.5138 of 2000 at Annexure-1, there is establishment of the fact that there has been in fact a disciplinary proceeding; besides the Petitioner has also been provided with opportunity of response in the said process though orally. Answering to the allegation in the show cause already indicating the punishment finally to be inflicted, Mr. Pattanaik, learned counsel for the Opposite Party referring to the pleas of the University through counter affidavit contended that Annexure-1 remains only a show cause asking the Petitioner to have his response and in no circumstance, this can be construed to be a final outcome, further since the Petitioner was provided with opportunity, allegations of the Petitioner in this regard remains unfounded. Mr. Pattanaik, learned counsel, however, did not dispute that the disciplinary

proceeding was required to be conducted and for the document at Annexure-1, it appears, there has been a disciplinary proceeding conducted by the authority. Taking this Court to the questions and answers in the report involving the inquiry, Mr. Pattanaik, learned counsel for the Opposite Parties contended that there has been a great level of exercise in conducting a departmental inquiry and thus contended that since the Petitioner was given opportunity, there is no illegality in the manner of holding the inquiry. On the aspect that the Vice Chancellor should not have functioned as the Enquiry Officer, Mr. Pattanaik, learned counsel for the Opposite Party contended that for the Vice Chancellor being the Disciplinary Authority there may not be any grave error in conducting the departmental inquiry by himself. Taking this Court to the serious allegations made in the charge-sheet against the Petitioner, Mr. Pattanaik, learned counsel for the Opposite Party claimed that looking to the grave allegations involving the Petitioner, there should not be showing of any leniency to the Petitioner, as it may create a bad precedent, further not in the interest of an Educational Institution.

5. Mr. Pattanaik, learned counsel for the Opposite Parties, however, did not dispute to the legal position settled through the decisions relied on by the Petitioner, but however, looking to the level of exercise undertaken Mr. Pattanaik, learned counsel for the Opposite Parties claimed that the inquiry involved cannot be held to be totally vitiated. Mr. Pattanaik, learned counsel for the Opposite Parties accordingly claimed for dismissal of the writ petition.

6. Considering the rival contentions of the parties, this Court finds, in the first round of litigation agitated after issuance of show cause vide Annexure-1, the Petitioner moved O.J.C No.5138 of 2000, this writ petition was disposed of with the following order:

> "However, in view of the statement made by the learned counsel appearing for the Opposite Parties 1 & 2 that an enquiry will be conducted and concluded within a period of two months, nothing is required to be done in this writ application which is disposed of with an observation that as undertaken by the learned counsel for the Opposite Parties 1 & 2, the departmental inquiry shall be concluded expeditiously be giving the present petitioner due notice of the date and time of the proceeding. It goes without saying that with the disposal of the writ application, the interim orders passed by the Court stand vacated."

7. On reading of the aforesaid order it becomes clear that there was no decision on the allegation made therein, except the writ petition was disposed of recording the commitment of the University-the Opposite Parties therein to take the issue through a disciplinary proceeding. Undisputedly, at this stage there was also appointment of an Enquiry Officer. This Court, therefore, observes, the issue of illegality in issuing the show cause remained undecided. Further after the commitment of the Opposite parties before this Court to have a departmental inquiry involving the issue involved herein, this Court looking to the documents appended to Annexure-1 finds, undisputedly there is involvement of a disciplinary proceeding and for the clear material disclosures also undisputedly the inquiry was conducted by the Vice Chancellor being the Disciplinary Authority. This Court, therefore, observes, for the exercise of inquiry conducted by the Vice Chancellor therein, there is no doubt that the Disciplinary Authority not only became the Enquiring Officer but also became the Marshaling Officer, which is not permissible in the eye of law. This Court here observes, the University followed a procedure which is unknown to law and against the Service Jurisprudence, unless condemned would lead to a bad precedent.

8. Coming back to the issue raised herein on the maintainability of the show cause, this Court from the paragraph no.3 of the show cause finds as follows:

> "It is, therefore, decided that you are to be dismissed from service following provisions of Rule 72(2) of Orissa Service Code which is applicable to employees working in Population Research centre under the Utkal University, *mutadis mutandis* as per University statute and as per Govt. of India instructions."

On reading the aforesaid, there remains no doubt that there is already a decision to dismiss the Petitioner and this Court observes, for a decision already taken to dismiss the Petitioner from service that too by the Vice Chancellor being the appointing authority and Disciplinary Authority, there remains no doubt that in issuing show cause the Vice Chancellor being the appointing and the disciplinary authority has already indicated the punishment to be inflicted on the Petitioner and the inquiry in this situation will remain nothing, but is a formality and academic. It is, at this stage of the matter, considering the contentions of both the learned counsel involved herein, this Court finds, the position on disclosure of punishment likely to be inflicted on contemplation of a departmental proceeding have been settled through various decisions of the Hon'ble apex Court as well as also of this

Court. This Court here taking into account the decision in the case of ***Punjab National Bank and Others Vrs. Kunj Behari Misra*** : AIR 1998 (S.C) 2713 and through paragraph Nos.16, 17 & 18 finds, the Hon'ble Apex Court has observed as follows:

> 16. In *Karunakar case* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] the question arose whether after the 42nd Amendment of the Constitution, when the enquiry officer was other than a disciplinary authority, was the delinquent employee entitled to a copy of the enquiry report of the enquiry officer before the disciplinary authority takes decision on the question of guilt of the delinquent. It was sought to be contended in that case that as the right to show cause against the penalty proposed to be levied had been taken away by the 42nd Amendment, therefore, there was no necessity to give to the delinquent a copy of the enquiry report before the disciplinary authority took the final decision as to whether to impose a penalty or not. Explaining the effect of the 42nd Amendment the Constitution Bench at p. 755 observed that: (SCC para 28)
>
> "All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges."
>
> The Court explained that the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, the enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. It is the second right which was taken away by the 42nd Amendment but the right of the charged officer to receive the report of the enquiry officer was an essential part of the first stage itself. This was expressed by the Court in the following words: (SCC p. 754, para 26)
>
> "26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to

consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the enquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute an additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

17. These observations are clearly in tune with the observations in *Bimal Kumar Pandit case* [AIR 1963 SC 1612 : (1964) 2 SCR 1 : (1963) 1 LLJ 295] 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 enquiry officer had given an adverse finding, as per *Karunakar case* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] 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 enquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry 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 enquiring 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 enquiry 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.

> 18. Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar case [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] .

Similarly taking into account the decision in the case of ***Yoginath D. Bagde Vrs. State of Maharashtra and Another*** as reported in ***AIR 1999 (S.C.) 3734***, this Court finds, by way of this decision the Hon'ble Apex Court in paragraph nos.28, 29, 33 has also observed as follows:

> 28. In view of the provisions contained in the statutory rule extracted above, it is open to the disciplinary authority either to agree with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings. Where the enquiring authority has found the delinquent officer guilty of the charges framed against him and the disciplinary authority agrees with those findings, there would arise no difficulty. So also, if the enquiring authority has held the charges proved, but the disciplinary authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the disciplinary authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the disciplinary authority may, of its own, provide such an opportunity. Where the rules are in this regard silent and the disciplinary authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the enquiring authority that the charges were established, "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the enquiring authority's report is provided

principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the enquiring authority, is found "guilty" without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded.

29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the findings of the enquiring authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with.

33. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the latter, namely, the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded by the enquiry officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the enquiry officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event

> punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution.

This Court here finds, the case of the Petitioner also gets support of law through the decision of this Court in W.P.(C) No.10071 of 2021 decided on 9.04.2021 and a reported decision of this Court in the case of (Shri) ***Ashok Kumar Mishra*** Versus ***Industrial Development Corporation of Orissa Ltd. & Ors. As reported in 2020 (Supp.) OLR 561***.

9. It is, in this view of the matter, this Court finds, the show cause notice is even *per se* not maintainable. As a consequence, while declaring the show cause notice vide Annexure-1 remains bad in law, this Court observes, as per the view already taken on the manner the report is prepared, the report involved here is also not sustainable in the eye of law. This Court finds, while entertaining the writ petition by order dated 18.10.2000, this Court had already directed that the disciplinary proceeding initiated against the Petitioner may continue, but there shall be no final decision, which order is in operation as of now. In the circumstance, this Court while setting aside the show cause at Annexure-1 and the inquiry report enclosed, allows the writ petition. It is, at this stage, considering that the proceeding was initiated in the year 2000 and the Petitioner was aged at about 46 years old in the year 2000, having attained the age of superannuation long since and there is also no possibility in continuing with such inquiry. There is also no possibility of punishment considering that the Petitioner is already attained the age of superannuation. In the circumstance, while setting aside the show cause notice vide Annexure-1 and declaring the inquiry report as bad in the eye of law, this Court directs the Utkal University to consider the case of the Petitioner for retirement benefit. Benefit of the Petitioner on superannuation, if not cleared, be calculated and paid in favour of the Petitioner by undertaking the entire exercise within a period of one & half months from the date of communication of an authenticated copy of this order by the Petitioner. The Petitioner will also be entitled to interest at the rate 5% per annum all through.

10. With the aforesaid direction the writ petition succeeds. There shall, however, be no cost.

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2021 (III) ILR - CUT- 559

BISWANATH RATH, J.

W.P.(C) NO. 23128 OF 2021

UTKAL CHAMBER OF COMMERCE AND INDUSTRIES LTD. .....Petitioner

.V.

SANJEEV MAHAPATRA & ORS. .....Opp. Parties

WITH

W.P.(C) NO.12645 /2021

JYOTI PRAKASH DAS & ANR. .....Petitioners

.V.

SANJEEV MAHAPATRA & ORS. .....Opp. Parties

(A) COMPANIES ACT, 2013 – Sections 241, 242, and 430 – Jurisdiction of Civil Court vis-à-vis National Company Law Tribunal – Held, in view of the provision enumerated under section 430, the NCLT has been empowered to entertain any suit or proceedings in respect of any matter, the jurisdiction of the civil court is completely barred.

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of Certiorari – Writ petition instituted at the instance of the Utkal Chamber of Commerce And Industry Ltd. – The petitioner representing the company, has not been authorized or no document has been filed in support of any resolution of the board of the company to that effect – Effect of – Held, Writ petition stands dismissed as not maintainable.

Case Laws Relied on and Referred to :-

1. 2021 SCC Online SC 272:Tata Consultancy Services Ltd. Vs. Cyrus Investments Pvt. Ltd. & Ors.
2. (1971) 1SCC 486 : Union of India (UOI) Vs. Tarachand Gupta & Bros
3. (2019) 18 SCC 569 : Shashi Prakash Khemka (Dead) through legal representatives and Anr. Vs. NEPC MICON (Now NEPC India Limited) & Ors.
4. Ors 2019 (212) Comp. Cas.102 : SAS Hospitality Pvt. Ltd &Anr. Vs. Surya Constructions Pvt. Ltd.
5. .(2021) 225 Comp. Cas. 259 : Naresh Dayal and Ors. Vs. Delhi Gymkhana Club Ltd. and Ors.
6. 2017 SCC Online Del. 11436 : Jai Kumar Arya & Ors. Vs. Chhaya Devi and Anr.
7. AIR 1940 PC 105 : Secretary of State Vs. Mask & Co.
8. AIR (1969) SC 78 : Dhulabhai and Ors. Vs. The State of Madhya Pradesh & Ors.
9. AIR 1971 SC 1558 : Union of India (UOI) Vs. Tarachand Gupta & Bros.
10. (2011) 11 SCC 524 : State Bank of Travancore Vs. Kingston Computers India Pvt. Ltd.

11. 2010 SCC Online Ori. 415 : Eimco Elecon (India) Ltd. Vs. Mahanadi Coal Fields Ltd.
12. (2019) 18 SCC 569 : Shashi Prakash Khemka (dead) through Legal representatives and Anr. Vs. NEPC MICON (Now NEPC India Limited) & Ors.

W.P.(C) NO.23128 OF 2021

For Petitioner : M/s. A.Ch. Swain
For Opp. Party 1 & 2 : Mr. M.K. Mishra, Sr. Adv., Mr. L. Mishra, Mr. S. Acharya.

For Opp. Party 3 : Mr. P.K. Parhi, Asst. Solicitor General

W.P.(C) NO.12645 /2021

For Petitioners : M/s. L.N. Rayatsingh
For Opp. Party 1 & 2: Mr. M.K. Mishra, Sr. Adv.,
For Opp. Party 3 : Mr. P.K. Parhi, Asst. Solicitor General
For Opposite Party Nos.6, 7, 8, 10 & 11 : Mr. A.Ch. Swain

JUDGMENT Date of Hearing : 02.09.2021: Date of Judgment: 04.10.2021

BISWANATH RATH, J.

1. Writ petition bearing W.P.(C) No.12645 of 2021 is filed by the elected executive members of the Company, Utkal Chamber of Commerce & Industrial Limited, W.P.(C) No. 23128 of 2021 has been filed by Utkal Chamber of Commerce & Industrial Limited, as the company involved herein.

2. Bare perusal of the pleadings involving both the writ petitions, it appears, both writ petitions almost run parallel, except very minimal changes maintaining the same framework.

Prayer made in W.P.(C).No. 12645 of 2021 reads as follows:

> "It is, therefore, most humbly prayed that this Hon'ble Court may graciously be pleased to:
>
> (i) Issue a writ in the nature of "certiorari", mandamus" or any other writ(s), order(s)/ direction(s) quashing the proceeding in C.P.No.11/CB/2021 pending before the NCLT, Cuttack;
>
> (ii) Pass as such other or further order as this Hon'ble Court may deem fit and proper.

> And for such act of kindness, the petitioners as in duty bound shall ever pray."

3. Similarly, prayer made in W.P.(C).No.23128 of 2021 reads as follows:

> "It is, therefore, most humbly prayed that this Hon'ble Court may graciously be pleased to:
>
> i) Issue a writ in the nature of "certiorari", mandamus" or any other writ(s), order(s)/ direction(s) quashing the proceeding in C.P.No.11/CB/2021 pending before the NCLT, Cuttack;
>
> ii) pass as such other or further order as this Hon'ble Court may deem fit and proper.
>
> And for such act of kindness, the petitioners as in duty bound shall ever pray."

Through both the writ petitions it is again observed that there is almost a common relief sought for.

4. Common background involved in both the cases is that both the cases appear to be aiming with challenge to the initiation of the Company Proceeding No.11/CB/2021 pending before the National Company Law Tribunal (for short "NCLT"), Cuttack on the premises of issues raised in the Company Act proceeding is pending consideration of the suit bearing C.S.No.1182 of 2020, both sets of Petitioners claimed, the Company Proceeding in the circumstance is not maintainable. Looking to the nature of dispute and keeping in view a clear undertaking, this Court here also takes into account the prayer in C.S.No.1182 of 2020 as well as prayer in C.P.No.11/CTB/202 which runs as follows.

Prayer made in C.S.No.1182 of 2020 reads as follows:

> "Under the aforesaid facts and circumstances, this Hon'ble Court may be graciously pleased to award decree in favour of plaintiffs as follows:
>
> a) Let a decree be passed declaring the Executive Committee is the only and final authority to take decision on confirmation of Balance Sheets, Annual General Meeting and the Office Bearers / directors be part of Executive Committee not a separate body;
>
> b) Let a decree be passed directing defendants to perform duties in accordance with the Article of Association (AoA) of the Chamber,

c) Let a decree be passed in favour of the plaintiffs permanently restraining defendants taking decisions of Balance Sheets and AGM;

d) Any other further or other order(s)/direction(s) may be passed as this Hon'ble Court may deem fit and proper under the circumstance of the case.

Prayer made in in C.P.No.11/CTB/202:

"In the facts and circumstances, the Petitioners humbly pray for the following reliefs:

(a) A scheme be framed for management and administration of the Company.

(b) Declare the decision of the board of Directors vide resolution dated 12.1.2021 as absolute and binding;

(c) The purported cessation of the Petitioners as Director of the Company be adjudged null and void;

(d) The Petitioners and other ex-Directors be forthwith reinstated as Director of the Respondent No.1 Company;

(e) The Respondent Nos.3-7 be removed as Directors of the Respondent No.1 Company and be restrained from holding themselves out as Directors of the company;

(f) Mandatory Injunction restraining the Respondents from transferring and movable or immovable property of the company, conducting the affairs of the Company or intermeddling with the affairs of the Company or from operating the bank accounts of the Company in any form or manner whatsoever;

(g) The Petitioners be permitted to solely and exclusively operate the bank accounts of the company;

(h) Mandatory injunction upon the respondents to forthwith disclose upon oath books, records and accounts of the company;

(i) Quash the election process held in pursuance to the Executive Committee dated 14.01.2021 for holding the election on and from 20.01.2021 to 22.01.2021, as well as the subsequent resolution passed, in consequence to the same;

(j) Declare as illegal all such decisions taken by the Executive Committee against the interests of the Company;

(k) A Special Officer/Administrator be appointed to take charge and custody of any records or accounts of the Company that may presently be in the custody of the Respondents and to make over the same to the Petitioners and ex-Directors consisting the Board of Directors as on 12.01.2021;

(l) Direct an enquiry into the affairs of the Company as regarding the decisions taken by the Respondents for the acts of mismanagement and oppression;

(m) Appropriate reliefs be passed in accordance with Sections 241 and 242 of the Companies Act, 2013; (n) Costs of and incidental to this application be paid by the respondents;

(o) Such further orders be passed and/or directions be given as this Hon'ble Tribunal may deem fit and proper."

5. Advancing his submission, Mr. A.Ch. Swain, learned counsel along with Mr.L.N. Rayatsingh, learned counsel focused on the maintainability of the Company Proceeding thereby jurisdiction of Civil Court vis-à-vis NCLT. Mr. Swain, learned counsel appearing for the petitioner contended that on 11.12.2020 notice for adjourned was issued to be held on 20.12.2020 for declaration of the election to the post of Office Bearers involving vacancy occurred on expiry of tenure disclosed therein. On 16.12.2020 notice inviting nomination was published on the disclosure of details of vacancies due to expire of tenure. It is claimed that opposite party nos.1 and 2 in the writ petition were due to retire for expiry of their tenure and thus both of them filed nomination for the post of Vice President and Honorary Joint Treasurer respectively. It is, in the meanwhile, on 14.1.2021 when the Executive Committee passed a resolution suspending five members for their involvement in indiscipline work as per the provision of AoA and new Returning Officer was appointed to conduct the election of the Governing Body, keeping in view resignation of the previous Returning Officer. On 23.1.2021 the result of the election was published declaring the successful candidates, which discloses opposite party nos.1 and 2 failed to be elected to their contested post. On 15.2.2021, the opposite pastries filed C.P.No.11/CTB/2021 under Section 241 and 242 of the Companies Act, 2013 alleging oppression and mismanagement involving the Company.

6. In the above background, in their common challenge to the maintainability of the Company Proceeding in the pendency of the Civil Suit, Mr.Swain, raised the following grounds:

A) For that the O.P.Nos.1 & 2 suppressing the material facts are making an ill attempt to subterfuge the order of the Ld. Civil Judge in the I.A. and further, where no economical right of any member is violated;

B) For that there is no cause of action arose for filing a petition under section 241 & 242 of the Company's Act, 2013 in favour of the O.P.-1 & 2.

C) For that Section 241 and 242 only concern with the issue of Oppression of mismanagement by majority share holders against the minority share holders. Here is a company having no share holder and hence, the question of majority or minority do not arise. The facts. issue, as alleged in the Company Petition by the OP.-1 & 2 do not pertain to any oppression or mismanagement by the majority against any minority./ No financial irregularity was ever noticed or agitated upon in any forum speaks of smooth running of the organization.

D) For that entire allegations in the Company Petition pertain to the power/ jurisdiction/ authorities/ duties/ functions of directors, Executive Committee and office bearers, election, suspension of members, retirement of office bearers and directorial issues accordingly fall beyond the scope of Section 241 and 242 of the Company's Act, 203;

E) For that the AGM/adjourned AGM, EC, Meeting, Directors Meeting and election of the petitioner Company are direct out come of the order in I.A. No.1 of 2020 in C.S.No.1182 of 2020 and cannot be questioned before NCLT, Cuttack,. Except the statutory appeal;

F) For that the allegation in the Company Petition 11 of 2021, even if accepted for the sake of argument, it disclose a dispute, which is civil kin nature being election dispute and the Civil Court has only the jurisdiction to try the same and not the NCLT as no corporate right is violated;

G) For that the Company Petition is barred by acquiescence/ waver/ estoppels and at no point of time the O.P.-1 & @ have ever objected to the Article of Association of the petitioner Company;

H) For that the remedy sought in the Company Petition is worse than the disease- not just and equitable to wind up petitioner Company, which is primarily for non-profit making and none of the office bearers draws salary/remuneration towards their service, which is honorary;

I) For that no pecuniary/economic rights of any members involved in this case and there is no question of minority being oppressed by the majority as all member have only lone voting rights only;

J) For that the allegations in the Company Petition are all personal in nature and to feed fat to the grudge of the O.P.-1 & 2, particularly when they failed in the election process to be elected have filed the Company Petition under the guise of Section 241 and 242 of the Company's Act, 2013, which is not maintainable;

K) For that Hon'ble Supreme Court of India in catena of cases held that the issue pertaining to Directorial are outside the scope of the petition under Section 241 and 242 of the Company's Act, 2013;

L) For that it is only the civil court have the jurisdiction on the issue at hands and the O.P.-1 & 2 be directed to pursue in civil court in C.S.No.1182 of 2020 pending before Civil Judge, Sr.Div., Bhubaneswar and not in the NCLT.

7. It be stated here that both the writ petitions involve almost same ground except there is little bit of change here and there not making any effect ultimately. It is not a material. Mr.Swain, learned counsel submitted that the attempt of opposite party nos.1 and 2 in filing the Company Petition is not only in suppression of the material fact but is an ill attempt to softer fuse the order of the Civil Judge in the I.A. involving the suit and further without making these petitioners as party to the alleged proceeding in the NCLT. Mr.Swain, learned counsel also raised the question of Company Proceeding having no cause of action under the provisions of Section 241 and 242 of the Companies Act, 2013. It is further contended that for the clear provision in Sections 241 and 242 of the Companies Act, 2013 concerning with the issue of oppression and mismanagement by a majority share-holder against the minority shareholder, for the Company involved having no share-holder, it is claimed that there is no question of majority or minority. It is thus alleged that the Company Act Proceeding did not involve any oppression or mismanagement by the majority against any minority. Mr.Swain, learned counsel, therefore, contended that the entire allegation in the Company Petition is curtail to the power/ jurisdiction, authorities/ duties/ functioning of directors, Executive Committee and Office Bearers, election, suspension of members, retirement of Office Bearers and directorial issues, which undoubtedly fall beyond the scope of Section 241 and 241 of the Companies Act, 2013. Mr.Swain, learned counsel also pointed out that the AGM,/ adjourned AGM, E.C. Meeting, Directors Meeting and election of the petitioner Company are the direct outcome of the order in I.A.No.1 of 2020 arising out of Civil Suit No.1182 of 2020, which cannot be questioned before the NCLT, Cuttack as only requires to be questioned before the Appellate Authority having jurisdiction to sit over Civil Court order. Mr. Swain, learned counsel further contended that even assuming the allegation involving the Company Petition and accepting the same for the sake of argument since it discloses a dispute of civil nature, a Civil Court has only jurisdiction to try the same but not before the NCLT which has nothing to do involving such issues. Mr.Swain, learned counsel further also contended that

the Company Petition is barred by acquiescence/ waver/estoppels as at no point of time neither the opposite party no.1 nor opposite party no.2 nor through proxy litigants are ever objected to the article of Association. Mr.Swain also contended that for the allegation in the Company Petition are all personal in nature and to feed fat to the alleged grudge of the opposite party nos.1 and 2 after both of them remained unsuccessful in the election. Mr.Swain, learned counsel taking this Court to the catena of decisions contended that apart from factual background, the grounds narrated hereinabove, there is also support of law to the case at hand and Mr.Swain thus relied on the decisions in the cases of ***Tata Consultancy Services Ltd. Vs. Cyrus Investments Pvt. Ltd. & Ors*** : 2021 SCC Online SC 272, ***Union of India (UOI) Vs. Tarachand Gupta & Bros.*** : (1971) 1 SCC 486, ***Shashi Prakash Khemka (Dead) through legal representatives and Anr. Vs. NEPC MICON (Now NEPC India Limited) & Others*** : (2019) 18 SCC 569, ***SAS Hospitality Pvt. Ltd & Anr. Vs. Surya Constructions Pvt. Ltd. & Ors*** : 2019 (212) Comp. Cas. 102, ***Naresh Dayal and Ors. Vs. Delhi Gymkhana Club Ltd. and Ors.*** : (2021) 225 Comp. Cas. 259, ***Jai Kumar Arya & Ors. Vs. Chhaya Devi and Anr***. : 2017 SCC Online Del. 11436.

8. Similarly, in reference to the jurisdiction of the Civil Court vis-àvis provision under Section 9 of the C.P.C., limiting to Section 9 of the CPC vis-à-vis a restriction contained in Section 430 of the Companies Act, Mr.Swain, learned counsel taking this Court to both the provisions also attempted to rely on the decisions in the cases of ***Secretary of State Vs. Mask & Co***. : AIR 1940 PC 105, ***Dhulabhai and Ors. Vs. The State of Madhya Pradesh & Ors***. : AIR (1969) SC 78 and in the case of ***Union of India (UOI) Vs. Tarachand Gupta & Bros.*** : AIR 1971 SC 1558.

9. Mr. M.K. Mishra, learned Senior Advocate being assisted by Mr. L. Mishra, learned counsel and Mr. S. Acharya, learned counsel for the contesting Opposite Party Nos.1 & 2 in both the writ petitions giving a common response involving both the writ petitions contended that the two Petitioners in the writ petition bearing W.P.(C) No.12645 of 2021 being elected as the Executive Members of the Company i.e. M/s. Utkal Chamber of Commerce and Industries Ltd. having no authorization on behalf of the Company to pursue such remedy, are not competent to pursue such litigation. Further, so far as the other writ petition bearing No.23128 of 2021 is concerned, Mr. Mishra, learned Senior Advocate contended that the person filing the writ petition one Brahmananda Mishra claiming to be the President

of the Company has also no authorization of the Board of Directors of the Company to undertake such exercise. It is, in the premises, Mr. Mishra, learned Senior Advocate submitted that the authorization to pursue such litigation on behalf of the Company since is a mandatory requirement and in absence of such authorization as well as also required resolution of the Company, the W.P.(C) No.23128 of 2021 itself is also not maintainable in the eye of law. It is, on the ground of maintainability of the writ petition bearing W.P.(C) No.23128 of 2021, Mr. Mishra, learned Senior Advocate drawing the attention of this Court to a judgment of the Hon'ble Apex Court in the case of ***State Bank of Travancore Vrs. Kingston Computers India Pvt. Ltd.*** : ***(2011) 11 SCC 524*** and in same analogy another judgment of this Court in the case of ***Eimco Elecon (India) Ltd***. Vrs. ***Mahanadi Coal Fields Ltd. : 2010 SCC Online Ori. 415*** submitted that for the decision of the Hon'ble Apex Court as well as of this Court through the above judgments contended that the question of maintainability of the subsequent writ petition bearing W.P.(C) No.23128 of 2021 on the grounds stated hereinabove, has also support of law through the above judgments. Mr. Mishra, learned Senior Advocate raising a question on the maintainability of the proceeding before the National Company Law Tribunal hereinafter in short be referred to as "NCLT" vide C.P.11/C.B/2021, contended that there has been deliberate concealment of material facts in approaching through the writ petitions indicated hereinabove and both the writ petitions appear to have been filed with unclean hands. In elaborating his such grounds Mr. Mishra, learned Senior Advocate taking this Court to different paragraphs involving the C.P. proceeding and on reading through the same, attempted to justify that the Petitioner herein has not only twisted the fact, but the grounds involved herein are also contrary to the material facts available on record and further also in clear suppression of the factual aspect involved in the Company Petition. Referring to the provision at Section 241 and 242 of the Companies Act, 2013 hereinafter in short be reflected as "the Act, 2013", Mr. Mishra, learned Senior Advocate made an attempt to justify his above submission and contended that for the clear disclosures in the C.P. proceeding involved herein the proceeding U/s. 241 & 242 of the Act, 2013 is very much maintainable and further the issue raised therein are within the competency of the "NCLT". It is next, taking this Court to the dispute involved in the suit and the dispute involving the Company Act proceeding and resisting the claim of Mr. Swain, learned Counsel that for the pendency of Civil Suit the Company Act proceeding remains not maintainable, Mr. Mishra, learned Senior Advocate contended that there is complete distinction between both

the disputes aiming for completely different outcome. On reading both the plaints involving the civil suit and the Company Petition under the Act, 2013, Mr. Mishra, learned Senior Advocate attempted to demonstrate his contention through the same that there is clear distinction between both the proceedings and submitted that there is no overlapping and/or overstepping of one proceeding over the other. Further, on the submission of Mr. Swain, learned counsel that for the dispute already involved in the civil suit and the issue raised in the Company proceeding since are available to be considered in the Company Petition by the "NCLT", Mr. Mishra, learned Senior Advocate here in clear objection to the submission of Mr. Swain, learned counsel, contended that not only there is factual difference, but for the difference in the claim in both the proceedings, it is wrong to claim that for pendency of the civil suit, the proceeding under the Act, 2013 is not maintainable. Mr. Mishra, learned Senior Advocate further taking this Court to the plea and the relief sought, argued that for the dispute involving the Company proceeding and the prayer requiring to be adjudicated in the suit involving such issue, the civil proceeding is prohibited through Section 430 of the Act, 2013. Mr. Mishra, learned Senior Advocate in reference to a decision in the case of ***Shashi Prakash Khemka (dead) through Legal representatives and Another Vrs. NEPC MICON (Now NEPC India Limited) and Others*** as reported in (2019) 18 SCC 569 contended that the claim of the Opposite Party Nos.1 & 2 also gets support of law through the above judgment. In the above background of the case Mr. Mishra, learned Senior Advocate contended that since a serious matter involving the issue involved is pending for consideration of the "NCLT", interference in such proceeding at this stage in any manner will affect the Petitioner therein seriously and thus accordingly, prayed for dismissal of both the writ petitions also on the above ground.

10. Considering the submissions of both the parties, this Court first takes up the preliminary objection of the Opposite Party Nos.1 & 2 that the writ petition bearing W.P.(C) No.23128 of 2021 being filed by one Sri Brahmananda Mishra claiming to be the president of the Utkal Chamber of Commerce & Industries Ltd., is not maintainable. This Court here finds, there is no doubt that if the writ petition at the instance of the Institution is initiated, there must be a resolution or an authorization in favour of the person undertaking such litigation. On entire reading of the pleadings involving the said writ petition, this Court nowhere finds, Brahmananda Mishra the Petitioner representing the Company has any authorization or support of any resolution of the Board of the Company at least authorizing

him to initiate such litigation. Furthermore, looking to the law of the land on this aspect, this Court here taking into account the case of State Bank of Travancore (supra) finds, the Hon'ble apex Court in similar situation in paragraph nos.14 & 15 therein has come to observe as follows:

> "14. In our view, the judgment under challenge is liable to be set aside because the respondent had not produced any evidence to prove that Shri Ashok K. Shukla was appointed as a Director of the Company and a resolution was passed by the Board of Directors of the Company to file a suit against the appellant and authorized Shri Ashok K. Shukla to do so. The letter of authority issued by Shri Raj K. Shukla, who described himself as the Chief Executive Officer of the company, was nothing but a scrap of paper because no resolution was passed by the Board of Directors delegating its powers to Shri Raj K. Shukla to authorize another person to file a suit on behalf of the Company.
>
> 15. In the result, the appeal is allowed, the impugned judgment is set aside and the one passed by the trial court dismissing the suit of the respondent is restored. The appellant shall be free to withdraw the amount deposited by it in the trial court in terms of this Court's order dated 24.07.2009. Since the respondent has not appeared to contest the appeal, the costs are made easy."

11. In another case decided by a Division Bench of this Court, in the case of ***Eimco Elecon (India) Ltd***. (supra), this Court finds, in deciding similar issue the Division Bench of this Court in paragraph nos.6 & 7 has come to hold as follows:

> "6. This writ petition has been filed by a company being represented by its sales manager on the basis of a power of attorney given by the director. The board of directors of the petitioner-company passed a resolution authorizing the director to represent the company to institute the proceedings on behalf of the company. Therefore, the director has no further authority to execute the power of attorney in favour of the sales manager to act on his behalf in the court proceedings. The power can only be given by the board of directors of the company in exercise of its statutory power by passing the resolution under the provisions of Section 291 of the Companies Act in favour of a director or principal officer of a company who is well versed with facts to speak, sign and verify the same in the pleadings.
>
> 7. Therefore, the documents, namely, power of attorney and the resolution passed by the board of directors of the company giving authority to its director to sue in the court of law on its behalf, produced by Mr. Das, learned senior counsel will not support the case of the petitioner. Hence, the contention urged in this regard by learned counsel for the petitioner is wholly untenable in law. Further, the Constitution Bench decisions of the Supreme Court cited by learned counsel for opposite party No.4 in the case of ***Charanjit Lal Chowdhury Vrs. Union of India***,

AIR 1951 SC 41; ***State of Orissa Vrs. Madan Gopal Rungta***, AIR 1952 SC 12 and ***Calcutta Gas Co. (Proprietary) Ltd. Vrs. State of West Bengal***, AIR 1962 SC 1044, are aptly applicable to the fact situation of the case.

12. Looking to the above decisions and further for the support of both the decisions hereinabove to the case of the Opposite Party Nos.1 & 2, this Court finds, Sri Brahmananda Mishra is not duly authorized to institute such litigation and as such the writ petition bearing W.P.(C) No.23128 of 2021 is not maintainable. The writ petition bearing W.P.(C) No.23128 of 2021 stands dismissed as not maintainable. This Court since finds, the other writ petition bearing W.P.(C) No.12645 of 2021 is filed at the instance of the elected Executive Members in their personal capacity being elected as the Executive Members of the Company i.e M/s. Utkal Chamber of Commerce and Industries Ltd. in the meantime and the same is maintainable. This Court proceeds to consider the merit involving such writ petition as hereunder.

13. For a question being raised on the entertainability of the proceeding before the "NCLT" in absence of satisfying that the case falls for consideration under the provisions of Section 241 & the relevant provisions at Section 242 of the Act, 2013, this Court here takes note of both the above provisions, which read as follows:

> **Section 241. Application to Tribunal for relief in cases of oppression, etc.** – (1) Any member of a company who complains that –
>
> (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or
>
> (b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the Company's share, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interest or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under thisChapter. (2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

Section 242. Powers of Tribunal – (1) If, on any application made under section 241, the Tribunal is of the opinion-

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

xx xx xx

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for-

(a) the regulation of conduct of affairs of the company in future;

xx xx xx

(e) the termination, setting aside or modification, of any agreement, however, arrived at, between the company and the managing direction, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreements between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

xx xx xx

(h) removal of the managing director, manager or any of the directors of the company;

xx xx xx

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

xx xx xx"

14. From the provision at Section 241 of the Act, 2013, this Court finds, this provision of the Act, 2013 authorizes any member of the company to complain under the provision of oppression & mismanagement. Similarly section 242 of the Act, 2013 gives power to the "NCLT" to opine that the company affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members and also on other aspect, which are of course not relevant here. Section 242(2) particularly deals with the matter involving regulation of conduct of affairs of the Company in future apart from also several other aspects included therein. It is, at this stage of the matter, this Court going through the provision at the Companies Act, 2013 and on reading through the company petition appended to W.P.(C) No. 12645 of 2021 at Annexure-8 and on reading through the document at page 146 therein finds, the Petitioner has the following :

> "The concerned members of the Executive Committee in connivance with the respondent No.2 (Ex-President) deliberately did not amend the Articles of Association to bring it in compliance with the Companies Act, even though the Executive Committee has the power to amend the same."

Similarly on reading of the document at page 148 internal page 27 this Court finds as follows

> "Election held during 20.01.2021 to 22.01.2021 is not as per the Articles of Association nor as per the Companies Act, 2013 and thus the result of the said Election is voidab-Initio."

Further in paragraph Nos.64, 66 & 69 of the C.P. proceeding, this Court finds as follows:

> "64. That without prejudice to the aforesaid, it is pertinent to mention herein that as per the Section 179 (4) r/w Section 180 of the Companies Act, 2013 even the Board of Directors of a Company have restrictions on its power and the concerned Company can control the power of the Boards, but in the present case the Executive Committee have no restrictions on its power, which is evident from the following clause of the Article of Association, and thus the said Article of Association can in no point be said to be in compliance of the Companies Act, 2013."
>
> 66. That further as per Section 169(3) on receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting. But in the present case no resolution at the first place was ever received to remove the Petitioners and other Ex-Directors, and the said action was taken by the EC with mala fide intention and without giving any chance for opportunity of being heard.
>
> **ILLEGAL AND MALA FIDE ACTIONS UNDER TAKEN BY THE RESPONDENT NO.2 WITH THE CONNIVANCE OF OTHER RESPONDENTS**.
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> 69. That in furtherance of the aforesaid it is also mentioned herein that the Respondent No.2 with connivance of other Respondents has also issued orders barring entry of the Petitioners to office premises of Respondent No.1 Company. Prior to the said direction also the Respondent No.2 had issued a written direction to Respondent No.1 office staff barring access of any office papers and documents to all members including office bearers without his permission.

RESPONDENTS CAN BE TERMED TO BE OFFICERS IN DEFAULT UNDER SECTION 2 (60) OF THE COMPANIES ACT, 2013."

15. It is, at this stage of the matter, on reading of the factual background of the case involving the suit referred to hereinabove and the prayer made therein alongwith the factual aspect involving the company petition and the prayer made therein, this Court not only finds, both the proceedings are aimed with different directions, but keeping here in view the prohibition U/s.430 of the Act, 2013, this Court finds, subject involving the proceeding vide C.P.11/CTB/2021 cannot be undertaken by a Civil Court as the NCLT has the authority and competency to decide such aspect. The issues involving the C.P. proceeding are clearly barred for being undertaken in exercise of a suit before the Civil Court. This Court here takes into consideration a decision of the Hon'ble apex Court in the case of ***Shashi Prakash Khemka (Dead) through Legal representatives and another Vrs. NEPC MICON (Now NEPC India Limited) and others reported in (2019) 18 SCC 569***, in which case the Hon'ble Apex Court in paragraph nos.4, 5, 6 & 7 has observed and held as follows:

> "4. The learned counsel for the appellants has drawn our attention to the view expressed in Ammonia Supplies Corpn. (P) Ltd. V. Modern Plastic Containers (P) Ltd., to canvass the proposition that while examining the scope of Section 155 (the predecessor to Section 111), a view was taken that the power was fairly wide, but in case of a serious dispute as to title, the matter could be relegated to a civil suit. The submission of the learned counsel is that the subsequent legal developments to the impugned order have a direct effect on the present case as the Companies Act, 2013 has been amended which provides for the power of rectification of the Register under Section 59 of the said Act.
>
> 5. The learned counsel has also drawn our attention to Section 430 of the Act, which reads as under:
>
> "***430. Civil court not to have jurisdiction***. – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate tribunal."
>
> The effect of the aforesaid provision is that in matters in respect of which power has been conferred on NCLT, the jurisdiction of the civil court is completely barred.

> 6. It is not in dispute that were a dispute to arise today, the civil suit remedy would be completely barred and the power would be vested with the National Company Law Tribunal (NCLT) under Section 59 of the said Act. We are conscious of the fact that in the present case, the cause of action has arisen at a stage prior to this enactment. However, we are of the view that relegating the parties to civil suit now would not be the appropriate remedy, especially considering the manner in which Section 430 of the Act is widely worded.
>
> 7. We are thus of the opinion that in view of the subsequent developments, the appropriate course of action would be to relegate the appellants to remedy before NCLT under the Companies Act, 2013. In view of the lapse of time, we permit the appellants to file a fresh petition within a maximum period of two months from today."

Looking to the contest in the above case and involved herein, this Court finds, above decision has direct application to the case at hand.This Court at this stage taking into account the citations shown by Mr. Swain, learned counsel, finds, none of the decisions are applicable to the case at hand at this stage of the matter.

Even though the writ petition involves some other aspect, this Court since finds, same are to be left for consideration of the NCLT dependent on the claim and counter of both the parties involved, touching these aspects at this stage of the matter will be amounting to encroaching upon the jurisdiction of the NCLT. In the circumstance, this Court is not inclined to enter into any other area and leaves all these open to the parties to agitate and get adjudicated by the NCLT concerned.

16. In the circumstance, since both the writ petitions involved herein don't have any merit, are thus dismissed. No cost.

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2021 (III) ILR - CUT- 574

S.K. SAHOO, J.

BLAPL NO. 1886 OF 2021

PITAMBAR SAHOO .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDUER, 1973 – Section 439 – Grant of bail – Offences under sections 409, 419, 420, 467,468,471,120-B/34 of Indian Penal Code – Chance of tempering with the evidence – Whether the accused should be granted bail – Held, No – When investigation is still continuing and there is reasonable apprehension of tampering with the evidence, in the larger interest of public and State, release of the petitioner on bail should not be allowed.

Case Laws Relied on and Referred to :-

1. (1987) 2 SCC 364 : State of Gujarat Vs. Mohanlal Jitamalji Porwal & Ors.
2. (2013) 7 SCC 439 : Y.S. Jagan Mohan Reddy Vs.CBI.
3. (2021) 84 OCR 1 : Aswini Kumar Patra Vs.Republic of India.

For Petitioner : Mr. Dharanidhar Nayak (Sr. Adv.)

For Opp. Party : Mr. Soubhagya Ketan Nayak, Addl. Govt. Adv.
Mr. Tapas Kumar Praharaj, Standing Counsel

For informant : Mr. Asit Kumar Choudhury

ORDER Date of Order: 29.10.2021

S.K. SAHOO, J.

The petitioner Pitambar Sahoo has filed this application under section 439 of Cr.P.C. for grant of bail in connection Lalbag P.S. Case No. 308 of 2020 corresponding to G.R. Case No. 1513 of 2020 pending in the Court of S.D.J.M. (Sadar), Cuttack in which charge sheet has been submitted against the petitioner under sections 409, 419, 420, 467, 468, 471, 120-B/34 of the Indian Penal Code.

The petitioner moved an application for bail in the Court of learned Sessions Judge, Cuttack, which was rejected vide order dated 01.03.2021.

2. The factual matrix of the case, in hand, is that one Lipun Behera lodged a written report before the Lalbag Police Station on 11.12.2020 stating therein that he was working as a security guard in L.I.C. Office, Nuapatana Branch and he had got acquaintance with one Harmohan Dash, who was working in S.S.I.B. security organization as the latter used to visit the L.I.C. office. It is further stated that he requested Harmohan Dash to arrange a job for one Suman Mandal, who belonged to his sahi, as a security guard. On such request being made by the informant, the said Harmohan Dash told him to act as the guarantor for Suman Mandal and also to bring documents like

his own Aadhar card, photo, ID proof along with that of Suman Mandal. Sometimes in December 2018, he along with Suman Mandal came to IIFL office, Nayasarak Branch (hereafter in short, 'Company') and handed over all the required documents to Harmohan Das, who took some of his signatures and also that of Suman Mandal for the purpose of getting a job for Suman Mandal. Suman Mandal got a job at some other place. After the dacoity took place in the Company, he came to know that by utilizing the documents, which he and Suman Mandal had submitted along with plain paper signatures, fraudulently the said Harmohan Dash, accused Lala Amrut Sagar Ray and accused Nilima Lenka conjointly pledged gold ornaments of the Company in Manappuram Finance Ltd., Bajrakabati Road, Cuttack (hereafter 'Manappuram') with the help of the then Manager and the present petitioner.

On the basis of such first information report, Lalbag P.S. Case No. 308 of 2020 was registered under sections 409, 419, 420, 467, 468, 471, 120-B/34 of the Indian Penal Code.

During course of investigation, it transpired that the accused Harmohan Dash introduced Suman Mandal with accused Lala Amrut Sagar Ray, Nilima Lenka and other staff of the Company in the pretext of giving him a job as a security guard and the accused Harmohan Dash also convinced the informant to give the documents to act as a guarantor. Instead of giving any employment, accused Harmohan Dash in connivance with accused Lala Amrut Sagar Ray and Nilima Lenka, the employees of the Company obtained their personal documents like Aadhar Card, PAN Card etc. and created fake gold loan accounts in their favour at Manappuram with the help of the present petitioner, who was working as Branch Manager in Manappuram. In the customer history and account details in respect of the informant Lipun Behera and witness Suman Mandal, it revealed that a series of accounts were created in their names at Manappuram and huge quantity of gold was pledged in their names without their knowledge and consent, i.e. 25 accounts of gold loan in the name of Suman Mandal and 223 accounts of gold loan in the name of informant Lipun Behera. The investigation further revealed that fake photographs and mobile numbers which were clearly visible in the KYC document were provided in the branch in respect of fake accounts in the name of Lipun Behera and Suman Mandal. During opening of fake loan accounts, the petitioner used the documents of Suman Mandal, but changed the name of his father, which is clearly visible in the loan accounts. It is also revealed that the petitioner being the Branch Manager had accepted pledging

of gold provided by the employees of the Company in the name of Lipun Behera and Suman Mandal and made multiple loan accounts with the KYC and later on, they pledged more gold and created new accounts with the same gold loan account by misusing the KYC of those witnesses and their official status. On completion of investigation, the Investigating Officer submitted charge sheet against the petitioner and others under sections 409, 419, 420, 467, 468, 471, 120-B/34 of the Indian Penal Code keeping the investigation open under section 173(8) of Cr.P.C.

3. Mr. Dharanidhar Nayak, learned Senior Advocate appearing for the petitioner submitted that the petitioner was the Branch Manager of Manappuram and he is in judicial custody since 16.12.2020 and the offences under which charge sheet has been submitted are all triable by Magistrate. The main allegations are against co-accused Harmohan Dash, Lala Amrut Sagar Ray and Nilima Lenka, who were processing all the documentation work relating to grant of gold loan of the customers in IIFL and the petitioner has an excellent service career and he was performing his duties perfectly and he has neither created any fake accounts of the informant Lipun Behera or Suman Mandal of Pareswar Sahi and in his official capacity, he provided loans to the customers against the pledged gold at Manappuram after due verification. There was neither any malafide intention on the part of the petitioner while sanctioning loans nor he had committed any misappropriation. The petitioner was not aware that the gold pledged at Manappuram were also utilized for availing gold loan in IIFL in the running account. The gold items pledged were also seized from Manappuram branch. There are no clinching materials on record to show that the petitioner had connived with the co-accused persons in the misappropriation of ornaments of the customers pledged in the Company to avail gold loan. It is argued that there is no chance of absconding of the petitioner or tampering with the evidence and therefore, the bail application may be favourably considered.

4. Mr. Soubhagya Ketan Nayak, learned Additional Government Advocate for the State being ably assisted by Mr. Tapas Kumar Praharaj, learned Standing Counsel submitted that from the statements of the witnesses and the materials available on record, it appears that number of illegalities committed by the co-accused persons Lala Amrut Sagar Ray and Nilima Lenka in connivance with the petitioner came to the fore during course of investigation. It is further contended that the petitioner being the Branch Manager of Manappuram with the assistance of the aforesaid two accused

persons along with others have created number of fake gold loan accounts in the names of the informant and Suman Mandal and siphoned off the money received in respect of the said gold loan. It is also contended that without the connivance and active participation of the petitioner, the misappropriation would not have been possible and when the investigation is still under progress and final charge sheet is yet to be submitted and huge gold ornaments and cash have been siphoned, the petitioner should not be released on bail.

5. Mr. Asit Kumar Choudhury, learned counsel appearing for the IIFL submitted that the petitioner was appointed as Branch Manager of Manappuram and he in connivance with other accused persons committed serious economic fraud, which is having a wider ramification not only to the Company but also to the society. It is further contended that the petitioner has illegally facilitated transfer of money into various fictitious loan accounts in Manappuram in connivance with accused Lala from the Company. It is argued that the petitioner being an economic offender, committed the offences keeping an eye on personal profit regardless to the consequence to the society and therefore, he should not be released on bail particularly when there is chance of tampering with the evidence. Reliance was placed on the decisions of the Hon'ble Supreme Court in the cases of ***State of Gujarat -Vrs.- Mohanlal Jitamalji Porwal and others reported in (1987) 2 Supreme Court Cases 364, Y.S. Jagan Mohan Reddy -Vrs.- CBI reported in (2013) 7 Supreme Court Cases 439 and Aswini Kumar Patra -Vrs.- Republic of India reported in (2021) 84 Orissa Criminal Reports 1***.

6. Adverting to the contentions raised by the learned counsel for the respective parties and on perusal of the case records, it appears that fake gold loan accounts were created by the petitioner at Manappuram in connivance with accused Lala, Nilima, Harmohan Dash etc. by using the fake KYC documents of the informant and another. The investigation further revealed that 72.1 grams of gold was seized from Manappuram pledged in the name of Lipun Behera and 76.017 grams of gold was seized, which was pledged in the name of Suman Mandal. It is further revealed during investigation that the seized gold items from the accounts of Lipun Behera and Suman Mandal at Manappuram correspond to the original accounts of Geeta Mohanty, Nasim Khan, Smt. Banalata Barick, which were pledged by them in the Company. It is also revealed that an amount of Rs.13,54,191/- has been credited in Manappuram by accused Lala, which was in the knowledge of the petitioner

for repayment of the premium against fake loan accounts in order to show the accounts alive and other payments. It is also revealed during investigation that in the customer history details of the loan applications of Lipun Behera and Suman Mandal at Manappuram, the photographs of other persons have been attached.

Apart from the informant Lipun Behera and Suman Mandal, the witnesses like Basanta Kumar Behera and Meena Behera have also stated regarding the involvement of the petitioner in the crime in connivance with Lala Amruta Sagar Ray, Nilima Lenka and Harmohan Das and they were instrumental in opening the gold loan accounts in the names of the witnesses without their knowledge in Manappuram and availed huge loan illegally by taking out pledged gold from the vault of the Company. The materials on record further indicate as to how the petitioner played a pivotal role in the sanctioning of gold loans illegally from Manappuram with the active connivance of the co-accused persons.

7. Economic offences are always considered as grave offences as it involves deep rooted conspiracy and huge loss of public fund. Such offences are committed with cool calculation and deliberate design solely with an eye on personal profit regardless of the consequence to the community. In such type of offences, while granting bail, the Court has to keep in mind, inter alia, the larger interest of public and State. The nature and seriousness of an economic offence and its impact on the society are always important considerations in such a case and those aspects must squarely be dealt with by the Court while passing an order on bail applications. (Ref: ***Mohanlal Jitamalji Porwal (supra), Y.S.Jagan Mohan Reddy (supra) and Aswini Kumar Patra (supra)).***

It is the settled law that detailed examination of evidence and elaborate discussion on merits of the case should not be undertaken while adjudicating a bail application. The nature of accusation, the severity of punishment in case of conviction, the nature of supporting evidence, the criminal antecedents of the accused, if any, reasonable apprehension of tampering with the witnesses, apprehension of threat to the witnesses, reasonable possibility of securing the presence of the accused at the time of trial and above all the larger interests of the public and State are required to be taken note of by the Court while granting bail.

The materials on record indicate that the petitioner while working as Branch Manager of Manappuram has failed to discharge his official duties properly being gained over by the co-accused Lala Amrut Sagar Ray. The statements of the witnesses and documents seized during the course of investigation prima facie make out the offences alleged against the petitioner and the entire activities have been carried out in a very calculated and organized manner for which Manappuram has suffered huge loss and the reputation of Manappuram was also affected. In view of the post which the petitioner was holding at the relevant point of time in Manappuram and the duties assigned to him as a Branch Manager, I am of the prima facie view that the entire illegal activities committed by the co-accused persons were with the active connivance with the petitioner in a pre-planned and organized manner. The petitioner as a Branch Manager was supposed to act with honesty and integrity and show leadership qualities but the protector has turned to a predator.

In view of the foregoing discussions, the oral and documentary evidence available on record, the nature and gravity of accusation, the manner in which the crime has been committed, the punishment prescribed for the offences and since the petitioner seems to have played a very pivotal role in the commission of offences in a pre-planned and organized manner with active participation of the other co-accused persons as per charge sheet and thereby Manappuram has suffered huge financial loss on account of illegal sanction of gold loan, at this stage when investigation is still continuing and there is reasonable apprehension of tampering with the evidence, in the larger interest of public and State, I am not inclined to release the petitioner on bail.

8. Accordingly, the bail application sans merit and hence, stands rejected.

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2021 (III) ILR - CUT- 581

S.K. SAHOO, J.

JCRLA NO. 65 OF 2008

BIJAYA BHOI ……..Appellant

.V.

STATE OF ODISHA ……..Respondent

INDIAN PENAL CODE, 1860 – Section 304-B – Dowry Death – Proof – Essential Conditions – Death of deceased within seven years of marriage – Death was homicidal in nature – Demand of dowry also proved – However there is no material on record that soon before the death of the deceased, she was subject to cruelty in connection with demand of dowry – Whether conviction under the section is attracted? – Held, No.

Case Laws Relied on and Referred to :-

1. 16 Supreme Court Cases 35 : Raman Kumar Vs. State of Punjab (2009).
2. (2010) 12 Supreme Court Cases 350 : Ashok Kumar Vs. State of Haryana.

For Appellant : Mr. Asutosh Tripathy
For Respondent : Mr. A.K. Beura, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 02.11.2021

S.K. SAHOO, J.

1. The appellant Bijaya Bhoi faced trial in the Court of learned Additional Sessions Judge, Angul in Criminal Trial (Sessions) No.149 of 2004/36 of 2004 for offences punishable under sections 498-A/302/304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act.

The learned trial Court vide impugned judgment and order dated 28.03.2006 has been pleased to hold that the prosecution has not proved the charge under section 302 of the Indian Penal Code against the appellant and accordingly, acquitted him of such charge. However, learned trial Court found the appellant guilty under sections 498-A/304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act and sentenced him to undergo rigorous imprisonment for eight years under section 304-B of the Indian Penal Code, rigorous imprisonment for one year and to pay a fine of Rs.100/- (rupees one hundred), in default, to undergo rigorous imprisonment for one month more under section 498-A of the Indian Penal Code and

rigorous imprisonment for six months and to pay a fine of Rs.100/-(rupees one hundred), in default, to undergo rigorous imprisonment for one month more under section 4 of the Dowry Prohibition Act and the substantive sentences were directed to run concurrently.

2. The prosecution case, in short, is that as per the first information report (Ext.1) lodged by Krushna Nahak (P.W.1) before the Officer in-charge, Handapa police station, Angul on 09.01.2004 is that his sister Bimala Nahak (hereinafter 'the deceased') had married to the appellant out of her love affair with him a year prior to the date of lodging of the first information report. Few days after their marriage, the deceased was subjected to physical and mental cruelty by the appellant in connection with demand of dowry and the appellant was also making aspersion against the deceased that she was having illicit relationship with others. It is stated that in connection with demand of one cycle and cash, the deceased was subjected to torture by the appellant. On 09.01.2004 at about 7.00 a.m., the informant received a message from one Sita Bhoi of his sahi that the deceased was lying in an unconscious state. Hearing such news, the informant and others rushed to the house of the appellant, where they found that the deceased was lying dead on the floor of the bed room. The appellant was present and he stated about commission of suicide of the deceased. The informant suspected that as the deceased was subjected to torture, the appellant had killed the deceased.

On the basis of the first information report, officer in-charge of Handapa Police Station registered Handapa P.S. Case No.5 dated 09.01.2004 for offences punishable under sections 498-A/304-B/302 of the Indian Penal Code and section 4 of the Dowry Prohibition Act against the appellant. P.W.8 Ratan Kumar Sahu, who was the officer in-charge of Handapa police station after registration of the first information report, took up investigation of the case. During course of investigation, he examined the informant and other witnesses, visited the spot and prepared the spot map (Ext.6) and he held inquest over the dead body in presence of the witnesses and prepared the inquest report (Ext.2). He also sent the dead body for post mortem examination to the District Headquarters Hospital, Angul. P.W.3 Dr. Ajay Chandra Das, who conducted post mortem examination noticed some bruises and abrasions in and around the neck and opined the injuries to be ante mortem in nature and submitted his report (Ext.4) in which it is mentioned that the cause of death was due to asphyxia and vasovagal shock due to

throttling and time of death was within to 18 to 24 hours from the date and time conducting the post mortem examination.

The Investigating Officer seized the wearing apparels of the deceased as per seizure list (Ext.7) on production by the escorting party and he also seized the dowry articles from the house of the appellant vide Ext.5, which were released in favour of the informant under zimanama Ext.3. He also received the post mortem report of the deceased and forwarded the appellant to the Court on 11.01.2004 and then handed over the charge of investigation of the case to Muralidhar Baral (P.W.7), Circle Inspector of Police, Athamallik. P.W.7 sent the viscera of the deceased collected at the time of post mortem examination to the State Forensic Science Laboratory, Rasulgarh, Bhubaneswar for chemical examination and on completion of investigation, charge sheet was placed on 23.03.2004 against the appellant under sections 498-A/304-B/302 of the Indian Penal Code and section 4 of the Dowry Prohibition Act.

3. After submission of the charge sheet, the case was committed to the Court of Session after observing due formality where the learned trial Court framed charges against the appellant on 19.08.2004 and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish guilt of the appellant.

4. During course of trial, in order to prove its case, the prosecution examined eight witnesses.

P.W.1 Krushna Nahak is the brother of the deceased and he is the informant in this case and he stated about the demand of dowry and torture on the deceased due to non-fulfillment demand of dowry and also stated that the appellant committed murder of his deceased sister. He is also a witness to the inquest vide Ext.2.

P.W.2 Sabitri Nahak is the mother of the deceased and she stated about the disclosure made by her deceased daughter before her regarding the demand of dowry of cash of Rs.5,000/- (five thousand) and one cycle and also torture made by the appellant due to non-fulfillment of the dowry demand. She stated that on getting information from Sita, the aunt of the appellant, she along with P.W.1 proceeded to the house of the appellant and

found injury on the neck of the deceased and the dead body of the deceased was lying on the floor of the in the bed room of the appellant.

P.W.3 Ajay Chandra Das is the doctor, who was working as Orthopaedic Specialist at District Headquarters Hospital, Angul, conducted post mortem examination of the dead body of the deceased and noticed some bruises and abrasions in and around the neck and opined the injuries to be ante mortem in nature and submitted his report Ext.4 in which it is mentioned that the cause of death was due to asphyxia and vasovagal shock due to throttling and time of death was within to 18 to 24 hours from the date and time conducting the post mortem examination.

P.W.4 Debaraj Naik is the paternal uncle of the deceased and he stated that when he received the information about the death of the deceased, he rushed to the house of the appellant on the next day of the occurrence and found the dead body of the deceased in the house of the appellant. He also stated that the police held inquest over the dead body of the deceased in his presence and prepared the inquest report vide Ext.2 and he also found the injuries on the neck of the dead body of the deceased.

P.W.5 Ajay Bhoi is the labourer and he stated that one Sita, the aunt of the appellant came and told that the appellant killed the deceased by pressing her neck and the deceased died after nine months of her marriage. He also stated that the appellant physically and mentally tortured the deceased demand dowry and he also stated that the police held inquest over the dead body of the deceased in his presence and prepared inquest report vide Ext.2.

P.W.6 Biranchi Narayan Bhoi is the seizure witness and he stated that about the seizure of household articles from the house of the appellant under seizure list Ext.5.

P.W.7 Muralidhar Baral, was the Circle Inspector of Police, Athamallik, who as per the order of Superintendent of Police, took charge of investigation of the case from Ratan Kumar Sahu (P.W.8), the then officer in-charge of Handapa Police Station. He sent the viscera of dead body of the deceased collected through the Medical Officer of Handapa Government Hospital to the State Forensic Science Labouratory, Rasulgarh for

examination and after obtaining the order of Superintendent of Police, he submitted charge sheet.

P.W.8 Ratan Kumar Sahu was the Officer in-charge of Handapa police station. He was the Investigating Officer of the case and on his transfer, he handed over the charge of investigation to P.W.7.

The prosecution exhibited seven documents. Ext.1 is the written first information report, Ext.2 is the inquest report, Ext.3 is the zimanama, Ext.4 is the post mortem examination report, Exts.5 and 7 are the seizure lists, Ext.6 is the spot map.

5. The defence plea of the appellant is one of denial.

Defence has examined one witness i.e. D.W.1 Bhaba Bhoi, who stated that the deceased was living happily with the appellant after their love marriage and in Khetriya Samaj no bridegroom demands dowry.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that the medical evidence provided by P.W.3 proves that the deceased met with an unnatural death, which was homicidal in nature. It was further held that the prosecution evidence clearly indicates that the deceased was subjected to harassment and was tortured before her death. Learned trial Court further held that though the prosecution has not successfully established the charge under section 302 of the Indian Penal Code and acquitted the appellant of such charge but found him guilty under sections 498-A/304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act.

7. Mr. Asutosh Tripathy, learned counsel appearing for the appellant contended that learned trial Court has not assessed the evidence on record in its proper perspective and the basic ingredients of the offence under section 304-B of the Indian Penal Code are lacking inasmuch as there is no material on record that soon before the death of the deceased, she was subjected to physical and mental cruelty in connection with demand of dowry. Learned counsel further submitted that the marriage between the appellant and the deceased was a love marriage and the evidence on record indicates that they were pulling on well and the parents of the deceased were in visiting terms to the house of the appellant. It is further submitted that so far as the other

charges are concerned, the appellant was taken into custody in connection with this case on 11.01.2004 and he was not released on bail during trial and after filing of the appeal, he was granted bail by this Court as per order dated 05.04.2010 and therefore, he has already undergone substantive sentence of more six years and two months and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

8. Mr. A.K. Beura, learned Additional Standing Counsel, on the other hand, supported the impugned judgment and contended that the appellant was staying with the deceased at the relevant point of time and number of bruises and abrasions were noticed on the person of the deceased as per the post mortem report, which were opined to be ante mortem in nature and the cause of death was asphyxia and vasovagal shock due to throttling and the family members of the deceased have consistently stated about the physical and mental torture on the deceased and therefore, it cannot be said that the ingredients of the offence under section 304-B of the Indian Penal Code are not satisfied. It is further submitted that the victim was pregnant at the time of occurrence and the post mortem report indicates that the gestation period was 14 weeks and if the surrounding circumstances were not hostile, then the deceased would not have died committing suicide which plea has been taken by the appellant but the same has been negatived by the post mortem report findings. Learned counsel further submitted that in view of the clinching materials available on record, no infirmity can be found with the impugned judgment and therefore, the appeal should be dismissed.

9. Coming to the ingredients of the offence under section 304-B of the Indian Penal Code, the essential ingredients are as follows:-

(i) The death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;

(ii) Such death should be occurred within seven years of her marriage;

(iii) The deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

(iv) Such cruelty or harassment should be for or in connection with the demand of dowry; and

(v) Such cruelty or harassment of the deceased should be soon before her death.

Section 113(B) of the evidence Act is also relevant which deals with presumption as to the 'dowry death'. Presumption under section 113(B) is a presumption of law. On the proof of essential ingredients of offence under section 304-B of the Indian Penal Code, it becomes obligatory on the part of the Court to raise presumption that the accused committed 'dowry death'. In case of Raman Kumar -Vrs.- State of Punjab reported in (2009) 16 Supreme Court Cases 35, it has been held as follows:-

> "16. A conjoint reading of Section 113B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence, there was cruelty or harassment and only in that case, presumption operates. Evidence in that regard has to be led in by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no strait jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113B of the Evidence Act is present, with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods soon after the theft, is either the thief who has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."

In the case of ***Ashok Kumar -vrs.- State of Haryana reported in (2010) 12 Supreme Court Cases 350***, it has been held as follows:-

"14. We have already referred to the provisions of Section 304-B of the Code and the most significant expression used in the section is 'soon before her death'. In our view, the expressions 'soon before her death' cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act. Further, the interpretation given should be one which would avoid absurd results on the one hand and would further the object and cause of the law so enacted on the other.

15. We are of the considered view that the concept of reasonable time is the best criteria to be applied for appreciation and examination of such cases. This Court in the case of Tarsem Singh v. State of Punjab: AIR 2009 SC 1454, held that the legislative object in providing such a radius of time by employing the words 'soon before her death' is to emphasize the idea that her death should, in all probabilities, has been the aftermath of such cruelty or harassment. In other words, there should be a reasonable, if not direct, nexus between her death and the dowry related cruelty or harassment inflicted on her.

Similar view was expressed by this Court in the case of Yashoda v. State of Madhya Pradesh (2004) 3 SCC 98, where this Court stated that determination of the period would depend on the facts and circumstances of a given case. However, the expression would normally imply that there has to be reasonable time gap between the cruelty inflicted and the death in question. If this is so, the legislature in its wisdom would have specified any period which would attract the provisions of this Section. However, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient whereafter, the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters, of course, will have to be examined on the facts and circumstances of a given case."

The informant (P.W.1) has stated that the marriage of the deceased with the appellant was a love marriage. He further stated that while a marriage function was going on in their village, the appellant took away the deceased from the marriage function accepting her as his wife. He further

stated that the appellant was a labourer. He further stated that the deceased was physically and mentally tortured by the appellant demanding a cycle and cash of Rs.5,000/- (rupees five thousand) and that they were unable to satisfy the demand of the appellant.

P.W.2, who is the mother of the deceased, also stated that the appellant demanded cash of Rs.5,000/- (rupees five thousand) and one cycle towards dowry and since the said demand was not satisfied, the appellant tortured the deceased both physically and mentally, which the deceased complained before them. However, in cross-examination, she has stated that the marriage between the deceased and the appellant was a love marriage and in their caste, the bridegroom does not demand dowry.

P.W.4 is the paternal uncle of the deceased and he has stated that the appellant married the deceased out of love and the appellant was pulling on well with the deceased and the parents of the deceased were visiting the house of the appellant.

P.W.5 Ajay Bhoi has also stated that the appellant was physically and mentally torturing the deceased for demand of dowry and in cross-examination, he has stated that he had seen the appellant assaulting the deceased.

Therefore, the evidence of the aforesaid witnesses, particularly that of P.W.1, P.W.2 and P.W.5 indicate that though it was a love marriage but demand was raised by the appellant for a cycle and cash of Rs.5,000/-(rupees five thousand) towards dowry and since the same was not fulfilled by the family members of the deceased, the deceased was subjected to physical and mental torture.

However, as rightly pointed out by the learned counsel for the appellant that there are no materials on record that soon before the death the deceased, she was subjected to cruelty in connection with demand of dowry. The material on record, no doubt proves that the death of the deceased took place within seven years of marriage which is as one of the essential ingredients of section 304-B of the Indian Penal Code and in view of the evidence of the doctor, the learned trial Court has rightly held that the prosecution has proved that the deceased met an unnatural death, which was homicidal in nature. However, when the appellant has been acquitted of the

charge under section 302 of the Indian Penal Code and such acquittal has not been challenged by the State and the evidence is lacking that soon before the death of the deceased, she was subjected to cruelty or harassment by the appellant in connection with demand of dowry, I am of the humble view that the ingredients of the offence under section 304-B of the Indian Penal Code are not satisfied.

So far as the other offences under section 498-A of the Indian Penal Code and section 4 of the Dowry Prohibition Act under which the appellant was found guilty are concerned, there are ample materials available on record and the finding of the learned trial Court that the prosecution has successfully established such charges is quite justified.

In view of the foregoing discussion, the conviction of the appellant under section 304-B of the Indian Penal Code is set aside and the conviction of the appellant under section 498-A of the Indian Penal Code and section 4 of the Dowry Prohibition Act and the sentence passed for such offences stands confirmed.

Accordingly, the Jail Criminal Appeal is partly allowed.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

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2021 (III) ILR - CUT- 590

K.R. MOHAPATRA, J.

WRIT PETITION (CIVIL) NO.12128 OF 2016

THE EXECUTIVE ENGINEER (ELECT.), NESCO UTILITY, RAIRANGPUR ELECTRICAL DIVISION,RAIRANGPUR, MAYURBHANJ. …….. Petitioner

.V.

M/s MAA KIRANDEVI AGRO FOODS (P) LTD. & ANR. ……..Opp. Parties

ELECTRICITY ACT, 2003 – Section 126 and 127 – When the Assessing Officer is not a member in the Inspection Team – Effect of – Held, the verification of Inspection Report on the basis of which the provisional as well as final assessment order passed is vitiated and not sustainable.

Case Laws Relied on and Referred to :-

1. 2017 (Supp.II) OLR 243: Assessing Officer-cum-Executive Engineer (Electrical), WESCO,Rajgangpur Vs. Appellate Authority-cum-Electrical Inspector and Anr.
2. Civil Appeal No. 9198 of 2018 : Sesha Nath Singh and another Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. and Anr.
3. 2019 (II) OLR 127 : M/s Global Feeds Feedback Energy Distribution Company Private Limited and another Vs.Commissioner-cum-Secretary, Government of Odisha, Energy Department & Ors.
4. (2012) 2 SCC 108 : Executive Engineer & Anr. Vs. M/s Sri Seetaram Rice Mill.
5. AIR 2007 Cal 298 : Narayan Chandra Kundu Vs. State of West Bengal & Ors.
6. AIR 2006 Cal 59 : Hasi Mazumdar and Anr. Vs. the West Bengal State Electricity Board & Ors.
7. 2018 SCC Online Pat 5373 : Bihar State Electricity Board through its Chairman & Ors. Vs.State of Bihar through Energy Secretary, Energy Department, Government of Bihar & Ors.
8. JT 2001 (8) SC 271 : State of Goa Vs. Western Builders.
9. AIR 2007 Cal 298 : Narayan Chandra Kundu Vs. State of West Bengal & Ors.
10. (2011)14 SC 770 : State of Punjab Vs. Davider Pal Singh Bhulla & Ors. etc.

For Petitioner : Mr. Suresh Chandra Dash

For Opp. Parties : Mr. Lalit Kumar Maharana (For O.P. No.1)

JUDGMENT Date of Judgment: 29.10.2021

K.R.MOHAPATRA, J.

1. The Petitioner, namely, Executive Engineer (Electrical), NESCO Utility, Rairangpur Electrical Division (at present TPNODL), has filed this writ petition assailing the order dated 1st March, 2016 (Annexure-7) passed by the Appellate Authority, namely, Superintending Engineercum-Electrical Inspector, Keonjhar (Opposite Party No.2) in Appeal Case No.AAC-06 of 2015 filed under Section 127 of the Electricity Act, 2003 (for short, 'the Act').

2. The genesis of the writ petition emanates from a proceeding under Section 126 of the Act initiated against M/s. Maa Kiranevi Agro Foods Private Limited (a proprietary unit)-Opposite Party No.1.

3. The averments made in the writ petition reveal that the Opposite Party No.1-Unit (for short, 'the Consumer') has a power supply of 555 KVA. The Proprietor of the Consumer has another Unit, namely, M/s Preeti Pragnya Stone Crusher with a contract demand of 126 KVA. Both the Units situate adjacent to each other. There was disconnection of power supply to the Crusher Unit at the relevant time. While conducting physical verification of the electrical installation to the Consumer Unit, namely, M/s. Maa Kirandevi Agro Foods Private Limited by the Vigilance squad of the NESCO Utility (for short, 'the Licensee') on 21st March, 2015, it was detected that the Consumer through underground cable had extended power supply to his Crusher Unit unauthorizedly through a three phase four wire cable violating Regulations 72 and 106 of the Odisha Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (for short, 'the Code'). Consequentially, Vigilance squad snapped the power supply to the Crusher Unit. Upon verification, a report was submitted by the Vigilance squad on 21st September, 2015 vide Annexure-1. On the basis of said verification report, the Petitioner being the Assessing Officer of the Licensee, proceeded under Section 126 of the Act and provisionally assessed an amount of Rs.7,38,110/- on the Consumer, which was communicated vide his letter No.1475 dated 15th October, 2015 (Annexure-2 series) asking the Consumer to file objection within a period of seven days. Responding to the same, the Consumer filed its objection on 26th October, 2015 and also filed W.P.(C) No.19642 of 2015 against the provisional assessment made by the Petitioner as well as disconnection of power supply under Section 135(1A) of the Act. The said writ petition was disposed of vide order dated 4th November, 2015 with the following direction:-

> *"Considering the contentions raised by learned counsel for the petitioner and after going through the records, it appears that the provisional assessment is still pending and the Petitioner has paid substantial amount pursuant to the notice of disconnection in Annexure-2 dated 16.09.2015. In spite of that power supply has been disconnected to his premises. Therefore, liberty is granted to the petitioner to move the authority, who is in seisin over the matter by bringing notice that pursuant to disconnection notice issued under Annexure-2, he has deposited a substantial amount. By filing properly constituted application, if the petitioner brings this fact to the notice of the authority by way of an application, the authority shall do well to consider the same and pass appropriate order as expeditiously as possible.*
>
> *With the aforesaid observation and direction, the writ petition is disposed of."*

4. Pursuant to the aforesaid order, the Consumer filed fresh objection to the provisional assessment before the Assessing Officer on 19th November,

2015. Considering his objection, the Assessing Officer passed the final order of assessment of Rs.7,38,110/- to be paid by the Consumer under Section 126(3) of the Act and communicated the same vide his letter No.1639 dated 20th November, 2015 (Annexure-4) to the Consumer. It is contended in the writ petition that instead of availing the statutory remedy under Section 127 of the Act, the Consumer again moved this Court in W.P.(C) No.22281 of 2015 assailing the spot verification report as well as the final assessment order. The writ petition was disposed of on 22nd December, 2015 with the following direction:-

> *"Considering the submissions of learned counsel for the parties and on perusing materials available on record, it appears that vide Annexure-11, the petitioner has only made an application on 19.11.2015 and he has never asked for restoration of power supply to his premises in compliance to the order dated 04.11.2015 in W.P.(C) No.19642 (sic) of 2015, rather the said application is in the form of objection to the proposed final assessment order made under Section 126 of the Indian Electricity Act. On consideration of the same, the final assessment order has been passed by the authority on 20.11.2025, copy of which is served on the Petitioner on the very same day. Therefore, this Court finds no illegality or irregularity to have been committed by the opposite parties in violating the orders of this Court. Since the final order of assessment has been passed, which is an appealable one, if the petitioner so advised, may take recourse to the provisions of law as per the Indian Electricity Act. So far as restoration of power supply to its premises is concerned, the petitioner may move an appropriate application before the appropriate authority, who shall consider the same and pass appropriate order in accordance with law.*
>
> *With the aforesaid observation, the Writ Petitionstands disposed of.*
>
> *Personal appearance of Sri Manas Ranjan Mohanty, Executive Engineer, and Sri Chitta Ranjan Jena, Asst. Manager, Commerce of Rairangpur Electrical Division of NESCO is dispensed with."*

Thereafter, the Consumer preferred appeal on 16th January, 2016 before the Appellate Authority under Section 127 of the Act. The said appeal was registered as AAC-06 of 2015 after deposit of the statutory amount of Rs.3,69,055/- with the Licensee on 5th January, 2016.

5. Though the Petitioner filed its show cause raising the issue of maintainability of the appeal both on the ground of limitation as well as on merit, the Appellate Authority without considering the objection filed by the Petitioner, allowed the appeal vide order dated 1st March, 2016 under Annexure-7 and directed the Petitioner for withdrawal of final assessment

order dated 20th November, 2015 including DPS amount. It also directed to refund 50% statutory amount along with reconnection charge of Rs.3,000/- deposited by the Consumer with further direction to continue to provide power supply to the Consumer. Being aggrieved, this writ petition has been filed.

6. It is contended by Mr. Dash, learned counsel for the Petitioner that memo of appeal under Annexure-5 was filed beyond the statutory period of 30 days from the date of the final order of assessment. The appeal memo did not accompany a petition for condonation of delay. Thus, the memo of appeal ought to have been rejected at the outset. The finding of the Appellate Authority to the effect that the final assessment is illegal as it is made beyond the 30 days of provisional assessment, is also not sustainable. It is submitted that the provisional assessment was made and communicated on 15th October, 2015 and thereafter the Consumer moved this Court against the provisional assessment in W.P.(C) No.19642 of 2015, which was disposed of on 4th November, 2015 granting liberty to the Consumer to file objection. The Consumer filed its objection on 19th November, 2015 and on the very next day, i.e., on 20 th November, 2015, the final assessment order was communicated to the Consumer. As such, the impugned appellate order is an outcome of total non-application of mind. It is further submitted that the Proprietor of the Consumer Unit namely, Mr. Babish Prusty has another Unit in the name and style Preeti Pragnya Stone Crusher. Notice was served on the Proprietor in the address of the Consumer Unit and was received by him without any objection at any point of time. Thus, the finding that verification was carried out and served in the premises of M/s Preeti Pragnya Stone Crusher, whereas the provisional as well as final assessment order was made in respect of M/s Kirandevi Agro Foods Private Limited, is not correct and sustainable.

6.1 It is further contended by Mr. Dash, learned counsel for the Petitioner that the Appellate Authority has no *locus standi* to complain against the inventory or the result of inspection made under Annexure-1, which is the basis of initiation of proceeding under Section 126 of the Act. The competent authority is the '*designated authority'* of the Licensee, who is authorized to enquire into the matter of the complaint against correctness of the enquiry or the result of inspection. Since no complaint was ever made, as has been enunciated under Regulation 52 of the Code, 2004, the Appellate Authority could not have made any observation with regard to correctness of the

verification report under Annexure-1. Mr. Dash, learned counsel also contended that the final assessment order was passed on consent, as the Consumer accepting the same had deposited a substantial amount before the Licensee and had prayed for restoration of power supply to its Unit. He therefore, prayed for setting aside the appeal order under Annexure-7 and to uphold the final assessment order under Annexure-4.

7. Mr. Maharana, learned counsel for the Consumer-Opposite Party No.1 referring to its counter affidavit submitted that the issue with regard to limitation raised by the Petitioner is not sustainable. It is his submission that if on a plain reading of the appeal memo the ground of condonation of delay in filing the appeal is made out, the Appellate Authority has jurisdiction to consider the same and condone the delay. In support of his submission, he relied upon a decision of this Court in the case of ***Assessing Officer-cum-Executive Engineer (Electrical), WESCO, Rajgangpur Vs. Appellate Authority-cum- Electrical Inspector and another***, reported in 2017 (Supp.II) OLR 243 and contended that if the appeal memo contains sufficient ground for condonation of delay in filing the appeal under Section 127 of the Act, the same can be entertained by the Appellate Authority even if the appeal memo is not accompanied with a petition for condonation of delay. He also relied upon the order of the Hon'ble Supreme Court in Civil Appeal No.9198 of 2018 (***Sesha Nath Singh and another Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. and another in Civil Appeal No. 9198 of 2018***), wherein it has been held that a formal application for condonation of delay under Section 5 of the Limitation Act, 1963 is not mandatory. Delay can be condoned if sufficient cause is shown.

7.1 It is further contended that Assessing Officer must be a member of the Inspection Team at the time of detecting pilferage or the unauthorized use of electricity, so that he can pass an order of assessment not only on the basis of the papers placed before him, but also after actually visiting the site at the time of detection of the illegality. In the instant case, admittedly the Petitioner, who is the Assessing Officer, did not accompany the Inspection Team which prepared the report, on the basis of which the assessment proceeding was initiated. In support of his case, he relied upon a decision in the case of ***M/s Global Feeds Feedback Energy Distribution Company Private Limited and another Vs. Commissioner-cum-Secretary, Government of Odisha, Energy Department and others***, reported in 2019 (II) OLR 127, wherein this Court has held as under:-

"9-(b). In the Narayan Chandra Kundu case (supra) of Hon'ble Calcutta High Court, the virus of notification was not challenged and question was as to whether the prosecutor U/s. 135 of the E. Act can be the assessing officer U/s. 126 of the Act. While analyzing the same it is observed that "Legislature has intended that the assessing officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or the unauthorized use of electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the sight at the time of detection of the illegality."

In view of Hon'ble Apex Court's observation that Assessing Officer can make inspection and the Hon'ble Calcutta High Court's view that the Assessing Officer should be a member of the inspection team, the view taken by learned Single Judge in the impugned judgment to the effect that inspection and assessment can be done by the same person or even by a different person does not run contrary."

(emphasis supplied)

7.2 He also placed reliance on the order passed by Hon'ble Supreme Court in the case of ***the Executive Engineer and another Vs. M/s Sri Seetaram Rice Mill***, reported in (2012) 2 SCC 108, wherein in paragraph23, it has been held as follows:-

"23. Having dealt with the principle of interpretation of these provisions and the distinction between Sections 126 and 135 of the 2003 Act, we shall now discuss the ambit and scope of Section 126. The provisions of Section 126 contemplate the following steps to be taken :

(i) An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place.

(ii) The formation of a conclusion that such person has indulged in unauthorized use of electricity.

(iii) The assessing officer to provisionally assess, to the best of his judgment, the electricity charges payable by such person.

(iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving - him an opportunity to file objections, if any, against theprovisional assessment.

(v) The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30 days from the date of service of such order of provisional assessment.

(vi) The person, upon whom the provisional order of assessment is served, is at liberty to pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against

which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation."

7.3 He also pressed into service the case law in ***Narayan Chandra Kundu Vs. State of West Bengal and others***, reported in AIR 2007 Cal 298 and ***Hasi Mazumdar and another Vs. the West Bengal State Electricity Board and others***, reported in AIR 2006 Cal 59. He further objecting to the submission of Mr. Dash, learned counsel for the Petitioner to the effect that assessment order was passed on consent submitted that merely because the Consumer-Opposite Party No.1 has made part payment of the final assessment amount, it cannot be construed to be a tacit consent to the final order of assessment. In support of his case, he relied upon a decision in the case of Patna High Court in the case of ***Bihar State Electricity Board through its Chairman and others Vs. State of Bihar through Energy Secretary, Energy Department, Government of Bihar and others***, reported in 2018 SCC Online Pat 5373, in which it is held that mere payment of penalty/ fee/arrear amount cannot lead to an inference that the provisional assessment had been consented to thereby barring compounding fee was merely with a view to avoid criminal trial and/or reconnection of electricity supply. The order of final assessment clearly discloses that it was a contested one.

8. When the assessment took place on the basis of a report of spot verification which was not in conformity with Section 126 of the Act, the authenticity and legality of the same can be challenged at any stage even at the appellate stage and appellate authority has jurisdiction to look into the legality of the verification report while adjudicating the appeal. In view of the above, he prayed for dismissal of the writ petition.

9. The first issue raised by learned counsel for the Petitioner is that the appeal under Section 127 of the Act was incompetent as the memorandum of appeal was filed beyond the statutory period without accompanying a petition for condonation of delay. Thus, it is to be considered as to whether the Appellate Authority has the power to entertain an appeal under Section 127 of the Act after the statutory period, when the memo of appeal did not accompany a petition for condonation of delay. Admittedly, the final assessment order was passed on 20th November, 2015 and the appeal was presented before the Appellate Authority on 6th January, 2016 along with statutory deposit (50% of the final assessment along with fees). Thus, it is

clear that the appeal was presented beyond the statutory period. Further, Section 127 of the Act does not make any provision for condonation of delay. In the case of ***Assessing Officer-cum-Executive Engineer (Electrical), WESCO, Rajangpur (supra)***, this Court discussing the scope and ambit of Sections 126 and 127 of the Act as well as different provisions of the Limitation Act, held as follows:-

> *"14. From the above, it is evident that the apex Court has also taken note of the judgment of the apex Court in State of Goa v. Western Builders, JT 2001 (8) SC 271 and also in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department, JT 2008 (6) SC 22 and has come to a conclusion that the policy of Section 14 is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which, by reason of some technical defect, cannot be decided on merits and is dismissed. Therefore, while considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. The section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading of Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Needless to say that in the present context Section 5 of the Limitation Act may not have any application, but while applying such provisions condonation of delay has to be made on showing the "sufficient case". But the said provision is not applicable to the case of this nature, as because due to pendency of the writ application & writ appeal before this Court the petitioner approached the appellate authority at a belated stage. Reason for approaching the appellate authority is because of the pendency of the writ application & writ appeal before this Court. Therefore, the petitioner is entitled to avail the benefit of Section 14 of the Limitation Act to exempt the period covered by bona fide litigious activity."*

From the above, it is evident that the Hon'ble Supreme Court in the case of ***State of Goa Vs. Western Builders***, reported in JT 2001 (8) SC 271, made it clear that the policy of Section 14 is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which, by reason of some technical defect, cannot be decided on merit.

10. In the light of the observation made in the aforesaid case law the memorandum of appeal (Annexure-5) filed by Opposite Party No.1-Consumer is scrutinized, which reveals that in paragraph-5 of the appeal memo, the Opposite Party No.1 had categorically stated that against the final assessment order it moved this Court in W.P.(C) No.22281 of 2015. The said

writ petition was disposed of on 22nd December, 2015 upholding action of the Assessing Officer and granting liberty to the Opposite Party No.1-Consumer to take recourse to the provisions of the Act assailing final assessment order. The appeal was filed within 30 days from the date of disposal of the writ petition. Thus, Section 14 of the Limitation Act is squarely applicable to the case of Opposite Party No.1-Consumer for consideration of condonation of delay in filing the appeal. The principles of Sections 5 and 14 of the Limitation Act can be invoked to grant relief to an applicant by purposively construing 'sufficient cause' in a case, where applicability of the aforesaid provisions are not expressly or by necessary implication barred. Further, Section 5 does not contemplate any application. In absence of a formal application, the provision can also be invoked, if the applicant has explained the delay providing sufficient cause. As discussed above, the writ petition in W.P.(C) No.22281 of 2015 was filed on 11th December, 20215 against final assessment order dated 12th November, 2015 and disposed of on 22nd December, 2015. The appeal was filed on 6th January, 2016. Thus, the reason for not filing the appeal within the statutory period has been well-explained in the memorandum of appeal. As such, this Court finds that the Appellate Authority has committed no error in deciding the appeal on merit.

11. It is the admitted case of the parties that the Petitioner, who was the Assessing Officer, did not accompany the vigilance squad which inspected the Consumer's premises. Law is well-settled in the case of ***M/s Sri Seetaram Rice Mill (supra)*** that the Assessing Officer must be a member of the inspection team at the time of detecting pilferage or the unauthorized use of electricity, so that he can pass an order of assessment not merely on the basis of the papers placed before him, but by visiting the site of alleged pilferage or the unauthorised use of the electricity. It has been held in the case of ***Narayan Chandra Kundu Vs. State of West Bengal and others***, reported in AIR 2007 Cal 298 that "….After going through the provisions contained in Sections 126 and 135 of the Act we find that the legislature has intended that the Assessing Officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or the unauthorised use of the electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the site at the time of detection of the illegality….." In the case of ***Sri Seetaram Rice Mill*** (supra), it is held in paragraph-23 that Section 126 of the Act contemplates the steps to be taken, which include 'the Assessing Officer is to conduct inspection of

the place or premises and the equipments, gadgets, machines, devices found connected or used in such place.' (emphasis supplied). Relying upon the said observation, this Court in ***M/s Global Feeds Feedback Energy Distribution Company Private Limited*** (supra) categorically held that the Assessing Officer should be a member of the inspection team. The Petitioner, who was the Assessing Officer being not a member in the inspection team, the verification report on the basis of which the provisional assessment was made, is vitiated. In the case of ***State of Punjab Vs. Davider Pal Singh Bhulla*** and others etc., reported in (2011) 14 SC 770 it is held as follows:-

> *"72. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case."*

In the instant case, the inspection report being vitiated for the reasons stated above, the provisional assessment order as well as the final assessment order passed on the basis of the said report is not sustainable.

12. Section 126(3) of the Act provides that the Assessing Officer after affording a reasonable opportunity to the assessee, should pass final order of assessment within 30 days from the date of service of such order of provisional assessment of electricity charges payable by such person. In the instant case, admittedly, the provisional assessment order was served on the Consumer on 15th October, 2015 and the final assessment order was passed and communicated on 20th November, 2015, which is beyond the statutory period. Although no explanation has been offered for such delay, learned counsel for the Petitioner in course of argument contended that it is due to delay on the part of the assessee in filing the objection to the provisional assessment order, delay was caused in passing the final assessment order. It is submitted by Mr. Dash, learned counsel for the Petitioner that assailing the provisional assessment order and disconnection of power supply the Consumer had preferred W.P.(C) No 19642 of 2015, which was disposed of on 4th November, 2015. The Consumer-Opposite Party No.1 in reply to the provisional assessment submitted his objection on 26th October, 2015 and again on 19th November, 2015. The matter was adjourned from time to time on his request. However, after giving opportunity of hearing to the Consumer, the final order of assessment was passed on 20th November,

2015. Thus, the delay in passing the final assessment order is attributable to the Consumer and not to the Assessing Officer. Such a contention is not acceptable, inasmuch as neither there was any restraint order in W.P.(C) No.19642 of 2015 passed by this Court nor there was any impediment on the part of the Assessing Officer to pass the final assessment order within the statutory period of 30 days more particularly when the Consumer had already filed his initial reply/objection on 26th October, 2015.

13. On perusal of the materials on record, more particularly spot verification report as at Annexure-1, it appears that Inspection Team had visited the premises of M/s Preeti Pragnya Stone Crusher and not the premises of the Consumer-Opposite Party No.1, namely, M/s Kirandevi Agro Foods Private Limited. Although it is contended by Mr. Dash, learned counsel for the Petitioner that the Proprietor of both the Units is Mr. Babish Prusty, who received the spot verification report without any objection, but it is apparent that the premises of the Consumer-Opposite Party No.1 was never visited by the inspection team. Section 126 (1) of the Act clearly stipulates that 'if on the inspection of any place or premises' as well as the equipments, gadgets, machines devices, it is found connected or used or after inspection of the records maintained by any person, the Assessing Officer comes to a conclusion that such person is indulged in unauthorized use of electricity, he shall provisionally assess the charges payable for such use. In the instant case, the premises of the Consumer-Opposite Party No.1 was never visited or inspected. It is on the basis of the spot verification report of the Crusher unit of the Proprietor of the Consumer–Opposite Party No.1, the provisional assessment was made, which is in violation of Section 126(2) of the Act.

14. In course of hearing, a feeble argument was advanced by Mr. Dash, learned Counsel for the Petitioner that since the Consumer Opposite Party No.1 accepting the final assessment order had paid a part of the dues assessed, the final assessment order itself can be construed to be an order passed on consent. Relying upon Section 127(5) of the Act Mr. Dash, therefore submitted that no appeal shall lie to the Appellate Authority against final order of assessment made with consent of the parties. On perusal of the final order of assessment under Annexure-4 dated 20th November, 2015, it is crystal clear that it was contentious one. Further, it is clarified in the order under Annexure-4 that the Consumer was required to pay the finally assessed amount of Rs.7,38,110.80 within 30 days from receipt of the said order and may prefer an appeal under Section 127 of the Act within 30 days subject to

production of proof of payment equal to 50% of the finally assessed amount. In view of the above, the contention raised by Mr. Dash, learned counsel for the Petitioner merits no consideration.

15. In view of the discussions made above, I find no infirmity in the impugned order under Annexure-7 passed by the Appellate Authority under Section 127 of the Act. Thus, the writ petition being devoid of any merit fails and is accordingly dismissed, but in the circumstances, there shall be no order as to costs.

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2021 (III) ILR - CUT- 602

S.K. PANIGRAHI, J.

CRLMC NO.1325 OF 2021

BAMADEV SANKHUALA ……..Petitioner

.V.

STATE OF ODISHA (VIG.) ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Prayer for quashing of charges – Offences u/s 13(2) r/w section 7 and S 13 (1)(d) of the Prevention of Corruption Act, 1988 – Whether mere recovery of tainted amount can establish the offence under section 7 of the Prevention of Corruption Act – Held, No – It is a settled principle that mere recovery of currency notes cannot constitute the offences under section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe – The impugned charges suffers from gross infirmities, warrant interference of this Hon'ble Court u/s 482 of Cr.P.C.

Case Laws Relied on and Referred to :-

1. (2014)13 SCC 55 : B.Jayraj Vs State of Andhra Pradesh.
2. (2015) 10 SCC 152 : P. Satyanarayana Murthy Vs District Inspector of Police, State of Andhra Pradesh and Anr.
3. (1980) 2 SCC 390 Para-10 : Hajarilal Vs. State (Delhi Admn.)
4. (2001) 1 SCC 691 Para-21 : M.Narsingha Rao.

For Petitioner : M/s. P. Anup Das, B.P.Das, A.Mohanty, G.Mohanty,S.Patra,S.Samal.

For Opp. Parties: Mr. Niranjan Moharana, Addl. Standing Counsel (Vig.)

JUDGMENT Date of Hearing: 15.09.2021: Date of Judgment: 08.10.2021

S.K. PANIGRAHI, J.

1. The petitioner, in this application u/s 482 of Cr.P.C, seeks to challenge the order dated 20.01.2018 passed by Learned Special Judge Vigilance Dhenkanal in T.R. Case no. 72 of 2017 arising out of Cuttack Vigilance P.S. Case No. 28 of 2016 wherein the learned trial court after taking cognizance of the case has been pleased to frame charge and directed the petitioner to be tried with two charges head for commission of offences punishable u/s 13(2) r/w s.7 & s.13 (1)(d) of the Prevention of Corruption Act 1988 (hereinafter referred as "PC Act") on the basis of the materials and documents submitted by the prosecution.

2. The facts of the case, in brief, as narrated in the charge sheet, is that on 19.05.2016 a written complaint was made before S.P Vigilance Cuttack by complainant named Nagen Binayak wherein it was alleged that one constable Nilamani Pradhan of Sarang PS demanded Rs.11,000/- from the complainant in order to facilitate protection from arrest him until his grant of Anticipatory Bail. The charge sheet further alleges that the request was also made for relaxation of charges while filing the charge-sheet with regard to the F.I.R registered against him on 14.05.2016. it was also alleged that the demanded amount of Rs 11,000/- out of which Rs.10,000/- is for IIC Parjang Mr. Bamadev Sankhuala/present Petitioner and Rs 1000/- is for the Constable Nilamani Pradhan, who is one of the co-accused in the T.R 72/2017. It is alleged that finding no other option, the complainant readily agreed to the demand of Nilamani Pradhan. Furthermore, after the said complaint of the complainant a trap team was constituted and the team along with the official witnesses proceeded towards Parjang Police Station in compliance with the direction of S.P. Vigilance, C.D, Cuttack on 20.05.2016. As per the plan, the Vigilance Trap Party reached Parjang Town and their vehicle was parked at about 2 K.M. away from the Parjang Police Station. While proceeding towards Parjang, Nilamani Pradhan contacted the complainant over phone and enquired about his arrival to the Police Station. The complainant said that he would proceed towards Parjang after taking his breakfast and thereafter he was asked by Nilamani Pradhan to come towards Mundeilo village. Accordingly, the Complainant along with overhearing witnesses proceeded towards Mundeilo village. When they met one another Nilamani Pradhan returned to Parjang town along with the complainant and overhearing

witnesses. In between Mundeilo and Parjang town the complainant requested to Nilamani Pradhan stating that a case has been registered against him. In reply to the same, Nilamani Pradhan asked him as to whether he had brought the demanded amount or not? The complainant replied in affirmative and as per the demand, he handed over the tainted money Rs 11,000/ to Nilamani Pradhan after taking out from the four-fold paper wherein the said cash was kept as per the plan.

3. The said Nilamani Pradhan kept the tainted money Rs 11,000/ inside the front right-side pocket of his pant. It is alleged that after the money was delivered to Nilamani Pradhan, he then proceeded towards Parjang Police Station to hand over Rs 10,000/ to the petitioner. Nilamani Pradhan parked his motorcycle in front of the Parjang Police Station and walked towards the residential Govt. Quarter of the petitioner and stayed there for half an hour and once again returned to Police Station. On receiving the pre-arranged signal from the Overhearing witness Sri Prakash Chandra Dehury, the Trap Party members immediately rushed to the spot and found that the complainant Sri Nagen Binayak was standing with Sri Nilamani Pradhan. Thereafter, Inspector S.K Kanhar disclosed his identity along with his team and asked the Constable Nilamani Pradhan with regard to the demand and acceptance of the bribe, after being silent for a while he accepted the claim as stated in the charge sheet. Thereafter, Inspector S.K Kanhar proceeded towards the quarter of the petitioner and recovered Rs.10, 000/- from the table drawer. Further, the witness Arun Kumar Baliarsingh compared the seized notes with the denominated G.C Notes which were applied with phenolphthalein powder. Thereafter, wash of the right and left hand of Nilamani Pradhan, right and left hand of the petitioner, right hand black pant of Constable Nilamani Pradhan, cotton scrap on the table and the G.C Notes were seized and marked as Ext. B to G.

4. The entire incident form part of the detection report and the said report was read over to the trap officers, complainant and the accused and contains the signature of all, except the present petitioner. In this way, the trap team seized all relevant materials and made it the part of seizure list and also arrested the petitioner along with the Constable Nilamani Pradhan on 21.05.2016.

5. At this backdrop, Ld. Counsel for the petitioner Mr. P. Anup Dash, submitted that registering Vigilance PS No.28 of 2016 blindly following the

Complainant's version is bad in law as it is evident from the complaint that the present Petitioner has never demanded bribe from the complainant and the allegation as set out in the complaint regarding the demand for the relaxation in the charge sheet and facilitate the complainant by not arresting in Parjang PS Case No.93 of 2016 so that the complainant may be granted Anticipatory Bail is out and out a falsehood and an attempt to implicate the petitioner since the present Petitioner was not the IO to the Parjang PS Case No.93 of 2016. In view of such facts, there is no question of facilitating by the petitioner to the complainant in any manner.

6. He, further, strenuously contended that taking cognizance on 13.11.2017 by the learned Special Judge Vigilance Dhenkanal in T.R No. 72 of 2017 is not maintainable as the tainted bribe amount was never delivered to the petitioner by the complainant and at the time of presence of co-accused i.e., Nilamani Pradhan at the quarter of the Petitioner, neither the complainant was present nor the over hearing witness was present. It is trite here to mention that, the order of framing charge and directing the petitioner to be tried under two charge head u/s 13(2) r/w s.7 & s.13 (1)(d) of the Prevention of Corruption Act 1988 vide order dated 20.01.2018 by the learned Special Judge Vigilance Dhenkanal in T.R No. 72 of 2017 is illegal as it is a settled principle of law that mere recovery of tainted bribe money cannot prove the charge of the prosecution. Therefore, after being aggrieved by such arbitrary inaction of the opposite party the petitioner constrained to approach this Hon'ble Court.

7. He Contended that the impugned order of taking cognizance, order of framing charge and direction to the Petitioner to be tried in charge head have been passed mechanically without considering the materials available on record which is illegal, erroneous and un-sustainable in the eyes of law. In fact, framing of charges is bad in law as the materials submitted by the prosecution does not satisfy the necessary ingredients of Section 7 of PC Act which may be quoted herein below:

> *"7. Public servant taking gratification other than legal remuneration in respect of an official act.-Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to*

any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than 1 [three years] but which may extend to 2 [seven years] and shall also be liable to fine.

Explanations: *(a) "Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, be may be guilty of cheating, but he is not guilty of the offence defined in this section.*

(b) "Gratification." The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration." The words "legal remuneration" is not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organization, which he serves, to accept.

(d) "A motive or reward for doing." A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section."

8. He further submitted that the written report filed by the complainant, on the basis of which the FIR was lodged, makes it clear that the present petitioner had never come in contact with the said complainant or has demanded any bribe. On the other hand, on a bare reading of the FIR and also the statement of the complainant recorded under Section 161 of Cr.PC prima facie discloses the version of the co-accused Nilamani Pradhan that the petitioner demanded the complainant to give Rs.11,000/- for the relaxation in charge-sheet and protecting him from arrest till his grant of Anticipatory Bail, the present petitioner has been arrayed as an accused. There is no material on record to show that the petitioner ever demanded any money from the complainant. In that view of the matter, the legal position is clear, where there is no demand of bribe, the question of acceptance of such bribe does not arise.

9. He, emphatically, argued further that Parjang PS Case No. 93 of 2016 which is the subject matter of the vigilance case, in connection with illegal transportation of coal by vehicle No. OR-19B-6433 & OR-04-G-6919 which was registered for commission of offences U/s. 379/34 of I.P.C read with Section 21 of M.M.D.R Act was not being investigated by the present petitioner. On the other hand one S.I Jugal Kishore Das was the I.O in that case. In course of supervision of the said case, the petitioner had also instructed the said I.O in Parjang PS Case No. 93 of 2016 to arrest the complainant, which is clearly stated in the case diary of the said case. Since the petitioner was cracking whip on illegal transportation of coal in the area, the complainant with an oblique motive only to frame and demoralize the petitioner from carrying out such operations on illegal transportation of coal, falsely filed the case before Cuttack Vigilance P.S.. Hence it is factually incorrect and motivated allegation against the present petitioner. Hence, demanding money through the constable Nilamani Pradhan is itself is unfounded.

10. He further argued that the allegation levelled against the present petitioner by the prosecution that the recovery of tainted amount of Rs.10,000/- was made from a table kept outside the premises of the quarter also smacks false. It is also forthcoming from the statements and materials collected during the investigation that both the complainant and the over hearing witness were not present at the spot, when allegedly the tainted amount of Rs 10,000/- was kept in the drawer of the table. There is no material or statement except the statement of co-accused Nilamani that the petitioner ever demanded the amount. The statement of co-accused has got no evidentiary value in the eyes of law. Even if the case of the prosecution is accepted, for the sake of arguments, the star witness in the instant case is the co-accused himself before whom the petitioner had demanded the bribe money and from whom he had accepted the said amount. Even otherwise, in the meantime, the said co-accused as well as the star witness of the case, Mr Nilamani Pradhan has already expired since 28.05.2021.

11. He, further, underlined the fact that from the charge-sheet it is amply clear that the over hearing witness has never seen or heard about the demand or acceptance of the present petitioner. It is stated that when the hands of the petitioner were washed by Sodium Carbonate Solution, it did not change any colour which is quite apparent from the statements of the over hearing witness Prakash Chandra Dehury and the complainant. In fact, the

phenolphthalein powder were applied to the notes would have changed to pink colour, had the petitioner ever received notes.But in the present case it did not change the colour. He further stated that the statements of other witnesses including that of the so called independent witness Arun Kumar Baliar Singh who claimed to have witnessed the change in colour of the said solution into faded pink, is ex-facie contradictory to the statements of the complainant and the over hearing witness who were also stated to be present at the spot.

12. He contended that the entire episode as it appears that the IO is quite biased against the petitioner and with an ill-intention wanted to implicate the instant petitioner, and accordingly statements of the witnesses have been manipulated to strengthen the case of the prosecution.

13. At the fag end of his argument, Mr. Das has placed reliance on catena of judgments of Hon'ble Supreme Court of India holding that mere recovery of tainted bribe money is not sufficient to convict the accused and mere recovery by itself cannot prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. In ***B.Jayraj Vs State of Andhra Pradesh***[1] wherein it is held that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of Hon'ble Apex Court and High Courts. He also referred to several other judgments like ***C.M. Sharma v. State of A-P.2 and C.M. Girish Babu v. CBP*** wherein it is held that "the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Sections 13(1)(d)() and (ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."

1. (2014)13 SCC 55

In ***P. Satyanarayana Murthy Vs District Inspector of Police, State of Andhra Pradesh and Another***[2] it has been held that:

> *"20. This Court in A. Subair v. State of Kerala, while dwelling on the purport of the statutory prescription of Sections 7 and 13(1)(d) of the Act ruled that (at SCC p. 593, para 28) the prosecution has to prove the charge thereunder beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification which are vital ingredients necessary to be proved to record a conviction".*
>
> *"21. In Strate of Kerala v. C.P. Rao'4, this Court, reiterating its earlier dictum, vis-a-vis the same offences, held that mere recovery by itself, would not prove the charge against the accused and in absence of anyevidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing il to be bribe, conviction cannot be sustained."*
>
> *"22. In a recent enunciation by this Court to discern the imperative prerequisites of Sections 7 and 13 of the Act, it has been underlined in B. Jayaraj in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Section 7 as well as Sections 13(1)(d)() and (ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Sections 13(1)(d)(i) and (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasised, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise."*

In view of the authoritative pronouncement of the Hon'ble Supreme Court of India in the afore-cited cases, the impugned charge order dated 20.01.2018 under Annexure-6 suffers from the vice of gross non- application of judicial mind to the materials on record and warrants interference of this Hon'ble Court u/s 482 Cr.P.C. It is further stated that the order for taking cognizance, order for framing charge and order directing the petitioner to be tried under charge with two heads are illegal and are not sustainable in the eyes of law. Therefore, the continuance of the proceedings against the petitioner will

2. (2015) 10 SCC 152

amount to abuse of process of court. Therefore, the entire proceedings in T.R. Case no. 72 of 2017 arising out of Cuttack Vigilance P.S. Case No. 28 of 2016 as well as the impugned order dated 13.11.2017 under Annexure-5, 20.01.2018 under Annexure-6 and order dated 20.01.2018 under Annexure-7 deserved to be quashed, in the interest of justice.

14. Learned Counsel for the Vigilance, Mr. Maharana, submits that the complainant and the shadow witnesses namely, Parkash Chandra Dehury in their statement U/s-164 of the Cr.P.C. have categorically stated about the demand and acceptance of the said bribe money of Rs.10,000 / by the petitioner through the constable, and keeping of the same in his table drawer of his residential quarter through the co-accused-constable as per the direction of the petitioner, and the said tainted GC note had been recovered from the said drawer. The hand wash of the present petitioner in chemical solution turned to pink. The aforesaid fact has also been corroborated by the Detection Report, chemical examination Report and statement of independent witness as well as other witnesses present in the spot.

15. He further submitted that prayer for quashing of the impugned order dtd. 13.11.2017 of the order of cognizance and issuance of summons to the accused persons, which is a revisable order, and application U/s-482 Cr.PC. is not maintainable. Moreover, the said impugned order of cognizance and summon for appearance of accused persons are challenged at such a belated stage i.e., after framing of charge vide order dated 20.01.2018 and after commencement of the trial.The petitioner did not file any discharge petition, and the trial court after application of Judicial mind and based upon the materials collected during investigation, framed the charge, and proceeded for trial.

16. The present petition is filed only to procrastinate the trial. It is further submitted and as reveal from the investigation as per the statement of Jugal Kishore Das, Sub-Inspector of Police, who was the investigating officer of Parjang P.S. Case No. 93 dtd.15.05.2016, in which complainant is stated to have been made as an accused, the petitioner was the IIC and supervising the case of the complainant, in respect of which the bribe demand was made by the petitioner through the co accused-constable to show him favour as aforesaid. Therefore, the plea taken by the petitioner to the effect that he was no way connected to the case of the complainant, is not acceptable.

17. He further submits that the decisions relied by the petitioner i.e. ***B. Jayraj vs. State of AP (Supra) and C.M Girish Babu vs. CBI***(Supra), are not applicable to the present case. In the aforesaid cases, the complainant had not supported the case of prosecution and become hostile during trial. However, the present case is different from those cases qua the complainant as well as all the witnesses, the chemical examination Report and the circumstantial evidences. It clearly portrays the cleverly manner and methodology adopted by the petitioner in accepting the aforesaid bribe through demand and acceptance by his sub-ordinate i.e. co accused-constable, and without any plausible immediate explanation at the time of recovery of tainted money sufficiently establishes the allegations against the petitioner. Therefore, the plea accepted by the petitioner to the effect that there was no proof of demand and acceptance against him is not sustainable.

18. He further relied the decisions of the Hon'ble Apex Court in ***Hajarilal vs. State (Delhi Admn.)***[3] ***and M.Narsingha Rao***[4] which states contrary to the stand of the petitioner. It is well settled position of law as well as statutory provision of the P.C Act, 1988, that when a public servant accepts or obtained any gratification or valuable things from any person other than legal remuneration, knowing fully well that the said money is bribe and not a legal remuneration. The presumption U/s-20(1) of the P.C Act is attracted and it shall be presumed, unless the contrary is proved by rebutting the said presumption with immediate plausible explanation by the accused about the acceptance and recovery of the said tainted money.

19. Heard learned Counsels for the parties. As the facts unfolded, a few points which seem to be more than meeting the eyes persuades this Court to go deeply into the facts. It reveals that the registration of Vigilance PS Case No.28 of 2016 by blindly following the Complainant's version is bad in law since there is no prima facie proof shown by the prosecution regarding the demand of bribe by the petitioner. The allegation as set out in the complaint regarding the demand for bribe for relaxing the charges in the charge-sheet and facilitate the complainant by not arresting in Parjang PS Case No.93 of 2016 so that the complainant may be granted Anticipatory Bail is not supported by any material to make out even a prima facie case, since the Present petitioner is not the IO of the said case for which such demand was stated to have been made. In view of such facts, there is no question of facilitating by the petitioner to the complainant.

3. (1980) 2 SCC 390 Para-10, **4.** (2001) 1 SCC 691 Para-21

20. Further, taking cognizance on 13.11.2017 by the learned Special Judge Vigilance, Dhenkanal in T.R No. 72 of 2017 also suffers from certain glaring infirmities in so far as the tainted bribe amount which was never delivered to the petitioner by the complainant and at the time of presence of co-accused i.e., Nilamani Pradhan at the quarter of the Petitioner. Neither was the complainant present nor was the over hearing witness present. Hence, the Court below should have been extra careful while framing charge and directing the petitioner to be tried under two charge heads u/s 13(2) r/w s.7 & s.13 (1)(d) of the Prevention of Corruption Act 1988 vide order dated 20.01.2018 in T.R No. 72 of 2017. It is a settled principle of law that mere recovery of tainted bribe money cannot prove the charges of the prosecution.

21. Moreover, Parjang PS Case No. 93 of 2016 which is the germinating point of the subject matter of the instant vigilance case lodged in connection with illegal transportation of coal by vehicle No. OR-19B-6433 & OR-04-G-6919 which was registered for commission of offences U/s. 379/34 of I.P.C read with Section 21 of M.M.D.R Act was not being investigated by the present petitioner. On the other hand, one SI Jugal Kishore Das was the IO in that case. Hence, implicating the present petitioner, prima facie, is not a correct act on the part of the prosecution.

22. The allegation levelled against the present petitioner by the prosecution that the recovery of tainted amount of Rs.10,000/- was made from a table kept outside the premises of the quarter is also seems to be having a shaky base. There is no material or statement except the statement of co-accused Nilamani that the petitioner ever demanded the amount. In the instant case, the star witness is the co-accused himself before whom the petitioner had demanded the bribe money and from whom he had accepted the said amount. In the meantime, the said co-accused as well as the star witness of the case Mr. Nilamani Pradhan has already expired since 28.05.2021. Hence, continuing with the present case without the star witness would be like rudderless ship.

23. As stated, the hands of the petitioner were washed by Sodium Carbonate Solution it did not change any colour which is quote apparent from the statements of the over hearing witness Prakash Chandra Dehury and the complainant. But the phenolphthalein powder as was applied to the notes would have changed to pink colour in the event of the petitioner receiving the notes. However, in the present case it did not change the colour. The

independent witness Arun Kumar Baliar Singh who claimed to have witnessed the change in colour of the said solution into faded pink, is ex-facie contradictory to the statements of the complainant and the over hearing witness who were also present at the spot. Such inherent contradiction has the tendency to weaken the case of the prosecution.

24. In catena of judgments rendered by the Hon'ble Apex Court held that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. ***B.Jayraj Vs State of Andhra Pradesh (supra) C.M. Sharma v. State of A-P.2 and C.M. Girish Babu v. CBP (supra), P. Satyanarayana Murthy Vs District Inspector of Police, State of Andhra Pradesh and Another***(supra) and so on are some of the sheet anchor of similar sentiments. These precedents vindicate the stand of the petitioner legally.

25. In view of the authoritative pronouncement of the Hon'ble Supreme Court of India, the death of the star witness during the pendency of trial and in the light of the impugned charge order dated 20.01.2018 under Annexure-6 which suffers from the gross infirmities warranting interference of this Hon'ble Court u/s 482 Cr.P.C. Therefore, the continuance of the proceedings against the present petitioner will amount to abuse of process of court. Therefore, the entire proceedings in T.R. Case no. 72 of 2017 arising out of Cuttack Vigilance P.S. Case No. 28 of 2016 as well as the impugned order dated 13.11.2017 under Annexure-5, 20.01.2018 under Annexure-6 and order dated 20.01.2018 under Annexure-7 are quashed, in the interest of justice.

26. Accordingly, in terms of the aforesaid discussion and above cited decisions, the instant CRLMC is allowed.

27. The CRLMC is accordingly disposed of.

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2021 (III) ILR - CUT- 614

MISS SAVITRI RATHO, J.

CRLREV NO.304 OF 2021

KHIROD KUMAR SAHU .....Petitioner

.V.

1.STATE OF ODISHA
2.SUKANTA KUMAR PRADHAN .....Opp. Parties

THE NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 147 – Compoundable of offence – Accused punished & fined in trial court and the same also confirmed by the Appellate Court – However in the meantime payment made and settlement between the parties reached – Revision application filed to disposed of the case in view of such settlement – legality of such settlement discussed – Held, in view of Authoritative pronouncement/guidelines of the Apex Court in Damodar S.Prabhu reported in (2010) 5 SCC 663, the application allowed.

Case Laws Relied on and Referred to :-

1. AIR 2010 SC 276 : 2010 (1) SCC 798 : K.M.Ibrahim Vs. K.P.Mohammed & Ors.
2. 2012 (II) OLR (SC) 496 : V.I.Uthuppan Vs. Thankachan & Anr.
3. 2011 (Supp.II) OLR 366 : Debabrata Dash Vs. Malaya Bhowmick.
4. (2018) 1 SCC 560 : Meters and instruments Pvt. Ltd Vs Kanchan Mehta.
5. (2010) 5 SCC 663 : Damodar S.Prabhu Vs. Sayed Babalal H.

For Petitioner : Mr. A.K.Nath

For Opp. Parties: Mr. Sibani Shankar Pradhan, Addl. Govt. Adv. (for O.P. No.1), Mr.A.K.Jena (for O.P.No.2)

JUDGMENT Date of Hearing & Judgment: 02.11.2021

SAVITRI RATHO, J.

The petitioner has been convicted for commission of offence punishable under Section 138 of the Negotiable Instruments Act (in short "N.I. Act ") by judgment dated 28.2.2014 passed in C.T. No.1229/2010/Trial No.419 of 2012 (I.C.C. Case No.176 of 2010) by the learned J.M.F.C., Angul and sentenced to undergo simple imprisonment for one year and to pay a compensation of Rs.2,50,000/- (Rupees two lakhs fifty thousand only) to the complainant. This been confirmed by judgment and order dated 18.03.2021 by the learned Sessions Judge, Angul in Criminal Appeal No.6/2014.

2. Perusal of the order dated 24.8.2021 passed in C.T. No.1229/2010 by the learned J.M.F.C.(I/C), Angul which has been annexed to this Criminal Revision as **Annexure-3** reveals that the written acknowledgement had been filed by the complainant who was present in Court stating that he has received the full and final compensation amount from the petitioner. The prayer of the petitioner to set aside the order of conviction however was rejected as the sentence of simple imprisonment of one year had been confirmed by the learned Sessions Judge, Angul.

3. Mr. A.K.Nath, learned counsel for the petitioner submits that the petitioner is in custody since more than two months. He further submits that the petitioner is a poor man but with great difficulty has paid the entire compensation amount to the complainant (Opp. Party No.2) and the dispute has been settled between the parties and the parties had filed a compromise petition before the learned J.M.F.C. Angul, but the same was rejected. He further submits that as the offence under Section – 138 of the N.I. Act is compoundable and the compounding can be done at any stage, the criminal revision may be allowed and disposed of in terms of the settlement and the conviction and sentence of the petitioner set aside. In support of his submission, he relies on the decisions of the Hon'ble Apex Court in the case of ***K.M.Ibrahim v. K.P.Mohammed and others*** reported in ***AIR 2010 SC 276:2010 (1) SCC 798***, ***V.I.Uthuppan v. Thankachan & another*** reported in ***2012 (II) OLR (SC) 496*** and this Court in the case of ***Debabrata Dash v. Malaya Bhowmick*** reported in ***2011 (Supp.II) OLR 366.***

4. Mr.A.K.Jena, learned counsel for opp. party No.2 confirms that the dispute has been settled between the parties and the accused petitioner has paid the entire compensation amount to the opp. Party and he has no objection if the case is disposed of in terms of the said settlement.

5. The copy of the compromise petition dated 23.08.2021 filed under Section 147 of the N.I. Act before the learned Magistrate has been filed by the learned counsel. It is stated in the petition that as the matter has been compromised and the complainant has received the claimed amount, the complainant does not want to proceed any more in the case. Prayer has been made in the said petition to set aside the conviction and punishment. The copy of the petition be kept in the record.

6. Mr S.S. Pradhan learned Additional Govt. Advocate who had been requested to assist the Court, referring to the decision of the Hon'ble Apex court in the case of ***Meters and instruments Pvt. Ltd vs Kanchan Mehta reported in (2018) 1 SCC 560*** and ***Damodar S.Prabhu v. Sayed Babalal H, reported in (2010) 5 SCC 663*** submits that it is true that the offence under Section 138 of the N.I. Act is compoundable and the conviction imposed by the Courts can be set aside at any stage on basis of such compounding, but in view of the submission of learned Attorney General of India in the case of ***Damodar S Prabhu*** (supra) that the "requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice", the Hon'ble Supreme Court has framed certain guidelines regarding the cost to be imposed for compounding at different stages, if the settlement is entered into after conviction.

7. Section 147 of the N.I. Act provides that every offence punishable under the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), shall becompoundable."

8. The Hon'ble Supreme Court in the case of K.M.Ibrahim (supra) after referring to its earlier decisions has held as follows:

> *…" 9. The golden thread in all these decisions is that once a person is allowed to compound a case as provided for under Section 147 of the Negotiable Instruments Act, the conviction under Section 138 of the said Act should also be set aside. In the case of* ***Vinay Devanna Nayak*** *(supra), the issue was raised and after taking note of the provisions of Section 320 Cr.P.C., this Court held that since the matter had been compromised between the parties and payments had been made in full and final settlement of the dues of the Bank, the appeal deserved to be allowed and the appellant was entitled to acquittal.Consequently, the order of conviction and sentencerecorded by all the courts were set aside and the appellant was acquitted of the charge leveled against him.*
>
> *10. xxx xxx xxx*
>
> *11. As far as the non-obstante clause included in Section 147 of the 1881 Act is concerned, the 1881 Act being a special statute, the provisions of Section 147 will have an overriding effect over the provisions of the Code relating to compounding of offences. The various decisions cited by Mr. Rohtagi on this issue does not add to the above position.*

> *12. It is true that the application under Section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the Appellate Forum. However, Section 147 of the aforesaid Act does not bar the parties from compounding an offence under Section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application under Section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution."…*

In the case of ***V.I.Uthuppan*** (supra) the parties arrived at a settlement when the appeal was pending before the Hon'ble Supreme Court. The Court allowed the parties to compound the offence under Section 138 of N.I. Act in view of the settlement arrived between them.

In the case of ***Debabrata Dash*** (supra), this Court after referring to the judgment of the Hon'ble Supreme Court in K.M.Ibrahim (supra) relied on the memorandum filed by the complainant stating that he has received the defaulted amount in full and final settlement of the dispute and supported the prayer of the petitioner to allow the revision and set aside the order of conviction and sentence and compounded the offences arising out of the N.I. Act by virtue of Section 147 of the N.I. Act and set aside the order of conviction and sentence passed by the learned S.D.J.M., Bhubaneswar against the petitioner by the which has been confirmed in appeal by the learned Adhoc Addl. Sessions Judge (F.T.C.-3), Bhubaneswar.

In the case of ***Damodar S Prabhu*** (supra) the Hon'ble Supreme Court the portions of the judgment relevant for the purpose of deciding this Criminal Revision are extracted below :

> *"….21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-*
>
> *THE GUIDELINES*
>
> *(i) In the circumstances, it is proposed as follows:*

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

22. xxx	*xxx*	*xxx*
23. xxx	*xxx*	*xxx*
24. xxx	*xxx*	*xxx*

25. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons inwriting for such variance…"

9. In the present case the parties have settled the matter after the judgment passed by the Appellate Court. Hence as per the guidelines framed by the Hon'ble Apex Court, the composition should be allowed by imposing cost of 15% of the dishonoured cheque value. But considering that fact that the petitioner has been taken into custody and has spent more than two months in judicial custody in the meanwhile, I feel imposition of cost of Rs.1,000/- would be in the interest of justice. I am also of the view that the said cost should be deposited in High Court Bar Association Advocate's Welfare Fund.

In course of hearing when this amount was suggested to the counsel for the petitioner he has submitted that he will deposit the said amount and file the receipt in course of the day and has in fact filed the receipt.

10. That as the matter has been settled between the parties and the compensation amount has been paid to the complainant–Opp party No.2, in full and final settlement of the dispute, I allow the compounding of the offence under Section -138 of the N.I.Act and set aside the conviction of the petitioner under Section 138 of N.I. Act and the sentence to undergo simple imprisonment for one year and to pay compensation of Rs.2,50,000/- imposed by the learned J.M.F.C., Angul which has been confirmed by the learned Sessions Judge, Angul in Criminal Appeal No.6/2014. The petitioner who is in custody shall be set at liberty forthwith.

11. The CRLREV is accordingly allowed.

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2021 (III) ILR - CUT- 619

SASHIKANTA MISHRA, J.

CRLMC NO. 148 OF 2021

NARESH KUMAR SWAIN @ KALIA .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 482, 82 – Learned JMFC issued NBW along with proclamation and attachment under section 82 – Application for quash of the impugned order – Whether the learned Court below has exercised the power under section 82 in accordance with provision? – Held, No. – Preconditions for exercising of such power indicated.

Case Laws Relied on and Referred to :-

1. 1976 (1) SCC 172 : Kartarey and Ors. Vs. State of U.P.
2. AIR 1973 SC 1062 : Indradeo Mahato Vs. State of West Bengal.
3. 2016 Crl. L.J. 1231 : Antaryami Barik and Anr. Vs. State of Orissa.

For Petitioner : M/s. Debashis Panda & S. Panda.
For Opp. Party : Mr. M.K. Mohanty, Addl. Standing Counsel.

ORDER Date of Order: 24.11.2021

SASHIKANTA MISHRA, J.

In the present application filed under Section 482 Cr.P.C.,the petitioner questions the correctness of the orders dated 10.09.2020 and 21.12.2020 passed by the learned J.M.F.C., Nimapara in G.R. Case No. 458 of 2020, whereby, NBW along with proclamation and attachment under Sections 82 and 83 was issued against him.

2. Briefly stated, the facts of the case are that the petitioner along with eight other persons is facing trial in the aforementioned case for the alleged commission of offence under Sections 147/148/332/294/304/395/ 506/149/120-B IPC read with Sections 25 and 27 of Arms Act. The aforesaid case has been instituted on the basis of an FIR lodged before the Kakatpur Police Station on 25.07.2020. On 10.09.2020, the record was put up before the learned J.M.F.C., Nimapara for consideration of prayer made by the I.O. to issue NBW proclamation and attachment against the present petitioner and another accused by submitting that despite several efforts, the accused persons could not be apprehended as they had absconded from their village to avoid arrest. Learned J.M.F.C. after noting the steps purportedly taken by the I.O. to apprehend the accused persons, allowed the prayer and directed issue of NBW proclamation and attachment against the petitioner and the other accused persons. Subsequently, the I.O. submitted preliminary charge sheet on 19.12.2020 and on such basis, the case record was put up before the learned J.M.F.C. on 21.12.2020 describing the petitioner and other accused persons as absconders with prayer to keep the investigation open. Learned J.M.F.C. observed that the petitioner and his co-accused have been shown as absconder by the I.O. in charge sheet and that NBW was issued by the said court on 10.09.2020 and accordingly directed the CSI to open a split up file. Being aggrieved by the aforementioned orders, the petitioner has approached this court.

3. Heard Mr. D. Panda, learned counsel for the petitioner and Mr. M.K. Mohanty, learned Addl. Standing Counsel through virtual mode.

4. It is submitted by Mr. Panda that the learned Magistrate could not have issued order for proclamation and arrest straightaway without first directing issuance of NBW against the accused persons. Referring to the provisions under Section 82 & 83 of Cr.P.C. it is contended that the power under Section 82 Cr.P.C. can be exercised only if a warrant has already been issued and the Magistrate has reasons to believe that the accused is absconding for the purpose of avoiding arrest. It is further submitted that the petitioner may have been simply absent at his home when he was being searched for by the I.O. but the same cannot be given the colour of abscondance. The learned J.M.F.C., has however, accepted the version of the I.O. in his entirety without applying his judicial mind.

5. Mr. M.K. Mohanty, learned Addl. Standing Counsel has, on the other hand contended that the petitioner has so far avoided arrest by staying away from his home, which amounts to abscondance and therefore, there was nothing wrong on the part of the learned J.M.F.C. to take coercive steps for his apprehension. It is however, fairly submitted that the power under Section 82 of Cr.P.C. can be exercised only after NBW has been issued but not simultaneously.

6. To appreciate the rival contentions, it is felt proper to refer to the relevant provisions which are quoted herein below.

> ***"82. Proclamation for person absconding.***
>
> *(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.*
>
> *(2) The proclamation shall be published as follows:-*
>
> *(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;*
>
> *(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;*
>
> *(c) a copy thereof shall be affixed to some conspicuous part of the Court- house;*

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub- section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

[(4) Where a proclamation published under sub-section (1) is in respect of person accused of an offence punishable under Section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 59 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).]

From a plain reading of the language employed in the provision, it becomes abundantly clear that the power under Section 82 of Cr.P.C. can be exercised only upon satisfaction of the following pre conditions, namely; (a) a warrant must have been issued against the accused; (b) the accused must have absconded or concealed himself in such manner that the warrant cannot be executed; (c) The court must have reason to believe that the aforementioned two circumstances exist. Thus, in a case where a warrant has been issued and the Magistrate has reason to believe that the warrantee is absconding solely for the purpose of avoiding execution of such warrant, then only the proclamation under Section 82 Cr.P.C. can be issued requiring him to appear at a specified place and at a specified time.

7. The essential ingredients for exercise of the power is subjective satisfaction of the court that the warrantee is hiding himself to evade the process of law. Further, mere absence from home cannot be treated as abscondance, because a person may be absent from home for any number of reasons. It is well settled that to be an absconder in the eye of law it is not necessary that a person should have run away from his home; it is sufficient if he hides himself to evade the process of law, even if the place of hiding be his own home. The above view was taken by the apex court in the case of ***Kartarey and others vs. State of U.P.***, reported in 1976 (1) SCC 172. It is

also the settled position of law that simultaneous issue of warrant and proclamation is illegal. Reference in this regard may be had to the decision of the apex Court in the case of ***Indradeo Mahato vs. State of West Bengal*** reported in AIR 1973 SC 1062. That apart, the attachment contemplated under Section 83 can be issued at any time after the issue of proclamation under Section 82 if the court is satisfied that the person concerned is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local jurisdiction of the court.

8. Coming to the facts of the case at hand, it is seen that the I.O. claims to have taken several sincere steps along with Police Staff to apprehend the above noted persons in the locality but in vain and that from confidential enquiry at the village regarding whereabouts of the accused persons it was revealed that they have absconded from their village soon after the occurrence so as to avoid police arrest. On such submission of the I.O., learned J.M.F.C. held that the case is "currently at the stage of investigation and that the court does not want to stand as the stumbling block in the process of investigation by the I.O." and thus, went on to allow the prayer of the I.O.

9. The impugned order as above strikes as blatantly illegal for the reasons indicated below. Firstly, learned J.M.F.C. failed to consider that a warrant had not yet been issued against the accused and therefore, no proclamation under Section 82 could be issued and secondly, the submission of the I.O. was accepted lock, stock, and barrel without citing any justified reason.

10. In a case involving similar facts, i.e., ***Antaryami Barik and another v. State of Orissa***, 2016 Crl. L.J. 1231, this court held that reason is the heartbeat of the orders passed by this court and that reason always show the basis on which the learned court came to a particular conclusion and absence of reasons in an order itself is violative of principles of natural justice.

11. Learned JMFC in the instant case has merely held that the court does not want to stand as a stumbling block in the process of investigation. While it is true that the court should not interfere in the investigation and rather, pass any order that may aid the same yet, no order can be passed dehors the statutory provisions. It goes without saying that if the statute requires a thing to be done in a particular manner, the same shall be done in that manner or not at all. It is also a long standing settled principle of law.

12. From the discussion made hereinbefore, it becomes explicit that the learned JMFC has exercised jurisdiction in a manner not provided for in law, for which the impugned order becomes liable for interference. Such being the position and the fact that the petitioner accused has approached this court challenging such order, he is to be directed to surrender before the court below and move for bail.

13. For the forging reasons therefore, the CRLMC is allowed. The impugned orders dated 10.09.2020 and 21.12.2020 in so far as it relates to accused- Naresh Kumar Swain @ Kalia are hereby quashed. It is further directed that the petitioner shall surrender before the court below within a period of two weeks and move for bail, which shall be considered on its own merit in accordance with law.

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2021 (III) ILR - CUT- 624

A. K.MOHAPATRA, J.

W.P.(C) (O.A.) NO. 616 OF 2017

BASANTA KUMAR BARIK .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Regularization of Service – Petitioner is working as an adhoc employee in the Sailabala Women's College since last 25 Years – No regularisation – Claim of regularisation – Direction issued to regularise the service of the petitioner.

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC 1 : Secretary, State of Karnataka Vs. Uma Devi.
2. 2011 (2) SCALE 377 : State of Odisha Vs. Mamata Mohanty.
3. (2010) 9 SCC 247 : State of Karnataka Vs. M.L. Kesari.
4. (2013) 14 SCC 65 : Nihal Singh and Ors. Vs. State of Punjab and Ors.

5. (2014) 13 SCC 249 : Malathi Das & Ors Vs. State & ors.
6. (2015) 11 SCC 255 : Prem Ram Vs. Managing Director, Uttarakhand Pey Jal and Nirman Nigam and Ors.
7. (2018) 8 SCC 238 : Narendra Kumar Tiwari and Ors. Vs. The State of Jharkhand and Ors.
8. (2018) 13 SCC 432 : Sheo Narain Nagar & Ors. Vs. State of Uttar Pradesh & Ors.
9. AIR 2014 SC 1716 : Amarendra Kumar Mohapatra and Ors. Vs. State of Orissa and Ors.
10. (2019) 17 SCC 648 : Rajnish Kumar Mishra and Ors. Vs. State of Uttar Pradesh and Ors.
11. (2019) 4 SCC 290 : Union of India (UOI) and Ors. Vs. Central Administrative Tribunal and Ors.
12. AIR 2021 SC 3529 : Vice Chancellor, Anand Agriculture University Vs. Kanubhai Nanubhai Vaghela and Ors.
13. 2017 (II) ILR Cuttack 912 : R.K.Nayak Vs OMC Ltd.
14. 2018 (I) ILR Cuttack 695 (DB) : Ranjeet Kumar Das Vrs. State of Orissa.
15. 2020 (I) ILR Cuttack 415 : Kalyani Pattnaik Vs. Registrar, Utkal University & Ors.
16. 2021 (II) ILR Cuttack 469 : Sunil Barik Vs. State of Odisha.
17. 2018(I) ILR Cuttack 695 (DB) : Ranjeet Kumar Das Vs. State of Orissa.

For Petitioner : Mr. S.C. Acharya, Mr. A. Mohanty, Mr. A.P. Dhirsamanta and Mr. C.R. Dash

For Opp. Parties: Mr. N.K.Praharaj, Standing Counsel for State (Opp. Party Nos.1 and 2.)

JUDGMENT Date of Hearing: 12.11.2021: Date of Judgment: 26.11.2021

A. K.MOHAPATRA, J.

1. The facts narrated in the present writ petition depicts the misery and exploitation of a person by his employer over a period of 25 years. The Petitioner has been engaged by Sailabala Women's College, Cuttack on adhoc basis against a class VI post of the college for a meager salary. Despite assurances given by the College Authorities, his services have neither been regularized nor has he been absorbed against an existing vacancy in any of the Class VI posts stated to have been lying vacant in the College. The conduct of the college Authorities is not only against all canons of law, the same is against morality and humanitarian values. Moreover, the College Authorities have engaged in a practice which has been clearly deprecated by the Hon'ble Supreme Court of India in ***Secretary, State of Karnataka Vs. Uma Devi;*** reported in (2006) 4 SCC 1 as well as by this Hon'ble Court in a catena of judgments.

2. Initially the Petitioner moved an application bearing O.A. No.616 of 2017 before the Orissa Administrative Tribunal, Principal Bench, Bhubaneswar for regularization of his services in any suitable Class IV post at Sailabala Women's College, Cuttack considering his long service of 21 years. The learned Tribunal vide order dtd.27.04.2017 admitted the O.A. and further directed that the pendency of the O.A. shall not be a bar for the Respondents to consider the grievance of the Applicant with regard to regularization of his services.

3. While the matter stood thus, the Orissa Administrative Tribunal was abolished. In the year 2019, the Applicant Petitioner filed a writ petition before this Hon'ble Court bearing W.P.(C) No.25528/2019 for transfer of his case records to this Hon'ble Court. Finally vide order dtd.10.01.2020, the case records of the O.A. No.616/2017 were transferred to this Hon'ble Court and were renumbered as W.P.(C)(O.A.) No.616/2017.

4. By way of this writ petition, Petitioner has sought for a direction to the Opposite Parties to regularize the services of the Petitioner in any suitable Class-IV post at Sailabala Women's College, Cuttack, considering his long and continuous service in the said Institution.

5. Heard submission of Mr. S.C. Acharya, learned counsel for Petitioner and Mr. N.K. Praharaj, learned Standing Counsel for State-Opposite Party Nos.1 and 2.

6. The case of the Petitioner, in a nutshell, is that since he is having requisite qualifications, he was appointed for the post of 'Gardener' on contractual basis at Sailabala Women's College, Cuttack on 1st August, 1996. Subsequently, he was directed by the College Authority to perform his duties as a watchman at the main gate of the college vide Order No.1947, dated 18th December, 2007. Further vide Order No.286 dtd.8.02.2010, the Petitioner was directed by the Opposite Party No.3 to perform his duty as 'Watchman' at the main gate of the College. Further, vide Office Order No.286, dated 8th February, 2010, Opposite Party No.3 allotted the Petitioner to work as 'Night Watchman' on Sundays in place of another regular employee of the College. Again, vide Order No.323, dated 13th February, 2010 while posting the Petitioner to work as 'Night Watchman' at the main gate of Arts Block, Opposite Party No.3 while observing that his duties found to be satisfactory, assigned him to work at the college main gate and public

examination during the summer vacation in the year 2010. Satisfied with his work, the Authorities have also issued certificate of bonafideness. While this was so, the Opposite Party No.3 vide letter bearing Memo No.1217 dated 6th July, 2010 sought for clarification from Opposite Party Nos.1 and 2 for absorption of the Petitioner in regular establishment of Opposite Party No.3's institution, copy of the said letter is filed along with the writ petition as Annexure-4. Further apart from his regular work, the Petitioner was also assigned duties such as seat arrangements for interviews, e-admissions, annual athletic meet etc. The Petitioner was also asked to work as a gardener vide order No.2787 dtd.28.12.2011 w.e.f. 1.01.2012 and vide order No.1987 dtd.6.08.2013, he was assigned the additional duty as night watchman and finally vide order No.1169 dtd.6.04.2017, the Petitioner has been directed to work as gardener remaining in charge of all gardens in the Administrative Block and Old Hostel Garden. On a careful examination of the pleadings of the Petitioner, it appears that the Petitioner since the date of his initial appointment is being engaged by the college authority continuously till date.

7. Mr. Acharya, learned counsel appearing on behalf of the Petitioner submits that although Petitioner has been working regularly in the Opposite Party No.3's institution since last 25 years continuously, the college authorities as well as the government is not considering his case for regularization/ absorption in service against any of the sanctioned vacant Class IV post lying vacant in the college. Instead of regularizing the services of the Petitioner, the College Authorities are utilizing the services of the Petitioner for different purposes continuously and mercilessly for almost over two and half decades for a paltry sum as remuneration for his valuable services rendered to the College.

8. Mr. Acharya further submitted that a large number of regular posts in the establishment pertaining to class-III and IV employees are lying vacant in the Opposite Party No.3's institution. Mr. Acharya further submitted that Petitioner being a poor man, the Petitioner has no other alternative than to continue working at Opposite Party No.3's institution with a very meager monthly remuneration.

9. Learned counsel for the Petitioner referring to the judgment of the Hon'ble Supreme Court reported in the case of Secretary, State of Karnataka and others Vrs. Umadevi and others : reported in AIR 2006 SC 1806 and in the case of State of Karnataka Vrs. M.L. Kesari & Ors.: reported in AIR 2010

SC 2587 submits that since the Petitioner has been working for more than 10 years as a temporary employee against various regular posts, lying vacant under the Opposite Party No.3's institution, Opposite Party No.3-authority should have considered his case for regularization/absorption in service.

10. The main contesting Opp. Party i.e. the Opposite Party No.3 has filed a counter affidavit in this case. In the said counter affidavit, the factum of Petitioner's engagement by Opposite Party No.3 against different vacant posts has not been denied or disputed by the said Opposite Party No.3. In the counter affidavit filed by the Opp. Party No.3 it has been stated by the Opp. Party No.3 that the Petitioner passed Class IX and that he was engaged by the then Principal of the College as a gardener on 1st August, 1996. It has also been stated by the Opp. Party No.3 that the Petitioner was being engaged for different works of the College at different points in time. The Opp. Party No.3 has further stated that no proposal for regularization of services of daily wage workers has been sent to the higher authorities. The Opp. Party No.3 has further stated that the Petitioner's service was on contractual basis (89 days basis) and the same was being renewed from time to time. It has been specifically stated by the Opp. Party No.3 in his counter affidavit that a number posts remaining vacant is a long standing problem of their institution (Shailabala Women's College, Cuttack) and the same is evident across all categories of posts However, they have specifically stated in their counter affidavit that Petitioner is not a regular recruitee and he has not been selected for any post by any recruitment process or selection hence his case for regularization /absorption cannot be considered in view of the judgment in the case of ***State of Odisha Vrs. Mamata Mohanty***: reported in 2011 (2) SCALE 377.

11. To defeat the claim of the Petitioner for regularization of his services, the Opp. Party No.3 in his counter affidavit has relied upon the judgment of the Hon'ble Supreme Court of India in the matter of ***State of Odisha Vrs. Mamata Mohanty*** : reported in 2011(2) SCALE 377. The subject matter involved in the said judgment is completely different from the facts of the present case. The Hon'ble Supreme Court of India in the aforesaid case was dealing with cases of the teaching staffs and the Rule involved was "The Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974. However, in the present case the institution involved is a Government

College under the Odisha Government. Therefore, the ratio laid down in the said judgment is not applicable to the facts of case at hand.

12. After going through the pleadings and the submissions made by the respective parties, I am of the firm view that it is no more open to the Opposite Party to take the plea of irregular recruitment/not selected through a valid recruitment process, as such a stand at the instance of the Opposite Parties would amount to allowing Opposite Parties to take advantage of their own wrong. Having utilized the service of the Petitioner for almost last 25 years regularly, it is no more open to the Opposite Parties to take a stand as has been taken in the counter affidavit filed. The law laid down by the Hon'ble Apex Court in ***Umadevi (supra)*** is a clear guideline to be followed in these types of matter. It is submitted by learned counsel for the Petitioner that Petitioner has submitted several representations to the authorities requesting them to consider his case for regularization/absorption, such representations have been annexed to the writ petition as Annexure-8 series.

13. In the aforesaid facts and circumstances, now let us examine the legal position as it stands till today. The landmark judgment of the Hon'ble Supreme Court of India in the case of ***Secretary, State of Karnatak Vrs. Uma Devi*** (supra) does not preclude the claims of employees who seek regularization after the exercise has been undertaken with respect to some employees, provided that the said employees have completed the years of service as mandated by Uma Devi. The ruling casts an obligation on the State and its instrumentalities to grant a fair opportunity of regularization to all such employees which are entitled according to the mandate under Uma Devi and ensure that the benefit is not conferred on a limited few or a selected few as per the sweet will and whims of the executives or bureaucracy. The subsequent regularization of employees who have completed the requisite period of service is to be considered as a continuation of the one-time exercise. The relevant paragraph of the judgment in ***Uma Devi*** (*supra*) has been extracted here in below;

> "53. ...In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six

> months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

14. The directions issued in Uma Devi have been considered by subsequent Benches of the Hon'ble Supreme Court of India in ***State of Karnataka Vrs. M.L. Kesari : reported in (2010) 9 SCC 247***, a two-judge Bench of the Hon'ble Apex Court held that the "one-time measure" prescribed in Uma Devi must be considered as concluded only when all employees who were entitled for regularization under Uma Devi, had been considered. Justice R. V. Raveendran, who wrote the opinion of the Court, held:

> "9. The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi, each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services.
>
> 10. At the end of six months from the date of decision in Umadevi, cases of several daily-wage/ad hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularization process. On the other hand, some government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi, will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53 of Umadevi has expired. The one-time exercise should consider all daily-wage/ad hoc/casual employees who had put in 10 years of continuous service as on 10-4-2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi, but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi, the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi, are so considered.
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> 11. The object behind the said direction in para 53 of Umadevi is two-fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of

> decision in Umadevi was rendered, are considered for regularisation in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ adhoc/ casual basis for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10-4-2006 [the date of decision in Umadevi] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation. The fact that the employer has not undertaken such exercise of regularisation within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularisation in terms of the above directions in Umadevi as a one-time measure."

15. The ground reality after Uma Devi judgment has been correctly assessed in paragraph 11 of the judgment of the Hon'ble Supreme Court of India in ***State of Karnataka Vrs. M.L. Kesari*** *: reported in* ***(2010) 9 SCC 247***. It has been specifically observed that the State and its instrumentalities, despite the direction of the Hon'ble Supreme Court of India, have not completed the one time regularization of daily wage/ adhoc / casual employees. The process of regularization of such employees should have been concluded by the State within a period of 6 months from date of judgment in *Uma Devi's* case. However, the case at hand is a glaring example as to how the State machinery has failed to consider the case of the Petitioner and similarly situated persons. The State and its instrumentalities have failed in their duty to carry out the mandate of the Hon'ble Supreme Court of India in para 53 of the Uma Devi's judgment.

16. The Petitioner who was initially appointed by the Opp. Party No.3 college authority in the year 1996, had almost completed 10 years of continuous service in the Opp. Party No.3 college. The Petitioner is otherwise eligible to be appointed in the vacant posts of the college.

17. The Hon'ble Supreme Court of India in matter of ***Nihal Singh and Ors. Vrs. State of Punjab and Ors***.: reported in ***(2013) 14 SCC 65*** has taken note of the fact as to how the State and its instrumentalities are subjecting the daily wagers / casual workers to exploitation. It has been specifically observed that the judgment in *Uma Devi's* (Supra) case doesn't give the State and its instrumentality a licence to indulge in exploitation. The relevant portion of the judgment has been quoted here in below;

"36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the Legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the Appellants is made available have agreed to bear the burden. If absorbing the Appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is - the various banks which avail the services of these Appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi's judgment cannot become a licence for exploitation by the State and its instrumentalities.

37. For all the above mentioned reasons, we are of the opinion that the Appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside."

18. In yet another case of the Hon'ble Supreme Court of India viz. ***Malathi Das & Ors Vrs. State & ors***.: reported in ***(2014) 13 SCC 249***, has observed as follows;

"8. It is not in dispute that the original batch of employees who had filed writ petition Nos. 33541-571/1998 on the basis of which the writ petitions filed by the Respondents herein (W.P. Nos. 39117-176/1999) were allowed by the order dated 15.12.1999 have been regularized. It is also not in dispute that out of the 445 employees who had filed writ petition Nos. 39117-176/1999, by separate government orders, the service of 161, 64 and 55 employees have been regularized in three batches. The records placed before the Court would indicate that 7 other persons have been regularized during the pendency of the present appeal. In a situation where a Scheme had been framed on 29.12.2005 to give effect to the order of the High Court dated 15.12.1999 passed in the writ petitions filed by the Respondents herein and many of the similarly situated persons have been regularized pursuant thereto the action of the Appellants in not granting regularization to the present Respondents cannot appear to be sound or justified. The fact that the regularization of 55 employees, similarly situated to the present Respondents, was made on 18.04.2006 i.e. after the decision of this Court in Umadevi (supra) is also not in serious dispute though Shri Bhat, learned senior Counsel for the Appellants, has tried to contend that the said regularizations were made prior to the decision in Umadevi (supra). The date of the order of regularization of the 55 persons i.e. 18.4.2006 will leave no doubt or ambiguity in

the matter. In the aforesaid undisputed facts it is wholly unnecessary for us to consider as to whether the cases of persons who were awaiting regularization on the date of the decision in Umadevi (supra) is required to be dealt with in accordance with the conditions stipulated in para 53 of Umadevi (supra) inasmuch as the claims of the Respondent employees can well be decided on principles of parity. Similarly placed employees having been regularized by the State and in case of some of them such regularization being after the decision in Umadevi (supra) we are of the view that the stand taken by the Appellants in refusing regularization to the Respondents cannot be countenanced. However, as the said stand of the Appellants stem from their perception and understanding of the decision in Umadevi (supra) we do not hold them liable for contempt but make it clear that the Appellants and all the other competent authorities of the State will now be obliged and duty bound to regularize the services of the Respondents (74 in number) which will now be done forthwith and in any case within a period of two months from the date of receipt of this order."

19. In ***Prem Ram Vrs. Managing Director, Uttarakhand Pey Jal and Nirman Nigam and Ors***.: reported in (2015) 11 SCC 255 it has been held;

"9. If that be so, there is no denying the fact that the persons who were junior to the Appellant, having been engaged much later than him, steal a march over him in terms of regularization in service while the Appellant remained embroiled in litigation over what was eventually found to be an illegal termination of his service. It is true that the Appellant has already superannuated. That does not, however, make any difference. What is important is that the Appellant had been appointed as early as in the year 1988 and had by the time the decision of this Court in Umadevi's (3) case (supra) pronounced, already completed more than 10 years service. Government has formulated rules for regularization of such daily-wagers, no matter the same are the subject matter of a challenge before the High Court. What is noteworthy is that neither the State Government nor the Jal Nigam has resented the idea of regularization of those who have served for over a decade. The rules providing for regularization are a sufficient enough indication of that fact. We do not, therefore, see any impediment in directing regularization of the service of the Appellant on the analogy of his juniors with effect from the date his juniors were regularized and for the release of all retiral benefits in his favour on that basis by treating him to be in continuous service till the date of his superannuation. We make it clear that this direction will not entitle the Appellant to claim any amount towards arrears of salary based on such regularization.

20. In ***Narendra Kumar Tiwari and Ors. Vrs. The State of Jharkhand and Ors. :*** reported in (2018) 8 SCC 238 it has been observed as follows;

"8. The purpose and intent of the decision in Umadevi (3) was therefore two-fold, namely, to prevent irregular or illegal appointments in the future and secondly, to confer a benefit on those who had been irregularly appointed in the past. The fact

that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in Umadevi (3) is a clear indication that it believes that it was all right to continue with irregular appointments, and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. This is nothing but a form of exploitation of the employees by not giving them the benefits of regularisation and by placing the sword of Damocles over their head. This is precisely what Umadevi (3) and Kesari sought to avoid.

9. If a strict and literal interpretation, forgetting the spirit of the decision of the Constitution Bench in Umadevi (3), is to be taken into consideration then no irregularly appointed employee of the State of Jharkhand could ever be regularised since that State came into existence only on 15th November, 2000 and the cut-off date was fixed as 10th April, 2006. In other words, in this manner the pernicious practice of indefinitely continuing irregularly appointed employees would be perpetuated contrary to the intent of the Constitution Bench.

10. The High Court as well as the State of Jharkhand ought to have considered the entire issue in a contextual perspective and not only from the point of view of the interest of the State, financial or otherwise - the interest of the employees is also required to be kept in mind. What has eventually been achieved by the State of Jharkhand is to short circuit the process of regular appointments and instead make appointments on an irregular basis. This is hardly good governance.

11. Under the circumstances, we are of the view that the Regularisation Rules must be given a pragmatic interpretation and the Appellants, if they have completed 10 years of service on the date of promulgation of the Regularisation Rules, ought to be given the benefit of the service rendered by them. If they have completed 10 years of service they should be regularised unless there is some valid objection to their regularisation like misconduct etc."

21. In ***Sheo Narain Nagar and Ors. Vrs. State of Uttar Pradesh and Ors***. : reported in (***2018) 13 SCC 432***, the Hon'ble Supreme Court has held in paras 9 and 10 as follows;

"9. Coming to the facts of the instant case, there was a direction issued way back in the year 1999, to consider the regularization of the Appellants. However, regularization was not done. The Respondents chose to give minimum of the pay scale, which was available to the regular employees, way back in the year 2000 and by passing an order, the Appellants were also conferred temporary status in the year 2006, with retrospective effect on 2.10.2002. As the Respondents have themselves chosen to confer a temporary status to the employees, as such there was requirement at work and posts were also available at the particular point of time when order was passed. Thus, the submission raised by learned Counsel for the Respondent that posts were not available, is belied by their own action. Obviously, the order was

passed considering the long period of services rendered by the Appellants, which were taken on exploitative terms.

10. The High Court dismissed the writ application relying on the decision in Uma Devi (supra). But the Appellants were employed basically in the year 1993; they had rendered service for three years, when they were offered the service on contract basis; it was not the case of back door entry; and there were no Rules in place for offering such kind of appointment. Thus, the appointment could not be said to be illegal and in contravention of Rules, as there were no such Rules available at the relevant point of time, when their temporary status was conferred w.e.f. 2.10.2002. The Appellants were required to be appointed on regular basis as a one-time measure, as laid down in paragraph 53 of Uma Devi (supra). Since the Appellants had completed 10 years of service and temporary status had been given by the Respondents with retrospective effect in the 2.10.2002, we direct that the services of the Appellants be regularized from the said date i.e. 2.10.2002, consequential benefits and the arrears of pay also to be paid to the Appellants within a period of three months from today."

22. The Hon'ble Supreme Court of India in ***Amarendra Kumar Mohapatra and Ors. Vrs. State of Orissa and Ors.:*** reported in ***AIR 2014 SC 1716*** has analyzed the law on regularization of services as follows;

"41. As to what would constitute an irregular appointment is no longer res integra. The decision of this Court in *State of Karnataka v. M.L. Kesari and Ors*. (2010) 9 SCC 247, has examined that question and explained the principle regarding regularisation as enunciated in Umadevi's case (supra). The decision in that case summed up the following three essentials for regularisation (1) the employees worked for ten years or more, (2) that they have so worked in a duly sanctioned post without the benefit or protection of the interim order of any court or tribunal and (3) they should have possessed the minimum qualification stipulated for the appointment. Subject to these three requirements being satisfied, even if the appointment process did not involve open competitive selection, the appointment would be treated irregular and not illegal and thereby qualify for regularisation. Para 7 in this regard is apposite and may be extracted at this stage:

7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in *Umadevi*, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

23. In ***Rajnish Kumar Mishra and Ors. Vrs. State of Uttar Pradesh*** and Ors.: reported in ***(2019) 17 SCC 648*** the Hon'ble Supreme Court of India while examining the facts in the context of regularization has held, which is quoted here in below;

"17. Another aspect that needs consideration is that during the pendency of the petitions, the Rules with regard to regularization were amended which provided cut-off date of 31.12.2001. Undisputedly, all the Appellants were appointed prior to 31.12.2001. The change in position of law ought to have been taken into consideration by the High Court. It is not in dispute that all the Appellants were appointed prior to 31.12.2001. Undisputedly, the Appellants were continued in services from 01.08.2006 on account of interim orders passed in writ petitions. However, the selection process in which the Appellants were permitted to participate, could not see the light of the day, as it was subsequently cancelled in 2008. As such, as a matter of fact, when the Appellants' case was considered for regularization by a Committee under the chairmanship of Additional District Judge, the Appellants had, in fact, put in service almost for a period of 12 years.

18. As such, apart from the circular issued by the Registrar General of the High Court dated 05.11.2009, the Appellants' cases were also required to be taken into consideration in view of the exception carved out in the case of Umadevi (supra). We find that the Committee under the chairmanship of the Additional District Judge had rightly submitted its report dated 12.07.2012 and the then District Judge had rightly passed the order of regularization on 09.11.2012 granting regularization from 01.06.2012. We find, that while considering the representation of some of the employees for promotion, the successor in the office of the District Judge could not have annulled the order of the regularization of the Appellants which was done after following the proper procedure. The least that was required to be done was to follow the principles of natural justice by giving an opportunity of being heard to the Appellants. We find, that the three orders passed by the District Judge dated 16.08.2014 also suffer from violation of the principles of natural justice.

19. In any case, we find that in view of the exception carved out in the case of Umadevi (supra) providing for one-time regularization of employees who have completed 10 years or above; the parity of similarly circumstanced employees who have been granted benefit in the case of Sheo Narain Nagar (supra) and the Rules

amended in 2016 which provide a cut-off date of 31.12.2001, the Appellants are also entitled for regularization of their services."

24. In ***Union of India (UOI) and Ors. Vrs. Central Administrative Tribunal and Ors.*** : reported in ***(2019) 4 SCC 290***, the Hon'ble Supreme Court of India while speaking through Hon'ble Justice D.Y. Chandrachud has analyzed the law on regularization and has observed in paras-25 and 26 as follows;

"25. The Court noted in the above judgment that if a strict and literal interpretation was given to the decision in Uma Devi, no employee from the State of Jharkhand appointed on an irregular basis could ever be regularized as the State was formed on 15 November 2000 and the cut-off date had been fixed as 10 April 2006. The intent of the Court was to grant similarly-placed employees who had put the requisite years of service as mandated by Uma Devi, the benefit of regularization. The Court thus held that the Jharkhand Sarkar ke Adhinasth Aniyamit Rup se Niyukt Ewam Karyarat Karmiyo ki Sewa Niyamitikaran Niyamawali, 2015 ("the Regularisation Rules") must be interpreted in a pragmatic manner and employees of the State who had completed 10 years of service on the date of promulgation of the rules, ought to be regularized. In doing so, the Court ensured that employees in the State of Jharkhand who had completed the same years of service as employees from other States, are granted parity in terms of regularization. The spirit of non-discrimination and equity runs through the decisions in *Uma Devi, ML Kesari and Narendra Kumar Tiwari.*

26. In this background, the issue which now arises before this Court is in regard to the effective direction which would govern the present case. The High Court has directed the Union of India to absorb the casual workmen, if it is not possible at the Institute in question, then in any other establishment. The latter part of the direction, as we have already noted, cannot be sustained. Equally, in our opinion, the authorities cannot be heard to throw their hands in despair by submitting that there are no vacancies and that it had already regularized such of the persons in the seniority list, who reported for work. The Tribunal has entered a finding of fact that this defence is clearly not borne out of the record. Accordingly, we are of the view that having decided to implement the decision of the Tribunal, which was affirmed by the High Court, the Union of India must follow a rational principle and abide strictly by the seniority list in proceeding to regularize the workmen concerned. Accordingly, we direct that the case for regularization shall be considered strictly in accordance with the seniority list in pursuance of the directions which were issued by the Tribunal and confirmed by the High Court and such of the persons, who are available for regularization on the basis of vacancies existing at present, shall be considered in accordance with law. The Tribunal has denied back-wages but has ordered a notional fixation of pay and allowances. While affirming that direction, we also direct that persons who have crossed the age of superannuation will be entitled to the computation and payment of their retiral dues on that basis. This

exercise shall be carried out within a period of three months from the receipt of a copy of the judgment. If it becomes necessary to grant age relaxation to the concerned workmen, the Appellants shall do so."

25. The latest judgment on regularization of daily wagers like the Petitioner by the Hon'ble Supreme Court of India has been delivered by L. Nageswar Rao J. in ***Vice Chancellor, Anand Agriculture University Vrs. Kanubhai Nanubhai Vaghela and Ors***.: reported in ***AIR 2021 SC 3529***, where in the regularization of services of the daily wagers of the Anand Agricultural University has been allowed with the following observation;

"11. We have heard Mr. P.S. Patwalia, learned Senior Counsel for the university and Mr. Nachiketa Joshi, learned Counsel for the Respondents. The main contention of the university is that after the judgment of this Court in Secretary, State of Karnataka and Ors. v. Umadevi and Ors. MANU/ SC/1918/2006: (2006) 4 SCC 1, the Respondents are not entitled for regularization as there are no sanctioned posts available. Another submission made on behalf of the Appellant is that the judgment of this Court dated 18.01.2001 in Gujarat Agricultural University (supra) does not survive after the judgment of this Court in Uma Devi. It is no doubt true that in Umadevi's case, it has been held that regularization as a one-time measure can only be in respect of those who were irregularly appointed and have worked for 10 years or more in duly sanctioned posts. However, in the instant case the Respondents are covered by the judgment of this Court in Gujarat Agricultural University (supra). This Court approved the proposed scheme of the State of Gujarat and directed regularization of all those daily wagers who were eligible in accordance with the scheme phase-wise. The right to be regularized in accordance with the scheme continues till all the eligible daily-wagers are absorbed. Creation of additional posts for absorption was staggered by this Court permitting the Appellant and the State of Gujarat to implement the scheme phase-wise. We are not impressed with the submissions made on behalf of the university that the judgment of this Court in Umadevi's case overruled the judgment in Gujarat Agricultural University (supra). The judgment of this Court in Gujarat Agricultural University (supra) inter parts has become final and is binding on the university. Even according to Para 54 of Uma Devi's case, any judgment which is contrary to the principles settled in Umadevi shall be denuded of status as precedent. This observation at Para 54 in Umadevi's case does not absolve the university of its duty to comply with the directions of this Court in Gujarat Agricultural University (supra)."

26. Let us now examine some of the judgments delivered by this Hon'ble Court. During post 2006 period (i.e. post Uma Devi's Case) all most all the judgments have followed the law laid down in Uma Devi's Case (Supra). The ratio laid down in Uma Devi's case has been followed by this Hon'ble Court while considering regularization of service of the adhoc/ temporary/ daily wage employees in ***R.K.Nayak Vrs OMC Ltd.: reported in***

2017 (II) ILR Cuttack 912, in Ranjeet Kumar Das Vrs. State of Orissa: reported in 2018 (I) ILR Cuttack 695 (DB), in Kalyani Pattnaik Vrs. Registrar, Utkal University & Ors.: reported in 2020 (I) ILR Cuttack 415, in Sunil Barik Vrs. State of Odisha; reported in 2021 (II) ILR Cuttack 469.

27. A Division Bench of this Hon'ble Court had the occasion to analyse and explain the terminology "irregular appointment" in ***Ranjeet Kumar Das Vrs. State of Orissa : reported in 2018(I) ILR Cuttack 695 (DB***). In paragraph 9 of the aforesaid judgment, the Hon'ble Division Bench has taken note of the fact that allowing the persons to continue for a quite long period, even if with one day break in service, cannot be stated to be a reasonable one, rather, this is an unfair and unreasonable action of the authority concerned.

> "9. Temporary or ad hoc or stop gap or casual basis or the like appointments are made for various reasons. An emergent situation might make it necessary to make such appointments. Since the adoption of the normal method of regular recruitment might involve considerable delay regulating in failure to tackle the emergency. Sometimes such appointments were to be made because although extra hands are required to meet the workload, there are no sanctioned posts against which any regular recruitment could be made. In fact in the case of ad hoc or casual appointees, the appointments, are in the majority of cases, not against sanctioned posts and the appointments are made because of the necessity of workload and the constraints of sanctioning such post (mainly on financial consideration) on permanent basis. Needless to say that filling up vacancies against sanctioned posts by regularisation is against the constitutional provisions of equality of opportunity in the matter of public employment violating Articles 14 and 16 of the Constitution by not making the offer of employment to the world at large and allowing all eligible candidates equality of opportunity to be considered on merits. If that be so, considering the emergent necessity of filling up of vacancies and allowing the petitioner to continue for a quite long period, even if with one day break in service, cannot be stated to be a reasonable one, rather, this is an unfair and unreasonable action of the authority concerned.

28. In the backdrop of the factual matrix as borne out from records placed before this Court and from the analysis of law laid down by the Hon'ble Supreme Court of India in Uma Devi's Case (Supra), which has been consistently followed by subsequent Supreme Court judgments as well as by this Hon'ble Court, it is crystal clear that the long uninterrupted services of the Petitioner should have been considered by the Opp. Party No.3 immediately after the Uma Devi's judgment and his services should have been regularized. The judgment in Uma Devi's case while deprecating the

temporary/ adhoc / illegal appointments by the State and its instrumentalities, have reminded the authorities of their constitutional obligations. Further, as an one time measure, direction has been given to the State Government and its instrumentalities to constitute a screening committee and to regularize the services of the persons who have been appointed irregularly and rendered more than 10 years of service uninterruptedly. The Petitioner's initial appointment was only irregular and not illegal as revealed from the records of the case. The State Govt. and the instrumentalities like the Opp. Party No.3 have failed to carry out the direction issued by the Hon'ble Supreme Court of India in Uma Devi's case as no such exercise as has been mandated have been carried out till date. Even after the said judgment, the exploitation of the Petitioner continued in the hands of the Opp. Party No.3. It is also clear from the record that by the time the judgment in Uma Devi's case was delivered, the Petitioner had completed almost 10 years of continuous service in Opp. Party No.3 College. Further it has been specifically stated in the Counter affidavit filed on behalf of the Opp. Party No.3 that sanctioned posts in Class IV are lying vacant in the college and due to want of approval by the Govt. the same are not being filled up.

29. In such view of the matter, the Opp. Parties are hereby directed to carry out the exercise as mandated in *Uma Devi's* case forth with and list of such temporary and adhoc employees working in the college be prepared and on the basis of their seniority and keeping in view the vacant posts available to be filled up, the Opp. Parties shall do well to regularize the service of the Petitioner within a period of three months from the date of communication of this judgment. Needless to say that all legitimate dues payable as per law be paid to the Petitioner within the aforesaid period.

30. Accordingly the writ petition filed by the Petitioner stands allowed. However, there shall be no order as to cost.

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