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2022 (II) ILR - CUT-545

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

CRA NO. 125 OF 2001

DIBAKAR SWAIN & ORS. ……..Appellants

.V.

STATE OF ODISHA …….Respondent

CRIMINAL TRIAL – Conviction of the appellants for the offences under sections 447/323/302/34 of IPC – Imprisonment for life – This is a case of direct evidence, where the case of the prosecution rest essentially on the evidence of four eye-witness, all of whom are related to the deceased and therefore, could be termed as interested witness – The legal principles governing the appreciation of ocular evidence, particularly of interested witness discussed with case laws – Appeal dismissed. (Para 20)

Case Laws Relied on and Referred to :

1. (2006) 10 SCC 601: Syed Ibrahim v. State of A.P.
2. (2016) 16 SCC 418 : Harbeer Singh v. Sheeshpal
3. (1996) 6 SCC 241 : Gentela Vijayavardhan Rao v. State of AP.
4. 1994 Supp (2) SCC 372 : Arjun Marik v. State of Bihar
5. (1998) 14 OCR 557 : Sarada Rout v. State
6. (2014) 12 SCC 389 : Ganesh Datt v. State of UK
7. (2000) 1 SCC 621 : Padam Singh v. State of U.P.
8. (2012) 11 SCC 158 : Laxman v. State of Maharashtra
9. 2022 Livelaw (SC) 258 : State of M.P. v. Ramjilal Sharma
10. AIR 1953 SC 364 : Dalip Singh v. State of Punjab
11. AIR 1977 SC 2274 : Piara Singh v. State of Punjab
12. (1981) 3 SCC 675 : Hari Obula Reddy v. The State of Andhra Pradesh
13. (2005) 10 SCC 498 : Ramashish Rai v. Jagdish Singh

For Appellants : Mr. Devashis Panda

For Respondents: Mr. P.K. Muduli, A.G.A

JUDGMENT Date of Judgment: 05.07.2022

Dr. S.MURALIDHAR, C.J

1. This appeal is directed against an order dated 13th June, 2001 passed by the Additional Sessions Judge, Cuttack in Sessions Trial Nos.222 of 1997 and 516 of 1998 convicting the Appellants for the offences under Sections 447/323/302/34 IPC and further the Appellant Bijay Kumar Swain for the offence punishable under Section 354 IPC and sentencing each of them to

imprisonment for life for the offence under Sections 302/34 IPC and no separate sentence for the remaining offences.

2. Initially, there were five Appellants when the present appeal was filed.The Appellants are Dibakar Swain and his four sons Bijaya Kumar Swain, Ajay Kumar Swain, Akhaya Kumar Swain, Abhaya Kumar Swain, Appellant Nos. 1 to 5 respectively, who were also arraigned as Accused Nos. 1 to 5 in the trial. Accordingly, they are hereafter referred to as A-1 to A-5 respectively. By an order dated 11th September, 2001, A-3 and A-4 were enlarged on bail; by order dated 27th January, 2003 A-1 was enlarged on bail and by order dated 16thMarch, 2004 A-2 and A-5 were enlarged on bail by this Court during pendency of the appeal.

3. During the pendency of the present appeal, A-1 Dibakar Swain and A-2 Bijay Kumar Swain expired and the appeal as far as they are concerned, stands abated.

4. The case of the prosecution is that at about 1:30 pm on 23rd October, 1996 when Manoj Kumar Swain (PW 7) was returning to his house to Cuttack, he saw his sister Mamata Swain (PW 9) protesting against the uprooting of the fence of the house by A-2 to A-5. He noticed A-2 assaulting PW 9 by tearing her frock.

5. The deceased Siba Prasad, father of PWs 1, 7, 8 and 9, returned home from the field around that time. A-1, A-2 and A-5 are said to have suddenly caught hold of him and all of them conjointly assaulted him on his head by means of a thenga, iron rod and tangia, which they were respectively holding, as a result of which, the deceased sustained bleeding injuries and fell down. When PW 7 and the other son Mahendra Prasad Swain (PW 1) went to rescue their father, A-2 Bijaya and A-5 Abhaya assaulted both of them with iron rod causing injuries. When their grandfather who also was present protested, A-2 Bijaya pushed him. The deceased was removed to the SCB Medical College and Hospital, Cuttack and was admitted to the Neurosurgery Ward for treatment. Siba died in the hospital at 9.30 pm on 25th October, 1996 and the offence for which the FIR was earlier registered was converted from Section 307 to 302 IPC.

6. On completion of investigation, a charge sheet was filed. The accused pleaded not guilty and claimed trial. The plea of the defence was that on the date of incident, the deceased along with PWs 1 and 7 had trespassed into the house of the accused in the afternoon and abused the wife of A-2 in obscene

language and dragged her wearing apparels. When A-1 went to rescue his daughter-in-law, PWs 1 and 7 along with the deceased assaulted A-1 and A-2 causing injuries on their person, whereafter A-1 lodged a written report at the police station, on the basis of which Sadar P.S. Case No.287 of 1997 was registered. After the injured were examined by the doctor and after conclusion of the investigation, a charge sheet was submitted against the deceased and PWs 1 and 7 under Section 448/323/354/341 IPC which was registered as G.R. Case No.1347 of 1996.

7. At the trial in the present case, as many as ten witnesses including PWs 1, 7, 8 and 9, who were the eye-witnesses, were examined by the prosecution. Dr. Nayan Kishore Mohanty (PW 2), who conducted the post-mortem of the deceased was examined. Since the Investigating Officer (IO) was dead by the time the trial was taken up, the Deputy Superintendent of Police Sailendra Kumar Tripathy (PW 10), who supervised the case, was examined. While the defence did not examine any witness, the FIR, Final Form and Injury Reports in G.R. Case No.1347 of 1996 were marked as exhibits.

8. The trial Court while examining the entire evidence came to the conclusion that the prosecution had proved the guilt of the five accused beyond reasonable doubts as well as the guilt under Section 354 IPC and accordingly convicted each of them and sentenced them to undergo imprisonment for life.

9. Mr. Devashis Panda, learned counsel appearing for the surviving Appellants i.e. A-3 to A-5 first submitted that although the case was based on the testimony of the interested eyewitnesses, who were related to the deceased, their evidence was full of material contradictions and inconsistencies and was, therefore, unreliable. He referred to the decisions of the Supreme Court in ***Syed Ibrahim v. State of A.P. (2006) 10 SCC 601*** and ***Harbeer Singh v. Sheeshpal (2016) 16 SCC 418*** and submitted that the burden of proving its case beyond all reasonable doubt lies on the prosecution and never shifts; further if two views were possible on the evidence adduced in a case, the one pointing to the innocence of the accused must be adopted. He further submitted that where the evidence is based on the testimonies of interested/partisan witnesses, as in the present case, it is required to be corroborated by other independent witnesses. Such evidence was to be examined very carefully and all infirmities must be taken into account. It is the quality of evidence not the quantity which is required to be judged by this Court.

10. Mr. Panda then turned to the inconsistencies appearing in the testimonies of the PWs. He pointed out that the presence of PW 1 at the time of occurrence was doubtful as in his cross examination he admitted that he did not reside with his father but in village Satabatia in his uncle's house. Further, PW 1 mentioned the presence of PWs 7 and 9 but excluded PW 8, who is also said to be an eyewitness. According to PW 1, by the time the deceased reached the house, the uprooting of the fence was over and 10 to 15 minutes had elapsed; the assault continued for 10 minutes during which time all the Appellants were simultaneously assaulting and had dealt eight to ten blows on the head. Yet no incised wounds were found by the doctor (PW 2), who noted only one injury on the head with nine internal injuries. PW 2 admitted that two blows with force can cause the head injuries and further that if successive blows were given with the iron rod of crowbar size as well as lathis, there are possibilities of more severe injuries. Further, PW 1 had deposed that the accused had assaulted the deceased on the chest, waist and legs which was, however, not corroborated by any of the other PWs including PW 2.

11. Mr. Panda submitted that the prosecution projected PW 5 and PW 6 as eye witnesses when they were in fact only hearsay witnesses. Relying on the decision in ***Gentela Vijayavardhan Rao v. State of AP. (1996) 6 SCC 241***, he submitted that the evidence of the hearsay witnesses not having been immediately recorded, they could not have been considered by the trial court.

12. Turning next to the evidence of PW 7, Mr. Panda submitted that his evidence contradicts the evidence of PW 1 who said that on the blow given by A-1, the deceased fell down and thereafter A-2 attacked with an iron rod and A-5 with a Tangia and that when both PW 1 and PW 7 intervened they were assaulted and as a result, both had sustained injuries. However, while deposing in Court PW 7 only said that who had threatened and thereafter he left the place and went to the P.S. and when he returned he found that his father had already been removed to the hospital by PWs 8 and 9. If indeed he left for the P.S. when the assault took place, the delay in lodging of the FIR at about 4 pm has not been properly explained. Reliance is placed on the decision in ***Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372.***

13. According to Mr. Panda, there was also no supporting evidence for the time of the return of PW 7 from the P.S. PW 7 stated that he came to the P.S. with PW 1, but the latter did not utter anything about accompanying PW 7 to the P.S. There is also inconsistency about where exactly the incident took

place. In the FIR it is stated that the accused were uprooting the fence, put up in the informant's badi while in the Court, the witnesses stated that the incident took place in the courtyard. Although the PWs asserted that there were blood stains at the place of incidence, nothing had been seized in this regard by the IO. From the statement of PW 7, it appeared that he had not seen the uprooting of the bamboo fence or the tearing of the frock of PW 9.

14. Turning next to the evidence of Namita Swain PW 8, Mr. Panda submitted that according to her the fence was put on the front side whereas in the FIR the fence was stated to be in the badi. Further, while she says that it was A-1, who assaulted PW 9 and tore her wearing clothes, PW 1 stated that it was A-2, who tore PW 9's frock. Mr. Panda stated that the story of PW 8 about all the accused having assaulted the deceased is neither supported by PWs 1 and 7 nor have they said that the incident occurred in front of the house. He further pointed out that PW 8 deposed that she and PW 9 took their deceased-father to the hospital and that the deceased sustained 15 lacerated injuries and three cut wounds on the head but the evidence of PW 2 did not corroborate this. Relying on the decision in ***Sarada Rout v. State (1998) 14 OCR 557***, Mr. Panda submitted that while appreciating the evidence of eye witnesses both intrinsic and extrinsic corroboration had to be looked into.

15. Mr. Panda next turned to PW 9 and submitted that her version was not supported by the versions of her siblings PWs 1, 7 and 8. According to him, PW 9 did not say that the frock was torn by A-2 or that the accused persons were uprooting the fence and when she raised an objection, she was assaulted and her frock was torn. The statements according to him, were also at variance as to what has been stated in the FIR. There was no oral or documentary evidence to support her story that she was injured too. There was also no record of medical evidence regarding the treatment received by her and her siblings at the SCB Medical College and Hospital. He pointed out that she admitted that her family was not in good terms with the accused and that she had seen A-1 and A-2 in the hospital where they were sent for medical examination by the Police. Mr. Panda submitted that although PWs 1, 7, 8 and 9 had spoken of A-1, A-2 and A-5 being armed, none of them identified any seized weapon or even the torn frock of PW 9.

16. Mr. Panda submitted that the prosecution also failed to prove that the accused shared a common intention. Also, the accused were shown to have suffered injuries but this was not properly explained by the prosecution.

Reliance was placed on the decisions in ***Ganesh Datt v. State of UK (2014) 12 SCC 389*** and ***Padam Singh v. State of U.P. (2000) 1 SCC 621.***

17. Mr. Panda submitted that the four main elements of the prosecution story viz., the uprooting of the fence, the tearing of the frock of PW 9, assaulting of the deceased, the assaulting of PW 1 and 7 were sought to be proved through PWs 1,7, 8 and 9 but their testimonies were riddled with contradictions and inconsistencies. He submitted that it was therefore, unsafe to rely on the evidence of PWs 1,7,8 and 9 to bring home the charge of guilt against the accused for the offence punishable under Section 302 IPC read with Section 34 IPC.

18. Mr. P.K. Muduli, learned Additional Government Advocate appearing on behalf of the State-Respondent on the other hand supported the trial Court judgment. According to him, there was full corroboration of the evidence of the eye-witnesses by the medical evidence and the contradictions pointed out were not material so as to discredit their testimonies. He relied on the decision in ***Laxman v. State of Maharashtra (2012) 11 SCC 158*** and the recent judgment in ***State of M.P. v. Ramjilal Sharma, 2022 Livelaw (SC) 258***.

19. The above submissions have been considered. The two factors that immediately stand out on an examination of the evidence in the case is that this is a case of direct evidence where the case of the prosecution rests essentially on the evidence of four eyewitnesses, all of whom are related to the deceased and therefore, could be termed as interested witnesses. The second fact of the case is that it is a case of homicidal death with the medical opinion confirming that the cause of death were the fatal injuries received by the deceased.

20. To begin with, the Court would like to recapitulate the legal principles governing the appreciation of ocular evidence, particularly of interested witnesses. In ***Dalip Singh v. State of Punjab AIR 1953 SC 364*** it was held as follows:

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.
>
> It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along

with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

21. In ***Piara Singh v. State of Punjab AIR 1977 SC 2274*** the Supreme Court held:

"4. It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

22. In ***Hari Obula Reddy v. The State of Andhra Pradesh (1981) 3 SCC 675*** the Supreme Court observed:

"13. …it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence.

All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

23. Again in ***Ramashish Rai v. Jagdish Singh (2005) 10 SCC 498***, it was held:

"7. …The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is wellsettled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

24. The decision in ***Harbeer Singh v. Sheeshpal*** *(supra)* reiterates the settled position in law on the question of appreciation of evidence, where it holds as under:

"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted."

25. Keeping in view the above legal position, when the evidence of the eye witnesses is examined, it is seen that the families of the accused and the deceased are related. The deceased Siba and the accused A-1 (Dibakar) are brothers. However, they were separated since long and were not on visiting terms. The lands and homestead were separated.

26. The Court would also not like to begin with the evidence of PWs 5 and 6 both of whom are termed by learned counsel for the Appellants as 'hearsay' witnesses. Instead, the Court like to first begin with examining the evidence of the two daughters of the deceased i.e. Mamata Swain (PW 9) and her sister Namita Swain (PW 8), who are two of the four eye witnesses whose testimonies are relied upon by the prosecution.

27. The incident begins with the accused coming to the house of the deceased on 23rd October, 1996 at around lunch time, uprooting of the fence put up by the deceased and his sons on their land in order to prevent cattle trespass. What PW 9 stated was that at about 1 pm while she was feeding her brother (Manoj Kumar Swain, PW 7), A-2 then came and assaulted PW 7. When PW 7 asked him why he was assaulting, A-2 in turn asked PW 7 why the fence has been put up. When the reason about stray cattle was given, A-2 started assaulting PW 9 at which point the deceased arrived. While PWs 7 and 9 were explaining to the deceased what had transpired, A-1 came and suddenly assaulted the deceased by means of a thenga. Then PW 8 Namita Swain and another brother Mahendra Swain (PW 1) came and tried to lift the deceased. Thereupon, A-2 assaulted PW 1 by means of a thenga and also pelted stones. PW 1 sustained injuries on his head. Both PWs 1 and 7 went outside to prevent further assault and went to the PS to report the incident at which point A-1 and A-2 again assaulted the deceased, as a result of which he fell down. When PW 9 tried to lift the deceased, A-2 assaulted her and A-1 tore her dress and gave a fist blow on her back. She then brought the deceased in an auto to the SCB Medical College, where on 25thOctober, 1996 the deceased died.

28. In her cross-examination what could be elicited was a statement that she had shown her injury to the doctor and was treated for two days and that PW 1 and PW 8 also got treated there. She further stated that PW 7 had sustained injuries on his body in 10 to 12 places and PW 1 had a bleeding injury on his head. She stated that the blood-stained clothes of herself and her brothers and sister were given to the police. She further stated that the assault

went on for 10 to 15 minutes and her father had protested. She then stated that stones were pelted by the accused for 20-25 minutes and after he sustained injuries on his head and knees, the police arrived at the hospital between 1 and 1:30 pm and she narrated the occurrence. According to her, the two brothers arrived thereafter at the hospital.

29. Certain contradictions were sought to be elicited from PW 9 and also from the examination of PW 10. However, on a careful examination of the evidence of PW 10 vis-à-vis what PW 9 informed the IO, it is seen that the essential details about A-2 assaulting PW 7 and about A-1 suddenly assaulting the deceased by thenga and A-2 assaulting PW 8 and PW 1; PW 1 sustaining injuries on his head; then PWs 1 and 7 going outside to prevent further assault; when the deceased was going to the P.S. to report, A-1 and A-2 assaulting him as a result of which he fell down and PW-9 trying to lift the deceased by which time A-2 assaulted her and A-1 gave a fist blow are available both in the previous statement to the police and in her testimony in Court. The defence was not able to bring out contradictions and inconsistencies in these essential details. The fact that initially before the Police he may not have said anything about her frock being torn cannot be said to discredit her testimony particularly when that part of the occurrence has been spoken to consistently by both PW 7 and PW 8. It must be recalled here that the main occurrence is about the accused coming together and assaulting the deceased with a lathi, iron rod, thenga and the deceased succumbing ultimately to the said attack. On these broad details, there is complete corroboration of the testimony of PW 9 by the testimonies of PWs 7 and 8.

30. Even when one turns to the deposition of PW 1 while his presence was spoken to by PWs 7, 8 and 9 there may be some differences in their description of the exact role played by each of the accused in assaulting the deceased. Also, the difference as to where exactly the fence that was uprooted was located. However, on a broad spectrum, there is a consistent and cogent narration in the testimonies of the four eye witnesses. Although they are related and 'interested' witnesses, a careful scrutiny of their testimonies goes to substantiate the case of the prosecution. It must be remembered that each of these witnesses have been examined more than two years after the event. In fact, PW 9 was examined on 6th April, 2000 which is almost four years after the occurrence. It is but natural that there will be some variations in their narration of events. Some margin has to be allowed for

lapses and precise recall of the events or the sequence of events. However, on the material particulars of the assault and the deceased succumbing to the assault, there is very little that has emerged in the cross examination of the witnesses to discredit their testimonies.

31. The medical evidence corroborates the testimonies of the eye witnesses in large measure. PW 2 - the doctor who conducted the autopsy found the following injuries on the person of the deceased:

> "1. Abraded contusion of size 7 cm x 6 cm situated on the left side frontal region along the coronal plane 8 cm above the root of the left ear.
>
> 2. Abrasion 3 cm x 1.5 cm looking reddish-brown situated on the lateral aspect of left gluteal region just above the greater trochanter.
>
> 3. Abrasion 9 cm x 4.5 cm looking reddish-brown colour situated on left gluteal region 4.5 cm behind the injury no.2
>
> 4. 3 small abrasions looking reddish-brown colour size of 1 cm x 1 cm each situated on the right shoulder outer to the lateral end of right clavicle and acromion process 1.5 cm apart from each other.
>
> There are three external injuries, one on the head, two on the buttocks and some small abrasions on the shoulder."
>
> On discussion he found the following internal injuries:
>
> 1. Corresponding to external injury No.1 the undersurface of the scalp over left frontal scalp, left parietal scalp and left temporal scalp was contused with contusion and extravasation of blood into the anterior half of left temporalis muscle.
>
> 2. Undersurface of right parietal and right temporal scale was contused associated with contusion with extravasations into the right temporalis muscle.
>
> 3. Fissure fracture involving the left half of frontal bone with fissure extension involving the left temporal bone and left parietal bone present corresponding to external injury No.1.
>
> 4. Fissure fracture involving right temporal bone extending along the coronal suture to cause separation of suture which extends 2 cm left lateral from mid line to join with the fissure fracture over left half of frontal bone.
>
> 5. Extradural haematoma corresponding to external injury No.1 and internal injury nos. 1 and 3 found over the left fronto-temporo parietal area of size 11 cm x 6 cm x 1 cm.
>
> 6. Extradural haemotoma corresponding to internal injury no.4 over the temporo parietal area of size 10 cm x 8 cm x 1.5 cm.
>
> 7. Contusion and laceration of the right side temporal lobe to right side middle carnial fossa, i.e. corresponding to internal injury no.4.
>
> 8. Contusion of size 5 cm x 4 cm over left frontotemporo-parietal area of brain corresponding to external injury no.1 and internal injury nos.1, 3 and 5.

> 9. Fractures as described under internal injury nos.3 and 4 have extended on right side to involve the base of right middle cranial fossa alongwith petrous part of right temporal bone and on left side it involves the case of left middle cranial fossa."

32. The description by the eyewitnesses of the manner of assault by the accused of the deceased more or less corresponds to the injuries detected by the doctor. The multiple fractures on the most sensitive parts of the skull and brain points to the brutal nature of the attack. Also, with the eye witnesses speaking clearly of the assault with deadly weapons, the fact that the weapons may not have been shown to the witnesses really does not weaken the case of the prosecution.

33. The fact that the accused themselves may have sustained some injuries for which they lodged a separate complaint against the deceased as well as PWs 1 and 7 does not detract in any manner from the complete corroboration by the medical evidence of the ocular testimony of the eye witnesses of the assault of the deceased by the accused. The internal injuries were fractures of the temporal and parietal bones, the frontal bones, the base of the right middle cranial fossa along with the petrous part of right temporal bone. The presence of all the accused have been spoken of consistently by the four eye witnesses. The five accused combined to ensure that the deceased did not survive. That three of them were armed and the other two perhaps not, will make no difference to their sharing a common intention for the purposes of Section 34 IPC. That the accused acted in concert is established beyond reasonable doubt. Even if one or two of the accused may not have been armed, this much is plain that A-1 and A-2 were definitely armed as was A-5 as mentioned in the FIR. The other two accused did act in consort and shared the common intention. The evidence more than eloquently speaks to the commission by each of the accused of the offence punishable under Section 302 IPC with the aid of Section 34 IPC.

34. In ***Laxman v. State of Maharasthra*** *(supra),* on the question of injuries on the accused not having been explained, it was observed as under:

> "17. Insofar as the injuries sustained by some of the accused are concerned, it is seen from the evidence of Dr. D. Trimabak (PW-2) that those injuries are minor in nature. This Court on various occasions has held that in the case of minor injuries, merely because the prosecution has not furnished adequate reasons, their case cannot be rejected. Considering the fact that the injuries sustained by some of the accused were minor in nature, even in the absence of proper explanation by the prosecution, we hold that the prosecution story cannot be disbelieved."

35. Further in ***State of M.P. v. Ramjilal Sharma (supra),*** the legal position as far as ocular evidence corroborated the medical evidence, has been clearly explained as under:

> "4.2. Even otherwise once it has been established and proved by the prosecution that all the accused came at the place of incident with a common intention to kill the deceased and as such, they shared the common intention, in that case it is immaterial whether any of the accused who shared the common intention had used any weapon or not and/or any of them caused any injury on the deceased or not."

36. As regards the submission that there was delay in despatch of the FIR, and that it was probably manipulated or backdated, the Court finds that the incident occurred on 23rd October, 1996 and the FIR was despatched on the following day to the Court. It is shown to have been received on 25th October, 1996. The so-called delay has not been shown to have been deliberate or to have distorted the case of the prosecution or have caused any prejudice on that score to the accused. The Court is not persuaded that the FIR has been doctored or predated as is sought to be suggested.

37. Consequently, this Court is not persuaded that the trial Court has committed any error in holding that the prosecution has proved its case against the accused beyond all reasonable doubt. They have been rightly convicted for the offence punishable under Sections 302 read with Section 34 IPC and sentenced in the manner indicated before. Thus, the Court finds no merit in this appeal and it is dismissed as such.

38. The bail bonds of the surviving Appellants i.e. A-3 to A-5 are hereby cancelled and they are directed to surrender forthwith and in any event not later than 20th July, 2022 failing which the Inspector-in-Charge of the concerned police station will take immediate steps to have them arrested and taken into custody to serve out the remainder of their sentences.

39. The appeal is dismissed, but in the circumstances, with no orders as to costs.

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2022 (II) ILR - CUT-557

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

W.P.(C) NO. 17546 OF 2011

OSWAL SARAKARAKHANA SHRAMIKA SANGHA TRADE UNION ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 227 – Judicial review of an award passed by the Industrial Tribunal – Scope of interference – Held, the power under Article 227 is to be exercised sparingly in appropriate cases – Principles summarised. (Para 33)

Case Laws Relied on and Referred to :

1. AIR 2004 SC 969 : Ram Singh v. Union Territory, Chandigarh
2. 2011 (128) FLR 560 : General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v.Bharat Lal
3. 2009 (123) FLR 321 (SC) : International Airport Authorities v. International Airport Cargo Workers Union
4. AIR 1979 SC 1652 : Shankar Chakravorti v. Britannia Biscuit and Co.
5. 1991 LAB IC 1747 (All) : M/s. IFFCO Ltd. v. Industrial Tribunal, Allahabad
6. (2008) 12 SCC 275 : General Manager, ONGC v. ONGC Contractual Workers Union
7. AIR 1995 SC 1893 : Gujaral Electricity Board, Thermal Power Station Ukai v. Hind Mazdoor Sabha,
8. AIR 1992 SC 457 : Dena Nath v. National Fertilisers Ltd.
9. (2001) 8 SCC 97 : Estralla Rubber v. Dass Estate (P) Ltd.
10. 2022 SCC Online SC 29 : Garment Craft v. Prakash Chand Goel.

For Petitioner : Mr. Milan Kanungo, Sr.Adv.

For Opp. Parties: Mr. Surya Pr.Mishra, Sr.Adv.
Mr. P.K.Muduli, A.G.A.

JUDGMENT Date of Judgment: 19.07.2022

Dr. S.MURALIDHAR, C.J

The reference

1. The Oswal Sarakarakhana Shramika Sangha Trade Union (hereafter 'Union') has filed this petition challenging an Award dated 4th May, 2011 passed by the Industrial Tribunal, Bhubaneswar (Tribunal) in Industrial Dispute (ID) Case No.15 of 2002, answering the reference made to it of the following dispute in favour of the First Party-Management and against the Second Party-Union:

"Whether the workmen engaged in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep through M/s. Balaji Traders (list furnished by the L&E Deptt. vide Letter No.9854 dtd. 17.8.2002) are entitled to absorption in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep on expiry of contract on dt. 31.8.2001 or entitled to absorption/engagement under new contractors establishments entrusted with the execution of the said work?"

2. The Union is stated to be espousing the cause of 1139 Workmen, who were engaged to work in the fertilizer plant of OSWAL Chemical and Fertilizers Limited (OCFL) (Opposite Party No.2 herein) at Paradeep from 1997 onwards. The case of the Union was that the aforementioned 1139 workers were directly engaged by OCFL during the years 1997 to 2000 in a permanent and perennial nature of work. However, according to the Union, OCFL placed their services under a fictitious contractor-M/s. Balaji Traders (Opposite Party No.4 herein) in the month of September/October, 2000. The case of the Union was that there is no such Firm by the name of M/s. Balaji Traders in existence and such a fictitious entity was introduced only to deprive the Workmen of their status as regular workers of OCFL. The Union contended that the work of the 1139 Workmen was being controlled by officers of OCFL and, therefore, they should be treated as employees of OCFL.

3. The Union contended that with a view to suppressing the Union's activities, OCFL in January, 2001 refused employment to 18 members of the Union. This resulted in the Union calling for a strike with effect from 14th February, 2001. Despite intervention of the authorities, the dispute could not be resolved. Another strike took place on 21st June, 2001. The contract between OCFL and M/s. Balaji Traders expired on 31st August, 2001 and the services of the Workmen were terminated with effect from 1st September, 2001. The conciliation efforts on the Union's demand for absorption of the Workmen in the OCFL failed. A failure report was submitted on 15th July, 2002 by the Conciliation Officer-cum-Deputy Labour Commissioner, Cuttack.

4. Thereafter on 23rd July 2002, the Labour and Employment Department of the Government of Orissa (Opposite Party No.1) referred the aforementioned dispute for adjudication to the Tribunal. It may be noted here that according to the Union, it wrote a letter on 15th August, 2002 to Opposite Party No.1 whereby it sought amendment of the order of reference as under:

"Whether the 1139 workers who were directly working under the 1st Party Management are entitled to get the status of regular workers under the 1st Party

management of M/s. O.C.F.L. and if not to what relief they are entitled to as workers under said M/s. Balaji Traders."

5. The above amendment sought to alter the basic premise of a tripartite contract labour arrangement involving OCFL, the workman and M/s. Balaji Traders to a premise that "the 1139 workers who were directly working under the 1st Party Management" i.e. OCFL. The alternate plea was about their entitlement if they were to be considered workers of M/s. Balaji Traders. However, as acknowledged by the Union itself, the amendment to the terms of reference as requested for was not carried out. The Union does not appear to have pursued the matter of the amendment further. Thus, the reference continued to be premised on the engagement of the workers "through" M/s. Balaji Traders and not directly with OCFL.

Union's statement of claim

6. The Union filed its statement of claim in the Tribunal on 28th January, 2004. *Inter alia*, the contention of the Union was that M/s. Balaji Traders was a fictitious entity; that OCFL as well as the said contractor did not obtain the registration under the Contract Labour (Regulation and Abolition) Act, 1970 ('CLRA Act') and the act of placing the services of Workmen under the said contractor was only to deprive them of the legitimate and bona fide rights. It was contended that the so-called contract system was merely a camouflage; in fact, each of the Workmen was engaged on a permanent and perennial basis in OCFL. Without prejudice to the above contentions, it was submitted that even assuming 1139 workers were engaged by the said M/s. Balaji Traders then the OCFL-Management was under an obligation to comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947 ('ID Act') and the Orissa Contract Labour (R & A Rules) 1975 ('Rules'), which require notice and payment of wages in lieu thereof before terminating the services of the Workmen. If the workers were hired to work through a contractor, who did not possess a valid licence under the CLRA Act, then the workers would be treated as Workmen of the principal employer.

7. The Union applied to the Tribunal for a direction to OCFL to produce the applications submitted by it for registration under the CLRA Act and M/s. Balaji Traders to produce the application made by it for being issued a licence under the CLRA Act. It was prayed in the application that the District Labour Officer (DLO), Jagatsinghpur should be asked to produce the relevant register, which would show whether the OCFL as well as the fictitious contractor in question were registered under the CLRA Act. It was further

prayed that the Tribunal should direct reinstatement of the 1139 Workmen with OCFL.

Case of OCFL (Management)

8. A written statement was filed by OCFL stating that the Workmen were contract labourers governed by the CLRA Act and Rules thereunder. It was contended that OCFL had given various miscellaneous jobs to different contractors having valid licence to engage contract labourers. M/s. Balaji Traders was one such contractor having a valid labour licence, who was given the contract for supply of labourers. It is contended that the disengagement of the Workmen on the expiry of the contract between OCFL and M/s. Balaji Traders on 31st August, 2001 did not create a right in the workers for absorption in OCFL. It was contended that the workers were under the direct control and supervision of M/s. Balaji Traders, who was liable to pay their wages. As regards the 18 workers who were not taken back, it was submitted that the said issue formed a subject matter of another reference being I.D. Case No.8 of 2001 before the Tribunal and did not form part of the present reference. It is pointed out that the alleged non-compliance of Section 25-F of the ID Act was not the subject matter of the reference and, therefore, did not come within the purview of adjudication of the present dispute. It was contended that Section 25-H of the ID Act also did not apply to contract labourers.

Case of IFFCO, the transferee

9. During pendency of the proceedings before the Tribunal, the ownership of the fertilizer plant was transferred from OCFL to Indian Farmers Fertilizer Co-operative Limited (IFFCO) (Opposite Party No.3). A Sale Agreement was executed on 13th March, 2006 between the OCFL and IFFCO.

10. Anticipating the Sale Agreement, an application was filed before the Tribunal on 28th September, 2005 to implead IFFCO as a party. After the said application was allowed by the Tribunal on 8th March 2006, IFFCO was impleaded as First Party No.2 and filed its written statement on 7th July, 2006. IFFCO adopted the written statement of OCFL and further contended that the Management of IFFCO, Paradeep was no way concerned with the engagement/non-engagement of the contract labourers engaged by different contractors of OCFL. The dispute if any was between Union on the one hand and the OCFL and M/s. Balaji Traders on the other.

11. IFFCO pointed out that it had purchased the offered assets of OCFL on an "as is where is basis" under certain terms and conditions. IFFCO was not obliged in terms of the Sale Agreement to accept the liabilities of the contract labourers. Reference was made to Clause 2.3.3 of the Agreement, which stipulated as under:

> *"2.3.3 The Vendor has represented that the major litigations listed in Schedule D are pending in respect of and relating to the undertaking. The Vendor acknowledges and confirms that any liability arising out of these or any other pending or future litigation, relating to the period prior to 1st October 2005, shall be liability of the Vendor. The Vendor hereby agrees and undertakes to indemnify and keep indemnified and saved harmless at all times the purchaser against the same."*

12. Reference was also made to Section 11 of the Agreement whereby IFFCO had agreed to absorb OCFL's 1292 employees comprising 874 Workmen covered by the ID Act, 240 Officers and 178 trainees. Further, IFFCO agreed that all salaries and other emoluments relating to employees for the period after 1st October, 2005 shall be borne by it. Clause 11.6 was an Indemnity Clause, which stated as under:

> *"11.6* ***Vendor indemnity for employee matters****:*
>
> *The Vendor shall indemnify the purchaser against each and every cost, claim, liability express or demand which relates to or arises out of any act or omission by the Vendor prior to the 1st October, 2005 and which the purchaser may incur in relation to any contract of employment or pursuant to the regulations or collective agreements concerning the employees including without limitation any such matter relating to or arising out of."*

13. The contention was that since the services of the members of the Union had been terminated prior to 1st October 2005, no liability attached whatsoever to IFFCO as regards the Union's claim for absorption/ regularization. Clause 11.7 of the Agreement was an Indemnity Clause, which reads as under:

> *"11.7* ***Purchaser Indemnify for Employee Matters****:*
> *Save and except pending litigations as on 30th September, 2005. The purchaser shall indemnify the Vendor against each and every cost, claim, liability, expense, payment or demand arising from any act or omission of the purchaser in relation to any Employee relating to their employment at the undertaking after 1st October, 2005 including without limitation any act or omission which leads to a liability on account of wrongful termination, discharge, lay off, retrenchment or wrongful dismissal or compensation for race sex or disability discrimination occurring after 1st October, 2005."*

14. The contention was that IFFCO did not step into the shoes of OCFL vis-a-vis the liabilities towards the workmen of the Union.

Impugned Award of the Tribunal

15. On the basis of the above pleadings, the Tribunal, in the impugned Award, first took up the 1st issue whether the contract between OCFL and M/s. Balaji Traders was genuine and if not, whether the Workmen were liable to be treated as employees of the principal employer i.e. OCFL was "not beyond the scope of the reference." The four issues framed by the Tribunal for consideration were as under:

> *1. Whether the workmen engaged in M/s. OSWAL Chemicals and Fertilisers Ltd, Musadia, Paradeep through M/s. Balaji Traders (list enclosed) are entitled to absorption in M/s. OSWAL Chemicals and Fertilisers Ltd., Musadia, Paradeep on expiry of Contract on dt. 31.8.2001 or entitled to absorption/engagement under new contractors establishments entrusted with the execution of the said work?*
>
> *2. Whether the reference is maintainable?*
>
> *3. Whether the workmen (list enclosed) working in M/s. OCFL were engaged through M/s. Balaji Traders or were engaged directly under Management OCFL and whether the contract is real or mere camouflage?*
>
> *4. Whether M/s IFFCO is liable to accept any liabilities to arise out of this I.D. Case?"*

16. The Tribunal took up Issues 2 and 3 first. It answered Issue No.2 in the affirmative by holding that the reference was maintainable. On Issue No.3, the Tribunal relied on the decision of the Supreme Court of India in ***Ram Singh v. Union Territory, Chandigarh AIR 2004 SC 969*** where it was held that if the contract is found to be not genuine then the so-called contract labourers will have to be treated as employers of the principal employer and they would be directed to be regularised in the establishment under the principal employer. Further, in determining the relationship of the employer and the employee, the two tests that had to be adopted were the 'control' test viz., whether the principal employer controls and supervises the work of the employees and the second was the 'integration' test viz., whether the person was fully integrated into the employer's concern or remained apart from and independent of it. In this context, the Tribunal also referred to the decision in ***General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v.Bharat Lal 2011 (128) FLR 560*****,** where it was held that the wellrecognized tests to find out if the contract labourers were direct employees of the principal employer were as under:

"(i) whether the principal employer pays the salary instead of the contractors; and

(ii) whether the principal employer controls and supervises the work of the employee."

17. Reference was also made by the Tribunal to the decision in ***International Airport Authorities v. International Airport Cargo Workers Union, 2009 (123) FLR 321 (SC)*** where it was emphasized that merely because the contract labourer is working under the direct supervision and control of the principal employer would not make him a direct employee of the principal employer particularly if the salary is paid by the contractor and right to regulate the employment is with the contractor, who will decide where employee will work and subject to what conditions.

18. The Tribunal next shifted its attention to question of the burden of proof which according to it fell on the Union to aver and prove that the workers were directly employed under OCFL. It was noted that the Union "should have made a prayer to this Tribunal to direct the OCFL to cause production of any such Registers and/or documents wherefrom the second party could have obtained corroborative evidence to support their claim that they were directly recruited by the principal employer, they used to receive salary from the principal employer, and, any other facts that have a bearing on the status of the Workmen."

19. The Tribunal next took up for discussion the evidence of the two workers witnesses (WWs) 1 and 2 being the General Secretary and Executive Member of the Union and that of the Management Witnesses (MWs), MW1 being the representative of OCFL and MW2 that of IFFCO. It was noted that except stating in their depositions that the Workmen had been working with the establishment of OCFL continuously for one to four years, the WWs had not adduced any specific evidence on whether the job performed by them was of permanent or perennial in nature. There was no supporting material such as notices of recruitment, interview cards and appointment orders showing that the Workmen were directly recruited by OCFL. Further, "though it is claimed that the names of the Workmen were there in the Muster Roll of the OCFL and that the Workmen used to receive their salary from the OCFL by putting signatures on the Wage Register, it is not supported by relevant documents/ Registers. Even no prayer was made by the Second Party to direct the First party to produce such documents/Registers which may be supposed to be in the latter's custody. There is no evidence on the points as to who had the power to select and dismiss the Workmen, who used to pay

remuneration, who used to deduct insurance or other contributions and who used to supply tools and materials to the workers."

20. As regards the documents relied upon by the Union to show that M/s. Balaji Traders was a fictitious person, the Tribunal observed as under:

> *"….Simply picking up some anomalies from several documents that have not been subjected to the test of cross-examination, in that the person/authority who are executants/originators of the documents have not been brought before the Tribunal to explain on the facts contained in the documents and the circumstances under which the anomalies came to being, this Tribunal cannot give a finding as to whether the contractor is a fictitious person/ firm. That apart, merely because there are some variations in someone's name, address and age mentioned in different forms/ documents, that some letters addressed to someone have been received back undelivered or someone has not made personal appearance in some proceedings, there cannot be a conclusion that no such person is in existence or that he is a fictitious person."*

21. The Tribunal noted that in I.D. Case No.8 of 2001 M/s. Balaji Traders had at one stage entered appearance before the Tribunal and sought time, but did not file a written statement. Thus, both in the said case as well as in the present case i.e. I.D. Case No.15 of 2002, M/s. Balaji Traders was set ex parte. It was concluded that in the circumstances "it is not possible to say that the contractor is a fictitious person." The Tribunal then turned to examining whether the contractor (as a person or as a firm) was fictitious. The term of reference only required the Tribunal to determine whether "the very contract system introduced by the principal employer is genuine or not." In this context, the Tribunal noted that in terms of Section 10 (2) of the CLRA Act, the following factors had to be considered in addressing the question whether the contract was a sham or a genuine one:

> *"(a) Whether the process, operation or other work is incidental to, or necessary for, the industry, trade, business, manufacture or occupation that is carried on in the establishment;*
>
> *(b) Whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;*
>
> *(c) Whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;*
>
> *(d) Whether it is sufficient to employ considerable number of whole-time workmen."*

22. The Tribunal then discussed the evidence produced. The Tribunal noted that although a number of attendance cards of some of the Workmen had been exhibited "there was nothing in the cards as to who used to take the

attendance of the Workmen concerned." Every card was signed by an 'issuing authority' but it was not explained whether this was an officer of the principal employer. There was no document to show that the remuneration of the Workmen was paid by the principal employer. It was noted "on the other hand, Salary Slips of some of the Workmen exhibited by the Second party seem to have been issued by Balaji Traders and there is nothing on the body of the slips wherefrom it can be said that the principal employer used to pay remuneration to the Workmen."

23. The Tribunal then examined the gate passes that had been exhibited. One was issued by M/s. Balaji Traders and another by a Chief Security Officer of OCFL. Then the Tribunal examined the mess/canteen passes, which by themselves did not show that the Workmen were the direct employees of the OCFL. Further, the gate passes were not going to show whether the Workmen were integrated with the establishment of the principal employer. Several other documents exhibited on behalf of the Workmen were then examined by the Tribunal but these were held to be insufficient to show that all 1139 Workmen were under the complete administrative control of OCFL and were integrated in its regular establishment. The duration of the employment of each of the Workmen during 1997 to 2000 was not ascertainable although the pay slips and attendance cards did show that some of the Workmen had been continuously engaged for years together.

24. The evidence placed on record led the Tribunal to conclude that the principal employer i.e. OCFL "used to exercise control over the Workmen with regard to the work they were to be assigned with." However, this by itself was not sufficient to conclude that the principal employer had "absolute control over the Workmen." It did appear that some of them had been established during the construction phase of the factory and it was possible that they were not redeployed after this phase was complete. Further, there was no evidence to show that the work which used to be performed by the Workmen "is now being done ordinarily through the regular Workmen of the First Party." The construction work would not be construed to be an integral part of the overall work to be executed by the establishment for production of fertilizer and other ancillary work. Therefore, the Tribunal concluded as under:

> *"Thus, it is found that the factors which are enumerated in sub-section (2) of Section 10 of the C.L.R.A. Act are absent. Even the 'control test' and 'integration' test fail. Consequently, the contract cannot be said to be sham or a mere camouflage.*

Accordingly, Issue No.3 is answered against the Second party. Once it is held that the contract is not proved to be sham or fictitious the reference becomes not maintainable."

25. In view of the findings recorded in Issue No.3, it was held that the Workmen, who were engaged in OCFL through M/s. Balaji Traders, were not entitled to absorption either under OCFL or any other contractor.

26. The Tribunal then turned to Issue No.4 concerning the liability if any of IFFCO. The Tribunal noted that the Union had not amended its claim statement to introduce any claim against the IFFCO. Relying on the decision of the Supreme Court in ***Shankar Chakravorti v. Britannia Biscuit and Co. AIR 1979 SC 1652,*** the Tribunal had held that in the absence of pleadings in the claim statement, the issue could not be decided. Accordingly, the reference was answered by the Tribunal against the Union and in favour of the Management.

27. Pursuant to the notice issued in the present petition, replies have been filed both by OCFL and IFFCO, which would be referred to in due course.

Submissions of counsel for the Union

28. Mr. Milan Kanungo, learned Senior Counsel appearing for the Petitioner Union, made the following submissions:

i. The exhibited sample copies of the gate passes, canteen passes, attendance passes and correspondence of some of the Workmen established that they were working directly under the OCFLManagement and not through M/s. Balaji Traders, which was a sham entity;

ii. The attendance cards showed that the Workmen were working during 1998 to 2000 continuously for more than 240 days in each year, which proved that they were directly employed under the OCFL;

iii. M/s. Balaji Traders did not appear before the Tribunal or this Court and throughout remained ex parte. The evidence of MW1 did not establish that the workers were contractual workers getting wages from M/s. Balaji Traders. Neither MW1 nor MW2 had produced any document in this regard. Once the Workmen were able to show that they worked continuously under OCFL and for more than 240 days in a year, the onus of proof shifted to the Management, which had to show by positive evidence that the workers were in fact on the pay roll of the contractor. The Management failed to do so. Reliance is placed on the decision in ***M/s. IFFCO Ltd. v. Industrial Tribunal, Allahabad, 1991 LAB IC 1747 (All)***;

iv. The reference to the Tribunal appears to have been loosely worded but the real issue was whether the Workmen were employees of OCFL or the contractor. It was open to the Tribunal to lift the veil for determining the nature of the employment.

Reliance is placed on the decision of the Supreme Court in ***General Manager, ONGC v. ONGC Contractual Workers Union, (2008) 12 SCC 275.*** The Tribunal ought to have undertaken that exercise, and declared M/s. Balaji Traders to be a sham entity, and that the documents showing its involvement were all paper transactions and that one of the Managers of OCFL was himself responsible for creation of such fake entity;

v. The copy of the application form for licence under the CLRA Act dated 24th November, 2001 (Ext.20) showed that the contractor himself had signed it, and a correction had been made. This showed that it was Mr. B. K. Sukla, who was with the principal employer OFCL, who had himself applied for such licence. Ext. 21 was the certificate of the principal employer. There was no date with the signature.

vi. As regards the salary slip issued by M/s. Balaji Traders which indicated deduction of PF, it was submitted that the said PF was never deposited in the PF account of M/s. Balaji Traders, which had not obtained any code number from the Regional Provident Fund Commissioner, Bhubaneswar. The labour licence had been issued for 1000 Workmen whereas M/s. Balaji Traders had engaged 1139 Workmen and, therefore, all the Workmen should be presumed to be Workmen of the principal employer. If the entire evidence was carefully examined, the only conclusion possible was that the transactions were paper transactions staged in a pre-planned manner by the OCFL-Management to deny the legitimate rights of the Workmen. Therefore, retrenchment with effect from 21st June, 2001 was illegal and contrary to the provision of the ID Act. Reliance was placed on the decision of the Apex Court in ***Gujaral Electricity Board, Thermal Power Station Ukai v. Hind Mazdoor Sabha, AIR 1995 SC 1893;***

vii. Since IFFCO was the successor-in-interest of OCFL, all the 1139 Workmen were entitled to be absorbed by IFFCO with back wages. The name of the Union had been amended as IFFCO Sarakarakhana Shramika Sangha after OCFL was taken over by IFFCO;

viii. The control test and integration test would come into picture only after contractor's existence was established. Since the contractor was a sham entity, Section 10 (2) of the CLRA Act was not applicable in the present case. There was no need to amend the claim statement to raise a claim against IFFCO, which had stepped into the shoes of OCFL by purchasing the plant by the Sale Agreement. IFFCO had adopted the statement of OCFL while filing a separate written statement. Therefore, there should have been no difficulty for the Tribunal to have answered Issue No.4 against the IFFCO. Reliance in this context was also placed on the decision of the Supreme Court in ***Dena Nath v. National Fertilisers Ltd. AIR 1992 SC 457.***

Submissions of counsel for the Management

29. Mr. Surya Prasad Mishra, learned Senior Counsel appearing on behalf of both IFFCO and OCFL, submitted as under:

a. The scope of interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution is limited. The power of superintendence had to be exercised

sparingly; it is extended to quashing an Award only on the ground of mistake apparent on the face of the record. It was not an appellate power. This meant that findings of fact reached by the Tribunal as a result of appreciation of evidence could not be reopened in writ proceedings. Only where the findings of fact were based on no evidence that it could be regarded as an error of law. The adequacy or relevance of the evidence was an issue to be considered by the Labour Court and not the High Court in its writ jurisdiction;

b. The engagement of the contract labourers was temporary and once the contract itself came to an end on 31st August 2001, their engagement also came to an end. The principal employer i.e. OCFL was liable only in respect of such matters provided under the CLRA Act. The dispute as referred to in the schedule was only between M/s. Balaji Traders, OCFL and the workers' Union. There was no dispute as such between OCFL and its workmen;

c. Under the sale agreement between IFFCO and OCFL, the liability vis-à-vis the workers engaged prior to 1st October, 2005 was entirely that of OCFL. Again, the liability of IFFCO was not part of the reference and in any event, was beyond the scope of the Sale Agreement. The disengagement of the Workmen on expiry of the contract did not create any right in the Workmen to be absorbed by OCFL, much less by IFFCO.

d. It was wrong to contend that M/s. Balaji Traders was a sham entity. It had a valid labour licence issued by the competent authority and had been engaged to provide contract labourers. The only liability of OCFL was to ensure payment of wages to the contract labourers in the event of failure by the contractor to pay their wages from the contractor's bill. The contractor declined to take back the labourers on expiry of the contract as they had already gone on strike and abstained from duty at least two months prior thereto.

e. There was no provision in the CLRA Act or the ID Act to absorb the contract labourers of one contractor under another. Therefore, the claim for absorption under another contractor was not maintainable. There was no evidence on record that the work that used to be performed by the Workmen was being done ordinarily thorough regular workmen of OCFL or for that matter IFFCO.

f. The Workmen were employed during the period of construction of the plant and, therefore, were not integral to the overall work of the plant which produced fertilisers. In terms of Section 10(2) of the CLRA Act neither the control test nor the integration test was fulfilled. The onus on the Workmen to show that they were directly engaged by OCFL was not discharged by them and, therefore, the Tribunal rightly rejected their claim.

Analysis and reasons

30. The above submissions have been considered. At the outset, the Court would like to begin by noting that while dealing with this writ petition, its exercising jurisdiction under Article 227 of the Constitution to judicially review an Award of the Tribunal in an industrial dispute. The Tribunal has delivered the Award on merits, after closely examining the evidence adduced

by the parties both oral and documentary. The scope of interference by a High Court in exercise of jurisdiction under Article 227 of the Constitution of India with an Award of the Industrial Tribunal is well settled in a large number of decisions.

31. In ***Estralla Rubber v. Dass Estate (P) Ltd., (2001) 8 SCC 97***, the Supreme Court explained the scope of the jurisdiction of a High Court under Article 227 of the Constitution and held as under:

> "6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in number of decisions of this Court. The exercise of power under this Article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required by them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the courts subordinate or tribunals. Exercise of this power and interfering with the orders of the courts or tribunal is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or Tribunal has come to.
>
> 7. This Court in *Ahmedabad Mfg. & Calico Ptg. Co. Ltd vs. Ramtahel Ramanand and Ors. [AIR 1972 SC 1598]* in para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case *Waryam Singh & Anr. vs. Amarnath & Anr. [1954 SCR 565]*. This court in *Babhutmal Raichand Oswal vs. Laxmibai R. Tarte and Anr. [AIR 1975 SC 1297]* has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal."

32. Recently in ***Garment Craft v. Prakash Chand Goel 2022 SCC Online SC 29***, the Supreme Court reiterated the above principles and held as under:

> "15. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination

> under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice."

33. To summarise the above principles:

> (I) The jurisdiction under Article 227 of the Constitution has to be exercised sparingly and only in appropriate cases for the purpose of keeping the subordinate Tribunals within the bounds of the authority and not to correct factual or legal errors;
>
> (II) In exercise of Article 227 of the Constitution, the High Court is not exercising an appellate function. The scope of judicial review is limited to correct the mistakes apparent on the face of the record or for gross irregularities where the procedure adopted by the Tribunal is opposed to the principles of natural justice or where the order itself is vitiated by mala fides.
>
> (III) It is not open to the High Court in exercise of its jurisdiction under Article 227 of the Constitution, to interfere with an Award of a Tribunal merely because on the same evidence a different view is possible. It is also not open to the High Court to judicially review an Award of the Tribunal on the basis of relevancy or sufficiency of the materials. It is only where the findings rendered by the Tribunal are based on no evidence, could it be said that there is an error of law, which requires to be interfered with.

34. It must also be noted that both in the pleadings in the writ petition as well as in the oral submissions before this Court, the attempt on behalf of the Petitioner-Union has been to persuade this Court to re-appreciate the evidence on record and come to a different conclusion than that reached by the Tribunal. This is precisely what is not permissible when the Court exercises jurisdiction under Article 227 of the Constitution of India.

35. To begin with, the Court would like to note that the reference before the Tribunal was on the basis of an assumption of relationships without questioning their validity. A careful scrutiny of the term of reference shows that the existence of M/s. Balaji Traders as a contractor through whom the members of the Union were engaged in OCFL appears to be a given. The only question was whether such workmen were entitled to absorption in OCFL on expiry of the contract dated 31st August, 2001. The alternative

question was "whether they would be entitled to absorption/engagement under new contractors/establishments entrusted with the execution of the said work".

36. In other words, the question posed was not whether M/s. Balaji Traders is a fictitious or sham entity and, therefore, whether the Workmen should be considered to have been directly employed by the OCFL? Such a question appears to be outside the scope of interference. This has also to be considered in the context of the failed attempt by the Union to have the term of reference amended as noted earlier. In the statement of claim, the Union mentioned that it had applied to the State Government for amending the term of reference precisely to include the above question namely "whether 1139 workers, who were directly working under the First Party Management are entitled to get the status of regular workers under the First Party Management". The second alternative prayer is that if the above question was answered in the negative then "what relief they are entitled to as the workers under the same M/s. Balaji Traders". However, the above amendment to the terms of reference never took place. The Union also did not challenge the correctness of the term of reference before this Court and allowed it to remain as such. Interestingly, even when it moved for an amendment to the reference, the attempt by the Union was not to question the very existence of M/s. Balaji Traders. In fact, the attempt was an alternative prayer in case the prayer for regularization in OCFL did not succeed. The question was about the relief they were entitled to "as workers under the said M/s. Balaji Traders". Therefore, the stand taken in the claim statement before the Tribunal that M/s. Balaji Traders itself was a sham entity appears to be a strategy thought of after the reference was made to the Tribunal without having the reference itself altered to include such a declaration.

37. Nevertheless in Issue No.3, the Tribunal did examine whether "the contract is real or mere camouflage". The Tribunal has rightly noted that the question whether the contract is real and the question whether the contractor was a sham entity are two different issues. These are not one and the same issue. If indeed, as the Tribunal points out in the impugned Award, the contractor was found to be sham or camouflage, the workers may not get any relief. The test under Section 10 (2) of the CLRA Act presupposes the existence of a genuine contractor and for that matter a genuine contract. It was explained by the Supreme Court in ***Gujarat Electricity Board, Ukai, Gujarat v. Hind Mazdoor Sabha*** (*supra*) as under:

> *"33. These decisions in unambiguous terms lay down that after coming into operation of the Act, (the C.L.R.A. Act) the authority to abolish the contract labour is vested exclusively in the appropriate Government which has to take its decision in the matter in accordance with the provisions of Section 10 of the Act. This conclusion has been arrived at in these decisions on the interpretation of Section 10 of the Act. However, it has to be remembered that the authority to abolish the contract labour under Section 10 of the Act comes into play only where there exists a genuine contract. In other words, if there is no genuine contract and the so called contract is sham or a camouflage to hide the reality, the said provisions are inapplicable. When, in such circumstances, the concerned workmen raise an industrial dispute for relief that they should be deemed to be the employees of the principal employer, the Court or the industrial adjudicator will have jurisdiction to entertain the dispute and grant the necessary relief."*

38. Therefore, the Tribunal was right in holding that reference was indeed maintainable but on Issue No. 3, the initial burden of proving that the workmen were directly engaged by the OCFL and not through the contractor, was entirely on the Union.

39. Here the Union appears to have run into difficulties because of the stand taken that the contractor itself was a sham entity. The attempt was to show that it was a mere paper entity and the entire contract itself was a camouflage erected by OCFL to avoid the liability arising under the CLRA Act. The difficulty with this approach of the Union was that there were documents to show the existence of the contractor including the license issued to it by the Licensing Authority under the CLRA Act. There were also pay slips issued, gate passes issued by M/s. Balaji Traders. While it is true that some other documents including gate passes were shown to have been issued by OCFL, as rightly pointed out by the Tribunal, such documents by themselves did not demonstrate that each of the 1139 workers were directly engaged by OCFL.

40. The Court notes that on the crucial aspect of the salary slips, the Tribunal found that some of them exhibited by the Union, were shown to have been issued by M/s. Balaji Traders and there was nothing on the body of the slips from which it could be said that "the principal employer used to pay the remuneration to the workers." This is a significant but adverse finding for which the Petitioner Union does not have a proper answer. The Union also does not appear to have succeeded in showing that the Workmen were being paid directly by OCFL particularly since they do not appear to have asked for the production of the wage register.

41. In the submissions made before this Court, detailed reference was made to each of the documents, which according to the Petitioner, would show that the Workmen were directly engaged by OCFL and further that the documents showing the license issued to M/s. Balaji Traders were actually make-believe documents when in fact the real person responsible for creating the fictitious entity, was working for OCFL. This Court is not called upon to re-appreciate the evidence which has already been examined in depth by the Tribunal. Each of the documents referred to has in fact been discussed by the Tribunal. The Tribunal was not satisfied that the anomaly appearing in some of these documents could substitute for proof that the Workmen were in fact directly engaged by OCFL.

42. On the important aspect whether M/s. Balaji Traders is a fictitious person, the Tribunal did note that the said entity had appeared before Tribunal in I.D. Case No.8 of 2001 and filed a written statement in the said ID Case. Of course, in the case in hand, after appearing before the Tribunal, M/s. Balaji Traders sought time but did not file a written statement and then stayed away altogether. These facts are not consistent with the plea of the Petitioner-Union that the entity is itself fictitious.

43. It is not possible in exercise of the jurisdiction under Article 227 of the Constitution for this Court to undertake a detailed examination of the evidence only to come to a conclusion different from that reached by the Tribunal. The questions to be asked are whether the view taken by the Tribunal on the evidence can be said to be perverse? Whether its finding are based on no evidence? Is there anything in the impugned Award that shocks the judicial conscience as being perverse? On a careful examination of the entire Award of the Tribunal, this Court is not persuaded that any of the above questions can be answered in the affirmative. On the other hand, the Tribunal appears to have undertaken an elaborate discussion in coming to the conclusion that Issue No.3 has to be answered against the Petitioner-Union. Indeed, the Union was unable to discharge the initial onus of showing as the Workmen were directly engaged under OCFL and that the contractor itself was a non-existent entity. As a corollary, the burden never shifted to OCFL to show that the workers were paid by the contractor and were under their control.

44. The Court is unable to agree with the submission on behalf of the Petitioner that neither the "control test" nor the "integration test" would apply in the present case. Such a submission presupposes that Section 10 (2) of the

CLRA Act will have no application. If that be the case, then the reference itself should be held to be wrongly worded. However, the Tribunal was tasked with answering the reference as it was worded and not the reference as it should have, according to the Union, been worded. With the Union not having succeeded in getting the terms of reference amended, it is not open to the Union to now contend that Section 10 (2) of the OLRA Act has no applicability whatsoever or that the Tribunal erred in answering the question whether the twin requirements of "control test, and integrity test"
were fulfilled in the present case.

45. On the basis of the evidence on record, the Tribunal came to the conclusion that the OCFL did exercise a degree of control over the workmen but not "absolute control". It also came to the conclusion that many of the Workmen perhaps were engaged at the construction stage and that kind of a work obviously did not continue once the production of fertiliser started in the plant. Consequently, the Tribunal was right in its conclusion that the Union had failed to discharge the burden of showing that the "integration test" stood fulfilled in the present case. In order to fasten the liability on OCFL, without fulfillment of the above tests, the workers could not have succeeded in getting the Tribunal to answer the claim for absorption in OCFL in their favour. As regards the decision in ***Dena Nath*** *(supra)*, the Court notes that the law since then has developed further with the judgment in ***Steel Authority of India Ltd. v. National Union Water Front Workers*** *(supra)* which lays down the parameters for absorption of contract labourers in the establishment of the principal employer. However, with two tests namely, the control test and integration test in terms of Section 10 (2) of the CLRA Act not having been fulfilled in the present case, the Petitioner-Union cannot take advantage of the above legal position.

46. Turning to Issue No. 4, it is surprising that although the Petitioner-Union was aware of the change of transfer of ownership, it only chose to implead IFFCO as a party but not amend the claim statement to seek any grievance against it. There could not have any presumption by the Petitioner-Union that the claim against OCFL would hold good against IFFCO as well and that in the case of IFFCO, it merely stepped into the shoes of OCFL. In the light of the written statement filed by IFFCO before the Tribunal, it ought to have been evident to the Petitioner-Union that the clauses of the said agreement absolved IFFCO of any liability whatsoever. Without seeking a declaration that the said Agreement was opposed to public policy, it was not

possible for the Union to simply contend without making any amendment to its statement of the claim, that IFCO should absorb all the 1139 Workmen. This is particularly since there is no relationship of master and servant or principal employer and contract labourer between the Members of the Petitioner-Union and IFFCO. The Tribunal was therefore, right in relying on the following passage in ***Britannia Biscuit and Co.*** *(supra)**:***

> *"32. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary, has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet."*

47. Consequently, the Court is unable to find any error having been committed by the Tribunal in answering the Issue No. 4 against the Petitioner-Union and in favour of the Management.

48. Viewed from any angle, the Court is not persuaded that the Tribunal has committed any error in passing the impugned Award. The writ petition is dismissed, but in the circumstances, with no order as to cost. The LCR be returned forthwith.

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2022 (II) ILR - CUT-575

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

W.P.(C) NO. 4472 OF 2012

THE MANAGEMENT OF RAMADEVI CHHATRINIVAS, UTKAL UNIVERSITY, BHUBANESWAR …….. Petitioner

.V.

SRI TANKADHAR DIGAL …….. Opp. Party

SERVICE LAW – Reinstatement – The Opp. party was working as watchman – The petitioner/management terminated Opp. Party/ workman verbally without assigning any reason – The Labour Court

held the termination to be illegal and directed to reinstate the workmen with lump sum amount of Rs. 40,000/- – Petitioner/management challenged the order of Labour Court with a plea that it has lost confidence on the workman – At present the workman is about 47 years old – Held, this Court is of the view that, the ends of justice will be served if in lieu of reinstatement the workman is awarded a substantial additional compensation – Direction issued that the petitioner/management will pay the Opp.Party Rs. 2,00,000/- – The said amount will be paid within eight weeks failing which simple interest 6% per annum will be accrued for the period of delay. (Para-14)

For Petitioner : Mr. Narendra Kishore Mishra, Sr.Adv.
For Opp. Party: Mr. A.K. Rath

JUDGMENT Date of Judgment: 29.07.2022

Dr. S.MURALIDHAR, C.J

1. The Management of the Ramadevi Chhatrinivas in Utkal University, Bhubaneswar has challenged an Award dated 20th July 2011 passed by the Labour Court, Bhubaneswar in Industrial Disputes (ID) Case No.35 of 2004 whereby the action of the Management in terminating the services of the Opposite Party-Workman, who was working as a Watchman with them, with effect from 30th September 2000 was held to be illegal and he was directed to be reinstated with a lump sum amount of Rs. 40,000/-.

2. While directing notice to issue in the present petition on 3rd April 2012, this Court stayed the operation of the impugned Award subject to the Management complying with Section 17-B of the Industrial Disputes Act, 1947 (ID Act).

3. This Court has heard the submissions of Mr. Narendra Kishore Mishra, learned Senior Advocate for the Management and Mr. A.K. Rath, learned counsel for the Opposite Party-Workman.

4. At the outset, it must be pointed out that although it was argued before the Labour Court that the Petitioner-Hostel was not an 'industry' within the meaning of the ID Act, Mr. Mishra in the course of his argument submitted that the Petitioner would not be pressing that point. The only question therefore is whether the Labour Court was justified in holding the termination of the services of the Opposite Party-Workman to be illegal and in directing his reinstatement with compensation of Rs.40,000/-?

5. The facts relevant to the above issue are that the Opposite Party was appointed as a Watchman in the said hostel by an order dated 31st January 1998 on a temporary basis on a consolidated pay of Rs.900/- per month with effect from 1st February, 1998. Subsequently, his pay was enhanced to Rs.1250/- per month.

6. The case of the Workman was that on 30th September 2000, he was refused employment verbally without notice or assigning any reason. He met the Superintendent of the hostel on 1st October 2000, and requested that he should be allowed to join duty, but this was refused. The Workman claims that later on he was directed to work in the residence of the Superintendent, but he was not paid for that work. Claiming that the provisions of Section 25-F of the ID Act were not followed, and the principles of natural justice have been violated while terminating his services, an industrial dispute was raised by the Opposite Party Workman.

7. In his statement of claim, apart from averring the above contentions, the Workman pointed out that similarly situated employees who were junior to him were still continuing in employment.

8. The Petitioner Management filed a written statement in the Labour Court contending that the reference itself was barred by limitation. It was denied that the Workman had ever been asked to perform duties in the residence of the Superintendent. It was denied that the Workman had been refused employment. Therefore, the question of compliance with Section 25-F of the ID Act did not arise. His employment had been changed from that of a Watchman to a Gardener by an order dated 8th September, 2000. It was stated that on 18th October 2000 at around 9.30 am, the Workman abused the Superintendent and Warden of the Hostel and threatened their lives as a result of which the matter was referred to the Sahidnagar Police Station (PS) on 23rd October, 2000. It was stated that the Workman refused to do the work of Gardener and thereafter he never reported for duty. It was a case of abandonment of service by the Workman. It was submitted that the Management had lost confidence in the Workman and had concerns about the reputation of the Hostel if he were to be reinstated.

9. Before the Labour Court, the Workman examined himself as WW-1 and proved Exts.1 to 7. The Management examined a Reader in Zoology as MW-1 and proved the documents as Exts. A to C. As regards the contention of the Workman that he had completed 240 days of service in the twelve calendar months preceding the date of his termination, the Labour Court took

on board the xerox copies of the attendance register for the period from October 1999 up to the year 2000. It was held by the Labour Court that the above documents and the letter (Ext.A) supposed to have been written by the Management to the Workman asking him to work as Gardener instead of Watchman showed that the Workman had completed 240 days of service in twelve calendar months preceding the date of his termination.

10. As regards the plea of the Management that this was a case of voluntary abandonment of service by the Workman and not termination of his services, the Labour Court held that since no inquiry had been conducted by the Management for such alleged misconduct or misbehavior of the Workman in remaining absent from duty, the case of the Workman that he was refused employment which amounted to termination of his services was established. Therefore, Section 25-F of the ID Act had to be mandatorily followed prior to such termination of services. He was accordingly directed to be reinstated. It was noted that the Workman had not proved by cogent evidence that he was not employed elsewhere after the termination of his services. Accordingly, instead of granting full wages, the Labour Court awarded him Rs.40,000/- as compensation.

11. The Court has considered the submissions of learned counsel for the parties. The case of the Management is that the Workman absented himself from service after 18th October, 2000. The fact remains, however, that no enquiry was held by the Management against the Workman for such absence. Further, from the documents produced by the Workman, it showed that he had been working continuously for 240 days in the calendar year preceding his termination.

12. Accordingly, this Court concurs with the Labour Court that in the absence of any disciplinary action taken against the Workman for his unauthorized absence, the Management cannot be heard to say that he was in fact absent from duty. The Court also concurs with the finding of the Labour Court that the termination of the services of the Opposite Party Workman, without complying with the mandatory provision of Section 25-F of the ID Act was illegal.

13. However, as regards the consequential reliefs, there is a plethora of case law of the Supreme Court of India holding that upon a finding of illegality of termination of services, reinstatement would not automatically follow. Here, it must be noted that the Opposite Party was 37 years in 2012

which means he is at present 47 years old. The Petitioner is the Management of a Ladies Hostel and the Petitioner categorically states that it has lost confidence in the Workman.

14. In the circumstances, given the above developments and the age of the Workman, at this stage, the Court is of the view that the ends of justice will be served if in lieu of reinstatement the Workman is awarded a substantial additional compensation. In that view of the matter, while modifying the impugned award of the Labour Court and setting aside that portion of the impugned award which directs reinstatement of the Opposite Party, this Court directs that the Petitioner-Management will pay the Opposite Party Rs.2,00,000/- (two lakhs) in all i.e., in addition to the Rs. 40,000 awarded by the Labour Court a further sum of Rs.1,60,000/- (one lakh sixty thousand) as compensation for the illegal termination of his services. The said amount will now be paid within eight weeks from today failing which the Management will, in addition, be liable to pay simple interest @ 6% per annum on the aforementioned sum for the period of delay.

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

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2022 (II) ILR - CUT-579

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

STREV NO. 8 OF 2013

M/S. GLAMOUR, CUTTACK ……..Petitioner

.V.

STATE OF ODISHA ……..Opp.Party
(COMMISSIONER OF SALES TAX, CUTTACK)

ORISSA ENTRY TAX ACT, 1999 – Entry 11 part 1 of schedule – Whether aluminium extrusion falls under entry 11 of part 1 of the schedule of the OET Act and is liable to entry tax @ 1 % ? – Held, No.

Case Laws Relied on and Referred to :

1. (1985) 3 SCC 284 : Indian Aluminium Cables Ltd. v. Union of India
2. AIR 1977 SC 597 : Dunlop India Ltd. v. Union of India
3. AIR 1923 Madras 511 : Rajagopala Pandarathar v. Thirupathia Pillai
4. AIR 1984 Ker 40 : K.V. Mathew v. District Manager, Telephones, Ernakulum
5. STREV No. 29 of 2012 (decision dt. 05/07/2022) : M/s. Patel Brothers & Co., Sambalpur v. State of Odisha

For Petitioner : Mr. R.P. Kar
For Opp. Party : Mr. Sunil Mishra, A.S.C

JUDGMENT Date of Judgment: 29.07.2022

Dr. S.MURALIDHAR, C.J

1. This revision petition arises from an order dated 6th July, 2012 passed by the Orissa Sales Tax Tribunal, Cuttack (Tribunal) dismissing the SA No.78(ET) of 2009-10 filed by the Assessee against an order dated 14th January, 2009 passed by the Assistant Commissioner of Sales Tax (Appeal), Cuttack (ACST) confirming an entry tax (ET) demand of Rs.4,45,596/- raised by the Sales Tax Officer (STO) under Section 7 of the Orissa Entry Tax Act, 1999 (OET Act) for the Assessment Year (AY) 2004-05.

2. The background facts are that the Assessee is a registered dealer, dealing in ready-made garments, hosiery cloth and 'Aluminum extrusion'. For the AY in question, the STO determined the gross turnover (GTO) of the dealer at Rs. 2,57,32,641. He then took up the ET liability of the dealer and held that the dealer was required to pay ET of Rs. 4,45,696/-. After the appeal of the dealer was dismissed by the ACST, he approached the Tribunal.

3. By the impugned order, the Tribunal decided the appeal *ex parte*. Nevertheless, on merits the Tribunal held that the entry in Part-I Schedule of the OET Act, which reads "Sheets, rods etc. of non-ferrous metal including Aluminum" would cover Aluminum extrusion as well and, therefore, they were amenable to tax @ 1%. The contention of the Assessee that Aluminum extrusions are not Scheduled goods and no ET was payable on the goods imported and not manufactured within the State of Odisha was not accepted by the Tribunal.

4. While admitting the present revision petition on 3rd November 2014, the operation of the Assessment order was stayed during pendency of the petition subject to the Petitioner depositing Rs.50,000/- and the following questions were framed by this Court for consideration:

> *"(i) Whether aluminum extrusion falls under Entry 11 of Part I of the Schedule of the OET Act and is liable to entry tax @1%?*
>
> *(ii) Whether the Tribunal is justified in upholding the levy of penalty under Section 7(5) of the OET Act undisputedly when the assessment was completed under Section 7(3) of the OET Act?"*

5. This Court has heard the submission of Mr. R.P. Kar, learned counsel appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Department.

6. The contention of the Petitioner is that it brings Aluminum extrusions from outside the State of Odisha for sale within Odisha and as such no entry tax is payable on goods which are not mentioned in the Schedule appended to the OET Act. Entry 11 of Part-I of the Schedule to the OET Act reads: "Sheets, rods etc. of non-ferrous metal including Aluminum". If one compares the above entry with certain other entries in the Schedule to the OET Act, it is seen that there are certain other entries which do not contain the word 'etc.' and connote a larger range of products. For e.g. Entry 16 reads: "Tobacco and Tobacco products". On the other hand there are entries which use the expression 'etc.' like Entry 5 in Schedule-II which reads: "Cinematography equipments and other equipments etc.". Here the word etc. can obviously mean only things of the same type as the goods preceding. These two contrasting entries reflect the legislative intent. Where the entry is meant to be broad and inclusive, it would include all products of a particular material. To connote this, the words "products and products thereof" are used.

7. However, in the context in which Entry 11 is inserted, it is seen that the word 'etc.' qualifies the words "Sheets, rods which are of non-ferrous metal including Aluminum". The word 'etc.' cannot obviously include all products of the non-ferrous metals including aluminum but to the articles which are similar to "sheets, rods." The definition of the term 'extrusion' as a noun refers to extruded products which are angles, brackets used in roofs as a base support. These are neither sheets nor rods. In common trade parlance when one goes to a shop selling such products and asks for 'Aluminum extrusions', the seller is unlikely to supply to such customer "sheets or rods." Conversely, if the customer is to ask for sheets/rods, he is unlikely to be given "extrusions". In other words, these are distinct and different types of products and understood as such in the trade pertaining to such products.

8. In taxation law, the principle applicable is that of strict interpretation. Either a certain article is included in an entry or it is not. In taxing statutes when interpreting technical words which are special to a trade or business, the test to be adopted is the 'common parlance tests'. In ***Indian Aluminium Cables Ltd. v. Union of India (1985) 3 SCC 284***, the Supreme Court observed that "in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the

consumer. The reason is that it is they who are concerned with it, and, it is the sense in which they understand it which constitutes the definitive index of legal intention."

9. In ***Dunlop India Ltd. v. Union of India AIR 1977 SC 597***, it was explained that if a word has acquired a particular meaning in the trade or commercial circles that meaning becomes the popular meaning in the context and should normally be accepted.

10. Here we are concerned with the purport of the word 'etc.' occurring in Entry 11 of the Schedule to the OET Act. Would it bring within its ambit, 'aluminium extrusions'?

11. The word "etc." has been defined in ***Collins Thesaurus of English Language***, 3rd Edition 2008, Page-343 as "and so on, and so forth etc.". In legal parlance, if one turns to ***Black's Law Dictionary*** (8th Edition, 2004) p 592 the expression et cetera has been defined as "and other things; the term usually indicates additional, unspecified items in a series".

12. Turning to the Indian context ***The Law Lexicon of P. Ramanatha Aiyar*** (Second Edition Reprint 2008 Page-678), defines it thus:

> "Etc or & C. is an abbreviation of Et Cetera, and therefore may mean and others, and so forth; and the rest; other things; of the same character, or only those things *ejusdem generis*. Custom, the intention of the parties, the context, and the manner and place in which the abbreviation is used may govern its meaning; but where it can have one certain meaning, it will be given that meaning; although as sometimes used it is considered as meaningless and without effect, and is often disregarded as surplusage (Cyc)."

13. In ***Rajagopala Pandarathar v. Thirupathia Pillai AIR 1923 Madras 511*** the words used in the mortgage-deed, on which the suit was based, came for interpretation. The question was whether the residence of the first defendant was included in the description contained in the decree? The plaintiff sought to rely on the word 'et cetera' occurring in the following line in the mortgage-deed to contend that the defendant's residence would be included and cold:

> "4……I possess in the waste lands, poramboke and other lands attached thereto, all kinds of trees, topes, wells, ponds, tank-bunds, fruit trees, wood trees, foot-paths, elevated and low portions, etc., be they a little more or a little less, have been given as security."

14. The Madras High Court did not agree with the Plaintiff's contention and held:

> "6….But the only argument advanced is that the palace building must be regarded as included in the expression 'the remaining lands' or 'poramboke and other lands' or the words 'etc.' I find it impossible to hold that the words 'the remaining lands' or 'poramboke and other lands attached thereto (remaining lands)' can be regarded as including the residential building of the Zamindar.
>
> Turning to the words 'etc.,' they follow an enumeration of specific things beginning with "all kinds of trees" having some characteristic, and the words should be restricted to things of the same nature as those which have been already mentioned. In such a case the rule of *ejusdem generis* will apply and the residential building cannot be said to be *ejusdem generis* with the things already enumerated."

15. In ***K.V. Mathew v. District Manager, Telephones, Ernakulum, AIR 1984 Ker 40***, the High Court was considering the expression 'institution' and in the context of scope of the expression, it was held that "the word et cetera does not share the character of an inclusive definition and cannot therefore enlarge the scope of the expression 'institution'

16. As already mentioned, where the entry is meant to include all kinds of products, the entry itself would read like it does in the case of Tobacco. In fact, in the context of entry 'Tobacco and Tobacco products', this Court has recently in its decision dated 5th July, 2022 in STREV No.29 of 2012 (***M/s. Patel Brothers & Co., Sambalpur v. State of Odisha***) held that 'bidis' would form part of 'tobacco products'. If Entry 11 had read 'sheets, rods of non-ferrous metals including Aluminum and products thereof', then it would have been arguable that it covered Aluminum extrusions as well. However, the word here used is 'etc.' and it is used soon after the words "sheets, rods" and, therefore, will include only a similar kind of product i.e. like sheets and rods. Aluminum extrusions, the pictures of which are readily available on the net, and which were viewed in the Court in the presence of the counsel, are distinct and different from 'sheets and rods.'

17. For all of the aforementioned reasons, the Court is of the view that Aluminum extrusions brought into Odisha from outside Odisha by the Petitioner is not exigible to entry tax @ 1% since it is not covered by Entry-11 of Part-I of the Schedule to the OET Act.

18. Question (i) is accordingly answered in the negative i.e. in favour of the Assessee and against the Department.

19. In view of the answer to Question (i), Question (ii) is answered in the negative by holding that the Tribunal was not justified in upholding the levy of penalty under Section 7 (5) of the OET Act.

20. The impugned order of the Tribunal and the corresponding orders of the STO and the ACST are hereby set aside. The petition is disposed of in the above terms.

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2022 (II) ILR - CUT-584

S. TALAPATRA, J & B.P. ROUTRAY, J.

MATA NO. 28 OF 2020

ARUN KUMAR SAHU …….. Appellant

.V.

SMT.MADHUMITA PUTHAL …….. Respondent

HINDU MARRIAGE ACT, 1955 – Section 25(1) – Permanent alimony and maintenance – Whether the Court can exercised its jurisdiction suo-moto, while passing any decree or at any time subsequent thereto to order the maintenance or alimony without any application made by either party ? – Held, No – The power or jurisdiction can only be exercised on application made to that court for that purpose either by the wife or the husband as the case may be.

Case Laws Relied on and Referred to :-

1. (2020) 20 SCC 787 : Ganesh vs. Sunil Kumar Srivastava & Anr.
2. AIR 2004 Bombay 345 : Geeta Satish Gokarna v. Satish Shankarrao Gokarna
3. AIR 1991 SC 101 : Delhi Transport Corporation V. D.T.C. Mazdoor Congress

For Appellant : Mr. Samir Kumar Mishra

For Respondent: Mr. T.K. Mishra

JUDGMENT Date of Judgment : 29.06.2022

S. TALAPATRA, J

This appeal U/s.19(1) of the Family Court Act, 1984 arises from the Judgment dated 19.09.2019 delivered in Civil Proceeding No.108 of 2018 by the Judge, Family Court, Baripada, District- Mayurbhanj.

2. Be it noted at the outset that, the entire Judgment is not under challenge. Only the direction, by which the appellant has been asked to pay the permanent alimony of Rs. 4,00,000/- (Rupees four lakhs) has been challenged.

3. Briefly stated the facts those are relevant are that the appellant and the respondent failing to live a peaceful conjugal life, filed a petition under section 13(B) of the Hindu Marriage Act, 1955 for dissolution of their marriage, after they lived two years separately. During that period, it has been asserted, by the parties that there had been no cohabitation. To reconcile the differences, the efforts taken by the Court did not bring any settlement, hence the Court proceeded to decide the petition.

4. Finally, by the impugned Judgment, the marriage between the appellant and the respondent has been dissolved by a decree on mutual consent but with a direction on the appellant to pay a lump sum permanent alimony to the extent of Rs. 4,00,000/- to the respondent.

5. Being aggrieved by that direction, the appellant has filed this appeal contending *inter alia* that the Judge, Family Court has transcended the jurisdiction as conferred by Section 13 (B) of the Hindu Marriage Act by giving the said direction.

6. Mr. S. K. Mishra learned counsel appearing for the appellant has drawn our attention to a part of the petition that was filed under Section 13 (B) Hindu Marriage Act with an object to show that the respondent had expressly waived any claim of alimony, any other claim from the appellant. For the purpose of reference, the relevant Clause dealing with the said aspect is reproduced here under :

> *"6. That the petitioner No. 1 undertakes not to claim any alimony from the petitioner No.2 in future and there shall have no other claim in any manner, against that petitioner No.2."*

7. Mr. Mishra, learned counsel has referred to the finding in the Judgment dated 19.09.2019, where it has been recorded that, the parties were examined and they supported the averments of the petition. They have admitted that they have filed the petition jointly and prayed for mutual divorce. Mr. Mishra, learned counsel has laid emphasis by stating that it therefore, clearly transpires that, the Court on due consideration found the clauses of the settlement in order, not unlawful. Hence, it was the duty of the Judge, Family Court to effectuate the understanding as reproduced in the said petition filed U/S. 13 (B) of the Hindu Marriage Act.

8. To buttress his contention, Mr. Mishra, learned counsel for the appellant has relied on a decision of the Apex Court in ***Ganesh vs. Sunil Kumar Srivastava and another*** reported in **(2020) 20 SCC 787**, where it has been enunciated that, when the spouses filed the petition by mutual consent -

> *"Appropriate course to be adopted in the matter is to effectuate the understanding"*

It has been further observed in *Ganesh (supra) that it was certainly open to the wife to give up any claim so far as maintenance or permanent alimony or Stridhan is concerned.* According to Mr. Mishra, learned counsel, a direction for payment of permanent alimony to the extent of Rs. 4,00,000/- is unsustainable, in as much as such relief was not sought by the respondent and, hence, is required to be intervened by this Court for ends of justice.

9. Per contra, Mr. T. K. Mishra learned counsel appearing for the respondent has submitted that, it is the duty of the Judge, who is passing decree of divorce under the provisions of Hindu Marriage Act, 1955 to pass the appropriate direction for alimony or maintenance. Mr. Mishra, learned counsel for the respondent has extensively referred to Section 25 (1) of the Hindu Marriage Act. Hence, the said provision may be reproduced.

> *"**25. Permanent alimony and maintenance**-(1) Any Court exercising jurisdiction under this Act may at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent." (Emphasis added)*

10. Mr. Mishra learned counsel for the respondent has robustly contended that, it is the duty of the Court at the time of exercising the jurisdiction under the said Act to pass the order as regards permanent alimony or maintenance. Therefore, the direction to pay the permanent alimony as made by the Judge, Family Court by the impugned Judgment is in conformity to the provision of Section 25 (1) of the Hindu Marriage Act and, as such, no interference is called for.

11. Mr. Mishra, learned counsel for the respondent has relied on a decision of Bombay High Court in ***Geeta Satish Gokarna v. Satish Shankarrao Gokarna*** reported in **AIR 2004 Bombay 345**. In that case, the marriage between the parties was dissolved by a decree of divorce by mutual consent. In the consent terms, the wife agreed not to claim alimony or maintenance. Later on, the wife had moved an application seeking alimony or maintenance U/S. 25 (1) of the Hindu Marriage Act. In that circumstance in

Geeta Satish Gokarna, the question that fell or consideration before the Bombay High Court is that, whether having considered the consent terms, the wife can be allowed maintenance. There was no dispute that the clause or term waiving the claim of permanent alimony or maintenance was embodied in the consent terms. In order to answer the said question, the Bombay High Court in ***Geeta Satish Gokarna (supra)*** has observed that, the question really would be whether under Section 25(1), a party who has been divorced, is entitled to maintenance even if in the consent terms she had agreed not to claim alimony/maintenance. Thereafter, it has been observed as under:

> *"The language of Section 25 shows that it is a power conferred on the Court at the time of passing of a decree or at any time subsequent thereto on an application made to aware alimony or maintenance. This is a jurisdiction to be exercised by the Court. The parties, therefore, cannot by an agreement between themselves as to oust jurisdiction of the Court which otherwise the Parliament has conferred."*

In Geeta Satish Gokarna *(supra)*, it has been further observed that permanent alimony or maintenance is inalienable component of Right to Life. Section-25(1) has been enacted to protect a person, unable to maintain herself or himself.

12. It has been held in the said report that in *Hirabai Bharucha,* interpreting Section 40 of the Parsi Marriage Act, a view has been taken following view taken by the English Courts that such a provision is based on public policy. That Public Policy has found accommodation in our Constitutional philosophy. The power is conferred on the Court with object of helping the weak. Therefore, any clause in a contract or consent terms providing to the contrary would be against the said public policy [See Delhi Transport Corporation V. D.T.C. Mazdoor Congress: AIR 1991 SC 101]. Clause 5 of the consent terms is clearly severable from the other terms. Clause 5 is contrary to the public policy and consequently that clause will have to be treated as non est [in the case of Geeta Satish Gokarna *(supra)*]. In the case in hand, the only question, is whether Clause 4 would bar the court from giving a direction of permanent alimony suo motu. The very fact that Clause 5 was placed differently from Clause 4 will indicate that it ought to cover situations other than those covered by Clause 5. Even otherwise, Clause 4 would prohibit a party ex facie from claiming maintenance and that requires consideration [in the case of Geeta Satish Gokarna *(supra)*]. It would also suffer similar consequence as Clause 5 is held being against the public policy. On consideration, it has been held in Geeta Satish Gokarna *(supra)* that the appellant was not barred from applying U/S. 25 (1). The application,

therefore, by the appellant was clearly maintainable. It has been further observed that, the learned trial Judge was right in so holding. The cross objections as filed by the respondent on the said finding is bound to fall flat.

13. Having appreciated the rival contentions, as raised by the counsel for the parties in this appeal, we need to refer more elaborately to the provision of Section 25 (1) of the Hindu Marriage Act. A bare reading of that Section would show that, the Court which is exercising the jurisdiction under the Hindu Marriage Act, 1955 has the power or jurisdiction at the time of passing any decree or at any time subsequent thereto to order the maintenance or alimony. But such power or jurisdiction can only be exercised on application made to that Court for that purpose either by the wife or the husband, as the case may be. On such application, the Court will inquire into the respondent's income or property for determining the quantum of alimony or maintenance to be paid periodically or at a time. What has been noticed by us is that, the respondents in this appeal, did not file any application at least no reflection of such fact is available in the Judgment or in the records, for permanent alimony or maintenance. The Judge, Family Court in the purported exercise of jurisdiction as conferred by Section 25 (1) of the Hindu Marriage Act has suo moto issued the said direction for permanent alimony to the extent of Rs.4,00,000/- to the respondent herein. It is noticed by us that there had been no inquiry at all.

14. In Ganesh *(supra)*, as referred by Mr. S. K. Mishra learned counsel for the appellant, the Apex Court has laid down that, either of the parties, the wife or the husband, may give up any claim so far as the maintenance or permanent alimony is concerned. It has been also observed by the Apex Court that, the duty of the Court which has been exercising the jurisdiction under the Hindu Marriage Act, 1955 is to effectuate the understanding as placed before it in order to pass a decree of divorce by mutual consent. In this regard, we have persuaded to observe that, the Court while adjudicating the petition U/S. 13 (B) of the Hindu Marriage Act is permitted to examine whether the consent terms is hit by Section 23 of the Indian Contract Act, 1872, in as much as the considerations and objects in the said consent terms have to be lawful. It has been provided by Section 23 of the Indian Contract Act that the considerations or objects of an agreement is lawful unless it is forbidden by law or it is of such a nature that, if permitted, it would defeat the provisions of any law. We may again refer to Rule (3) of Order 23 of the CPC, which provides for compromise or adjustment of the suit. It has been

clearly provided that, such decree on compromise can only be passed, when it is found by the Court to its satisfaction that, the suit has been adjusted fully or in part by any lawful agreement or compromise. The explanation which has been placed below the proviso under Rule (3) of Order 23 of the CPC as embodied by the Code of Civil Procedure (Amendment) Act, 1976 and come into effect from 01.02.1977, is relevant for consideration in the context, as the said explanation provides that an agreement or compromise, which is void or voidable under the Indian Contract Act, 1872 shall not be deemed lawful within the meaning of that rule. The same principle shall apply while appreciating the consent terms embodied in a petition filed U/S. 13 (B) of the Hindu Marriage Act. Now, the question that finally falls for our consideration in this appeal is that, whether the Clause regarding waiver or relinquishment of permanent alimony or maintenance is void or voidable.

15. In Ganesh *(supra),* what the Apex Court has observed is equally important. It may transpire that the waiver/relinquishment Clause relating to permanent alimony or maintenance is voidable in view of the provision of Section 25 (1) of the Hindu Marriage Act. But, if those provisions are appreciated cumulatively, it would be apparent that maintenance or permanent alimony cannot be granted by any Court by exercising its power under the provisions of the Hindu Marriage Act, unless that is sought by the person who needs permanent alimony or maintenance periodically. No jurisdiction for granting the permanent alimony or maintenance periodically can be exercised by the Court unless such alimony and maintenance is sought by either of the parties. It may further be noted that in **Ganesh**, the Apex Court has observed that the wife or the husband may give up any claim so far as the maintenance or permanent alimony or stridhan is concerned. Therefore, unless it is proved that consent terms in respect of the permanent alimony or maintenance periodically is the outcome of fraud, duress or any other undue influence, the duty of the Court will be to effectuate the said terms and not to pass an order contrary to the consent terms.

16. What has been observed by the Bombay High Court has been so observed in the different context. In that case, no order or direction was issued to pay the permanent alimony without being asked. The dispute in ***Geeta Satish Gokarna*** *(supra)* arose when the wife proceeded to secure permanent alimony and maintenance periodically. It was objected that since the claim of permanent alimony or maintenance periodically has been waived by the wife,she cannot be allowed to claim it in future. Here lies the difference

between the factual matrices of the case in hand and the case of ***Geeta Satish Gokarna*** *(supra).* Unless the permanent alimony or the maintenance is sought for by the wife or the husband, the Court may not ordinarily pass any order in that regard. In the case in hand, there was no such claim for permanent alimony or maintenance periodically under Section 25 (1) of the Hindu Marriage Act. Hence, the direction/order for permanent alimony to the extent of Rs. 4,00,000/- is totally uncalled for and unsustainable. The impugned direction, in our considered view, is not tenable and accordingly, the same is set aside.

17. Before parting with the records, if we do not observe that even if, the waiver clause is available in the consent terms, the wife-respondent may approach the Court for permanent alimony or the maintenance periodically in the changed circumstances, when she or he becomes unable to maintain herself or himself, in as much as the public policy, embedded in our Constitution is that no woman should be pushed to vagrancy or destitution. Moreover, Section 25(1) of the Hindu Marriage Act has been structured in such a manner that, even after passing of the decree, such application for alimony or maintenance can be moved. Therefore, in one hand, when a spouse can give up the claim, on the other hand, with the change of circumstances, the same spouse can approach the Court for maintenance under Section 25(1). The waiver clause in the consent terms cannot oust the jurisdiction of the Court which has been expressly conferred by Section 25(1) of the Hindu Marriage Act.

18. In this regard, we may recall what Justice Lord Atkin once remarked. It was spoken by Lord Atkin that, "the wife's right to future maintenance is a matter of public concern which she cannot barter away."

19. As it has been postulated in Section 23 of the Indian Contract Act that the considerations and objects are lawful, unless it is forbidden by law or is of such a nature that, if it is permitted to operate, it would defeat the provisions of any law. Therefore, any clause of the consent terms in a proceeding under Section 13(B) of the Hindu Marriage Act is subject to the test of Section 23 of the Indian Contract Act. If it is observed that for the said waiver clause, the respondent has been completely debarred from approaching the court seeking alimony or maintenance, it would defeat the provisions of law as provided by Section 25(1) of the Hindu Marriage Act and that would, in that event, stand contrary to the public policy against vagrancy or destitution.

20. In the result, the appeal stands allowed, but subject to observation as made above.

21. Decree be drawn accordingly.

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2022 (II) ILR - CUT-591

S. TALAPATRA, J & B.P. ROUTRAY, J.

CRLA NO. 454 OF 2014

NAIKU MAJHI ……..Appellant

.V.

STATE OF ODISHA …….Respondent

CRIMINAL TRIAL – Offences u/s 302 of the IPC – Conviction – Assault caused by a Musala – Plea of defence that, death of the deceased is not a case of culpable homicide amounting to murder rather it is a case of culpable homicide not amount to murder – The offence is committed out of anger due to exchange of hot words and by assaulting the deceased which resulted in death cannot stated to be murder rather the culpable homicide not amount to murder – Held, as out of fury the said act was done we cannot infer that there was intention of causing bodily injury as is likely to cause death – Hence, the conviction is converted under section 304 part-1 of the IPC, as no intention to cause death has been established by the state. (Para 13)

Case Laws Relied on and Referred to :-

1. Criminal Appeal No.854 of 2002 (Dated 14.09.2009) : Satish Narayan Sawant v. State of Goa
2. (2008) 8 SCC 270 : Dinesh Kumar v. State of Rajasthan
3. (1988) 4 SCC 302 : State of U. P. v. Krishna Gopal
4. (1997) 9 SCC 766 : Anwar v. State of Haryana
5. (2005) 9 SCC 315 : Ravi Kumar v. State of Punjab
6. (2006) 9 SCC 394 : Munivel v. State of T.N.
7. Criminal Appeal No. 530 of 1978 (Dated 08.03.1989) : Surinder Kumar v. Union Territory, Chandigarh
8. Jail Criminal Appeal No. 425 (Dated 23.01.2002) : Jogendra Sabara v. State of Orissa.

For Appellant : Mr. Niranjan Panda
For Respondent: Mrs. Saswata Patnaik, A.G.A.

JUDGMENT Date of Judgment : 12.07.2022

S. TALAPATRA, J

This is an appeal by the convict (hereinafter referred to as the appellant) from the Judgment and Order of conviction and sentence dated 20.06.2014 delivered in C.T. 46 of 2011 by the Sessions Judge, Rayagada. By the said Judgment, the Sessions Judge convicted the appellant for committing the offence punishable under Sections 302 and 323 of the IPC and sentenced him to suffer rigorous imprisonment for life [without imposing fine] and one year rigorous imprisonment for committing offence under Section 323 of the IPC. It has been also observed that the appellant is entitled to setoff under Section 428 of the Cr.P.C. While returning the finding of conviction, it has been observed by the Sessions Judge that the act of the appellant in dealing blows on the deceased cannot be termed to be only an act of preventing him from taking P.W.2 away. Had that been the case, the appellant could have pushed away the deceased, who was much older than him or, in the worst case, could have dealt a single blow to deter him for interfering in taking his wife away. The accused did not stop at a single blow. He dealt successive blows which certainly cannot be understood as preventive. In addition, it is also to be seen that the force with which the blows were dealt and the impact that caused, caused the death by doing an act with knowledge that he was likely by such act to cause death. Having noted thus, the Sessions Judge has held that it cannot be said that the act of the appellant was impulsive and outcome of his volatile temper. Thus, the appellant committed culpable homicide. The act with which the death is caused is done with intention of causing such bodily injury to the deceased, namely Bijaya Kumar Majhi and such bodily injury was sufficient in the ordinary course of nature to cause death. Hence, it has been observed that the clause, *thirdly* of Section 300 IPC read with illustration (c) takes within its fold the facts and the attendant circumstances of the case. Thus, the defence plea of culpable homicide not amounting to murder was discarded. It may not be out of context to note that the appellant dealt blow also on the wife of the deceased (P.W.4) by the same *Musala* (the weapon of offence), she sustained injuries on her head and fell down. P.W.15 found lacerated wound on the back of her head but she was not examined by P.W.21, as she was hospitalized till 16.01.2011. Such evidence has not been disputed, in any manner. From the above, it is clear that by the act of the accused she sustained pain. So the culpable act of hurt is proved against the appellant. The appellant by assault by *Musala* caused bodily pain to P.W.4 with intention to cause hurt to her. Hence, the conviction based on those findings is under challenge, by means of this appeal.

2. It appears that this appeal has been structured fundamentally on two grounds viz. (1) due to sudden provocation, the occurrence took place and hence, the conviction under Section 302 of the IPC is unsustainable and (2) there had been no meditation or preparedness but on the spur of a moment, when the deceased prevented the appellant being enraged hit the deceased and his wife with *Musala*. Therefore, there is no evidence of intention to kill as is essentially required to form the charge under Section 302 of the IPC. For the purpose of appreciating the appeal, the facts as are considered relevant, may briefly be introduced at the outset.

3. The wife of the appellant namely, Narangi Majhi, is the daughter of the deceased, namely, Bijaya Kumar Majhi. There had been matrimonial discord and his daughter came to his house. On 08.11.2011 at about 06.00 P.M., the appellant and his brother, Agin, Sister-in-law, Subarna, came to the deceased's house to take back Narangi. It was agreed that Narangi would leave for her matrimonial home. The deceased entreated the appellant and others to stay at night and to take his daughter on the following morning. During the discussion, the appellant tried to forcibly drag Narangi, but the deceased objected and prevented him. The appellant got enraged, being obstructed, and dealt two blows on Bijaya's head by means of a hand wood *(Musala)* lying nearby, resulting in bleeding injuries. The appellant also assaulted Laxmi Dei, Bijay's wife when she rushed to his rescue. Neighbours intervened, but the appellant fled from the scene. The injured were removed to Kashipur Hospital and thereafter to the District Headquarters Hospital at Rayagada. Their nephew, one Phaguna Majhi, P.W.1, lodged a written report at Kashipur Police Station on the following morning at 7 A.M. and the investigation commenced. On completion of the investigation. The charge sheet under Sections 302 and 323 of the IPC was submitted. Following the procedure, the case was committed to the Court of Sessions, and the trial commenced on the charge, as framed. The charge was framed under Sections 302 and 323 of the IPC, which was squarely denied by the appellant. After recording the evidence, the Trial Judge formulated three points for convenience of decision. Before that, the appellant was examined under Section 313 of the CrPC points those were formulated are:

> (I) Whether the accused dealt *Musala* blows on Bijaya Majhi and he died as a consequence thereof.
>
> (II) Whether the appellant did such act with the intention of causing death or with the intention of such bodily injury as was sufficient in the ordinary course of nature to cause death; and

(III) Whether accused assaulted Laxmidei Majhi by means of *Musala* causing bodily pain with an intention to cause harm on her.

4. It appears that, prosecution examined 21 witnesses. P.W.1 filed the FIR, but he was not the eye witness. He appeared in the crime scene after the occurrence took place. But he has testified that when he reached the place of occurrence, the deceased was lying on the ground in the pool of blood. In that place of occurrence, the brother and the sister-in-law of the appellant were present. He stood there. He has stated that the deceased died at Rayagada District Hospital in the evening of the following day. P.W.2, Narangi Majhi, is the wife of the appellant. P.W.2 is the eye witness. She has testified that the appellant tried to drag her out. Her father (the deceased) raised objection. The appellant by using *Musala*, dealt two blows on the head of the deceased which resulted in serious injuries. She has further deposed that the appellant also assaulted her mother, the wife of the deceased. The suggestion as advanced being contrary to the examination-in-chief has been denied. P.W.3, Sarat Majhi, who happens to be the son of the deceased, has stated in the cross-examination that at the time of occurrence he was outside the house. However, in the examination-in-chief, he has stated that the appellant, his brother and the sister-in-law had come to their house to take back his sister (P.W.2). His father did not allow his sister to go out in the night. Thereafter, the appellant by means of a *Musala* dealt two blows on the head of his father and as a result his father fell down on the ground. When his mother intervened, she was also assaulted by the appellant. His father was shifted to Kashipur and then to Rayagada Hospital, where he died. P.W.4, Laxmi Dei Majhi, the wife of the deceased is the injured witness of the said crime transaction. She has stated that her husband did not allow P.W.2 to go with the appellant in the night but the appellant insisted to take her back in that night itself. But the deceased refused to allow his daughter to leave in that night. Suddenly the appellant by means of a *musala*, dealt two blows on the head of her husband, as her husband tried to prevent the appellant, who had been dragging their daughter, Narangi, for taking her outside their house, her husband fell down on the ground, was found in a pool of blood. When she rushed to rescue her husband, the appellant assaulted her. After the occurrence, she shifted her husband to Kashipur Hospital and thereafter to Rayagada. At Rayagada Hospital, her husband died. All suggestions as advanced in order to to discredit the statements of P.W.4 have been squarely denied and thus, the defence has failed to bring out any contradiction in the statement of P.W.4. P.W.5, Pramod Kumar Majhi, after registering hue and

cry in the house of the deceased, appeared in the place of occurrence and found the deceased and his wife lying on the ground having sustained bleeding injuries on their person. They shifted the injured to Kashipur Hospital and thereafter, on the advice of the Hospital authority, the deceased was shifted to Headquarters Hospital, Rayagada, where he succumbed to the injuries. P.W.5 is an important seizure witness, as in his presence, the weapon of offence i.e. *Musala* was recovered from the house of the deceased on production by P.W.2 and seized by preparing the seizure list (Ext.2). The defence tried to prove P.W.5 an unreliable witness as his residence is estimated by 3 kilometers away from the place of occurrence but, P.W.5 has identified his signature on the seizure list, Ext.2. P.W.6, Singu Majhi also having registered hue and cry appeared in the place of occurrence and found the deceased and his wife lying on the ground with injuries. He has stated in trial that the deceased's daughter (P.W.2) told him that the appellant dealt two blows on the head of her father by a *Musala*. In the cross examination, he had deposed that he was under impression that P.W.2 and the appellant had been leading a happy conjugal life. But, at the same time, he had stated that the appellant did not permit P.W.2 to visit her father's house. P.W.7, Sudarshan Nayak, is the inquest witness. In the trial, he testified that on having information of the occurrence, he visited the house of the deceased and found the deceased and his wife lying on the ground on sustaining injuries. According to him, all the injuries were on the head of the deceased. He has revealed in the trial that son and daughter of the deceased informed him that the appellant dealt blows on head of their father by a *Musala*. Even their mother was injured by the appellant. But, in the crossexamination, P.W.7, Sudarsan Nayak, has stated as follows:

> *"I found only one injury on the head of the deceased. Out of the person present during inquest he had only signed on the inquest report."*

He has stated that he was not aware what contained in the inquest report. He only signed on one document. He has stated that one doctor was present at that time of the inquest held by the Police. The suggestions beyond what he has stated in the examination-in-chief were all denied. P.W.8, Dr. D.K. Dev, a Medical Officer was working at the relevant point of time in the District Headquarters Hospital, Rayagada. He has categorically stated that on requisition, he had conducted the post-mortem examination over the dead body of Bijaya Kumar Majhi (the Deceased) and found the following external injuries:

"i) lacerated wound of size 4"*1" scalp deep over the left parietal and temporal area of skull.

ii) lacerated wound of size 2"*1" over the right parietal area of skull."

On dissection he found the following injuries;

i) There was hematoma over the scalp around the lacerated wounds.

ii) Fracture of left parietal and temporal bone, right parietal bone and occipital bone.

iii) The cranium membrance was torn under the fracture and there was sub-Dural haematome on the temporal area."

iv) There was penetrating injury to the left parietal and temporal lobe of the brain.

5. All the injuries according to him are ante mortem in nature. The cause of death was due to fracture of the skull bone with penetrating injury to brain. He identified the report (Ext.4). He further testified that on 21.01.2011, the investigating officer produced a wooden *Musala*, cylindrical in shape, with length of 42'' having a handle with metal tip of length 10'' and length of the body is 32''. The circumference of the body is 7.1/2''X 9'' and 11'' at the beginning, middle and end of the cylindrical body. There are some traces of cow-dung stains with a big crack in the lower part. On the query of the Investigation Officer, he opined that the injuries found in the post mortem examination on the person of the deceased are possible by use of the same *Musala*. He has also identified it as Ext.6. In cross-examination, he denied that there was no injury on the head of the deceased as stated by him. P.W.9, Khagapati Muduli, who is a Police Constable and seizure witness of seizure of vials one containing the nail clippings and another vial, containing the hairs, one check full shirt and one full pant on production by one Nayak Majhi at the P.S. He signed over the seizure list (Ext.7). He has admitted in the cross-examination that there had been no outsider present at the time of seizure and he did not go through the contents of the seizure list, but he has categorically denied that there was no seizure or he was stating falsely in respect of the seizure. P.W.10, Padma Charan Padhy is another Police Constable, attached to Kashipur Police Station. He is the seizure witness of the Bed-head ticket of the deceased, from the District Hospital, Rayagada. He has acknowledged to have signed over the seizure list, Ext.8. In the crossexamination, he has stated that there were outsiders at the time of the seizure and two outsiders signed in the seizure list in his presence. P.W.11, Shyama Majhi, came to the house of the deceased, having heard of the occurrence from Narangi Dei Majhi, Laxmi Dei Majhi and Sarat Majhi that the appellant had assaulted Bijaya Majhi (the deceased). He found on his appearance on the place of occurrence that the deceased had sustained bleeding

injury on the back side of his head. He accompanied the other persons who took the deceased first to the Kashipur Hospital and thereafter, to the District Headquarters Hopital, Rayagada, on reference. According to him, on the following day, at about 9 P.M., Bijaya died at the District Headquarters Hospital. He denied the suggestion of the defence that he was not present at the place of occurrence. P.W.12 identified the appellant in the dock and testified that after hearing about the occurrence from P.W.2, P.W.3 and P.W.4 that the appellant assaulted the deceased, he went to the deceased's house. He also accompanied the other persons namely, Sudarsan Naik and Shyama Majhi to take Bijaya to Kashipur Hospital. He has categorically stated in the cross-examination that he had not seen the occurrence. P.W.13, Agin Majhi had turned hostile, as he did not support his statement as recorded by the Investigating Officer. During the cross-examination as carried out by the State, he denied the fact that he had stated before the Police Officer anything relating to the case. P.W.14, Dologovinda Naik is the person who scribed the FIR (Ext.1). He has testified in the trial that he prepared the report at the instruction of the informant, namely, Phaguna Majhi (P.W.1). After preparation, he read over the content to Phaguna Majhi and thereafter Phaguna Majhi signed on the said report. The defence failed to bring out any material which might dent the case of the prosecution. P.W.15, Dr. Subhasis Panigrahi had examined Laxmi Dei Majhi (P.W.4) and found one lacerated wound on the back of her head (occiput), which could have been caused by hard and blunt object. Injury was simple in nature. P.W.15 identified his report (Ext.9). However, in the cross examination, P.W.15 has stated that such injury is possible by fall in a particular manner or it can so happen if the head is struck against the wall. P.W.16, Birendra Naik identified the appellant in the dock, and testified that one day about two years back (from the day of deposition) there was hulla that the appellant had assaulted the deceased. The villagers took Bijaya Majhi and his wife Laxmi Dei Majhi first to Kashipur CHC for treatment and thereafter, on reference, to the District Headquarters Hospital at Rayagada. In his presence, the Police seized sample earth and blood stained earth from the spot and prepared the seizure list (Ext.10). In the cross examination, he has stated that he was present in the place of occurrence before the Police came and he signed the seizure list in the spot. He has denied the suggestion that he was not present at the time of seizure or he was deposing falsely. P.W.17, Bal Singh Majhi identified the appellant in the dock and deposed in the trial. He has stated that he heard that the appellant had assaulted his mother-in-law. Sundar Naik and Shyam Majhi

took the injured Laxmi and Bijaya to Kashipur Hospital. P.W.17 has admitted that he had not gone to the spot. He went there on the next morning. Thus, he had not seen the appellant assaulting Laxmi and Bijaya. P.W.18, Govinda Mallik is a seizure witness, as in his presence, the Police had seized one full pant, one full shirt, one vail containing nail clipping and another vail with hair on production by the Constable. In the cross-examination, he has admitted that he has not put his signature in the seizure list. P.W.19, Kaliamani Naik was declared hostile, as he did not support his statement as recorded by the Police under Section 161 of the CrPC. Hence, he was cross examined by the prosecution but he denied all suggestions stating that he did not state anything to the Police in respect of the said occurrence. P.W.20, Kunja Kishore Padhy is a Police Constable at the relevant time and was attached to Kashipur Police Station. P.W.20 escorted the dead body to Kashipur Hospital for the post-mortem examination. After the post-mortem examination, the doctor handed over the blood stained lungi and shirt of the deceased Bijaya Majhi for production of the same to the I.O. Accordingly, he had produced the wearing apparels of the deceased along with the Command Certificate to the investigating officer, who in turn, seized those materials by preparing a seizure list (Ext.12). He had signed over that seizure list. He had admitted in the cross examination that no receipt was taken after he deposited those seized materials, Ext.12. P.W.21 is the Investigating Officer. He has briefly stated how he had conducted the investigation by causing seizures of the material objects and by recording the statements of the witnesses. In the cross-examination, he has stated that he had no report that the relation between the appellant and the deceased was inimical. But P.W.21 has denied that there were no materials to file the charge sheet against the appellant. On appreciation of the evidentiary materials, the findings of the conviction has been returned.

6. Mr. N. Panda, learned counsel appearing for the appellant has argued that there had been no intention of the appellant to kill the deceased. But, as the deceased tried to physically prevent the appellant from taking her wife to his house, the appellant got furious and out of the rage by a *Musala* lying nearby, he struck blow on the head of the deceased which resulted in his death. According to Mr. Panda, learned counsel, it is evident that there had been no pre-meditation, no enmity even there was no preparation to assault and hence, the said act would fall within the Exception-4 of Section 300 of the IPC which provides that culpable homicide is not a murder, if it is committed without premeditation, in a sudden fight, in the heat of passion,

upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Therefore, Mr. Panda, learned counsel has urged to convert the conviction under Section 304 Part-II of the IPC. According to Mr. Panda, even if there is knowledge that such act is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death, such act be termed only as culpable homicide not amounting to murder. If such act can be brought under Section 304 Part-II of the IPC, the maximum punishment would be for a term which may extend to 10 years or with fine or with both. The petitioner is in jail for last eleven years two days according to Mr. Panda, learned counsel appearing for the appellant. Therefore, if this Court considers that the act committed by the appellant is covered under Section 304 Part-II of the IPC, the appellant is liable to be released from the jail forthwith. In support of his contention, Mr. Panda, learned counsel has relied on two decisions of the Apex Court. In ***Satish Narayan Sawant v. State of Goa*** [Judgment Dated 14.09.2009 delivered in Criminal Appeal No.854 of 2002] where the Apex Court had occasion to observe *inter alia* as follows:

> *18.…….....*
> *The aforesaid eye-witnesses, although, are related witnesses, were natural witnesses for they were the inmates of the house where the incident had taken place. The said eye-witnesses are consistent about the principal act of the appellant in stabbing the deceased. The discrepancies which were sought to be pointed out are minor discrepancies without in any manner affecting the substratum of the prosecution case and therefore, minor discrepancies in the evidence of the eye-witnesses are immaterial. This Court has observed as follows in the case of* ***Dinesh Kumar v. State of Rajasthan****: (2008) 8 SCC 270.*
>
> *"It is to be noted that PWs 7 and 13 were the injured witnesses and PW 10 was another eyewitness and was the informant. Law is fairly well settled that even if acquittal is recorded in respect of the coaccused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence.*
>
> *In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."*

It has been further observed in Satish Narayan Sawant as under:

> *21. The aforesaid eye-witnesses were crossexamined at length but even after such lengthy cross-examination these eye-witnesses account could not be shaken. The postmortem report indicates that there were sixteen injuries as against the two as adduced in ocular evidence and, therefore, a submission was made by the counsel appearing for the appellant that the medical evidence adduced in the present case is not supporting the ocular evidence. However, a perusal of record clearly shows that the doctor who conducted the postmortem (PW-7) stated in his evidence that there were in total 16 injuries when external examination was done by him and the knife M. O. 11 could have caused the injuries no. 1, 2, 3 and 4. He further stated that the death was caused due to hemorrhage and shock as a result of stab injury. He further stated that Injury No. 1 was sufficient to cause death in the ordinary course of nature. On being cross-examined, PW-7 categorically stated that death due to stab injury was in consequence of Injury No. 1 and all other injuries were superficial in nature. There is no doubt that four injuries are indicated in the postmortem report shown to have been received by the deceased but the fact that the deceased was given stab injuries by the appellant with the help of a knife brought by him from inside the house is clearly established from the ocular evidence. There is therefore one particular injury, being injury No. 1 caused because of stabbing and the rest being superficial in nature could be caused during scuffle. Therefore, the alleged discrepancy cannot be said to be very vital as it has been held by this Court in several decisions that ocular evidence cannot be brushed aside only because, to some extent, it is not in consonance with the medical evidence. Reference in this regard may be made to the decision of this Court in* ***State of U. P. v. Krishna Gopal, (1988) 4 SCC 302; Anwar v. State of Haryana: (1997) 9 SCC 766; Ravi Kumar v. State of Punjab: (2005) 9 SCC 315; Munivel v. State of T.N****: (2006) 9 SCC 394.*
>
> *22. All the contentions raised by learned counsel appearing for the appellant were considered by us in the light of evidence on record and we find that none of the aforesaid submissions has any basis. There is cogent and reliable evidence on record to prove and establish that the accused has committed the act of stabbing as a result of which the deceased had died."* [Emphasis added]

7. Mr. Panda, learned counsel has therefore, contended that, there is no straight jacket formula. It all depends on the facts. In ***Satish Narayan Sawant***, *(supra),* the Apex Court has observed that there was an altercation preceding the incident. There was no evidence that the deceased was armed with any weapon. Initially, the appellant did not have any weapon with him. But during the course of the incident, he went inside and got a knife with the help of it he stabbed the deceased. There was only one main injury due to stabbing and that was on the back-side of the deceased. For that, it cannot be said that there was any intention to kill or inflict an injury of a particular degree. There was provocation and the incident happened at the spur of the

moment. That being the factual position, the act cannot be brought under Section 302 of the IPC, it is a case falling under Section 304 Part-II of the IPC as there was no intention on the part of the accused either to cause death or such bodily injury that is likely to cause death. Mr. Panda has also placed his reliance on **Surinder Kumar v. Union Territory, Chandigarh**, [Judgment dated 08.03.1989 delivered in Criminal Appeal No. 530 of 1978]. While dwelling on Exception 4 to Section 300 of the IPC, the Apex Court has observed as follows:

> *3. On January 3, 1975, at about 7.15 p.m., PW 2 and his deceased brother had an heated argument with the appellant and his brother Amrit Lal in regard to the return of the kitchen. In the course of this heated exchange PW 2 is alleged to have showered filthy abuses. Although PW 2 denies this fact, PW 4 has admitted the same. PW 2 also threatened to throw out the utensils and lock the kitchen. Since PW 2 was uttering filthy abuses in the presence of the appellant's sister and Nitya Nand did not restrain him, the appellant got enraged, went into the kitchen and returned with a knife with which he inflicted one blow on the neck of PW 2 causing a bleeding injury. In the melee the appellant inflicted three knife blows to Nitya Nand; one on the shoulder, the other on the elbow and the third on the chest, as a result whereof Nitya Nand collapsed to the floor and later died while on the way to the hospital. The fact that Nitya Nand died a homicidal death is not in dispute.*
>
> *4. The appellant's defence was that on the date of the incident PW 2 and his deceased brother had demanded vacant possession of the kitchen and on being told that PW 4 had permitted them to continue to occupy it they uttered filthy abuses in the presence of his sister and on being asked to desist from using such language PW 2 began to throw out the utensils from the kitchen. When the appellant tried to stop him from doing so, PW 2 took out a knife from his pant pocket whereupon the appellant took shelter behind a door. PW 2 rushed towards him with the knife but in the meanwhile Nitya Nand moved in between and sustained the injuries in question. The courts below have, however, concluded, and in our opinion rightly, that the appellant had in the course of the quarrel given stab wounds to PW 2 and the deceased Nitya Nand.*
>
> *5. The learned Advocate for the appellant submitted that there was no previous ill-will between the parties, on the contrary the relations were cordial and the appellant was not the one who had started the quarrel but he acted in the heat of passion during a sudden quarrel without any premeditation and hence Exception 4 to Section 300, IPC was clearly attracted. On the other hand the learned counsel for the State argued that the High Court had rightly held that the appellant had acted in a cruel and unusual manner and was not entitled to the benefit of the said exception. He sub- mitted that the appellant had attacked an unarmed person and had caused as many as three injuries which showed that he had acted in a cruel manner. The appellant's counsel countered by pointing out from the evidence of PW 1 Dr. Goyal that the appellant had a deformity in the left leg which restricted his movement and he would ordinarily not venture to attack unless he was forced by circumstances to use the weapon to contain PW 2.*

6. Exception 4 to Section 300 reads as under:

Exception 4 : Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation: It is immaterial in such cases which party offers the provocation or commits the first assault.

7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly. In the present case, the deceased and PW 2 had entered the room occupied by Sikander Lal and his family members and had demanded vacant possession of the kitchen. When they found that the appellant was disinclined to handover possession of the kitchen, PW 2 quarrelled and uttered filthy abuses in the presence of the appellant's sister. On the appellant asking him to desist he threatened to lock up the kitchen by removing the utensils, etc., and that led to a heated argument between the appellant on the one side and PW 2 and his deceased brother on the other. In the course of this heated argument it is the appellant's case that PW 2 took out a knife from his pant pocket. This part of the appellant's case seems to be probable having regard to the antecedents of PW 2. It is on record that PW 2 was convicted at Narnaul on two occasions under Section 411, IPC and his name was registered as a bad character at the local police station. It was presumably because of this reason that he had shifted from Narnaul to Chandigarh a couple of years back and had started to live in the premises rented by PW 4. When the appellant found that PW 2 had taken out a pen knife from his pocket he went into the adjoining kitchen and returned with a knife. From the simple injury caused to PW 2 it would appear that PW 2 was not an easy target. That is why the learned Sessions Judge rejected the case that Amrit Lal had held PW 2 to facilitate an attack on him by the appellant. It further seems that thereafter a scuffle must have ensued on Nitya Nand intervening to help his brother PW 2 in which two minor injuries were suffered by the deceased on the left arm before the fatal blow was inflicted on the left flank at the level of the 5th rib about 2" below the nipple- It may incidentally be mentioned that the Trial Court came to the conclusion that the injury found on the neck of PW 2 was a self-inflicted wound and had therefore acquitted the appellant of the charge under Section 307, IPC, against which no appeal was carried. We have, however, proceeded to examine this matter on the premise that PW 2 sustained the injury in the course of the incident. From the above facts, it clearly emerges that after PW 2

> *and his deceased brother entered the room of the appellant and uttered filthy abuses in the presence of the latter's sister, tempers ran high and on PW 2 taking out a pen knife the appellant picked up the knife from the kitchen, ran towards PW 2 and inflicted a simple injury on his neck. It would be reasonable to inter that the deceased must have intervened on the side of his brother PW 2 and in the course of the scuffle he received injuries, one of which proved fatal. Taking an overall view of the incident we are inclined to think that the appellant was entitled to the benefit of the exception relied upon. The High Court refused to grant him that benefit on the ground that he had acted in a cruel manner but we do not think that merely because three injuries were caused to the deceased it could be said that he had acted in a cruel and unusual manner. Under these circumstances, we think it proper to convict the accused under Section 304, Part I, IPC and direct him to suffer rigorous imprisonment for 7 years. In the result, this appeal partly succeeds. The order of conviction and sentence passed under Section 302, IPC is set aside and the fine, if paid, is directed to be refunded. The appellant is convicted under Section 304 Part I, IPC and is directed to suffer rigorous imprisonment for 7 years."* [Emphasis Added]

8. A decision of this Court in **Jogendra Sabara v. State of Orissa**, [Judgment dated 23.01.2002 delivered in Jail Criminal Appeal No.425 of 1994] has been pressed in the service, to contend that when offence is committed out of anger due to exchange of hot words and by assaulting the deceased which resulted in death cannot be stated to be a murder rather the culpable homicide not amounting to murder. It has been observed in the said report as follows:

> *From the medical evidence it has further transpired that the thoracic cavity was filed with massive dark red blood and, therefore, the deceased met with homicidal death due to server haemorrhage. Considering the cumulative effect of the oral and documentary evidence along with the post mortem report we have no manner of doubt that the offence was committed by the appellant in committing the murder of Kuber. Next it is to be found whether the appellant was provoked by the abrasive language hurled at him by the deceased. It is true that the deceased was unarmed, but at the same time it may not be lost sight of the fact that due to exchange hot words between the appellant and the deceased, the appellant must have lost his mental equilibrium and being incensed with anger had committed the said grisly murder. It is true that in a criminal case intention is not of that consequence and such intention cannot develop at the spur of the moment. The intention cannot be known to any person other than the killer. But from the facts-situation we found that such an act was committed by the accused only after the provocative words hurled by the deceased. From the evidence it has further transpired that the deceased had gone near the house of the appellant in a challenging mood which followed by a heated discussion. Therefore, in such situation the appellant had committed the offence without any pr-meditation and at the spur of the moment.*

9. According to Mr. Panda, in this case also when the appellant was prevented from taking back his wife (P.W.2) to his house by the deceased and

he was physically prevented by him, he got suddenly enraged, lost his mental balance and struck with *Musala* which was lying nearby. It is evident from the transaction of crime that there had been no intention to kill or it cannot be gathered that there had been knowledge that the blow can cause the death. Hence, the conviction be altered under Section 304 Part-II of the IPC.

10. Per contra, Mrs. Saswata Patnaik, learned Addl. Government Advocate, appearing for the stated has submitted that this is not a case of single blow but two blows on the vital part of the body. Striking on the head, particularly, over the left parietal and temporal area of skull is the signifier of intention. According to her, there is no infirmity in the finding of the trial court in as much as the prosecution has successfully proved that the culpable act committed by the appellant falls under clause *thirdly* under Section 300 in as much as it was done with intention to cause bodily injury to the deceased and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause of death. According to Mrs. Patnaik, the illustration provided below Section 300 may be applied in the present case to bring the culpable act within the purview of murder. We have appraised the record of evidence elaborately, noted the relevant part of evidence and heard the submissions of learned counsel for the appellant and the State substantively.

11. We would like to make some initial observation before the grounds of objections are discussed. It has been established to the hilt that the appellant was engaged in a sudden fight with the deceased as the deceased prevented him from taking away his wife (P.W.2) as per the settlement. When the appellant started dragging P.W.2 to take her away, the deceased physically obstructed the appellant and there unleashed a sudden fight. There had been no pre-meditation, neither undue advantage was taken by the appellant. Even he did not act in a cruel and unusual manner.

12. From the records of evidence it appears that P.W.2 and P.W.4 are the eye witnesses of the occurrence and what they have stated is that, when the deceased prevented the appellant, they engaged in a fight and out of rage taking the Musala which was lying nearby, the appellant struck two blows on the parietal region. One blow was on the left parietal and temporal area of the skull and the other was on the right parietal area of the skull. P.W.10 has confirmed that the injuries were over the left parietal and temporal area of skull. Fracture of left parietal and right parietal bone and the occipital bone was the cause of death. The prosecution has established the transaction of crime without leaving any space for doubt. Even involvement of the appellant

in the death of the deceased is well established. Now, the question that falls on the face of the records is whether the said culpable act was rightly brought under Section 302 or the culpable act was supposed to be brought under Section 304 Part-I or Part-II of the IPC. In this regard, we may refer what has been observed in ***Virsa Singh*** *(supra)* that if the following conditions are satisfied, then the culpable homicide is murder:

> (a) The act which caused death is done with intention of causing death or is done with intention with a bodily injury.
>
> (b) The injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In *Virsa Singh,* it has been further stated for *purpose of eliminating any doubt that it must be put that there was an intention to inflict that particular injury which in the ordinary course of nature was sufficient to cause death,* meaning that the injury found to be present was the injury that was intended to be inflicted.

13. From the transaction of offence, what we have elaborately noted, while discussing the testimonies, it appears that there was no pre-meditation or preparation. When the appellant was obstructed by the deceased from taking back her wife on the very night of occurrence, he got infuriated and he had started to drag P.W.2 for taking away from the house of the deceased. It has been stated by the eye witnesses that at that time, the deceased physically prevented the appellant for the purpose of resisting him so that he could not take away his daughter. It has also been found that there was no previous enmity. There was some matrimonial disharmony which was settled prior to the occurrence. The heated exchange of words suddenly transformed into a fight. The deceased did not want to allow the appellant to take her daughter back in that night. When the appellant was prevented and there broke out sudden fight, the appellant lost his senses out of rage and dealt blows on the head of the deceased which caused fracture of left parietal and temporal bone, right parietal bone and occipital bone. Two external injuries were created by the blows even by the appellant. P.W.2 has categorically stated that the appellant gave two blows and there was no challenge in the cross-examination. In the cross-examination, even P.W.4 has given a reliable account of what happened at the time of occurrence. She has stated that two blows were given by the appellant by means of *Musala*. On the evidence of this nature, the single blow theory becomes irrelevant but we are of the view that the area where the blows were dealt is on the same region, roughly, located at the upper back area of the skull. In ***Jogendra Sabara*** *(supra)* it had been observed that it is true that in a criminal case, intention is of consequence, but such intention cannot develop at the spur of the moment.

Intention cannot be known by any person, other than the killer. But from the fact-situation, it is found that such an act was committed by the appellant only after the provocative words were uttered by the deceased. As there was no premeditation, the act was committed on the spur of moment, the said act requires to be was brought under Section 304 Part-I of the IPC, and not under Section 302 of the IPC and accordingly the appellant is liable to be convicted under Section 304, Part I of the IPC. We have not found that any undue advantage was taken by the appellant. Neither did he act in an unusual cruel manner. The cumulative effect of those observations is that the appellant has committed the culpable homicide not amounting to murder within the ambit of Exception 4 below Section 300 of the IPC. As out of fury the said act was done, we cannot infer that there was intention of causing bodily injury as is likely to cause death. Hence, the conviction is converted under Section 304 Part-I of the IPC, as no intention to cause death has been established by the State.

14. In the result, the impugned Judgment and order of conviction and sentence are set aside. However, the appellant is convicted under Section 304 Part-I of the IPC for the culpable act that he has committed resulting in the death of Bijaya Kumar Majhi. As consequence of the conviction under Section 304 Part-I of the IPC, the appellant shall suffer imprisonment for 10 years with fine of Rs.5,000/- (Rupees five thousand), in default whereof, the appellant shall suffer 3 months simple imprisonment.

15. In the result, appeal stands partly allowed.

16. Send down the L.C.Rs. forthwith.

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2022 (II) ILR - CUT-606

BISWAJIT MOHANTY, J & MISS. SAVITRI RATHO, J.

W.P.(C) NO. 26672 OF 2020

M/S. SUNRISE EGGS FIRMS ……..Petitioner

.V.

UNION OF INDIA & ORS. …….Opp.Parties

NATIONAL HIGHWAYS ACT, 1956 – Land Acquisition – Section 3A (1) – Govt. of India Ministry of Road Transport and Highway Dept. issued notification regarding acquisition of land for the purpose of construction of Raipur to Visakhapatnam Economic Corridor – Petitioner prayed for quashing of the said notification – Held, this Court made it clear that when the case is right of an individual versus public interest, individual right must yield to public interest – We do not find any reason whatsoever to interfere with the notification. (Para 9)

Case Laws Relied on and Referred to :-

1. AIR 2011 S.C. 3210 : Union of India Vrs. Dr. Kushala Shetty & Ors.
2. (2005) 13 SCC 477 : Competent Authority Vrs. Barangore Jute Factory & Ors.
3. AIR 1961 SC 652 : Diamond Sugar Mills Limited & Ors. Vrs. the State of Uttar Pradesh & Ors.
4. AIR 2022 SC 1045 : Phoenix ARC Private Limited Vrs. Vishwa Bharti Vidya Mandir & Ors.
5. AIR 1997 SC 1236 : Ramniklal N.Bhutta & Anr. Vrs. State of Maharashtra & Ors.
6. W.P.(C) No. 19970 of 2010 (disposed of on 3.12.2010) : M/s. Narayani Motors Private Limited Vrs. The National Highways Authority of India & Anr.

For Petitioner : Mr. G. Mukherjee, Sr. Adv.
For Opp. Parties: Mr. U.C.Mohanty & Mr. A.Das (O.P.Nos. 2,3 & 7)
Mr. H.M.Dhal, A.G.A (O.P.Nos. 4 to 6)

JUDGMENT Date of Hearing : 15.07.2022 : Date of Judgment : 26.07.2022

B. MOHANTY, J.

This writ petition has been filed by the petitioner challenging the notification dated 27.12.2019 published by the Government of India in Ministry of Road Transport and Highways Department under sub-section(1) of Section 3A of the National Highways Act, 1956, for short the 'Act' published in daily newspaper 'The Dharitri', regarding acquisition of lands of the petitioner for the purpose of construction of Raipur to Vishakhapatnam Economic Corridor and consequently prayer has been made for quashing of the said Notification which was published in the newspaper on 23.1.2020. The petitioner has also made an alternative prayer to direct the opposite parties more particularly opposite party Nos. 3 and 7 to modify the alignment of the proposed road in accordance with the enquiry report under Annexure-5 and to consider and dispose of the objection under Annexure-6 as per Section 3C of the 'Act'.

2. The case of the petitioner is that it is a registered farm and the said farm purchased Ac.24.00 cents land which was originally classified as 'Dongoro' i.e. dry land. Out of the said land Ac.14.00 cents has been converted to non-agricultural category under Section 8A of the Orissa Land Reforms Act,1960 and

the petitioner is in uninterrupted possession of the same. The petitioner ventured to construct a mega poultry farm namely, 'Sunrise Egg Farm' over Plot Nos. 9 to 13 of Khata No. 108/477. The total project cost was estimated of Rs. 14.00 crores. The petitioner availed loan from the bank for establishing the said project. Accordingly the petitioner has constructed boundary wall and construction of ware house, office building, water tank, seven numbers of poultry shed, staff quarters and other ancillaries have already been completed by spending Rs.8.00 crores and electricity connection has been obtained to the farm site by spending Rs.17.00 lakhs and the project is ready to have its maiden production. Copies of the relevant R.O.Rs. have been filed under Annexure-1 series. While so, on 23.1.2020 the Land Acquisition Authorities published Notification in daily newspaper i.e. 'The Dharitri' regarding acquisition of land for construction of Raipur to Vishakhapatnam Economic Corridor/Express Highway under Section 3A of the 'Act', a copy of which has been annexed to the writ petition as Annexure-2. According to the petitioner the Notification under Section 3A as indicated above violates sub-section 2 of Section 3A of the 'Act' as it does not give details of the properties along with the brief description of the land proposed to be acquired. Further the case of the petitioner is that the said Notification under Annexure-2 is otherwise illegal as the same does not indicate as to which portion of the land is going to be acquired. The petitioner only came to know about the exact area to be acquired when the staff of Land Acquisition Officer came to the spot on 16.8.2020 for conducting demarcation and put pillars over the land to mark the exact area. Only then the petitioner could realize that the proposed Highway is going to pass in the middle of the land of the petitioner as a result of which, one big patch of petitioner's land will be divided into small patches and partly constructed buildings have to be completely demolished and accordingly they would suffer huge financial loss of Rs. 14.00 crores. Accordingly, on 17.8.2020 the partner of the farm through whom the writ petition has been filed namely, Mohammed Rafi preferred an objection against the proposed land acquisition with regard to the land situated at village Kamra under Annexure-4 to Tahasildar, Borigumma (opposite party No.6). The Tahasildar, Borigumma conducted an enquiry and recorded his observation that the petitioner is going to suffer a lot if the alignment of the proposed highway is not changed. This enquiry report which has been addressed to the Land Acquisition Officer, Collectorate, Koraput (opposite party No.7) has been annexed to the writ petition as Annexure-5. There he indicated that the project of the petitioner farm will suffer huge financial loss, if the separation takes place due to the division of the land. Thereafter, on 22.9.2020 the partner of the petitioner farm submitted a representation/objection under Annexure-6 to opposite party No.7 praying for change of alignment to the extreme corner of the

farm so as to save the project from being destroyed. When there was no response from the side of the authorities, the present writ petition was filed on 6.10.2020 making the above noted prayers.

3. A counter affidavit has been filed by opposite party Nos. 2, 3 & 7. They have taken a stand that the Notification vide Annexure-B/2 dated 18.7.2019 published in exercise of powers conferred by clause(a) of Section 3 of the 'Act', by the Central Government in Ministry of Road Transport and Highways authorized Tahasildar-cum-Land Acquisition Officer, Borigumma to act as the Competent Authority to perform the functions of such authorities under "the Act" in respect of the stretch of land from Km. 238.200 to Km. 363.320 of the newly proposed highway for building (widening/fourlaning, etc.), maintenance management and operation in the State of Odisha. With regard to this stretch of land the earlier mentioned notification under Annexure-2 or Annexure-A/2 was issued later. The notification under sub-section(1) of Section 3A of the 'Act' which was published under Annexure-2 made it clear that any person interested in the lands indicated therein may within 21 days from the date of publication of the notification can object to the use of such land for the aforesaid purpose under sub-section(1) of Section 3C of the 'Act'. It also made it clear that every objection shall be made to the Competent Authority namely, Tahasildarcum-Land Acquisition Officer, Boriguma in writing and shall set out the grounds thereof and the Competent Authority would give the objector an opportunity of being heard, either in person or by a legal practitioner and may after hearing all such objections and making such further enquiry, if any, as the Competent Authority thinks necessary, by order, either allow or disallow the objections. The said notification while giving brief description of the land to be acquired also made it clear that the land plans and other details of the land to be acquired under the notification are available and can be inspected by the interested person in the Office of Competent Authority i.e. Tahasildar-cum-Land Acquisition Officer, Boriguma. Despite publication of this notification in the newspaper i.e. 'Times of India' and 'The Dharitri' on 23.1.2020 under Annexure-2, the petitioner never cared to file its objection within time as indicated in the notification and since the land has already vested in the Central Government with publication of notification under Section 3D of the 'Act' on 10.9.2020 under Annexure-C/2 the petitioner has no legal right to challenge the notification under sub-section (1) of Section 3A of the 'Act' at this stage. They have also taken a stand that the public interest cannot be defeated to uphold the private interest of the petitioner as the project deals with Raipur to Visakhapatnam Economic Corridor. They have further taken a stand that the notification under Annexure-2 or Annexure-A/2 clearly contains a brief description of the land. Therefore, the impugned

notification cannot be termed as illegal and by filing the present writ petition, an effort has been made by the petitioner to delay the project. With regard to the averments made relating to existence of boundary wall and construction of buildings and conversion of land from Dongoro to non-agricultural category, their stand is that all these will be taken care of/assessed at the appropriate stage of proceeding as provided under Section 3G of the "Act". With regard to map at Annexure-3 filed in the writ petition their stand is that this is a map prepared by the petitioner to satisfy its own vested interest to disturb the proposed national highway and the petitioner is estopped from raising all the issues as it never filed objection as provided under law when the notification under Annexure-2 was within his knowledge. With regard to the prayer of the petitioner for change of alignment, their stand is that the same is not tenable as prayed under Annexure-6. In this context they have relied upon the decision of the Supreme Court in the case of ***Union of India Vrs. Dr. Kushala Shetty and Others*** reported in ***AIR 2011 S.C. 3210***. Accordingly, their stand is that the writ petition being without any merit, should be dismissed.

4. The petitioner has filed a rejoinder affidavit reiterating that the authorities are bound to provide brief description of the land as required under sub-section(2) of Section 3A of the 'Act' and since the details of the lands were not published, the notification under Annexure-2 or Annexure-A/2 is legally vulnerable. If the authorities would have submitted the details, the petitioner could have been able to file objection as per Section 3C of the 'Act'. It is also indicated in the rejoinder affidavit that though the notification under sub-section(1) of Section 3A of the 'Act' was published on 27.12.2019 however only on 2.1.2020 the Project Director, NHAI forwarded the same to the Tahasildar-cum-Land Acquisition Officer, Borigumma, which was received there as per Anneuxre-7 on 16.1.2020.

5. Mr.Goutam Mukherjee, learned Senior Counsel appearing for the petitioner at the outset submitted that the relevant plots for the purpose of the present case are Plot No. 9 falling under Khata No. 108/468 and plot Nos. 10 and 11 falling under Khata No. 108/447 of Mouza Kamara under Tahasil Borigumma whose R.O.Rs. have been filed under Annexure-1 series. He submitted that since the notification under sub-section (1) of Section 3A of the 'Act' under Annexue-2 does not give a brief description of the land as required under sub-section(2) of Section 3A of the 'Act', such notification becomes legally vulnerable. He also submitted that the said notification does not contain the names of the owners and which part of the land is going to be acquired. According to him the notification under sub-section (1) of Section 3A of the 'Act' should have contained a clear cut identifiable description of the land

including the things which are present over the said land. In this context, he relied on definition of land as contained in 3(a) of the "Act". Placing reliance on the decision of the Supreme Court in the case of ***Competent Authority Vrs. Barangore Jute Factory and Others*** reported in ***(2005) 13 SCC 477,*** he prayed that the notification under Anexure-2 should be quashed. He also submitted that there has been total non-application of mind in issuing the notification under sub-section(1) of Section 3A of the 'Act' under Annexure-2 in as much as by the time that notification was issued the kisam of the lands have already been changed from 'Dangar' to 'Gharabari' as would be clear from the R.O.Rs. under Annexure-1 series covering those plots. In such background also the notification under Annexure-2 is legally vulnerable. He also submitted that the gazette notification under sub-section (1) of Section 3A of the 'Act' was published on 27.12.2019. On 2.1.2020 vide Annexure-7 the Project Director, NHAI communicated the said notification to the Tahasildar-cum-Land Acquisition Officer, Boriguma which was received by him on 16.1.2020. By that time 21 days for submitting objection have already expired. Accordingly, the petitioner has committed no mistake in not filing the objection in time as such notification was even not known to the Tahasildar-cum-Land Acquisition Officer. In such background he submitted that the objection under Annexure-4 ought to be treated as objection to Annexure-2 under Section 3C of the 'Act' and letter under Annexure-5 should be treated as an order passed under Section 3C(2) of the 'Act'. He also submitted that the notification under Annexure-2 was legally vulnerable as it violates sub-section(3) of Section 3A of the 'Act' as it was not published in a local newspaper having wide circulation in the area in which lands proposed to be acquired were situated. In this context with regard to the meaning of "Local Newspaper", Mr.Mukherjee relied upon the decision of the Supreme Court rendered in ***Diamond Sugar Mills Limited and Others Vrs. the State of Uttar Pradesh and Others*** reported in ***AIR 1961 SC 652*** and the case of ***Phoenix ARC Private Limited Vrs. Vishwa Bharti Vidya Mandir and others*** *reported in* ***AIR 2022 SC 1045***. Mr.Mukherjee submitted that the action of the authorities is malafide as though the petitioner has shifted seven structures after coming to know about Annexure-2 notification, again those lands to which such shifting has taken place, have been earmarked for acquisition in a fresh notification under Section 3A(1) of the 'Act'. With regard to the prayer for separate route/alignment, he stated that the prayer made under Annexure-6 should be treated as an objection under Section 3C of the 'Act' in the background of the enquiry report under Annexure-5. Accordingly, the authorities in the alternative should be directed to take a decision on such objection.

6. Mr. U.C.Mohanty, learned counsel appearing for opposite party Nos. 2, 3 & 7 assisted by Mr. A. Das, learned counsel submitted that sub-section(2) of

Section 3A of the 'Act' only reflects that the notification issued under sub-section (1) shall give a brief description of the land and nothing more and a perusal of Annexure-2/Annexure-A/2 would clearly show that the brief description of the land has been given. Further the said notification makes it clear that land plans and other details of the land to be acquired are available and can be inspected by the interested persons in the office of the Competent Authority. In such background he submits that the notification under Annexure-2 cannot be held to be in violation of sub-section (2) of Section 3A of the 'Act'.

With regard to submission of Mr.Mukherjee that 21 days have expired prior to receipt of the communication under Annexure-7 enclosing a copy of notification under Annexure-2 by the Tahasildar-cum-Land Acquisition Officer, Boriguma, he submitted that the petitioner has itself averred at paragraph-5 of the writ petition about the paper publication of the notification being made on 23.1.2020 in 'Dharitri' newspaper, which is a well circulated vernacular newspaper of the State. Therefore the petitioner could have filed his objection as he knew about such publication under Annexure-2 within 21 days from 23.1.2020 which it never did. With regard to submissions of Mr.Mukherjee that the notification was not published in the local newspaper resulting in violation of sub-section (3) of Section 3A of the 'Act', he submitted that there exists no such pleading either in the writ petition or in the rejoinder and therefore, he should not be permitted to raise this issue at this stage of hearing. Even otherwise he submitted that the very fact that in paragraph-5 of the writ petition, the petitioner refers to notification published in the daily newspaper 'The Dharitri' on 23.1.2020, would make it clear that the petitioner had knowledge about such notification. With regard to the allegations of malafide made by Mr.Mukherjee, he submitted that there exists no pleading whatsoever either in the writ petition or in the rejoinder filed by the petitioner on the same and accordingly, such argument should be ignored. Further with regard to submission of Mr.Mukherjee that the fact that Plot Nos. 9, 10 & 11 covered by R.O.Rs. under Annexure-1 series which are relevant for the purpose of case, falling under village Kamra, were shown to be of Dangara/2 kisam under Annexure-2 though by the time of such notification, the kisam of said land had already been changed to Gharabari shows non-application of mind while issuing the notification under Annexure-2, he submitted that such change as per the R.O.Rs under Annexure-1 series only occurred on 11.10.2019 and the impugned notification was published on 27.12.2019 and this has occurred due to non-correction of revenue records as collection of data with regard to land record must have started immediately after notification dated 18.7.2019 under Annexure-B/2 was issued. Therefore this should not be treated to be a serious issue. With regard to the submission of Mr. Mukherjee that Annexure-4

should be treated as the objection to Annexure-2 and Annexure-5 to be treated as an order under Section 3C(2) of the 'Act' as 21 days had expired on 17.1.2020, Mr.Mohanty submitted that 21 days expired on 13.2.2020 as the paper publication was made as admitted by the petitioner on 23.1.2020 in local vernacular newspaper 'The Dharitri' and Annexure-4 was submitted much after only on 17.8.2020 and therefore, the same cannot be treated as an objection filed under Section 3C of the 'Act' as the same was filed much beyond the time and accordingly he submitted that Annexure-5 cannot be treated as an order under Section 3C(2). Further according to him Section 3C(2) mandates that the Competent Authority shall give the objector an opportunity of being heard and should either allow or disallow the objections. A reading of Annexure-5 would show that it only makes some observations and the same never allowed the prayer of the petitioner. He also submitted that much cannot be read to Annexures-4, 5 & 6 because Annexure-4 was never addressed to the Competent Authority and it was only addressed to the Tahasildar, Boriguma but not in his official designation as Competent Authority. Similarly even if for a moment Annexure-5 is accepted as an order under sub-section(2) of Section 3C of the 'Act' but the same was never communicated to the Central Government which issued the notification under Annexure-2. Further, the same was communicated to the Land Acquisition Officer, Koraput by Tahasildar, Borigumma only as Tahasildar, Bogirumma not as Competent Authority. With regard to Annexure-6 he submitted that the representation under Annexure-6 also cannot be treated as an objection as the same was never addressed to the Competent Authority. Therefore, the alternative prayer of the petitioner for a direction to consider the objection under Annexure-6 for realignment is without any merit. In this context he submitted that the project has been prepared by the authorities keeping various relevant factors in mind and in larger public interest, prayer for realignment cannot be permitted. In this context he relied on the decision of the Supreme Court in ***Dr. Kushala Shetty and Others (supra)***. Lastly he submitted that the petitioner has not challenged the notification under Annexure-C/2 issued under Section 3D of the 'Act'. Accordingly, he prayed that the writ petition be dismissed. While concluding Mr.Mohanty submitted that since there has been no infraction of law in issuing notification under Annexure-2, in larger public interest this Court should not interfere in the matter and in this context he relied upon the decision of the Supreme Court in the case of ***Ramniklal N.Bhutta and another Vrs. State of Maharashtra and others*** reported in ***AIR 1997 SC 1236*** and an unreported decision of the Court rendered by a Division Bench in ***M/s. Narayani Motors Private Limited Vrs. The National Highways Authority of India and another*** in W.P.(C) No. 19970 of 2010 disposed of on 3.12.2010.

7. Heard Mr.Mukherjee, learned Senior Counsel, Mr.U.C. Mohanty and Mr.A.Das, learned counsels representing opposite party Nos. 2, 3 and 7.

8. The undisputed facts of the case are as follows:-

On 18.7.2019 vide Annexure-B/2 the Central Government authorized the Tahasildar-cum-Land Acquisition, Officer, Boriguma to act as an Competent Authority in respect of village Kamra in which the relevant plots of the petitioner viz. Plot Nos. 9, 10 & 11 covered by the record of rights under Annexure-1 series are situated. These plots which earlier belonged to kisam Dangar/2 were converted to Gharabari kisam pursuant to the orders passed in cases filed under Section 8-A of the Orissa Land Reforms Act, 1960 and accordingly R.O.Rs. were issued in favour of the petitioner on 11.12.2019 by the Additional Tahasildar, Boriguma. On 23.1.2020, the notification dated 27.12.2019 under sub-section (1) of Section 3A of the Act was published in "Times of India" and vernacular daily "Dharitri". Vide Annexure-7, the Project Director, National Highways Authority of India sent a copy of the above notification dated 27.12.2019 to the Tahasildar-cum-Land Acquisition Officer, Boriguma who happens to be the Competent Authority. As indicated earlier on 23.1.2020, the notification dt. 27.12.2019 under sub-section (1) of Section 3A of the 'Act' was published in the newspaper i.e. "The Times of India" and "The Dharitri" under sub-section(3) of Section 3A of the 'Act'. A copy of such publication has been filed as Annexure-2 by the petitioner itself making it clear that such publication was made on 23.1.2020. The publication as under Annexure-2 made it clear that objection if any should be filed within 21 days, for the purposes under sub-section(1) of Section 3C of the 'Act'. 21 days expired on 13.2.2020 but the petitioner did not file any objection. The said notification further made it clear that the land plans and other details of the land to be acquired under the notification are available and can be inspected by the interested person at the aforesaid office of the Competent Authority. Much after, on 16.8.2020 when the staff of the National Highways Authority came and demarcated the land of the petitioner, it realized that the proposed economic corridor is going to pass in the middle of its land by dividing the same into two parts. Accordingly, on 17.08.2020 the partner of the petitioner who is a resident of Gandhinagar at Nabarangpur i.e. the district Headquarter through whom the present writ petition has been filed, filed an objection under Annexure-4 before the Tahasildar, Boriguma much beyond 21 days. A perusal of Annxure-4, would show that the petitioner did not raise any objection with regard to description of the land under Annexure-2/Annexure-A/2 even at that late stage nor did it give any indication therein that the petitioner was not aware of Annexure-2 and the paper publication made on 23.1.2020. Thereafter, vide Annexure-C/2 the Central Government

issued the notification under sub-section (2) of Section 3D whereby major portion of plot Nos. 9,10,11 belonging to the petitioner under village Kamra vested with the Central Government. It appears that pursuant to the representation under Anneure-4, the Tahasildar made a field enquiry and sent a report of the same to the Land Acquisition Officer, Collectorate, Koraput on 21.9.2020 vide Annexure-5. It may be noted here that Tahasildar Boriguma only in the capacity of Tahasildar, Boriguma not in the capacity of Tahasildar-cum-Land Acquisition Officer, who has been declared as Competent Authority sent a letter under Annexure-5 to the Land Acquisition Officer, Collectorate, Koraput (opposite party No.7) who is another official distinct from Tahasildar. In Annexure-5, the Tahasildar, Boriguma (opposite party No.6) reflected his observations that major portion of construction of godown, large sheds, office building, big water tank, staff quarters are almost complete and the proposed road passes almost in the middle of the farm as a result of which the project is likely to be suffer huge financial loss. He also noted that the petitioner has already invested Rs.10 crores and he was requested by the petitioner to shift the road so that their project will be saved. Probably when nothing was done the petitioner addressed another representation under Annexure-6 to opposite party No.7, who is not the Competent Authority praying for change of alignment. It is in such background the present writ petition has been filed by making the above noted prayers.

9. Mr. Mukherjee mainly attacked the notification issued under sub-section (1) of Section 3A of the 'Act' on the ground that the same does not give brief description of the land either by stating the name of the owner or by giving description of the exact portion of land which was proposed to be acquired by the authorities. In this context he relied upon the decision of the Supreme Court in the case of ***Competent Authority Vrs. Barangore Jute Factory and Others (supra)*** wherein the Supreme Court after coming to a conclusion that as the notification therein under sub-section (1) of Section 3A of the 'Act did not clearly indicate as to which portion of the land was going to be acquired, held that the impugned notification failed to meet the requirement of sub-section(2) of Section 3A of the 'Act' and accordingly declared the notification bad in law. The Supreme Court arrived at such a conclusion after scanning the notification itself where from it found that there is nothing in the notification which would make it clear that the authorities are going to acquire which portion of the land. While coming to such conclusion the Supreme Court also noted that in the impugned notification therein, there never existed any reference to any plan which would have clearly reflected the area which was intended to be acquired. In this context the discussions made by the Supreme Court in Paragraphs 6 and 7 of that judgment are quoted hereunder:-

> "6 While dealing with the question of brief description of land in the acquisition notifications, reference was made to some judgments of this Court where acquisition Notifications under Section 4 of the Land Acquisition Act had come up for consideration on account of challenge being leveled on ground of vagueness of the Notifications. In most of these cases, Plan of the area under acquisition was made part of the notifications to show that the requirement of description of land was met. This leads us to inquire whether there was any site plan forming part of the impugned Notification.
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> 7. The availability of a Plan would have made all the difference. If there is a Plan, the area under acquisition becomes identifiable immediately. The question whether the impugned Notification meets the requirement of brief description of land under Section 3-A(2) goes to the root of the matter. The High Court rightly observed : "….It is just not possible to proceed to determine the necessity of acquisition of a particular plot of land without preparation of a proper Plan." The Appendix to the impugned Notification shows that in many cases small parts of larger chunks of land have been notified for acquisition. This is not possible without preparing a Plan. But where is the Plan? The Notification in question makes no reference to any Plan. Our attention was drawn to averments in pleadings by the Writ Petitioners and replies thereto of the acquiring authority. The Writ Petitioners have pleaded that there was no Plan. Replies are vague and by way of rolled up answers. There is no specific reply. It is obvious that there was no Plan and therefore none was referred to in the pleadings nor any thing was produced before the Court at the hearing. Learned counsel for the Competent Authority tried to submit before us that there was a Plan at the time of issue of the notification and the Writ Petitioners ought to have inspected it, if they so desired. He further submitted that the Plan was produced before the High Court. We find that both these submissions are not sustainable as they are not correct. A reference to the impugned Notification shows that there is no mention of any Plan. Without this how can anybody know that there was a Plan which could be inspected and inspected where? We are inclined to accept that there was no Plan accompanying the impugned Notification. During the course of hearing we were shown a Plan which we are unable to link with the impugned Notification. This was a 1996 P.W.D.Plan. P.W.D. is a department of the State Government. The impugned Notification is by the Central Government. NHAI is established under a Central Act. The Competent Authority under Section 3 of the Act is appointed by the Central Government. Therefore, this State Government Plan of 1996 (the impugned Notification is of 1998) is of no assistance. The impugned judgment of the High Court emphasizes the need for a Plan. It is clear from the judgment of the High Court that no Plan was produced before it. The absence of any reference to a Plan in the impugned Notification and in fact non-availability of any Plan linked to the Notification, fortifies the argument that the description of the land under acquisition in the impugned Notification fails to meet the legal requirement of a brief description of the land which renders the Notification invalid."

But in the present case a perusal of the notification under Annexure-2 clearly shows that the notification itself clearly refers to the land plan and makes it clear that the land plans and other details of the land to be acquired are

available and can be inspected by the interested person in the office of Competent Authority. Therefore, the facts of the present case are different from the fact of the case in ***Competent Authority Vrs. Barangore Jute Factory and Others (supra)***. If the partner or any authorized agent of the petitioner would have perused the land plan and the details which were available with the Competent Authority, this Court is sure, he would have known the details of the proposed acquisition. Further the language of sub-section(2) of Section 3A of the 'Act' speaks of "brief description" not detailed description and on perusal of notification under Annexure-2, it is clear that there exists brief description of the lands which are going to be acquired and the petitioner despite having knowledge of the same being published on 23.1.2020 in the vernacular newspaper 'The Dharitri' never chose to inspect the land plan and the details nor filed any objection. In this context the submission of Mr.Mukherjee that the notification under Annexure-2 is legally vulnerable as it did not point out the details of land which includes the benefits arising out of the land and things attached to the land permanently to the land as per the definition of the land at Section 3(a) of the 'Act' cannot be accepted as details of the land to be acquired along with the land plans were available in the office of Competent Authority. Even otherwise the petitioner never objected to such description even in his representations under Annexures-4 and 6 highlighting absence of brief description of land under Annexure-2. With regard to the submission of Mr. Mukherjee that there has been non-application of mind while issuing the notification under Annexure-2 as the relevant plots were indicated as Dangara/2 kisam instead of Gharabari kisam, it may be noted here that while the corrected record of rights were issued on 11.12.2019 and the impugned notification was published in the gazette on 17.12.2019 after a gap of 16 days. As Mr.Mohanty submitted the process of collection of data relating to land records must have been initiated after publication of notification dated 18.7.2019 under Annexure-B/2. Therefore, it will be reasonable to come to a conclusion that since the required information relating to the land must have been collected much prior to the issuance of R.O.Rs. on 11.12.2019 under Annexure-1 series after issuance of notification of Competent Authority under Annexure-B/2 on 18.7.2019, the incorrect description of land cannot be accepted as a serious error in issuance of the notification so as to attract violation of sub-section(2) of Section 3A of the 'Act'. Further if the petitioner would have checked the details of land and the land plans as indicated under Annexure-2 in the Office of Competent Authority, there was every possibility that these informations may have been available in that office relating to change in kisam. For all these reasons the first submission of Mr. Mukherjee fails.

With regard to his second submission that since the copy of gazette notification dated 27.12.2019 under sub-section(1) of Section 3A of the 'Act' was forwarded to the Tahasildar-cum-Land Acquisition Officer, Boriguma vide Annexure-7 by the Project Director, National Highways Authority of India on 2.1.2020 which was received by the said officer on 16.1.2020 and since by that time, the time period for filing objection vis-à-vis the notification had already expired, the petitioner was deprived of an opportunity to file his objection, the said submission also cannot be accepted for the following reasons. The petitioner itself has admitted that the paper publication of the notification was made in local newspaper i.e. "The Dharitri" on 23.1.2020 under Annexure-2 and has not disputed about such publication in Times of India of same date. Thus, the paper publication was made much after receipt of gazette notification under sub-section(1) of Section 3A of the 'Act' by the Tahasildar-cum-Land Acquisition Officer on 16.1.2020. Accordingly, the petitioner could have easily filed its objection by13.2.2020, which it did not do.

With regard to the third submission of Mr.Mukherjee that there has been violation of sub-section(3) of Section 3A of the 'Act' as the notification was not published in locally circulated newspaper, this Court is of the view that such submission cannot be accepted as there exists no pleading in the writ petition on this issue. Further the petitioner itself has indicated at paragraph-5 of the writ petition that the notification under sub-section(1) of Section 3A was published in daily newspaper i.e. 'The Dharitri' on 23.1.2020 and it is common knowledge that the said vernacular newspaper enjoys a good circulation in the State. More over from the affidavit portion of the writ petition it is clear that the partner through whom the writ petition has been filed lives at Gandhinagar of Nabarangpur, which itself is the District Head Quarter. Further it is no where the requirement of law that a newspaper in order to be a 'local newspaper' should have circulation in the area in which the plots are situated. This Court cannot give such a narrow interpretation to the phrase "local newspapers" used in sub-section(3) of Section 3A of the 'Act'. In this context, Mr.Mukherjee has relied upon two decisions of the Supreme Court, both of which according to us are not relevant and are factually distinguishable. In ***Phoenix ARC Private Limited Vrs. Bishwa Bharati Vidya Mandir & Others (supra)*** there does not exist any discussion relating to the interpretation of the phrase "local newspaper". It deals mainly with the maintainability of the writ petition with regard to action taken under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest At, 2002. With regard to ***Diamond Sugar Mills Limited and Others Vrs. the State of Uttar Pradesh and Others (supra),*** there the question involved was around the interpretation of the phrase "local area" appearing in Entry 52 of the State list of the 7th Schedule of the Constitution of India and

there the question was whether the premises of a factory would come within the definition of "local area" and it was held there that such premises will not come within the "local area" as appearing in Entry 52 of the list II. There the Supreme Court made it clear that the proper meaning attached to the words "local area" of entry 52 of the State list of the Constitution would be an area administered by a local body like municipality, a district board, a local board, a union board, a Panchayat and the premises of a factory cannot therefore be a local area. Thus the said case no where deals with the meaning of the phrase "local newspaper" which has been used in sub-section (3) of Section 3A of the 'Act' and its circulation. In such background submission of Mr. Mukherjee relating to the violation of sub-section (3) of Section 3A of the 'Act' cannot be accepted.

With regard to his submission of malafide activities of the authorities, it has been rightly pointed out by Mr. Mohanty that there exists no averment either in the writ petition or in the rejoinder affidavit filed by the petitioner on this. Therefore, we are not inclined to accept the submission of Mr.Mukherjee on this score.

Mr. Mukherjee further submitted that Annexure-4 should be treated as an objection to Annexure-2 under sub-section (1) of Section 3C of the 'Act' and Annexure-5 should be treated as an order under Section 3C(2) of the 'Act'. Again we are constrained to point out that there exists no pleading on such submission. Be that as it may, even otherwise we cannot accept such submission because sub-section(1) of Section 3C of the 'Act' makes it clear that the objection will have to be filed within 21 days from the date of publication of notification under sub-section(1) of Section 3A of the 'Act'. Here the notification as admitted by the petitioner itself at paragraph five of the writ petition was published in vernacular daily newspaper i.e. "The Dharitri" on 23.1.2020 and the so called objection under Annexure-4 was filed much after on 17.8.2020 even without taking the plea that the petitioner was not aware of Annexure-2. There also, as indicated earlier the petitioner has not raised any objection relating to the description of the land. With regard to his submission that Annexure-5 should be treated as an order under Section 3C(2) of the 'Act', the same cannot be accepted because sub-section(2) of Section 3C of the 'Act' presupposes that the objection should be filed in tune with sub-section(1) of Section 3C of the 'Act' and under the said sub-section, the Competent Authority is required to give an opportunity of being heard and thereafter either allow or disallow the objection. Here admittedly the objection was not filed in tune with sub-section (1) of Section 3C of the 'Act' and vide Annexure-5 the Competent Authority has neither allowed nor dismissed the objection. Further under Annexure-5 the Tahasildar, Boriguma has not passed any order in his capacity as

Competent Authority. He has only recorded his observation in Annexure-5 and in fact by no stretch of imagination Annexure-5 can be described as an order. From the subject matter it is clear that it is a report. Therefore, the said submission of Mr. Mukherjee also fails.

The last submission of Mr.Mukherjee that since the report of the Tahasildar, Borigumma under Annexure-5 clearly pointed out the difficulties of the petitioner, therefore the representation/objection filed by the petitioner under Annexure-6 on 22.9.2020 praying for realignment of Highway should be directed to be disposed of by the Land Acquisition Officer, Collectorate, Koraput, cannot be accepted because the Land Acquisition Officer, Koraput has no authority in such matter. Further as per the decision of the Supreme Court in the case of ***Union of India Vrs. Kushala Shetty and Others (supra)*** it has been made clear that the National Highways Authority of India prepare and implement the project relating to developments and maintenance of highway after thorough study by experts in different fields. The detailed project reports are prepared keeping in view the various relevant factors including intensity of heavy vehicular traffic and public interest at large. The Courts are not at all equipped to decide upon the viability and feasibility of the particular project and whether the particular alignment would sub-serve the larger public interest. In such background also the prayer for a direction to the authorities to consider the prayer for realignment of highway cannot be acceded to. Further in ***M/s. Narayani Motors Private Limited (supra)*** this Court has made it clear that when the case is of right of an individual versus public interest, individual right must yield to public interest.

10. For the reasons indicated above, we do not find any reason whatsoever to interfere with the impugned notification under Annexure-2 or to issue a direction to the authority to dispose of the representation under Annexure-6 praying for realignment. Accordingly, the writ petition is dismissed. There would be no order as to costs.

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2022 (II) ILR - CUT-620

Dr. B.R.SARANGI, J & SANJAY KUMAR MISHRA, J

W.P.(C) NO. 15209 OF 2018

SMT. RAJIA NAYAK & ORS. ……..Petitioners

.V.

STEEL AUTHORITY OF INDIA LTD. & ORS. ……..Opp. Parties

EMPLOYEES FAMILY BENEFIT SCHEME – Petitioner No. 1's husband died in a road accident leaving behind his widow, minor son and parents as legal heirs – The deceased husband was employee of Rourkela Steel Plant – The petitioners does not have any knowledge about the family benefit scheme – Duty of the employer – Held, the scheme in question being a beneficial one, it is incumbent upon the employer/Opp.Parties No. 1 to 3 to apprise this fact to the legal representatives of the deceased employee to avail such benefit of the scheme, being a model employer.

Case Law Relied on and Referred to :-

1. AIR 1964 SC 477 : Syed Yakoob v. K.S. Radhakrishnan.

For Petitioners : M/s.Biswajit Mohanty, H.K.Mohapatra

For Opp. Parties: M/s.B.P.Panda, R.P.Pattanaik,S.Moharana & B.P.Panda

JUDGMENT Date of Hearing & Judgment : 21.06.2022

Dr. B.R.SARANGI, J.

The petitioners, who are the widow, minor son and parents of late Kailash Chandra Nayak, the deceased employee of Rourkela Steel Plant, have filed this writ petition challenging the order dated 07.10.2016 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in T.A. No. 31 of 2015, in not clarifying the modalities for disbursement of the up to date emoluments under "Employees' Family Benefit Scheme" and for not directing the employer-opposite parties no. 1 to 3 to submit the pension papers before the Provident Fund Commissioner for grant of family pension under "Employees' Pension Scheme".

2. The factual matrix of the case, in brief, is that Kailash Chandra Nayak joined in the service of Rourkela Steel Plant on 23.12.1993 as a permanent employee with basic pay of Rs.6208/-, D.A. of Rs.3054/-. Unfortunately, he died due to motor accident on 18.11.2004, short after his marriage to petitioner no.1, having no opportunity to nominate his wife and son replacing his parents. After the death of the deceased employee, petitioner no.1 applied for family pension. The Sr. Manager (Personal) Welfare and Family Service Department, Rourkela Steel Plant, vide letter dated 19.02.2005, intimated petitioner no.1 that upon producing a succession certificate of the deceased employee Kailash Chandra Nayak, his successors will be entitled to receive a total amount of Rs.4,20,816/- as service benefits.

2.1 Pursuant to such instructions, petitioner no.1 filed a succession case, viz., Intestate Case No. 7/2005 before the Civil Judge (Senior Division), Kendrapra, in which the present petitioners no. 3 and 4, who are the parents of the deceased

employee, and the employer of the deceased employee are made opposite parties. After considering the evidence on record, vide order dated 30.08.2006, the Civil Judge (Senior Division), Kendrapra directed to issue succession certificate in favour of petitioner no.1. Against such order dated 30.08.2006, appeal was preferred before the Additional District Judge, Kendrapara in F.A.O. No. 59/2006, which was dismissed vide order dated 07.03.2007. The same was also challenged by the parents of the deceased employee before this Court in CRP No. 15/2007. During pendency of the said case, the present petitioners dissolved all their internal disputes and, by drafting all the terms and conditions of compromise, filed a joint compromise petition as Misc. Case No. 76 of 2008 in the said CRP and accordingly the CRP was disposed of vide order dated 28.07.2008 in terms of the compromise. Accordingly, the Civil Judge (Senior Division), Kendrapara issued Succession Certificate on 04.12.2008 with the following condition:-

> (a) On deposit of the Provident fund amount of Rs. 1,94,000/- and Gratuity amount of Rs.1,11,144/- amounting to a total sum of Rs.3,05,144/- in the family benefit scheme" of R.S.P., Rourkela a monthly payment equivalent to the Basic pay Rs.6208/- plus + D.A. of Rs.3054/- last drawn by the deceased employee shall be paid to the Petitioners till the normal date of superannuation of such deceased employee and thereafter the entire amount so deposited shall be refunded to the Successors of such deceased employee.
>
> (b) Family Pension shall be provided only to the widow and minor Son of the deceased employee late K.C.Nayak amounting Rs.3,598.75 per month along with termination increments.
>
> (c) The amount payable to the deceased employee towards EFVBVS, LCS and towards SESBF shall be paid to the present petitioners jointly amounting total amount of Rs. 1,15,672/-."

2.2 As per the succession certificate issued by the Civil Judge (Senior Division), Kendrapara, the employer-opposite parties no. 1 to 3 of the deceased employee, who were the opposite parties to the mutual succession certificate proceeding, are also bound by the terms and conditions enumerated therein, which was also made absolute against them being not appealed in higher forum. In spite of the production of the succession certificate, since the employer-opposite parties no. 1 to 3 did not take any step for disbursement of the dues of the deceased employee, the petitioners approached this Court by filing W.P.(C) No. 15530 of 2011 annexing the letter dated 19.02.2015 and the succession certificate for extension of benefits as due and admissible to the petitioners.

2.3 On being noticed, the employer-opposite parties no. 1 to 3 sanctioned the amount intimating the same vide letter dated 19.02.2015. But, in the meantime, by virtue of the notification issued by the Central Government, since

Steel Authority of India Ltd., came under the jurisdiction of Central Administrative Tribunal, the writ petition was transferred to the tribunal and renumbered as T.A. No. 31/2015. The said T.A. was disposed of vide order dated 07.10.2016, by which the tribunal directed the petitioners to appear before the Deputy Manager, F&A (PF & Pension), SAIL, Rourkela Steel Plant, Sundargarh, either personally, or through a legal reprehensive, duly authorized along with the required documents, within a period of 30 days from the date of receipt of a copy of the order and on such appearance, the said authority, who is looking after the provident fund and pension in the Rourkela Steel Plant, shall verify their records as to whether the cheques have been cleared and the amounts have been debited to the account of the petitioners. If it is found that the petitioners have not received the said cheques or it is found from the records of the opposite parties that amount has not been debited, then opposite parties shall ensure disbursement of due retiral benefits of the deceased employee to the petitioners. The petitioners have therefore challenged the said order of the tribunal in the present writ petition.

3. Mr. B. Mohanty, learned counsel appearing for the petitioners contended that order of the tribunal is absolutely erroneous, based without any records and, as such, without application of mind. He contended that as per the conditions stipulated in the mutual succession certificate, instead of directing investment of gratuity and provident fund amount in the Employees' Family Benefit Scheme, directed release of the same to the petitioners directly, thereby committed gross error apparent on the face of the record. Consequentially, the order so passed by the tribunal has to be modified. It is further contended that the tribunal has deviated from the terms of succession certificate and has not passed any order regarding payment of family pension. Consequentially, the order dated 07.10.2016 passed by the tribunal requires to be modified in terms of the conditions of the mutual succession certificate, and also for delay in compliance of the same the petitioners are entitled to get the interest.

4. Per contra, Mr. B.P. Panda, learned counsel appearing for the opposite parties vehemently refuted the argument advanced by the learned counsel for the petitioners and referring to the constitutional judgment of the apex Court in ***Syed Yakoob v. K.S. Radhakrishnan***, AIR 1964 SC 477 contended that this Court has no jurisdiction to interfere with the order passed by the tribunal. It is only when the order of the tribunal suffers from an error apparent on the face of the record; or based on complete misconception of law; or based on no evidence; or there is any jurisdictional error, the Court will interfere with the same. As such there is no laches on the part of the tribunal to pass the order impugned so as to cause interference by this Court.

4.1 It is further contended that the deceased employee joined as a Operator-cum-Technician in Rourkela Steel Plant in the year 1993 and as a condition of employment and Service Rules, he nominated petitioners no. 3 and 4 for the purpose of PF/Gratuity and other dues. As per the service record, the deceased employee married to petitioner no.1, but her name was not incorporated in the nomination form. Subsequently the employee died on 18.11.2004 leaving behind his family members. On 04.12.2004, petitioner no.1 submitted an application for payment of full and final settlement of dues in her favour. Separate application was also filed on 14.02.2005 by petitioners no. 3 and 4 for payment of full and final settlement of dues in their favour. In view of the rival claims, the employer, vide letter dated 19.02.2005, directed the petitioners to obtain succession certificate from the competent Court for settlement of the dues accrued to the deceased employee. Accordingly, petitioner no.1 filed Intestate Case No. 7/2005 before the Civil Judge (Senior Division), Kendrapara. Ultimately, pursuant to the direction given by this Court in CRP No.15/2007, the Civil Judge (Senior Division), Kendrapara passed the order dated 04.12.2008 regarding issuance of succession certificate. It is contended that in the said Intestate Case No. 7/2005, even though the opposite parties were made parties, they were neither been noticed nor appeared and, as such, since the opposite parties are not the signatories to the said joint compromise petition, on the basis of which the succession certificate was issued, it is not binding on them and as such the claim made by the petitioners in terms of said succession certificate issued cannot sustain in the eye of law. More so, in compliance of the order passed by the tribunal, the dues of the petitioners was determined as Rs. 4,60,018.26 as final settlement, which was sent vide letter dated 22.09.2011, was not accepted by the petitioners. Consequentially, the claim made by the petitioners for Employees' Family Benefit Scheme of the management cannot sustain and the tribunal is well justified in passing the order impugned and the writ petition should be dismissed.

5. This Court heard Mr. Biswajit Mohanty, learned counsel appearing for the petitioners and Mr. B.P. Panda, learned counsel appearing for the opposite parties by hybrid mode and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The undisputed fact is that the petitioners are the legal representatives of the deceased employee Kailash Chandra Nayak, who died prematurely in a road accident immediately after his marriage and could not bring his wife on record by nominating her to get the benefits of the deceased employee. When petitioners No. 1 and 2 and petitioners No. 3 and 4 laid their claim by filing

separate applications on 04.12.2005 and 14.02.2005 respectively, in view of the rival claims the employer-opposite parties directed the petitioners for production of succession certificate vide letter dated 19.102.2005. Pursuant to which, petitioner No. 1 filed Intestate Case No. 7/2005. Ultimately, pursuant to the compromise entered into between the parties, the matter was disposed of by this Court in CRP No. 15/2007 vide order dated 28.07.2008. In compliance to the same, the Civil Judge (Senior Division) Kendrapara, issued succession certificate on 04.12.2008.

7. Needless to mention here that these opposite parties had been made parties in Intestate Case No. 7/2005 before the Civil Judge (Senior Division) Kendrapara, which is apparent from the order passed in Intestate Case No. 7/2005, where the employer-opposite parties were made opposite parties no.3 to 5. The contention raised by the employer-opposite parties that they were neither noticed nor appeared in the case and therefore, such certificate is not binding on them, cannot have any justification, in view of the fact that nothing has been placed on record to indicate that no notice had been issued by the Civil Judge (Senior Division) Kendrapara in Intestate Case No. 7/2005. Normal presumption would be that if the persons are made opposite parties in a proceeding, the Court has to issue notices to them, if there surviving an inter se dispute between the parties. There is no dispute before this Court that there is no inter se dispute subsisting between the petitioners and the employer-opposite parties no. 1 to 3, who were the opposite parties No. 3 to 5 in Intestate Case No. 7/2005. Very often it is noticed that even if notices are issued to the opposite parties, at times they do not choose to appear to cause harassment to the petitioners on the plea that it is an inter se dispute of succession and that the employer has nothing to do in the matter. In view of such position, if the employer has chosen not to appear, that itself cannot be a ground to refuse the benefit admissible to the petitioners. More so, after the death of the deceased employee, the petitioners, being his legal representatives, are entitled to get the service benefits of the deceased employee. The plea that the employer had neither been noticed, nor appeared in the proceeding, has no leg to stand.

8. On perusal of the succession certificate, it is evident that in clause-(iii) of the terms and conditions of the settlement it was recorded as follows:-

> "(iii) the service benefit of the deceased towards provident fund and gratuity shall be deposited before the company as per the provisions of the Family Benefit Scheme of Rourkela Steel Plant and the monthly payment equivalent to the basic pay + D.A. last drawn by the deceased will be paid to the parties in the ratio of 40% and 60% in favour of the petitioners and opposite party respectively"

In view of the above, the service benefit of the deceased employee towards provident fund and gratuity shall be deposited before the company, as per the provisions of the Family Benefit Scheme of Rourkela Steel Plant, and the monthly payment equivalent to the basic pay + D.A. last drawn by the deceased will be paid to the parties in the ratio of 40% and 60% in favour of the petitioners and opposite parties respectively in the court below**.** It is not in dispute that Family Benefit Scheme of Rourkela Steel Plant was not available at the time the deceased employee died. It is also not in dispute that employer-opposite parties had never asked the legal representatives of the deceased employee to avail the benefit of Employees' Family Benefit Scheme of Rourkela Steel Plant. Thereby, the scheme in question being a beneficial one, it is incumbent upon the employer, namely, the opposite parties no. 1 to 3 to apprise this fact to the legal representatives of the deceased employee to avail such benefit of the scheme, being a model employer. As such, nothing has been placed on record to indicate that such offer had been made by opposite parties no. 1 to 3 to the petitioners to bring them into the Employees' Family Benefit Scheme of Rourkela Steel Plant. Therefore, in view of the conditions stipulated in the succession certificate, which was produced before the authority, being a model employer the authority should have cooperated petitioner no.1, who is a distressed lady and is otherwise entitled to get the benefit of the deceased employee.

9. It is fairly stated in the counter affidavit that "Employees' Family Benefit Scheme" is purely voluntary and optional one for rehabilitation of dependant of the deceased employee as an immediate measure, under which the provident fund nominee applies for availing monthly benefit. At the same time, it is contended that in the present scenario, such prayer cannot be entertained, as for the "Employees' Family Benefit Scheme" of the management, the nominee of the deceased employee, if so desires, can enjoy the benefit of the scheme by depositing with the management equivalent to the dues available under PF and gratuity. Against the said deposit, on her/his fulfilling the other criteria the applicant shall receive the last basic pay and DA of the deceased employee till the notional date of superannuation of the employee. It has also been clarified that under the scheme, there is no scope of multiple entry of beneficiaries and the limitation under the scheme is six months. Thereby, there is no scope of entertaining the application after expiry of six months.

10. Such a stand taken by the employer-opposite parties no. 1 to 3 cannot have any justification so far as the petitioners are concerned as because they were not the employee of the Steel Authority of India Limited, but they were the legal representatives of the deceased employee, who were in harness to avail the

"Employees' Family Benefit Scheme", as because they were not in picture till the death of the deceased employee. Therefore, the prescribed limitation of six months to exercise the option as per the said scheme may not be applicable. Otherwise also the "Employees' Family Benefit Scheme" was issued vide Personal Policy Circular No. 625 dated 07.08.1991 in pursuance of Clause 8.10.5 of the NJCS Agreement dated 05th July, 1989, which was effective from 01.01.1989, and more so the Scheme was communicated by the Steel Authority of India Limited, Rourkela Steel Plant, Rourkela, which has been placed on record vide Annexure-B to the counter affidavit of the employer-opposite parties filed in W.P.(C) No. 15530 of 2011, which was subsequently, on being transferred to the tribunal, registered as T.A. No. 31/2015. On perusal of the said scheme, it is evident that clause-5 deals with the condition and much reliance has been placed on clasue-5.3 with regard to the applicability of limitation period. Such limitation can only be applicable to the employee, who is in service, but the same having not been made available to the legal representatives of the deceased employee, being a beneficial scheme for the employees, the same should have been extended in favour of the petitioners.

11. So far as extension of "Employees Pension Scheme" is concerned, it is contended by the employer-opposite parties no. 1 to 3 that in the year 1995 "Employees Pension Scheme" was introduced by the Government of India, under which the employees of Steel Authority of India Limited are covered and the scheme is administered by the Employees Provident Fund Organization of Government of India. In the event any application is made in the format prescribed by the PF Organization, the employer only forwards the particulars of an employee or deceased employee to EPF Authority, who is the appropriate agency to consider and if admissible, extend the benefits. Accordingly, it is contended that for availing such benefits, the petitioners are to approach the concerned authority as prescribed under the EPF Act.

12. Be that as it may, since the petitioners are the legal representatives of the deceased employee, the employer-opposite parties, being a model employer, were to intimate them by carrying out the objectives of the "Employees' Family Benefit Scheme" or "Employees' Pension Scheme" applicable to them. In any case, though such points were raised before the tribunal, the tribunal did not consider the same and thereby committed gross error apparent on the face of record by passing the order impugned. Though in paragraph-5 of impugned order, the tribunal has candidly stated that both petitioners and opposite parties have admitted that retiral and death benefits of the deceased employee are to be disbursed on the basis of succession certificate issued by the competent authority. Having come to such conclusion, the direction was issued to them to

appear before opposite party No.3 and produce all records for verification and disbursement of the benefits directly, as they were interested to avail the "Employees' Family Benefit Scheme" as well as "Employees' Pension Scheme" applicable to the legal heirs of the deceased employee.

13. On the one hand the tribunal has come to a conclusion that the conditions stipulated in the succession certificate are binding on the parties, but on the other hand direction was given for release of the entire benefits in favour of the petitioners directly, which has no justification. Thereby, the tribunal has committed gross error apparent on the face of record. As a consequence thereof, under writ jurisdiction this Court has got the power to interfere with the same.

14. Considering the case from all angles, as discussed above, this Court is of the considered view that the direction of the tribunal contained in para-6 of its order dated 07.10.2016 needs modification to the extent that the opposite parties no. 1 to 3, being the model employer, instead of releasing the entire amount of Rs.4,60,018.26 to the petitioners directly, should have taken necessary steps to appropriate the same to bring the petitioners under the "Employees' Family Benefit Scheme" as well as "Employees' Pension Scheme" so as to enable the legal representatives of the deceased employee to avail such benefits, as petitioners are not willing to take the entire amount directly from the employer and they want to avail the benefit of "Employees' Family Benefit Scheme" as well as "Employees' Pension Scheme" applicable to the employees of the Steel Authority of India Limited.

15. Consequentially, opposite parties no. 1 to 3 are directed to take immediate steps to bring the petitioners under the aforementioned schemes by complying the requirements of the schemes at their level without creating any hindrance to the petitioners and discharge their duties and responsibilities as a model employer to cater to the needs of the members of a distressed family, who have lost their only earning member of the family at an early age. The entire exercise shall be done within a period of three months from date of communication of this judgment.

16. With the aforesaid modification of the impugned order dated 07.10.2016 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in T.A. No. 31/2015, the writ petition is allowed. There shall be no order as to costs.

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2022 (II) ILR - CUT-629

Dr. B.R.SARANGI, J & SANJAY KUMAR MISHRA, J

W.P.(C) NOS. 7281 OF 2018 & 4848 OF 2021

STATE OF ODISHA & ORS. .....Petitioners

.V.

SARASWATI BHOI & ORS. .....Opp. Parties

AND

W.P.(C) NO. 4848 OF 2021

STATE OF ODISHA & ORS. ..... Petitioners

.V.

NILAMANI BEHERA & ORS. .....Opp.Parties

PAY – Revised Assured Carrier Advancement Scheme – 2nd financial up gradation under the scheme and classification made there under – The screening committee has determined the benefits, which had already been extended to the private opposite parties – Whether same can be modified, withdrawn or cancelled by the authority arbitrarily reducing the same from Rs 4200/- to 2800/-? – Held, No – The authority cannot do this without complying the principle of natural justice.

(Para 20)

Case Laws Relied on and Referred to :-

1. W.P.(C) No. 2831 of 2016 (27.06.2016) : State of Odisha v. Bihari Lal Barik
2. 1976 (1) SCC 128 : Dwarka Prasad v. Dwarka Das Saraf
3. (1957) SCR 51 : Abdul Jabar Butt v. State of Jammu & Kashmir
4. 1991 (3) SCC 442 : Tribhovandas Haribhai Tamboli v. Gujurat Revenue Tribunal
5. 2015 (2) SCC 701 : Sidhharth Viyas & Anr. v. Ravi Nath Misra & Ors.
6. 2003 (11) SCC 632 : Ali M.K. v. State of Kerala
7. 2019 (10) SCC 660 : Bijay Ku.Singh & Ors. v. Amit Ku. Chamaria & Anr.
8. W.P.(C) Nos. 4819 & 4486 of 2018 (disposed of on 17.03.2022) : State of Odisha. v. Sujata Rani Sahu
9. W.P.(C) No. 11096 of 2022 (dismissed by this Court on 13.05.2022) : State of Odisha v. Fanindra Gain
10. W.P.(C) No. 15763 of 2021 (dismissed on 16.07.2021) : State of Odisha v. Surama Manjari Das

For Petitioners : Mr. S.Jena, Standing Counsel (S&ME)

For Opp. Parties: Mr. Asok Mohanty, Senior Advocate
M/s. S.B.Jena, S.Behera & A.Mishra
M/s. G.M.Rath & L.M.Pradhan

JUDGMENT Date of Hearing & Judgment : 24.06.2022

Dr. B.R. SARANGI, J.

The State of Odisha and its functionaries have filed both the Writ Petitions seeking to quash the Order dated 24.10.2017 passed by the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar, in O.A. No. 2576 of

2016 and batch, as well as the Order dated 09.11.2017 passed in O.A. No. 2499 of 2016 and batch, whereby the Tribunal, by holding that the private Opposite Parties are entitled to the Grade Pay of Rs.4200/- after completion of 20 years in a single Cadre towards 2nd Revised Assured Career Progression Scheme (RACPS) benefit, has quashed the impugned Orders of the Original Applications, by which the Grade Pay of the private Opposite Parties had been reduced to Rs.2800/- and Order of recovery had been passed for excess amount drawn by them and directed the State-Petitioners to allow the private Opposite Parties to continue in the Grade Pay of Rs.4200/- towards 2nd RACPS benefit.

2. The factual matrix, as borne out from both the cases, in a nutshell, is that the private Opposite Parties, who were the Applicants before the Tribunal, were initially appointed as Asst. Teacher in different Schools having their qualification as Matric C.T, I.AC.T and B.A C.T and continuing as per their qualification in Level-V post. During their service period, they had been duly considered under the provision of various Revised Scale of Pay Rules introduced by the State of Odisha in Finance Department from time to time. On introduction of ORSP Rules, 2008, which were notified to be applicable w.e.f 01.01.2006, the Govt. of Odisha in Finance Department, keeping in view the introduction of MACP (Modified Assured Career Progression) Scheme by the Govt. of India, introduced the RACP Scheme in supersession of earlier ACP Scheme with a further stipulation that the said RACP Scheme is applicable w.e.f. 01.01.2013 and on coming into force the RACP Scheme, the earlier Scheme, i.e., ACP, will cease to operate. The private Opposite Parties were enjoying the scale of pay as against the Level-V post in the Pay Band (PB-1) of Rs.5200-Rs.20,200/- with Grade Pay of Rs.2200/-. On completion of 10 years of service in one Grade, i.e., in the Grade of Asst. Teacher, their Pay Bands were enhanced to the next higher stage, i.e., Rs.5200-20,200/- with Grade Pay of Rs.2400/-, which is meant for the Level-IV post, as they were having the requisite qualification to get promotion to the Level-IV post, but could not be promoted due to certain exigencies. The private Opposite Parties, after completion of 20 years of service against the post, were extended with the benefit of 2nd RACP Scheme by allowing Grade Pay of Rs.4200/-, which was applicable to Level- III post.

2.1 One Benudhar Rout and 16 others having not been extended with the benefit of 2nd RACP Scheme, approached the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar, in O.A No.1904/2016, which was disposed of vide Order dated 11.08.2016 and in compliance thereto, it was ascertained that in view of the clarification issued by the Govt. of Odisha in School & Mass Education Department, vide its Letter No.16070/SME dated 11.08.2016, that in

view of the amendments of the Elementary Cadre Rules, 2014, which came into effect from 01.07.2014, the Level-V and IV Teachers, who are otherwise eligible to the post of Level-III Teachers, can only be extended with 2nd financial up-gradation with Grade Pay of Rs.4200/- and remaining other Teachers, who do not possess requisite qualification to hold Level-III post, can be extended with financial up-gradation of Grade Pay of Rs.2800/- as per First Schedule of ORSP Rules, 2008. Accordingly, the claim of said Benudhar Rout and others was rejected vide Office Order No. 2003/SME dated 03.10.2016 and it was decided to take appropriate action to modify the Order passed by the respective B.E.Os. granting Grade Pay of Rs.4200/- in favour of those categories of Asst. Teachers, as the same was contrary to the Finance Department Circular dated 20.01.2014.

2.2 Aggrieved by the above Office Order dated 03.10.2016, the private Opposite Parties approached the Tribunal by filing batch of Original Applications, including the ones involved in these Writ Petitions. Pursuant to the notice, the present Petitioners appeared and filed their Counter Affidavits contending that the private Opposite Parties are not eligible for promotion to Level-III post and, as such, the benefit of financial up-gradation under RACP Scheme with Grade Pay of Rs.4200/- was granted in their favour wrongly. Consequentially, such excess payment made are liable to be recovered and the Orders granting Grade Pay of Rs.4200/- in their favour were required to be modified to the extent that they are entitled to get the Grade Pay of Rs.2800/-. But, the Tribunal did not accede to the objection raised by the Petitioners, who were Respondents before the Tribunal, and allowed all the Original Applications by holding that the private Opposite Parties are entitled to Grade Pay of Rs.4200/- under the 2nd RACP Scheme by quashing the reduction of Grade Pay to Rs. 2800/- and Order of recovery of excess payment drawn by them. Hence, these Writ Petitions.

3. Mr. S. Jena, learned Standing Counsel for School & Mass Education Department vehemently contended that the Govt. of Odisha, in exercise of the powers conferred by the Proviso to Article 309 of Constitution of India, brought ORSP Rules, 2008, vide Finance Department Notification No.55244/PCC(F)/51/ 08 dated 24.12.2008, w.e.f 01.01.2006. Under Rule-14 of the ORSP Rules, 2008, it has been provided that all State Govt. employees up to Group-A category can avail ACP in 3 stages, i.e., 1st ACP on completion of 15 years, 2nd after 25 years and 3rd after 30 years of service in their original Post or Grade and such benefit of ACP will be given only after screening in each case by a Screening Committee to be constituted by the Department. All the norms for the promotion shall also be applicable for allowing ACP at different stages. Under First Schedule of ORSP Rules, 2008, the existing scale of pay under ORSP Rules,

1998, such as, Rs.3600-100-5600/-, Rs.4000-100-6000/- and Rs.4500-125-7000/- were brought under one Pay Band (PB-1) with scale of Rs.5200-20,200/- with Grade Pay of Rs.2200/-, Rs.2400/- and Rs.2800/-respectively.

3.1 The Govt. of India has introduced Modified Assured Career Progression (MACP) for Central Govt. civilian employees in supersession of the provision of ACP Scheme. Accordingly, the State Govt. in Finance Department Resolution No.3560 dated 6.2.2013 also decided to implement Career Advancement Scheme to be known as Revised Assured Career Progression Scheme (in short RACPS) with a stipulation that such Scheme is to be effective from 01.01.2013. Under the new Scheme there shall be three financial up-gradation counted in direct entry on completion of 10, 20 and 30 years of service in a single Cadre in absence of promotion. It also provided that the employee of the Cadre having promotional hierarchy will get the Grade Pay of promotional post. The employees not having a promotional hierarchy will get next higher Grade Pay as per his Schedule of ORSP Rules, 2008. The private Opposite Parties did not have the requisite eligibility criteria to be promoted to the next promotional Cadre, for which, they were not entitled to claim grant of 2nd financial up-gradation under the RACP Scheme. In view of Clause-14 of the ORSP Rules, 2008 and Clause-10 of the RACP Scheme dated 06.02.2013, the financial up-gradation cannot, ipso facto, be applied merely on completion 10 and 20 years of regular service, as the case may be. A candidate has to fulfill the eligibility of achieving either the benchmark or fitness as per the promotion norms. Therefore, the benefit had been extended to the private Opposite Parties erroneously. Consequently, the Petitioners are well justified by passing the Order impugned to withdraw such benefit from them. Thus, the Tribunal has committed a gross error apparent on the face of record by quashing such letters, by which the benefit of Grade Pay of Rs.4200/-, which was granted to the private Opposite Parties, were withdrawn and allowed them to continue as per the said Grade Pay of Rs.4200/- on the ground that they had been deprived of getting promotional avenue even after 20 years of their service in a particular Grade. Thereby, the Order so passed by the Tribunal is liable to be quashed.

3.2 It is further contended that while ordering so, much reliance was placed on Proviso to Rule-9(2) of the of the Elementary Cadre Amendment Rules, 2014, issued vide Government Notification dated 01.07.2014 to extend such benefit to the private Opposite Parties. But, on perusal of the said Rules, it is evident that in Order to be eligible for promotion to Level-III Cadre, an employee must have not only possessed the Bachelor Degree in any discipline, but also possessed the B.Ed Degree or its equivalent training course from a recognized Institution and also served continuously for a period of two years in Level-IV Cadre. But the

Tribunal fell into error in not relying upon the aforesaid principal provision of Rule 9 (2) and only relying upon the Proviso thereto, erroneously held that there is no complete bar for promotion of Level-V and Level-IV Teachers to Level-III Teacher and they can be promoted, as per Proviso to Rule-9 (2), to the next higher rank.

3.3 It is further contended that Proviso to Rule-9(2) is not applicable independently to the case of the private Opposite Parties excluding the main provision and, thereby, the finding of the Tribunal suffers from wrong interpretation of the provisions of the Statute. It is also contended that relying upon the judgment dated 27.06.2016 of this Court in the case of ***State of Odisha v. Bihari Lal Barik*** (W.P.(C) No. 2831 of 2016), the Tribunal has directed for continuance of the benefit of Grade Pay of Rs.4200/- to the private Opposite Parties, which cannot sustain in the eye of law. It was also contended that the Elementary Cadre Rules, 2014 was amended in the year 2019, by virtue of the Government Notification dated 08.03.2019, where benefit has been extended to the employees against the Cadre of Level-III, but in the amended Rules, 2019, the provision of Rule-9 (2) has not been deleted or substituted. Rather, in the said amended Rules, 2019, the Odisha Elementary Education Service Level-V Cadre has been restructured into two parts in Rule-3, which provides level-V Cadre consists of Level-V(A) and Level-V(B) and moreover such amended Rules, 2019 came into force much after the impugned Order passed by the Tribunal. Therefore, the same was not an issue before the Tribunal. As a result, the amended Rules, 2019 is in no way helpful to the private Opposite Parties.

3.4 To substantiate his contention, reliance has been placed on the cases of ***Dwarka Prasad v. Dwarka Das Saraf,*** 1976 (1) SCC 128, ***Abdul Jabar Butt v. State of Jammu & Kashmir***, (1957) SCR 51, ***Tribhovandas Haribhai Tamboli v. Gujurat Revenue Tribunal,*** 1991 (3) SCC 442, ***Sidhharth Viyas and another v. Ravi Nath Misra and others***, 2015 (2) SCC 701, ***Ali M.K. v. State of Kerala,*** 2003 (11) SCC 632, and ***Bijay Kumar Singh and others v. Amit Kumar Chamaria and another***, 2019 (10) SCC 660.

4. Per contra, Mr. Asok Mohanty, learned Senior Advocate appearing along with Mr. B.S. Tripathy-1, Mr. S.B. Jena and Mr. G.M. Rath, learned Counsels for the private Opposite Parties, contended that the stand of the Petitioners is contrary to the RACP Scheme. In view of Clause-10 of the Scheme, there must be a promotional hierarchy from the Cadre to which the employee belongs. Once it is found that the Cadre in which the employee is serving has got a promotional hierarchy, then the Grade Pay ought to be of the promotional post. Applying the same, in the instant case, the Level-III is the promotional post of Level-IV. Since

the private Opposite Parties were serving as Level-IV, they got promotional hierarchy of Level-III. As such, individual eligibility is not contemplated under RACP Scheme. The Petitioners, however, placing reliance upon the clarification dated 20.01.2014 issued by the Finance Department, have resorted to the impugned action. The said clarification has been considered by this Court in the case of ***Bihari Lal Barik*** (supra), wherein it has been held that the Scheme is clear that RACP is available to an employee having promotional hierarchy. Against the said judgment of this Court, the State had preferred an SLP bearing Diary No (s) 20358 of 2017 and the apex Court dismissed the said case vide Order dated 23.08.2017. Thereby, the judgment of this Court in the case of ***Bihari Lal Barik*** (supra) has reached its finality. In view of that, if the benefit has been extended to the private Opposite Parties, no error has been committed by the Tribunal so as to cause interference by this Court.

4.1 It is further contended that in the case of ***State of Odisha. v. Sujata Rani Sahu*** [W.P.(C) No.s 4819 & 4486 of 2018 disposed of on 17.03.2022], this Court upheld the decision of the Odisha Administrative Tribunal and approved that the clarification dated 20.01.2014 of the Finance Department has no legal force and RACP benefits are to be decided on the basis of RACP Scheme of 2013 and taking aid of ORSP Rules, 2008. Therefore, in consonance with the said judgment, the private Opposite Parties are entitled to get the RACP benefits as had been granted by the State. More so, the stand taken by the Petitioners is contrary to the decision of the Screening Committee so also to the provisions of ORSP Rules, 2008 and the retrospective application of amended Rules, 2019 to take away the accrued right, cannot sustain in the eye of law. More so, the entire action of the Authorities was discriminatory one. Consequentially, he contended that the Tribunal has not committed any error apparent on the face of the record so as to cause interference by this Court at this stage.

5. This Court heard Mr. S. Jena, learned Standing Counsel for School & Mass Education Department appearing for the State-Petitioners, and Mr. Asok Mohanty, learned Senior Advocate appearing along with Mr. B.S. Tripathy-1, Mr. S.B. Jena and Mr. G.M. Rath, learned Counsels for the private Opposite Parties by hybrid mode and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. The admitted facts are that the private Opposite Parties, who were Applicants before the Tribunal, are Primary School Teachers having qualification of Matric/I.A./+2 with C.T. training and are coming under the administrative control of the Directorate of Elementary Education. They joined

service between 1990 and 1995 as Assistant Teachers of Government Primary Schools and Assistant Teachers of Government Upper Primary Schools in Leve1-V and their service condition was governed by the Orissa Elementary Education (Method of Recruitment and Conditions of Service of Teachers and officers) Rules, 1997 (hereinafter to be referred as "1997 Rules"). In the 1997 Rules the posts have been categorically divided into five levels i.e., Level-V, IV, III, II and I. The 1997 Rules mandates that the Level-V post shall consist of Assistant Teachers of Government Primary and Upper Primary Schools, which shall be filled up through direct recruitment only. The next higher level is Level-IV which shall consist of Headmaster/Headmistress of Government Primary Schools. Rule-6(1)(b) of the 1997 Rules further mandates that vacancy to Level-IV, III, II & I shall be filled up only through promotion. The comparative position in the entry level is at Level-V and the promotional level is far too less, as a result of which, notwithstanding many Teachers, even after completion of minimum service period and having the basic eligibility criteria for promotion, could not be promoted to Level-IV & III, for which their service got stagnated. Considering the uncertain promotional avenue and career stagnation, the Government of India introduced Assured Career Progression (ACP) Scheme, which was subsequently re-introduced with modified terms and was renamed as Modified Assured Career Progression (MACP) Scheme. The Government of Odisha in the line of the Central Government Scheme also revised its Scheme with effect from 01.01.2013 which is known as Revised Assured Career Progression (RACP) Scheme. As per the said Scheme, 3 financial up-gradations have been provided from the direct entry Grade on completion of 10, 20 and 30 years of service in a single Grade in absence of promotion. Meaning thereby, an employee, if completed 10 years of service in the entry Grade, will be considered for 1st up-gradation under RACP. An employee completing 20 years of service and has got only one up-gradation either by way of promotion or by RACP, will be considered for 2nd up-gradation. Similarly, upon completion of 30 years of service there will be the 3rd up-gradation. The financial up-gradation under RACP would be admissible up to the highest Grade Pay of Rs.7600/- in Pay Band (PB)-3 under Orissa Revised Pay Scale Rules.

7. All the private Opposite Parties have completed more than 20 years of service either in the entry level, i.e. at Level-V or Level-IV, which is the next higher promotional level. Therefore they are entitled to the 2nd up-gradation under the RACP Scheme, 2013. Under the RACP Scheme, there shall be a Screening Committee to decide the eligibility of the persons for up-gradation. Regulation-10 of the RACP Scheme mandates that the employee of the Cadre having promotional hierarchy will get the Grade Pay of the promotional post.

The employee in isolated/ex-Cadre post, not having promotional hierarchy, will get the next higher Grade Pay in the First Schedule of ORSP Rule. Applying the said principle, admittedly, as per 1997 Rules, all Teachers entered in Level-V have minimum promotional avenue up to Level-III, subject to fulfillment of basic eligibility criteria. Therefore, under Regulation-10 of the RACP Scheme, they are entitled to Grade Pay of the promotional post, as the Cadre in which they are born in service has promotional avenue and is not an ex-Cadre post. As per the 1997 Rules, a Teacher at the entry level i.e. at Level-V is eligible for promotion to the next higher Cadre, i.e., post of Headmaster of Government Primary School in Level-IV after completion of continuous period of 8 years of service in Level-V. Similarly, an employee in Level-IV is eligible for promotion to Level-III, i.e., to the post of Headmaster of Government Upper Primary School, after serving for a period of 5 years in the Level-IV Cadre. To become eligible for promotion to Level-II, i.e., the Deputy Inspector of Schools, an employee must have served for a period of 3 years in Level-III. In Order to be eligible to be promoted to Level-I post, i.e., District Inspector of Schools, an employee must have served for a continuous period of 3 years and must possess a Degree in B.A./B.Sc./B.Com. with Bachelor's Degree in Education or an equivalent Degree. Therefore, a Teacher entered in Level-V, has promotional avenue up to Level-I as per the 1997 Rules.

8. As has been already stated, the private Opp. Parties have joined the service in between 1990 to 1995. Applying the 1997 Rules, there was no bar for their promotion to the post of Level-IV as well as Level-III as because they have completed 13 years of service by 2008. Thus, not only the promotional avenue exists from their entry Cadre but also they were eligible for promotion subject to availability of post in the promotional avenue. In the year 2009, the State Government brought an amendment to the existing 1997 Rules and prescribed the following changes

> *i. For direct recruits to the level V post of Asst. Teachers 60% vacancies would be filled up by Matric or +2 C.T. candidates and rest 40% vacancies would be filled up by B .Ed. candidates in Arts or Science or Commerce;*
>
> *ii. Promotion to level - IV post from Level V post after 8 years, 60% of Level-IV posts by way of promotion shall be filled up from candidates possessing Matricor +2 C.T. and rest 40% vacancies will be filled up through promotion by candidates with B.Ed. in Arts or Science or Commerce;*
>
> *iii. Similarly, promotion to Level-III from level IV post after 5 years, 50% vacancies would be filled by candidates with Matric or +2 C.T. and rest 50% vacancies will be filled up by B.Ed. in Arts or Science or Commerce."*

9. Although the private Opp. parties are eligible for promotion prior to coming into force of 2009 Rules, yet they could not be promoted because of lack of vacancy in the promotional posts. Even in the 2009 Rules, as would be evident from the above quoted provision, the private Opposite Parties with their Matric & CT or +2 & CT qualification, are eligible for promotion to the post of Level-III. In the meantime, they have completed 20 years of service by 2015. Therefore, applying the provisions of RACP Scheme, 2013 as well as ORSP Rule, 2008, the private Opposite Parties are eligible for 2nd RACP benefit upon completion of 20 years of service.

10. The 1997 Rules, again underwent an amendment in the year 2014 and as per the said amendment in Order to be eligible for promotion to the posts of Level-IV, a Candidate must have served for a continuous period of four years in the post of Level-V, i.e., entry level post provided that –

> *(i) 50% of the vacancies shall be filled up by the candidates having passed High School Certificate or Higher Secondary (10+2) Examination with Secondary Teachers Training/Certified Teachers Course from any recognized Board or University or equivalent thereof.*
>
> *(ii) 50% of the vacancies shall be filled up by the candidates possessing a Bachelor Degree in Education or an equivalent examination and training course from a recognized Board or University .*
>
> *(b) for sub rule (2), the· following sub-rule shall be substituted, namely:*
>
> *In Order to be eligible for promotion to Level-III of the service a candidate must have possessed a Bachelor Degree in any discipline with a Bachelor Degree in Education or an equivalent examination and training course from a recognised Board or University and have served for a continuous period of two years in the posts belonging to Level-IV of the service.*
>
> *Provided that in case of non-availability of adequate number of persons for promotion to Level-III of the service, six years of service in Level-IV and V shall be taken together for consideration· of promotion but must have rendered at least one year of service in Level-IV."*

11. Therefore, admittedly, by the time 2009 Rules came into force, most of the private Opposite Parties either in Level-IV or Level-V, had completed a period of service required for promotion to Level-III and possessed the requisite qualification. They could not be promoted to the post of Level-III for want of sufficient number of posts. Therefore, admittedly, as per the 1997 Rules or the amended Rules of 2009, the Opposite Parties are eligible to be considered for promotion to the post of Level-III.

12. At this point of time, in the year 2013, the State Government introduced the RACP Scheme. In Order to implement the recommendations of the 6th pay

Commission, the State Government formulated Odisha Revised Scale of Pay (ORSP) Rules, 2008. As per the ORSP Rules, 2008, the fitment principle is provided in Rule-4, which reads as follows:-

> ***"4. Fitment principle***
>
> *(i) The pay in the pay band/ pay scale will be determined by multiplying the existing basic pay without special pay as on 1st January, 2006 by a factor of 1.86 and rounding off the resultant figures to the next multiple of 10. Grade Pay corresponding to the pay band will then be added to be shown distinctly.*
>
> *(ii) If the minimum of the revised pay band/ pay scale is more than the amount arrived at as per the above fitment principle, the pay shall be fixed at the minimum of revised pay band/ pay scale with corresponding Grade Pay. "*

13. The pre-revised pay scale of trained Level-V Teachers was Rs.3600-100-5600/-. The pre-revised pay scale of trained Level-IV Teachers was Rs.4000-100-6000/- and the pre-revised pay scale of trained Level-III Teachers was Rs.5000-150-8000/-. Applying the above fitment principle by multiplying the basic pay by a factor of 1.86, the pay in the Pay Band of Level-V Teachers comes to Rs.6700/- and the corresponding Grade Pay is Rs.2200/-. Similarly, the pay in the Pay Band of Level-IV Teachers comes to Rs.7440/- and the corresponding Grade Pay is Rs.2400/- and pay in the Pay Band of Level-III Teachers comes to Rs.9300/- and the corresponding Grade Pay is Rs.4200/-. The Screening Committee· constituted under RACPS has in fact applied the above principle and since the Opposite Parties have completed 20 years of service on 01.04.2015, the Committee fixed the Grade Pay at Rs.4200/-, as would be evident from the Service Book of the private Opposite Parties. With eyes wide open and knowing fully well, the benefit of Grade Pay of Rs.4200/- had been extended to the private Opposite Parties. Thereby, no error has been committed by the Tribunal by granting such benefit to the private Opposite Parties.

14. As it appears, the Petitioners have unilaterally revised the Grade Pay and arbitrarily fixed it at Rs.2800/-which has been challenged by the private Opposite Parties before the Tribunal. The Tribunal, taking into consideration the fixation of Grade Pay by the Screening Committee at Rs.4200/- and considering the corresponding Rules and also the stand taken in the Counter Affidavits filed by the Petitioners herein, decided that the private Opposite Parties are entitled to Grade Pay of Rs.4200/- and, thereby, no illegality and irregularity has been committed by the Tribunal by holding that the private Opposite Parties are entitled to the Grade Pay of Rs.4200/-.

15. In the counter affidavits filed by the Petitioners before the Tribunal, a stand was taken that in view of 2014 Rules, the private Opposite Parties had no

promotional avenue and, thereby, they are not entitled to Grade Pay of Level-III post. The Tribunal, after examining such contention, found that since the promotional avenues exist from Level-IV to Level-III and the Screening Committee has approved the Grade Pay of Rs.4200/-, and accordingly quashed the Orders dated 30.10.2016 & 21.10.2016 revising the Grade Pay from Rs.4200/- to Rs.2800/-. As such, this Court does not find any error apparent on the face of record to interfere with the same.

16. The Petitioners in their Counter Affidavits before the Tribunal had urged that on the basis of the amendment made to the Odisha Elementary Education (Methods of Recruitment and Conditions of Service of Teachers and Officers) Amendment Rules, 2019, which were notified in the Gazette on 08.03.2019, much after passing of the impugned judgment of the Tribunal dated 24.10.2017, the private Opposite Parties, who have either Matric CT or I.A. CT qualification, do not have promotional avenue to the post of Level-III. Under 2019 Rules, the previous Level-V Post has been divided into two categories, i.e., Level-V(A) and Level-V(B) of which Level-V(A) is the feeder post and Level-V(B) is the 1st promotional post and Level-IV is the 2nd promotional post. On the basis of the aforesaid, it is contended that by virtue of this amendment, the private Opposite Parties, having their 2nd promotional avenue to Level-IV, which corresponds to a Grade Pay of Rs.2400/-, are not entitled to Grade Pay of Rs.4200/-. But fact remains, the amended Rules, 2019 debarring the privates Opposite Parties from getting their legitimate Grade Pay of Rs.4200/-, having been brought into effect after 24 years of services rendered by them, may have prospective application. But, by virtue of the amendment Rules, 2019, the right which has been accrued in favour of the private Opposite Parties cannot be taken away. Further, the Teachers, who possessed C.T. training, on completion of 20 years of service within 30.06.2014, are granted Grade Pay of Rs.4200/-. But Teachers with the same C.T. training, who have completed 20 years of service after 30.06.2014, are granted Grade Pay of Rs.2800/-, instead of Rs.4200/-, which is arbitrary, unreasonable and discriminatory. Basing upon the amended Rules, 2014 Rules, the Petitioners have resorted to such discrimination among the Teachers who possessed the same qualification, which is absurd and creates factions within the same group of Teachers. Thereby, such action of the Authorities cannot sustain in the eye of law.

17. Prior to amended Rules, 2014, the next promotional avenue was Level-III. After amended Rules, 2014, there was promotional avenue and after 2019 Rules the promotional avenue to level-V(B) was introduced. Such persons those who attained 20 years in between 2014 and 2019 Rules will be entitled to Rs.2800/- and persons after 2019 Rules will be entitled to Rs.2400/-. Thus there

will be two types of Grade Pay on completion of 20 years of service at different times, which is arbitrary and illegal and cannot sustain in the eye of law.

18. It appears that the private Opposite Parties, when entered into service, were governed by the 1997 Rules, in which promotional avenue to Level-III was all along there before amendment irrespective of qualification. As per the RACP Rules, those who completed 20 years of service, by the time the 2014 Rules came into force, were entitled to be promoted to Level-III and thus were fitted in Grade Pay of Rs.4200/-. After amended Rules, 2014 came into force, only the persons born in the Cadre of Level-IV, having the qualification 'Graduate', were eligible for promotion to Level-III. Therefore, the contention of the Petitioners that there was no promotional avenue to Level-III from Level-IV for the private Opposite Parties and that they could not be fitted into Level-III Teachers as they had no qualification, it is too late to make such a contention before this Court at this stage, as the private Opposite Parties, after the 2019 Rules came into force, were deprived of promotion to Level-III, in view of the bifurcation of the Level-V post into Level-V(A) and Level-V(B), which has been brought only with a view to deprive the private Opposite Parties of getting the Grade Pay of Rs.4200/-. The reasons ascribed by the Petitioners is that since the private Opposite Parties did not have the requisite qualification of Bachelor's Degree, and they were having Matric CT qualification, they could not be promoted to the post of Level-III. But such stand has been taken with a view to depriving the private Opposite Parties of the financial benefit which had already been granted to them and they were enjoying. Therefore, such action of the Petitioners is contrary to the provisions of law, smacks mala fide and creates discrimination between the same class of employees. Consequentially, the same cannot sustain in the eye of law.

19. If considered from other angle, as per Regulation-3 of RACP, it is only the Screening Committee, which can decide the entitlement of an employee to receive the Grade Pay. As such, the Screening Committee decided that the private Opposite Parties are entitled to receive Grade Pay of Rs.4200/- and the same was implemented by the Department and corresponding entries were made in the Service Book as well as payments were made. After making payment of Grade Pay of Rs.4200/-, the present Petitioners cannot unilaterally and arbitrarily revise the same to Rs.2800/-. Thereby, the entire action of the Authorities is in gross violation of the Principle of Natural Justice, as the right, which has been accrued in favour of the private Opposite Parties, has been attempted to be taken away without affording fair chance of hearing.

20. Much reliance has been placed under Rule-9 (2) of the amended Rules, 2014 and the Tribunal relying on the Proviso thereto, has come to a finding that

the private Opposite Parties are entitled to get the benefits. So far as the applicability of Proviso to the main provision is concerned, reliance has been placed on the ratios decided in ***Dwaraka Prasad, Abdul Jabar Butt, Triubhovandas Haribhai Tamboli, Sidharth Viyas, Ali M.K. and Bijay Kumar Singh*** (supra), which have application so far as interpretation of Statute is concerned. There is no doubt about such proposition of law. But, fact remains that once the Screening Committee has determined the benefits, which had already been extended to the private Opposite Parties, the same cannot be withdrawn or modified or cancelled by the Petitioners by arbitrary exercise of power reducing the same from Rs.4200 to Rs.2800/-, without complying the Principle of Natural Justice.

21. In some of the cases, it appears that even though the Order impugned has been passed on 09.11.2017, but the State has preferred the Writ Petition in the year 2021 and 2022. Thereby, one such case was considered by this Court in ***State of Odisha v. Fanindra Gain*** [W.P.(C) No. 11096 of 2022]. The said Writ Petition was dismissed by this Court on 13.05.2022 on the ground of delay and laches. Such Order was passed relying upon the earlier judgment of this Court in the case of ***State of Odisha v. Surama Manjari Das*** [W.P.(C) No. 15763 of 2021 dismissed on 16.07.2021]. Therefore, most of the Writ Petitions, which have been filed by the State Petitioners much after grant of the benefit to the private Opposite Parties, relying upon the judgment of the Tribunal dated 24.10.2017 in O.A. No. 2576 of 2016, are also liable to be dismissed on the ground of delay and laches, apart from the merits.

22. In view of the facts and law, as discussed above, this Court does not find any error apparent on the face of record in the impugned Order dated 24.10.2017 passed in O.A. No. 2576 of 2016 and batch, as well as the Order dated 09.11.2017 passed in O.A. No. 2499 of 2016 and bath by the Tribunal.

23. For the foregoing reasons, the Writ Petitions merit no consideration and the same stand dismissed. In view of dismissal of these two Writ Petitions, all other connected Writ Petitions stand dismissed. No Order as to costs.

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2022 (II) ILR - CUT-641

Dr. B.R.SARANGI, J & SANJAY KUMAR MISHRA, J

W.P.(C) NO. 21086 OF 2013

Dr. (MRS.) SUJATA RATHA …….. Petitioner

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of Certiorari – When can be issued ? – Indicated. (Paras 16 to 21)

(B) WORDS AND PHRASES – "Certiorari"– Meaning of – Discussed. (Paras 13 -14)

Case Laws Relied on and Referred to :-

1. 2011 3 SCC 436 : State of Orissa v. Mamata Mohanty
2. AIR 1943 PC 164 : Ryots of Garabandho v. Raja of Paralakhimedi
3. AIR 1954 SC 440 : T.C. Basappa v. T. Nagappa
4. AIR 1958 SC 398 : Nagendra Nath Bora v. Commr. of Hills Division
5. AIR 1975 SC 2151 : State of Andhra v. Chitra Venkata Rao
6. (2003) 6 SCC 675 : AIR 2003 SC 3044 : Surya Dev Rai v. Ram Chander Rai
7. AIR 1954 SC 440 : T.C. Basappa v. T. Nagappa
8. AIR 1950 SC 222 : Province of Bombay v. Khushaldas S. Advani
9. AIR 1996 SC 81 : Dwarka Nath v. ITO
10. 2020 (II) OLR 238 : Santosh Ku. Sahoo v. Secy, State Transport Authority, Odisha, Cuttack
11. 2020 (II) OLR -747 : General Manager, East Coast Railway & Ors. v. Surendra Jal & Ors.
12. 2020 (I) CLR 474 : Bidyut Manjari Sethi v. State of Odisha & Ors.

For Petitioner : Mr. B.Routray, Senior Advocate
M/s. U.C.Mishra, A.Mishra, D.R.Sendha & A.Bal.

For Opp.Parties: Mr. S.Jena, Standing Counsel (S&ME)

JUDGMENT Decided on : 28.06.2022

Dr. B.R.SARANGI, J.

The Petitioner, by means of this Writ Petition, seeks to quash the Order dated 25.06.2013 passed by the Odisha Administrative Tribunal, Bhubaneswar, dismissing O.A. No. 2716 of 1997.

2. The factual matrix of the case, in brief, is that the Petitioner was initially appointed as a Lecturer in Education on ad hoc basis on a consolidated honorarium of Rs.500/- per month for a period of 89 days vide Order dated 19.09.1988 issued by the Secretary, Nalini Devi Women's College of Education, Bhubaneswar. Again she was appointed, vide Order dated 13.02.1989, as ad hoc Lecturer until 31.03.1989 on a consolidated amount of Rs.750/- per month. The appointment of the Petitioner was extended beyond 28.09.1989 until further Orders or until the post is filled up on a regular basis, whichever is earlier, vide Order dated 23.09.1989. The College in question was taken over by the Government w.e.f 01.04.1990, pursuant to the Ordinance, i.e. The Nalini Devi Women's College of Education (Taking Over of Management) Ordinance, 1991 (Orissa Ordinance No.3 of 1991), which came into force w.e.f 27.06.1991,

giving effect from 01.04.1990. Vide Order dated 20.02.1991, the Petitioner was appointed as a Teacher in Education on ad hoc basis for a period of one year or till her appointment is regularized on the recommendation of Selection Board, whichever is earlier, subject to condition that the Petitioner will produce documentary evidence regarding her regular appointment as a Lecturer in Nalini Devi Women's College of Education.

2.1 Even though the Ordinance came into force with effect from 01.04.1990, but the Petitioner was denied absorption. Therefore, she approached the Tribunal by filing O.A. No. 2532 of 1992. A batch of cases had also been filed by different Applicants. All those Original Applications were heard analogously by the Tribunal and disposed of vide a common judgment dated 20.02.1997, with the following observation:-

> "*20 In case it is not possible to entrust the duty of enquiry to the Education Tribunal as suggested by me within the time stipulated, respondent No.1 shall appoint a Committee consisting of the Financial Advisor of the Department who is well acquainted with the service jurisprudence relating to employment, a representative of the department not below the rank of Deputy Secretary and a representative of the Directorate not below the rank of Deputy Director who shall make an enquiry into the matter jointly.*
>
> *21. The enquiry should be completed within three months as the matter is long delayed. To expedite completion of the enquiry the applicants shall submit representations with materials in support of their claim including affidavits and statements. They may also seek to call for documents from the Vigilance Department. Respondents may also obtain documents from the Vigilance Department to disprove that the applicants or any of them do not come under the protection given under Section 7 of the Act. It goes without saying that the Principal who is accepted by the State Government to the member of the staff on 01.04.1990 should be called upon to give her statement. The teaching and non-teaching staff who are continuing as Govt. Servants should also be examined to find out whether any or all the applicants were in the college on that date.*
>
> *22. "Respondent No.1 is directed to take appropriate steps on basis of the report of the enquiry either to treat all or any of the applicants as Government servants being member f the staff as on 01.04.1990 or would have continued as would be reported. Decision of Respondent No.1 shall be communicated to the concerned applicants within one month of the report of enquiry. If for any reason it is found adversely in the enquiry against any of the applicants, copy of the enquiry report and the Order of rejection of the claim shall be communicated to the concerned applicant within the aforesaid period. Concerned applicant, if aggrieved, can file application under Section 19 of the Administrative Tribunal Act afresh challenging the Order and the report for effective direction.*
>
> *23. In Order to temporarily accommodate the eligible and suitable applicants in any vacant post available, I sought for information from the Respondents. Without*

waiting for such information I direct that the applicants or any of the applicants who are found to be more suitable than others may be appointed to the teaching and non-teaching posts under the Directorate. Director shall take steps in this regard. However, such ad hoc appointment shall not be a subject matter of dispute in this Tribunal as the same is purely ad hoc in nature."

In compliance of the direction of the Tribunal contained in the Judgment dated 20.02.1997, as mentioned above, the Petitioner submitted a representation on 31.03.1997 to Opposite Party No.1. Vide letter dated 11.08.1997, the Petitioner was directed to appear before the Enquiry Committee to be held on 18.08.1997 with all the papers and documents in support of her claim. Pursuant thereto, she appeared before the Enquiry Committee on the stipulated date along with all supporting documents. Vide letter dated 20.11.1997, Opposite Party No. 1 communicated the Petitioner that the Government, basing on the Report of the Enquiry Committee, has been pleased to reject her claim for absorption in Government Service. Against such Order of rejection dated 20.11.1997, the Petitioner approached the Tribunal once again by filing O.A. No. 2716 of 1997. But the Tribunal, by the impugned Order dated 25.06.2013, confirmed the Order of rejection of the claim of the Petitioner for absorption in Government Service, by holding that no irregularity or illegality has been committed in the Order impugned so as to call for any interference by the Tribunal, and accordingly dismissed the Original Application. Hence, this Writ Petition.

3. Mr. Asutosh Mishra, learned Counsel appearing for the Petitioner, admitting the above fact, vehemently contended that the Tribunal, vide Order dated 20.02.1997 passed in O.A. No. 2532 of 1992 and batch, had specifically directed that the Enquiry Committee should determine as to whether any of the Applicants was continuing as the member of the staff of the College as on 01.04.1990 or would have continued as would be reported, but for the illegal and vindictive action of the Principal, it took a long time to decide. It is further contended that so far as the Petitioner is concerned, the Ex-Principal of the Petitioner's College, namely, V.V. Viddyrthee, gave a certificate on 27.02.1991 that she was Lecturer in Nalini Devi Women's College of Education, Bhubaneswar, from 15.02.1989 to 05.02.1991, which is placed on record as Annexure-7 to the Writ Petition. He also contended that the then Secretary of Nalini Devi Women's College of Education extended the engagement of the Petitioner beyond 28.09.1989 until further orders or until the post is filled up on regular basis, whichever is earlier, vide Order dated 23.09.1989, which is also made available at Annexure-6. If both the documents are taken into consideration, the irresistible conclusion would be, as on 01.04.1990 the Petitioner was in service and therefore, she should have been absorbed in Government Service by virtue of the Ordinance issued by the Government vide

Annexure-1 to the Writ Petition. The Enquiry Committee, which had been constituted by virtue of the direction given by the Tribunal by Order dated 20.02.1997 passed in O.A. No. 2532 of 1992 and batch, had not taken into consideration these two material documents to come to the conclusion that the Petitioner was not in service as on 01.04.1990 to get herself absorbed in service. Consequentially, illegalities and irregularities have been committed by the Enquiring Committee, which had been constituted by virtue of Order dated 20.02.1997 passed by the Tribunal in O.A. No. 2532 of 1992 and batch, and subsequently confirmed by the impugned Order dated 25.06.2013, at Annexure-9, passed by the Tribunal. It is contended that Opposite Party No.1 has not applied its independent mind, rather mechanically accepted the Report of the Committee rejecting the claim of the Petitioner for absorption in Government service, which cannot sustain in the eye of law.

4. Mr. S. Jena, learned Standing Counsel for School & Mass Education Department appearing for the Petitioners, contended that Nalini Devi Women's College of Teacher Education, Bhubaneswar, formerly known as Nalini Devi Women's College of Education, was taken over by the Government of Odisha with effect from 27.06.1991, as per Orissa Ordinance No. 3 of 1991, which got approval of the State Legislature. As per Clasue-7 of the Ordinance, "*all teaching and non-teaching employees in the employment of the College as on the 1st day of April, 1990 shall be deemed to have been absorbed in Government Service as employees of the College in their respective posts with effect from the date of its transfer*". As per the said Clause, the employees, who are in the employment of the College as on 01.04.1990, shall be deemed to have been absorbed in Government service. The claim of the Petitioner is that she was engaged as a Lecturer in Education on honorarium basis with an amount of Rs.500/- per month, vide Order dated 19.09.1988, and subsequently she was re-engaged as such till 31.03.1989 with monthly honorarium of Rs.750/- by one Shri B.K. Mania, Member Secretary. But the copy of the Resolution dated 24.09.1989 of the erstwhile Management reveals that Shri B.K. Mania was nominated as the Secretary of the Governing Body on 29.04.1989. Therefore, the so called engagement of the Petitioner by Shri B.K. Mania, vide Order dated 13.02.1989 at Annexure-5, appears to be fabricated and created by the Petitioner to justify her engagement. As the Petitioner was not a regular employee on the Pay Roll of the Institution as on 01.04.1990, she was not considered for absorption as per the condition stipulated in the Act. Pursuant to the Order dated 20.02.1997 passed by the Tribunal in O.A. No. 2532 of 1992 and batch, Opposite Party No. 1 had constituted a Committee to cause an enquiry as to whether the Petitioner and others were the staff as on 01.04.1990, i.e. the date

fixed as per the legislation as the cut-off date for taking over the institution by the Government. The Committee in its finding dated 07.11.1997, held that no service document in respect of the Petitioner was produced before the Committee regarding the retrenchment/approval of the Governing Body. As such, vide Order dated 20.11.1997, the claim of the Petitioner for absorption was rejected. Thereby, the entire action taken is well justified.

4.1 It is further contended that the Tribunal disposed of O.A. No. 1488 of 2000 filed by Dr. (Mrs) Swarnalata Parida, vide Order dated 13.03.2012, with an observation that the Petitioner therein, having not worked in the College as on 01.04.1990, can never be a regular employee of Nalini Devi Women's College of Teacher Education. In that view of the matter, the relief, as has been sought by the Petitioner herein, is not sustainable in the eye of law and the Writ Petition deserves to be dismissed accordingly.

5. This Court heard Mr. Asutosh Mishra, learned Counsel appearing for the Petitioner and Mr. S. Jena, learned Standing Counsel for School & Mass Education Department, appearing for the Opposite Parties by hybrid mode and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this Writ Petition is being disposed of finally at the stage of admission.

6. On the basis of the undisputed facts, as delineated above, the sole question arises for consideration is whether, as on 01.04.1990, the Petitioner was continuing in the College in question to be considered for absorption, pursuant to Clasue-7 of the Ordinance issued by the Government?

7. As is borne out from the records, the Petitioner was not absorbed in Government service, even though she claimed that she was in employment of the College as on 01.04.1990. Therefore, she approached the Tribunal by filing O.A. No. 2532 of 1992, which was disposed of along with O.A. No. 1367 of 1991 and batch, vide Order dated 20.02.1997, with the directions as mentioned hereinbefore. In compliance of the said Order of the Tribunal, a Committee was constituted by the Government to cause enquiry into the matter. After enquiry, the Committee submitted its Report on 07.11.1997. So far as it relates to the Petitioner, the Committee reported as follows:-

> *"(1) Smt.Sujata Rath*
>
> *She was appointed as Lecturer in N.D.W. College vide appointment letter dated 19.09.1988 for a period of 89 days by Sri B.K.Mania. She was again given appointment vide letter No.199 dated13.09.1989 up to 31.03.1989. Subsequent Orders of appointment are not available and not produced. The resolution of the Governing Body held on 29.04.1989 indicated that as per resolution No. 13 her*

appointment has been accepted till June 1989 along with Smt. Sunanda Patnaik. Subsequent office Orders signed by the Principal No.4307 dated 04.07.1989 and 3461 dated 10.07.1989 indicate that she was conducting classroom activities during July 1989. In a joint memorandum submitted to Govt. for absorption of the members of the staff, she has signed along with Smt. S.N. Lenka (who claimed to be the Principal of the college.)

Subsequently, neither the Orders of G.B. of retrenchment not the approval of G.B. has been produced to the committee.

In the report submitted by Sri R.K. Panda, administrator, the list of staff members as on 01.04.1989 i.e. the date from which the audit was taken up enclosed, Sri Panda has mentioned that this is as per audit report, whereas such a list is not found from the Govt. file. Of course, Sri Panda in his note mentioned that as he could not procure the copy of the audit report from the Department, he had to collect if from Law Department on 12.07.1990. Sri R.C. Dhal, as Secretary of the College has written a letter to the then Director, where he has mentioned that after November 1989 Smt. Ratha brought to his notice that she was not allowed to take classes in the college and approached for a valid appointment Order. As this point, the appointment Order issued by Sri Mania allowing her to continue until further Orders has been put to question. This makes doubt. She was not allowed to continue. Sri Dhal says he desired to issue an appointment Order on 13.02.1990 but could not issue the Order because of the vehement opposition of Sri B.K.Patnaik. Sri Dhal seems to have resigned, on this issue saying Smt. Sujata Rath has been harassed. Probably this is the reason why Director, TE & SCERT adjusted her as Teacher Educator of DIET. These facts throw light that Smt. Sujata Rath was very much present up to February' 90. Hence her claim to be absorbed as Lecturer in O.A. is becoming clearer and clearer. However, the committee did not get any evidence of Smt. Rath continuing from March' 90 because the audit is silent."

8. From the materials available before the Enquiry Committee, it is emerged that the Petitioner had filed two appointment orders issued by the Secretary of the erstwhile Managing Committee of the College. Initial appointment order was dated 19.09.1988, whereby consequent to her agreement to the terms and conditions of the appointment, she was appointed as a Teacher in Education on ad hoc basis on a consolidated honorarium of Rs.500/- for a period of 89 days. Second appointment order was dated 13.02.1989, whereby she was appointed as an ad hoc Lecturer in Education until 31.03.1989 on a consolidated remuneration of Rs.750/- for the entire period. But, she had not produced any document or appointment order issued in her favour thereafter. In support of her contention that she was continuing in the College as on 01.04.1990, reliance was placed to the order dated 23.09.1989 issued by the Secretary of the College to the effect that the appointment of the Petitioner as "*ad hoc Lecturer in Education in the College is extended beyond September, 28, 1989 until further Orders or until t he post is filled up on a regular basis*

whichever is earlier". But the Committee came to a finding and held that "*the committee did not get any evidence of Smt. Rath continuing from March' 90 because the audit is silent*".

9. It appears from the letter dated 12.07.1990 written by one Mr. N.C. Dhal, Advocate and Member of the College addressed to the Director, SC & SCERT, Bhubaneswar, which was also taken note of by the Committee in its Report that no appointment order was issued in favour of the Petitioner on 15.02.1990. After the College was taken over by the Government w.e.f. 01.04.1990, the Petitioner was appointed on ad hoc basis as a Teacher of Education in Language (Oriya) in DIET, Jeypore, with a stipulation that "*this adhoc appointment as a Teacher Educator in the DIET is subject to the condition that Smt. Sujata Rath will produce documentary evidence regarding her regular appointment as a Lecturer in Nalini Devi Women's College of Education vide Order dated 20.02.1991 issued by the Director, Teacher Education & SCERT, Odisha*".

10. Since the Petitioner was not continuing in service as on 01.04.1990, the Government, vide Order dated 20.11.1997, rejected the claim for her absorption in Government service. As the Petitioner had not produced any valid regular appointment order issued by the erstwhile Managing Committee, nor was she continuing in the teaching post from 01.04.1990, her claim for absorption pursuant to Clause-7 of the Ordinance, after the College was taken over, cannot have any justification.

11. In ***State of Orissa v. Mamata Mohanty***, 2011 3 SCC 436, the apex Court in Paragraphs-35, 36 and 37 of the Judgment held as follows:-

> *"APPOINTMENT/EMPLOYMENT WITHOUT ADVERTISEMENT:*
> *35. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors., AIR 1992 SC 789; State of Haryana & Ors. v. Piara Singh & Ors., AIR 1992 SC 2130; Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216; Arun*

Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors., AIR 1998 SC 331; Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors., AIR 2005 SC 2103; National Fertilizers Ltd. & Ors. v. Somvir Singh, AIR 2006 SC 2319; Telecom District Manager & Ors. v. Keshab Deb, (2008) 8 SCC 402; State of Bihar v. Upendra Narayan Singh & Ors., (2009) 5 SCC 65; and State of Madhya Pradesh & Anr. v. Mohd. Ibrahim, (2009) 15 SCC 214).

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

37. It is a settled legal proposition that if an Order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the Order. It would be beyond the competence of any authority to validate such an Order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an Order at the initial stage is bad in law, then all further proceedings consequent thereto will be non-est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin."

12. Applying the above principle laid down by the apex Court, this Court is of the considered view that the stand taken by the Petitioner, that she was in service as on 01.04.1990, cannot sustain in the eye of law and, as such, the rejection of her claim for absorption taking into account that as on 01.04.1990 she was not is service, is well justified.

13. It is not in dispute that this Court is exercising the power under Article 226 of the Constitution of India in writ of certiorari.

Relying upon ***Ryots of Garabandho v. Raja of Paralakhimedi***, AIR 1943 PC 164, the apex Court in ***T.C. Basappa v. T. Nagappa,*** AIR 1954 SC 440 held as follows:

"The writ of certiorari is so named because in its original form it required that the King should "be certified" of the proceedings to be investigated and the object was to secure by the authority of the superior Court, that the jurisdiction of the inferior tribunal should be properly exercised."

14. In **Halsbury's Law of England,** 4th Ed., vol.1, Para 1531 it is stated as follows:

> *"The Order of certiorari issues out of High Court, and is directed to the Judge or officer of an inferior tribunal to bring proceedings in a cause or matter pending before the tribunal into the High Court to be dealt with in Order to ensure that the applicant for the Order may have the more sure and speedy justice. It may be had in either civil or criminal proceedings."*

15. ***Halsbury's Laws of England***, (Fourth Edition) (2001 Re-issue) Vol.1(1) Para-123 have explained Certiorari (quashing Order) is an Order of the superior Court by which decisions of an inferior Court, Tribunal, public Authority or any other body of persons who are susceptible to judicial review may be quashed.

The supervision of the superior Court exercised through writs of certiorari goes on two points. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded.

16. Certiorari, under Article 226, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate Court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exits none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of Principles of Natural Justice, where there is no procedure specified, and thereby occasioning failure of justice.

17. In ***Bharat Bank v. Employees of Bharat Bank***, AIR 1950 SC 188, the apex Court held that the object of the writ of certiorari is to keep the exercise of powers by inferior judicial and quasi-judicial Tribunals within the limits of the jurisdiction assigned to them by law and to restrain from acting in excess of their authority.

18. A Constitution Bench of seven learned judges in ***Hari Vishnu v. Ahmad Ishaque,*** AIR 1955 SC 223, laid down the following propositions as well settled and beyond dispute:

> *"(1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.*
>
> *(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.*

> *(3) The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well a right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence, and substitute its own findings in certiorari."*

19. In ***Nagendra Nath Bora v. Commr. of Hills Division,*** AIR 1958 SC 398, the apex Court held as follows:

> *"The jurisdiction under Article 226 of the Constitution is limited to seeing that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi judicial powers do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them. In other words, its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even through of law, will not be sufficient to attract this extraordinary jurisdiction.*

20. In ***State of Andhra v. Chitra Venkata Rao***, AIR 1975 SC 2151 : (1975) 2 SCC 557, the apex Court held that since the function of the superior Court in a proceeding for certiorari is supervisory and not appellate, the superior Court will not review in intra vires findings of the inferior tribunal, even if they are erroneous.

21. In ***Surya Dev Rai v. Ram Chander Rai***, (2003) 6 SCC 675 : AIR 2003 SC 3044, relying upon ***T.C. Basappa v. T. Nagappa***, AIR 1954 SC 440; ***Province of Bombay v. Khushaldas S. Advani,*** AIR 1950 SC 222 and ***Dwarka Nath v. ITO***, AIR 1996 SC 81, the apex Court held that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine questions affecting the rights of a subjects and obliged to act judicially. Since the writ of certiorari is directed against the acts, Order or proceedings of the subordinate Courts, it can be issued even if the lis is between two private parties.

This Court has also considered the same in its judgments in the cases of ***Santosh Kumar Sahoo v. Secretary, State Transport Authority, Odisha, Cuttack,*** 2020 (II) OLR 238; ***General Manager, East Coast Railway and others v. Surendra Jal and others,*** 2020 (II) OLR -747 and ***Bidyut Manjari Sethi v. State of Odisha and others,*** 2020 (I) CLR 474.

22. In view of the facts and law, as discussed above, since the Petitioner was not continuing in service as on 01.04.1990, the Government, vide Order dated

20.11.1997, rejected her claim for absorption in Government service and rightly so. Therefore, the impugned Order dated 25.06.2013 passed by the Tribunal in O.A. No. 2716 of 1997, affirming the Order dated 20.11.1997 passed by the Government, does not call for interference, as this Court does not find any error apparent on the face of the record, in exercise of power conferred under Article 226 of the Constitution of India.

23. For the foregoing discussions, the Writ Petition merit no consideration and the same stands dismissed. No Order as to costs.

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2022 (II) ILR - CUT-652

Dr. B.R.SARANGI, J & SANJAY KUMAR MISHRA, J

W.P.(C) NO. 15857 OF 2022

JOGENDRA NAYAK ……Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Tender matter – Interference of Court – Writ petition filed challenging the decision of the competent authority, declaring the tender of Opp. Party No. 4 to be qualified – Whether decision of the authority can be interfered with? – Held, No – The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids – Such authority is aware of expectations from the tenders while evaluating the consequences of non-performance – The Writ Court should refrain itself from imposing its decision over the decision of the authority as such this Court does not feel inclined to interfere with award of work in favour of Opp. No. 4. (Paras 10,11)

Case Law Relied on and Referred to :-

1. Civil Appeal No. 1846 of 2022 [arising out of SLP (Civil) No. 2103 of 2022], disposed of on 21.03.2022 : M/s N.G. Projects Limited v. M/s Vinod Kumar Jain & Ors.

For Petitioner : Miss.Deepali Mahapatra

For Opp.Parties: Mr. S.N.Nayak, A.S.C (O.Ps. 1 & 2)
M/s. Jitendra Mohapatra, S. Mohapatra, K.Mohanty & A.K.Mishra (O.P. No.4)

JUDGMENT Decided on : 30.06.2022

Dr. B.R. SARANGI, J.

The Petitioner, by means of this Writ Petition, seeks to quash the letter dated 24.06.2022 at Annexure-3 issued by Opposite Party No.3 and to issue direction to the Opposite Parties to declare the Petitioner as successful bidder in the auction held on 21.06.2022 pursuant to Car Festival Quotation Call Notice No.8669 dated 13.06.2022 at Annexure-1.

2. The factual matrix of the case, in a nutshell, is that Opposite Party No.3-Executive Officer, Puri Municipality, Puri, issued Car Festival Quotation Call Notice No. 8669 dated 13.06.2022 at Annexure-1 inviting sealed quotations from the intending persons/agencies for auction of "Temporary Stalls from Badasankha to Gundicha Temple" during Car Festival 2022. As per the said notice, the intending persons were to visit www.purimunicipality.nic.in & www.puri.nic.in and download the auction papers along with the terms and conditions made available on the above website from 11.00 A.M. of 13.06.2022 up to 5.00 P.M. of 20.06.2022. It was also stipulated in the Notice that the quotation should reach the Office of Opposite Party No.3 by Registered Post/Speed Post on or before 21.06.2022 by 3.00 P.M. and the same would be opened on 21.06.2022 at 4.00 P.M. in presence of quotationers or their authorized agents. It was also indicated that Puri Municipality Authority would in no way be responsible for delay in reaching the quotations. The terms and conditions were also prescribed in the said Quotation Call Notice.

2.1 Pursuant to said Quotation Call Notice dated 13.06.2022, the Petitioner and Opposite Party No.4 submitted their tender documents within the time stipulated. Their documents were taken into consideration and ultimately Opposite Party No.4 was selected to undertake the work, as per the Quotation Call Notice. Since Petitioner was aggrieved by the selection of Opposite Party No.4, he has approached this Court by filing the present Writ Petition.

3. Miss. Deepali Mohapatra, learned Counsel appearing for the Petitioner, vehemently contended that the Quotation Call Notice at Annexure-1 dated 13.06.2022, specifies certain terms and conditions under Clause-1 to 12, out of which he relied on Clauses-9 and 11, the requirements of which Opposite Party No.4 has failed to satisfy. Therefore, acceptance of quotation of Opposite Party No.4 by the Puri Municipality cannot sustain in the eye of law and the same is liable to be quashed.

4. Mr. S.N. Nayak, learned Addl. Standing Counsel, has defended Opposite Party Nos. 1 and 2 and contended that because of the urgency in the matter,

Quotation Call Notice at Annexure-1 was invited by Opposite Party No.3 and it is a matter among Opposite Party No.3, Opposite Party No.4 and the Petitioner.

5. Mr. J.K. Mohapatra, learned Counsel appearing along with Mr. S. Mohapatra, learned Counsel for Opposite Party No. 4, vehemently contended that Opposite Party No. 4 has complied the Terms and Conditions stipulated in the Quotation Call Notice, more particularly Clauses-9 and 11 and, thereby Opposite Party No.4 has been selected to undertake the work, as per the Quotation Call Notice issued by the Authority under Annexure-1. Consequentially, no illegality or irregularity has been committed by the Authority by issuing the Work Order in favour of Opposite Party No.4, vide letter dated 24.06.2022 at Annexure-3. Therefore, question of declaration of the Petitioner as the Successful Bidder, as claimed by the Petitioner, cannot sustain in the eye of law. Consequentially, the Writ Application filed by the Petitioner is liable to be dismissed. To substantiate his contention, reliance is placed on the decision of the apex Court in the case of ***M/s N.G. Projects Limited v. M/s Vinod Kumar Jain & Ors***, Civil Appeal No. 1846 of 2022 (arising out of SLP (Civil) No. 2103 of 2022), disposed of on 21.03.2022.

6. This Court heard Miss. Deepali Mohapatra, learned Counsel appearing for the Petitioner, Mr. S.N. Nayak, learned Additional Standing Counsel appearing for State-Opposite Party Nos. 1 and 2, and Mr. J. Mohapatra, learned Counsel appearing along with Mr. S. Mohapatra, learned Counsel for Opposite Party No.4. Since Counter Affidavit has already been filed by Opposite Party No.4 and the same has already been exchanged with the Petitioner, keeping in view the urgency in the matter, as Car Festival 2022 is going to be held tomorrow (01.07.2022), this Writ Petition is being disposed of at the stage of admission with the consent of the parties, without even issuing notice to Opposite Party No.3, who was the Quotation Inviting Authority.

7. Having regard to the factual matrix as well as the rival submissions made by the learned Counsels for the parties, the sole question arose for consideration is whether Opposite Party No.4 has complied the Terms and Conditions stipulated in Clauses-9 and 11 of the Quotation Call Notice, which read thus:-

> *"9. The agency/person who have past experience of three years on installation of such stalls with work more than Rs.7,00,000/- will be considered.*
>
> *11. The quotation must be accompanied with a Bank Draft from any Nationalized Bank in favour of the Executive Officer, Puri Municipality, Puri towards cost of auction paper and earnest money deposit (EMD) of amount of Rs.6,000/- + Rs.12,00,000/- respectively."*

8. Clause-9 requires that the agency/person should have past experience of three years on installation of such stalls with work more than Rs.7,00,000/-In the Counter Affidavit filed by Opposite Party No.4, it has been specifically stated that Opposite Party No.4 has got vast experience in such type of works since last 18 years. In the year 2008, Opposite Party No.4 had also participated in the auction of stalls during Car Festival and accordingly he was selected in the tender and the work was allotted in his favour. Opposite Party No.4 was also awarded such type of works by the "Odisha Tourism Development Corporation Ltd., Government of Odisha; Eastern Zonal Cultural Centre, Ministry of Culture, Government of India; Director, Airport Authority of India; and the Programmes of Prime Minister and President of India organized by the Government of Odisha". Therefore, considering the vast experience of Opposite Party No.4, his quotation was accepted and Work Order was issued in his favour.

9. So far as the objection raised with regard to Clause-11 of the Quotation Call Notice, as mentioned above, it has been specifically stated that though Bandhan Bank is not a Nationalized Bank, but Bandhan Bank was appointed as RBI's agency Bank and authorized as agency Bank of RBI for undertaking Government business. As an agency Bank of RBI, the Bandhan Bank will be able to handle transactions related to collection of State Taxes. As such, the functioning of the Bank in question being authorized by the RBI, the same was duly considered by the Authorities and Opposite Party No.4 was selected and awarded with the work.

10. It is brought to the notice of this Court at the time of hearing that pursuant to the award of the Work Order, the work has already been completed since the Car Festival is scheduled to be held tomorrow (01.07.2022). Thereby, there is no time to go for a fresh auction and, as such, since the work has already been completed, this Court is not inclined to interfere with the same. More so, reliance has been placed, on behalf of Opposite Party No.5, on the judgment of the apex Court in the case of ***M/s. N.G. Projects Limited*** (supra), wherein at Paragraphs 22, 23 and 26, the apex Court held as follows:-

> *"22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ Petitioner was one of them. It is not the case of the writ Petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona-fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ Petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.*

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone."

11. In view of the law laid down by the apex Court, as mentioned above, this Court does not feel inclined to interfere with award of work in favour of Opposite Party No.4 and, as such, the Writ Petition merits no consideration and the same stands dismissed. No order as to costs.

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2022 (II) ILR - CUT-656

Dr. B.R.SARANGI, J & SANJAY KUMAR MISHRA, J

W.P.(C) NO. 2708 OF 2017

HRIDAY SHABAR ……..Petitioner

.V.

ODISHA ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH, BHUBANESWAR & ORS. …….Opp.Parties

ORISSA CIVIL SERVICE (REHABILITATION ASSISTANCE) RULES, 1990 – Appointment there under – The petitioner is the 2nd son of deceased civil servant – The authority rejected the application on the ground that the brother of the petitioner is serving as contractual health worker –

The petitioner gave false medical certificate declaring his elder brother to be unfit for any job under R.A Scheme – Whether the court can order appointment on compassionate ground dehors the provisions of statutory regulations and instructions ? – Held, No.

Case Laws Relied on and Referred to :-

1. 2021 (II) OLR (SC) 1072 : State of Madhya Pradesh & Others -Vrs- Ashish Awasthi
2. Civil Appeal No. 7752 of 2021(dtd. 16.12.2021) : The Secretary to Govt. Department of Education (Primary) & Ors. -Vrs- Bheemesh Allis Bheemappa
3. Civil Appeal No. 4103 of 2022 (dtd. 20.05.2022) : Malaya Nanda Sethy -Vrs- State of Orissa & Ors.
4. Judgments of this Hon'ble Court in W.P.(C) No. 22678 of 2020 (dated 05.11.2020) : Subash Chandra Khatua -Vrs- State of Odisha & Ors.
5. W.P.(C) No. 4239 of 2018 (dtd. 25.04.2018) : State of Odisha -Vrs- Kartika Bhoi
6. (1994) 2 SCC 718 : Life Insurance Corporation of India -Vrs- Asha Ramchandra Ambekar (Mrs) & Anr.
7. (2004) 7 SCC 271 : General Manager (D & PB) & Ors. -Vrs- Kunti Tiwary & Anr.
8. (2012) 11 SCC 307 : Union of India & Anr. -Vrs- Shashank Goswami & Anr.
9. AIR 2004 SC 4504 : A. Umarani -Vrs- Registrar, Cooperative Societies.

For Petitioner : M/s. Bhawani Sankar Panigrahi, Mr. D.K.Rout & K.C.Sahu

For Opp.Parties: Mr. A.K.Mishra, A.G.A.

JUDGMENT Decided on : 21.07.2022

SANJAY KU. MISHRA, J.

Being aggrieved and dissatisfied with the impugned Judgment/Order dtd. 19.02.2016 passed by the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar, in O.A. No. 1057 of 2015, vide which the said Original Application of the Petitioner was dismissed, the present Writ Petition has been preferred with a prayer to set aside the said Order so also the Office Order dtd. 02.12.2014, as at Annexure-4 to the Writ Petition, vide which his Application for appointment under the R.A. Scheme was rejected by the Authority. Further, a prayer has been made by the Petitioner to direct the Opp. Parties to allow his Application for compassionate appointment under Annexure-3 Series.

2. The factual matrix of the present case, in brief, is that the father of the Petitioner Shri Radheshyam Shabar, while working as a Driver in the Office of the Commercial Tax Officer, Investigating Unit, Bolangir, expired on 25.05.2011. The Petitioner, being an unemployed Graduate belonging to ST Community, applied for his engagement under the Rehabilitation Assistance Scheme (shortly "R.A. Scheme"), on 13.11.2011, to the present Opp. Party No. 5, consequent upon which the said Application was sent to the Collector,

Bolangir, for issuance of distress certificate. However, the present Opp. Parties No. 3 and 4, without considering the case of the Petitioner and without proper verification of distress condition of the family of the Petitioner so also without applying mind, rejected the Application for appointment of the Petitioner under the R.A. Scheme vide Order dtd. 02.12.2014 on the ground that the brother of the Petitioner is serving as contractual Health Worker. It was contended before the Tribunal that the elder brother of the Petitioner, who is presently working as a Health Worker on contractual basis and not permanently, is not residing in the family of the Petitioner and is living separately with his own family members much prior to the death of the father of the Petitioner and there is no relationship/nexus between the Petitioner's family and the family of his elder brother. It was also the case of the Petitioner before the Tribunal that his elder brother is not providing any financial help to the family of the Petitioner and they are now living with a lot of difficulty and after the death of his father a deed was executed between his elder brother and his mother for separation. But the case of the Petitioner having not found favour with by the Authority, the very purpose of providing appointment under the R.A. Scheme got frustrated.

3. The present Opp. Parties No. 3 to 5, being noticed, appeared before the Tribunal and filed their Counter indicating therein that as per the R.A. Scheme, the wife of the deceased is the first claimant for appointment. As the wife of the deceased was declared medically unfit, her elder son Gauranga Shabar was eligible for appointment in terms of Rule-2 (b) of the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 (Shortly "OCS (R.A.) Rules, 1990". However, the present Petitioner, who is the second son of the deceased Government servant, filed a medical certificate vide which the elder son of late Radheshyam Shabar was declared unfit for any job under the R.A. Scheme. Accordingly, the Joint Commissioner of Commercial Taxes, Bolangir Range, Bolangir, was requested to make an enquiry into the matter. Pursuant to the said request, an Enquiry Report was submitted to the CTO Mobile, Bolangir Range, Bolangir, indicating therein that the elder son of the deceased Government servant late Radheshyam Shabar is working as a contractual Health Worker and the present Petitioner, by suppressing the real fact, has applied for rehabilitation appointment, which is violative of the provisions under the R.A. Rules, 1990 and in terms of Rule-2 (a) (iii) of the OCS (R.A.) Rules, 1990, the present Petitioner is not entitled for a job under the R.A. Scheme. It was further contended by the present Opp. Party Nos. 3 to 5 before the Tribunal that the Explanation to Rule-2 (a) of the OCS (R.A.) Rules, 1990, amended for time to time, provides that the separation from the family has to be established by Registration Partition Deed made prior to the death of the Government Employee and no such deed was ever produced by the Petitioner before the Competent Authority to the said effect to

satisfy the concerned Authority that Gauranga Shabar, the elder brother of the Petitioner, was not residing with the family of the Petitioner and he was separated from the family prior to the death of the Petitioner's father Shri Radheshyam Shabar.

4. Considering the pleadings of the parties in the said Original Application so also provisions of the OCS (R.A.) Rules, 1990, i.e., Rule-2 (a) (iii) so also Explanation to the said Rule, the Tribunal dismissed O.A. No. 1057 of 2015 with an observation that in view of clear provisions under Rule-2 (a) (iii) of the OCS (R.A.) Rules, 1990 so also Explanation to the said Rule, the present Petitioner is not entitled for consideration of his case for appointment under R.A. Scheme and no illegality and irregularity has been committed by the Authority in passing the impugned Order dtd. 02.12.2014, as at Annexure-4 to the present Writ Petition. Rule-2 (a) (iii) of OCS (R.A.) Rules, 1990, which is annexed to the Counter Affidavit filed by the Opp. Parties No. 1 to 5 as Annexure- A/1, prescribes that none of the family members of the employee who has died while in service is already in the employment of the Government/Public or Private Sector or engaged in independent business with an earning above Rs. 20,000/- (Rupees twenty thousand) a year, is entitled to be appointed under the said OCS (R.A.) Rules, 1990. Similarly, Explanation to Rule-2 of the Orissa Civil Service (Rehabilitation Assistance) Rule, 1990 well explains that the income of any earning member will be taken into account for the purpose of assessing the Annual Gross Income of the family, if his separation from the family has not been established by a registered partition deed made prior to the death of the Government Employee. Hence, in view of the inevitable facts so also clear and unambiguous provisions in terms of Rule-2 (a) (iii) of the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 and the Explanation to the said Rule, the Tribunal, vide the impugned Order dtd. 19.02.2016, as at Annexure-5, came to a conclusion that there is no illegality or irregularity committed by the State-Opp. Parties while passing the said impugned Order dtd. 02.12.2014 and accordingly, dismissed the Original Application.

5. The learned Counsel for the Petitioner relied on the Judgments of the Apex Court in ***State of Madhya Pradesh & Others Vrs. Ashish Awasthi***, reported in 2021 (II) OLR (SC) 1072, ***The Secretary to Govt. Department of Education (Primary) and Others Vrs. Bheemesh Allis Bheemappa*** dtd. 16.12.2021 passed in Civil Appeal No. 7752 of 2021, ***Malaya Nanda Sethy Vrs. State of Orissa & Others*** dtd. 20.05.2022, in Civil Appeal No. 4103 of 2022 and unreported Judgments of this Hon'ble Court i.e. ***Subash Chandra Khatua Vrs. State of Odisha & Others*** dtd. 05.11.2020 in W.P.(C) No. 22678 of 2020, ***State of Odisha Vrs. Kartika Bhoi*** dtd. 25.04.2018, passed in W.P.(C) No. 4239 of

2018, to substantiate the prayer made in the present Writ Petition. However, on examination, it was ascertained that none of the said Judgments are applicable to the facts and circumstances of the present case.

6. Law is well settled that appointments on compassionate ground have to be made in accordance with the Rules, Regulations or Administrative Instructions taking into consideration the financial condition of the family of the deceased and Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian grounds. In the case of ***Life Insurance Corporation of India -Vs- Asha Ramchandra Ambekar (Mrs) and another,*** reported in (1994) 2 SCC 718, it has been held that Courts cannot order appointment on compassionate grounds dehors the provisions of statutory Regulations and instructions.

7. Further, in the case of ***General Manager (D & PB) and Others -Vrs- Kunti Tiwary and Another,*** reported in (2004) 7 SCC 271, the apex Court has held that criteria of penury is to be applied only in case of condition of the Petitioner who is without any means of livelihood and living hand to mouth that compassionate appointment was required to be accorded.

8. In another judgment of the apex Court in the case of ***Union of India and Another -Vrs- Shashank Goswami and another,*** reported in (2012) 11 SCC 307, it has been held at Paragraphs 9, 10 and 13, which are being quoted here-in-below for ready reference.

> *"9. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate ground is based on the premises that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right.*
>
> *10. As a rule, public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, applicant cannot claim appointment in a particular class/ground of post. Appointments on compassionate ground have to be made in accordance with the rules, regulation or administrative instructions taking into consideration the financial condition of the family of the decease.*

13. In Mumtaz Yunus Mulani (Smt) V. State of Maharashtra & Ors (2008) 11 SCC 384 , this Court examined the scope of employment on compassionate ground in a similar scheme making the dependent of an employee ineligible for the post in case the family receives terminal/ retiral benefits above the ceiling limit and held that the judgment in Govind Prakesh (supra) had been decided without considering earlier judgments which were binding on the Bench. The Court further held that the appointment has to be made considering the terms of the scheme and in case the scheme lays down a criterion that if the family of the deceased employee gets a particular amount as retiral/terminal benefits, dependent of the deceased employee would not be eligible for employment on compassionate grounds"

9. In ***A. Umarani Vrs. Registrar, Cooperative Societies***, reported in AIR 2004 SC 4504, while dealing with regard to issue of compassionate appointment, the Apex Court held that even the Supreme Court should not exercise the extra-ordinary jurisdiction under Article 142 issuing a direction to give compassionate appointment in contravention of the provisions of the Scheme/Rule etc. as the provisions have to be complied with mandatorily and any appointment given or ordered to be given in violation of the Scheme would be illegal.

10. Admittedly, the Petitioner in the present case not only gave false medical certificate to the Authority declaring his elder brother unfit for Government job but also failed to produce any Registered Partition Deed to satisfy the Authority that his brother was separated from the family prior to the death of his father.

11. In view of the facts and law, as discussed above, since the Petitioner gave false medical certificate declaring his elder brother to be unfit for any job under the R.A. Scheme and on enquiry it was revealed that his elder brother was working as a contractual Health Worker and no document in terms of the Explanation to Rule-2 of the OCS (R.A.) Rules, 1990 could be produced by the Petitioner to satisfy the Authority that his elder brother, who is/was working as a contractual Health Worker, was separated from the family by a Registered Partition Deed made prior to the death of his father, namely, Shri Radheshyam Shabar, the impugned Order dtd. 02.12.2014, as at Annexure-4 to the Writ Petition, which was also impugned in O.A. No. 1057 of 2015, was rightly affirmed vide Order dtd. 19.02.2016 passed in OA No. 1057 of 2015 by the Tribunal and the said Order does not call for any interference, as this Court does not find any error apparent on face of the record, in exercise of power conferred under Article 226 of the Constitution of India.

12. For the forgoing discussions, the Writ Petition merits no consideration and the same stands dismissed. No order as to costs.

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2022 (II) ILR - CUT-662

ARINDAM SINHA, J.

W.P.(C) NOS. 27381 OF 2019, 14243 OF 2021 & 16871 OF 2021

AMIYA KU. DAS & ORS. .....Petitioners

.V.

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

W.P.(C) NO. 14243 OF 2021
PRASANNA KU. JENA & ORS. .....Petitioners

.V.

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

AND

W.P.(C) NO. 16871 OF 2021
AMIYA KU. DAS & ORS. .....Petitioners

.V.

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

ODISHA POLICE SIGNAL SERVICE (Method of Recruitment and Condition of Service) ORDER, 2016 – Clause 21(4) – There is a merger of the two wings, i.e, Assistant Sub-Inspector (Mechanical) and Sub-Inspector (Operator) – Determination of inter-se seniority – It is well settled position of law that seniority would ordinary depend upon length of service, of course in accordance with rules, holding the field – Effect of – In the present case, there is no rule holding the field on conquences of merger – Held, Opp.Party is directed to cause the board to prepare fresh selection list, required by clause 21(4) as per order dated 11th April 2016, depending upon length of service of all personal holding present post of Sub-Inspector (Communication).

(Paras 19, 20)

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 394 : Nirmal Kumar v. State of Bihar
2. 1996 (1) OLR 209 : Ajit Kumar Ray v. Director, Higher Education Orissa
3. Supreme Court in Civil Appeal No. 6587 of 2003 (dtd. 31st March, 2011) : Deepak Agarwal v. State of Uttar Predesh
4. AIR 1998 SC 1882 : S.P. Shivprasad Pipal v. Union of India
5. AIR 2010 SC 3676 : Amarjeet Singh v. Devi Ratan.

For Petitioners : Mr. Sadasiva Patra
Mr. S.B. Panda
Ms. Saswati Mohapatra

For Opp.Parties: Mr. Y.S.P. Babu, A.G.A, Mr. Biswabihari Mohanty

ORDER Date of Order : 08.07.2022

ARINDAM SINHA, J.

1. Parties appear in support of their contentions in these writ petitions. The controversy appears to arise from order dated 11th April, 2016 of Government of Odisha, Home Department. It is Odisha Police Signals Service (Method of Recruitment and Conditions of Service) Order, 2016. Clause 21(4) in the order provides for inter se seniority. Petitioners in the writ petitions are aggrieved by sub-clause (4), which says as follows :

> *"(4) The inter se seniority in the rank of Inspector (Communication) and Sub-Inspector (Communication) shall be determined as per the position assigned in the select list prepared by the Board."*

2. The writ petitions were moved before this Bench on 16th December, 2021 after having had been specially assigned. They were heard on a few occasions.

3. Mr. Sadasiva Patra, learned advocate appears on behalf of petitioners in W.P.(C) no.27381 of 2019 and submits, his clients and private opposite parties were both recruited parallely in respective wings, Assistant Sub-Inspector (Mechanical) and Assistant Sub-Inspector (Operator). By the order there has been merger of the two wings. Inter se seniority to be fixed per sub-clause (4) cannot be on any other criteria but by reference to initial appointments.

4. On 6th April, 2022, Mr. Patra had prayed for direction upon opposite party no.2 (State) to produce merit list of petitioners and opposite party nos.4 to 22 in WP(C) no.27381 of 2019, on their appointments in years 1997 and 2003. He wanted production of consolidated merit list, from where, he had submitted, bifurcation was made in sending petitioners to 'mechanics' and said opposite parties, to 'operators'. Mr. Babu, learned advocate, Additional Government Advocate appears on behalf of State and refers to additional affidavit dated 23rd March, 2022, in which State said, pursuant to advertisement dated 7th August, 1996 published in local daily 'Dharitree' for recruitment to post of Assistant Sub-Inspector (operator/mechanic), interested candidates had applied. There were several qualifying tests, after which the candidates appeared before the Central Selection Board. The affidavit goes on to say that the Central Selection Board interviewed 49 candidates, out of whom 35 were selected as ASI (Operators).Then again said Board interviewed 53 candidates, out of whom 30 were selected as ASI (Mechanics). He submits, in absence of specific cadre rule, candidates were required to indicate their order of preference in the application.

5. Today Mr. Patra submits, the wing 'mechanics' is more specialized and had better quality of job application and pay. That is why his clients opted for the wing. However, promotional posts available were less in number. In spite of

being better than their counter parts in wing 'operators', his clients obtained promotion after said opposite parties, in their wing. However, on being promoted and thereafter the two separate wings being merged, date of reckoning for fixing inter se seniority must be reckoned from respective dates of initial appointment. This is because the wings were different in their requirements and other criteria. From the selection process they were different, irrespective of the common notice inviting applications for both the wings.

6. He draws attention to his clients' additional affidavit dated 5th January, 2022, in which following was said in paragraph 3 therein, reproduced below.

> *"3. That, it is submitted that in similar circumstances the seniority has been fixed in the Department of Ministry of Home Affairs of Govt. of India (Apex Body of wireless communication in India) vide Office Memorandum dtd.18.01.2019. For better appreciation it is submitted that like the present case in the Directorate of Co-ordination Police Wireless, two different cadres were there namely Radio Technician and Radio Operator and their training were same between the petitioners vis-à-vis private opposite parties. The Radio Technicals were promoted to Senior Technical Assistant where as the Radio Operators were promoted to station supervising officers in their own channel of promotion. After restructuring of cadre above two promotional posts were merged to communication officer. The seniority of above those employees were fixed on the basis of the entry into the grade i.e. joining in the feeder post which was circulated vide office memorandum dtd. 18.01.2019 which is filed herewith as Annexure-14."*

7. He relies on judgment of the Supreme Court in **Nirmal Kumar v. State of Bihar**, reported in **AIR 1998 SC 394**, paragraph 4, reproduced below.

> *"4. It is a well-settled position in law that seniority would ordinarily depend upon length of service subject, of course, to rules holding the field. That view has been taken by this Court in several cases and it is unnecessary to refer to all of them. In A. Janardhana v. Union of India,(1983) 2 SCR 936: (AIR 1983 SC 769), the situation was somewhat the same as here. The Court found that the method adopted for fixing seniority overlooked the character of appointments and pushed down persons validly appointed below others who had no justification to be given higher place. At page 960 (of SCR) : (at P. 781 of AIR), the Court observed:-*
>
> > *"It is an equally well recognised canon of service jurisprudence that in the absence of any other valid rule for determining inter se seniority of members belonging to the same service, the rule of continuous officiation or the length of service or the date of entering in service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Article 16."*
>
> *We may also refer to a very recent decision of this Court in K.S. Vora v. State of Gujarat, (1987) 5 JT 179: (AIR 1987 SC 2348). The High Court recorded a finding that there is no applicable rule in the matter of fixing inter se seniority in a situation*

of this type. In the absence of rules, the more equitable way of preparing the combined gradation list would be to take the total length of service in the common grade as the basis for determining inter se seniority. We would like to add that in regard to the Supervisors (now called Junior Engineers) serving in the three wings there is no dispute of the grade being the same. While we do not agree with the High Court that confirmation should be the basis and would substitute it by the length of service test, we would uphold the direction that in fixing the combined gradation list the inter se seniority of the incumbents in their respective departments would not be disturbed. Even if this be the test, the gradation list as published by Government has to be modified. We would accordingly confirm the conclusion of the High Court that Annexures 1 1, 11/1, 12, 13, 13/1, 15 and 16 should be quashed and a fresh combined gradation list has to be published. We have altered the test for fixing the seniority inter se generally but we have approved the direction of inter se seniority in their own departments to be respected. The respondent-State and its officers are directed to prepare and publish the fresh combined gradation list keeping the aforesaid directions in view."

He then relies on views taken by a Division Bench of this Court in **Ajit Kumar Ray v. Director, Higher Education Orissa**, reported in **1996 (1) OLR - 209** being that for determination of inter se seniority, general consideration of merit, educational qualification, age, past experience and several other factors are to be taken into account.

8. Ms. Mohapatra, learned advocate appears on behalf of petitioners in WP(C) no.16871 of 2021. She submits, her clients are in 'mechanics' wing. It being true that her clients got promotion later than 'operators', because of less promotional posts available in 'mechanics' wing, but for purpose of drafting combined gradation list on inter se seniority consequent to the merger, it is irrelevant that her clients were promoted later. This is because the wings were completely different. Her clients have nothing to say about promotional opportunities in wing 'operators'. However, on merger there has to be level playing field for purpose of determination of seniority since, the separate wings have now been brought together and the reckoning must be from the dates of appointment. More so, members of 'mechanics' wing had obtained their technical qualification much prior to members of 'operators' wing having got promotion in year 2010.

9. She relies on tentative gradation list as on 1st January, 2016 circulated by letter dated 3rd October, 2016 issued by Superintendent of Police, Signals. She draws attention to serial no.4 giving particulars of petitioner no.1. She demonstrates that the third and last technical qualification was achieved by petitioner no.1 in year 1993. It is thereafter on 31st December, 2012 that he got promotion to the post of Sub-Inspector (Communications). She then relies on

communication dated 4th April, 2012 issued by Inspector General of Police (Communications) to the Government saying, inter alia, the posts created for the Indian Reserve Battalion should maintain uniformity. She submits, uniformity between the operational and mechanical wings. Lastly, she refers to GO dated 15th March, 2021, whereby the Government rejected her clients' case for changing the select list prepared by the Board pursuant to clause 21(4) in said order of merger dated 11th April, 2016. Hence, her clients have moved Court. She relies on **judgment dated 31st March, 2011** of the Supreme Court in **Civil Appeal no.6587 of 2003 (Deepak Agarwal v. State of Uttar Predesh)**, wherein the Court in paragraph-30 said as reproduced below (Indian Kanoon print).

> *"30. In such circumstances, the Government may be well advised to have a re-look at the promotion policy to provide some opportunity of further promotion to the officers working on these posts."*

10. Mr. Mohanty, learned advocate appears on behalf of opposite party nos. 4 to 22 in W.P.(C) no.27381 of 2019. He submits, his clients were not impleaded in the other writ petitions. Court observes, that should not stand in the way since hearing of the writ petitions have been taken together, on participation of learned advocates appearing for all parties and Mr. Mohanty is on notice of all contentions put forward, recorded by Court in the order sheet. Object of pleadings, for notice of case, stands satisfied. Furthermore, said opposite parties were vigilant and had intervened to get themselves added as parties in one of the writ petitions.

11. Mr. Mohanty's clients were Assistant Sub-Inspector (Operators). He had earlier submitted, in the parallel wing, to which his clients belong, there were more promotional posts. His clients obtained promotion to rank of Sub-Inspector (Operators) in year, 2010. Impugned administrative order of 2016 provides for promotion from rank of Sub-Inspector to Inspector. One of the criteria is ten years service in the post of Sub-Inspector. This, petitioners do not have as they were promoted from being Assistant Sub-Inspector (Mechanical) to Sub-Inspector (Mechanical) later, in year, 2012. He submits with reference to clause 21(4) that the reckoning for preparing the select list was made on dates of promotion to the post SI, his clients having had obtained promotion in year 2010 and petitioners, thereafter in year 2012.

12. He had relied on judgment of the Supreme Court in **S.P. Shivprasad Pipal vs Union Of India,** reported in **AIR 1998 SC 1882**, paragraph-19 to submit, the writ petitions cannot be maintained and should be dismissed as petitioners have challenged merger of two posts. They cannot do so under the law declared thereby. He had submitted with reference to page-18 in his clients'

counter, there were more posts available for promotion in operational wing than the mechanical wing. There was common entrance. Different promotional prospects were known to all at the time of entrance. Petitioners having had accepted their appointments in the mechanical wing with less promotional prospects, cannot now challenge the merger on disparity in dates of promotion.

13. Today Mr. Mohanty relies on judgment of the Supreme Court in **Amarjeet Singh v. Devi Ratan,** reported in **AIR 2010 SC 3676**, paragraphs 24 and 28. Paragraph 24 is reproduced below.

> *"24. In the instant case, promotions had been made by two different DPC's held on 19-12-1998 and 22-1-1999. Both the DPC's had made promotions under different rules on different criterion and their promotions had been made with retrospective effect with different dates notionally. In the writ petition before the High Court, the promotion of the appellants had not been under challenge. The seniority which is consequential to the promotions could not be challenged without challenging the promotions."*

Ms. Mohapatra replies that there was no question of her clients challenging promotions given in a separate wing. The judgment is therefore distinguishable on facts. Mr. Patro adopts the submission as his reply as well.

14. The facts, as Court has been able to ascertain, are that there was notice issued for inviting applications for some posts of Assistant Sub-Inspector (ASI) operators and ASI mechanics, to be directly recruited by Odisha Police Signal Department. The notice was published in local newspaper 'Dharitree' on 7th August, 1986. Eligibility criteria were notified and both petitioners and private opposite parties in the writ petition, had applied. The process of selection, as stated in the affidavit filed by State and referred to above, appears to have been undertaken, as neither the several writ petitioners nor said private opposite parties could show anything otherwise. What transpires is, in the a pplication the candidates had to indicate their preference. It is, therefore, that there were a certain number of applicants for the post of ASI operator, from whom some few were selected and different number of candidates for the post of ASI mechanical, from whom some were selected. Also is a fact that Inspector General of Police, by relied upon communication dated 4th April, 2012, had said that posts created for the Indian Reserve Battalions should maintain uniformity regarding the two wings. As such, it is established that there were two separate wings. The Government then thought best to merge the wings to become a common post, at present Sub-Inspector (SI) (Communication).

15. There is no challenge to merger of the wings. Impugned sub-clause in merger order dated 11th April, 2016 has already been reproduced above. It is seen that thereby inter se seniority in rank of, inter alia, SI (Communication)

shall be determined as per position assigned in the select list prepared by the Board. It appears from submissions made at the Bar and materials on record that the select list was prepared taking into account SI operators having obtained promotion in year 2010 as had to have higher position in the table of seniority, over SIs in the mechanical wing, who had obtained their promotion in year 2012. Writ petitioners belong to the mechanical wing. It is demonstrated that they were a separate wing all along and had no connection with operations wing, right from the process of selection for appointment. They have said that they obtained their technical qualifications earlier than private opposite party nos. 4 to 22 having obtained promotion to the post of Sub-Inspector in year 2010. Mr. Mohanty submits, there is no pleading to this effect and he disputes this submission.

16. The difference in scope of work in the two wings has been indicated in the letter relied upon by Ms. Mohapatra, being letter dated 4th April, 2012 written by Inspector General of Police to the Government. First paragraph from said letter is reproduced below.

> *"Inviting a reference to the letter on the subject cited above, it is to intimate that Signals Estt comprise of two cadres viz. Operational and Mechanical in the field of Communication, where sophisticated sets and equipments are used in different channels/nets. The duty of the Operational cadre is to communicate/ informations/ messages pertaining to law & order, important administrative and security related matters. The Mechanical Cadre are to look after the maintenance, installation and take up repair/works."*

17. Of all the judgments relied upon by the parties, in context of the facts and circumstances, **Amarjeet Singh** (supra) and **Nirmal Kumar** (supra) are to be considered for instruction and application. Paragraph 24 in **Amarjeet Singh** (supra) has been reproduced above. Facts in that case become relevant. They were that appellants before the Supreme Court were appointed as Excise Inspectors under relevant rules. They became eligible to be considered for promotion to the next higher post. The rules stood amended w.e.f. 10th October, 1994. By the amendment, criterion of 'merit' was amended to be 'seniority subject to rejection of unfit'. A writ petition was filed by petitioner-appellants challenging the selection process for promotion under the rules. The High Court held that vacancies, which came into existence prior to 10th October, 1994 were to be filled up as per the un-amended rule. State of UP had preferred Special Leave Petition (SLP) and on 30th October, 1995 the Supreme Court passed interim order permitting State to make promotions as per amended rule but subject to outcome of the SLP. In view of the interim order 61 persons got promotion, subject to outcome of the SLP. The SLP was ultimately dismissed.

However, State did not revert the promotees but let them continue in the promoted post. Here, it would be appropriate to reproduce paragraph-14.

> *"14. In view of the above, the State Government ought to have reverted the respondents as their promotions were subject to the decisions of the said petition. In view of the fact that the respondents continued on a higher post under the orders of this Court for years together and even after dismissal of the petition filed by the state, and the exercise for making promotions was not undertaken by the state Authorities, the appellants should not suffer for no fault of theirs. It has fairly been conceded by learned counsel appearing for the respondents that had the exercise of making promotions been undertaken immediately after the order of this Court dated 19-8-1998, the appellants could have been promoted much earlier and they could have been senior to the respondents. Thus the question does arise as to whether appellants should be asked to suffer for the interim order passed by this Court in a case having no merits at all."*

18. After dismissal of the SLP the Departmental Promotional Committee (DPC) met and found that only 30 candidates were suitable for promotion, for filling up the vacancies, which came into existence prior to date of amendment (10th October, 1994). The DPC recommended and the unfilled vacancies were carried forward to enable State to fill them applying the amended rule. The DPC thereafter met again and made recommendation for promotion on the amended rule. After the two promotions, as recommended had happened, a seniority list dated 12th July, 2000 was issued, wherein appellants before the Supreme Court were placed above respondents. The respondents had approached the High Court challenging the seniority list. The High Court quashed the seniority list and another dated 26th July, 2002 was prepared. In this context, above reproduced paragraph-24 indicating that respondents in the Supreme Court had not challenged the promotion given to appellants pursuant to dismissal of the SLP. Not having done that they could not raise a dispute on seniority. The Supreme Court restored the earlier list dated 12th July, 2000. It is clear, facts in that case were different and the decision is not applicable to this case, where the wings being separate, petitioners cannot be held to have waived and thereby barred from raising dispute regarding preparation of combined seniority list on not having challenged earlier promotion granted in the operators wing.

19. In **Nirmal Kumar** (supra) facts appear to be similar to the case at hand. The Supreme Court was dealing with the dispute, where three different wings of engineers in department of agriculture had been amalgamated on 9th January, 1969. Combined gradation list was prepared giving rise to disputes. In those facts the Court said in paragraph-4, as reproduced above. The Court said, it is well settled position of law that seniority would ordinarily depend upon length of service subject, of course to rules holding in the field. In this case there is no rule

holding the field on consequence of merger and thereupon preparation of combined inter se seniority list. In **Nirmal Kumar** (supra) the Supreme Court directed for fresh seniority list.

20. Opposite party no.3 in W.P.(C) no.27381 of 2019 is directed to cause the Board to prepare fresh select list, required by clause 21(4) in order dated 11th April, 2016, depending upon length of service of all personnel holding present post of Sub-Inspector (Communication), by six weeks from date.

21. The writ petitions are disposed of.

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2022 (II) ILR - CUT-670

D. DASH, J.

RSA NO. 355 OF 2010

NIRMAL CHARAN KUND & ORS. ..... Appellants

.V.

TRILOKYANATH KUND & ORS. ..... Respondents

PROPERTY LAW – Whether the 1st Appellate Court is justified in passing a decree for permanent injunction against the Appellant/ defendant when the final ROR have been prepared under the provisions of OCH and PFL Act and there being prescribed forums under the said Act for rectifications of the mistakes, if any ? – Held, not justified – The First Appellate Court, instead of straight away passing a decree for permanent injunction, as foresaid, ought to have passed a decree for demarcation of the suit land of the plaintiff in consonance with the record and map finally published under the provision of OCH and PFL Act by pressing into service the provision of Order 7 Rule 7 of the Code – The decree of permanent injunction passed by the 1st Appellate Court set-aside – Appeal stands allowed in part.

For Appellants : Mr. S.P.Mishra, Senior Advocate
M/s. S.Nanda, B.S.Panigrahi, S.K.Sahoo,
S.S.Kashyap & S.K.Samantaray

For Respondents : Mr. A.K.Mohapatra-1 & S.C.Rath

JUDGMENT Date of Hearing : 19.07.2022 : Date of Judgment : 25.07.2022

D. DASH, J.

The Appellants, by filing this Appeal under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 23.07.2010 and 07.08.2010 respectively passed by the learned Additional District Judge, Kendrapara in Title Appeal No.10 of 2010.

By the same, the Appeal under section 96 of the Code filed by the unsuccessful Plaintiff before the Trial Court as the Appellant therein, whose legal representatives pursued that the Appeal present Respondents 1 to 4, has been allowed and the judgment and decree dated 18.01.2007 and 06.02.2007 respectively passed by the learned Civil Judge, Junior Division, Kendrapara in Civil Suit No.68 of 2004 have been set aside and the suit has been decreed restraining these Appellants (Defendants) or their agent or servants from interfering upon the suit land and making construction by encroaching upon the said land having due regard to the green demarcating fence between the suit plots and the plots of the Appellants (Defendants).

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 Trial Court.

3. The Plaintiff's case is that suit plots stated in the schedule of the plaint are his ancestral properties and those are under plot no.316, 317 and 2225. Those lands are said to be the homestead lands standing recorded in Khata No. 691. It is stated that the Plaintiff is in exclusive possession of the same with two Chakudna trees and two Palm trees standing to the western side. It is stated that the land under consolidation plot nos. 2226 and 2227 are adjacent to his lands and those belong to the Defendants and were lying vacant. In the year 2003, the Defendants attempted to encroach over the suit land for which a local survey knowing Amin was called to demarcate the boundary lines of the suit land of the Plaintiff and Defendants. The private Amin identified the boundary of the suit land by stating that those trees are within the boundary of the suit land of the Plaintiff and then the Defendants had admitted the said fact. But then again after demarcation, the Defendants again claimed those Palm trees as their own and threatened to cut the same for which FIR had been lodged at the Police Out Post. The matter was then settled that the suit land has to be demarcated by Tahasil Amin. It is stated that as the Defendants did not take any step for demarcation, the Plaintiff filed Demarcation Case No. 79 of 2003 when the Defendants created problems in all other plots. The measurement could not be made. On 18.11.2003,

the Defendants further attempted to cut the trees. So, the matter had been referred to the Sarpanch. The Defendants then agreed for demarcation of the suit plots but it was of no avail when finally on 24.05.2006, the Defendants were found to have collected bricks and other materials for putting up construction over the suit land. So the suit has come to be filed.

4. The Defendants, in their written statement, have questioned the description of the land, as given in the plaint, to be ambiguous. The specific case of the Defendants is that the suit plots of the Plaintiff in total as has been shown in the plaint schedule although is stated to be measuring Ac.0.39 decimals; but in the hal map, the suit plots in total measure Ac.0.36 decimals which, in the field, is actually Ac.0.37 decimals 6 links, as has been seen by Amin while making the measurement on 22.05.2004. The Defendants assert that they are putting up the constructions over their own land and have never encroached upon any portion of the suit land nor have any mind to do so.

5. On the above rival pleadings, the Trial Court having framed eleven issues, answered issue no.5, which is the crucial one that the Plaintiff has failed to prove his possession of the land as per the Hal Record of Right in answering the issue as to possession. The Trial Court's finding is that with the available evidence, the Plaintiff cannot be said to be in exclusive possession of Palm and Chakunda trees, which situate over his land. On the next issue as to the demarcation made by the Amin establishes the area of the parties and boundary line as per the Record of Right showing the ownership of the Palm trees and Chakudna trees in possession of the Plaintiff standing over the suit land, finding has been returned in the negative. The other issues having been answered against the Plaintiff, the suit stood finally dismissed.

The unsuccessful Plaintiff, having carried the Appeal, the same has been allowed.

6. The Appeal has been admitted on 08.07.2011 to answer the following substantial questions of law :-

> "A. Whether the learned lower appellate court has committed an error of law in holding that the suit for injunction simpliciter was maintainable when the consolidation records that the extent of land recorded in the name of the Plaintiff was 39 decimals when he is not in physical possession of the whole and said area as per the final map is 36 decimals, which was involved in the suit?;
>
> B. Whether the land records have been prepared under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short, 'the OCH

> & PFL Act') and there is a mechanism under the said Act for redressal of the grievance with regard to the correctness of such recording, the learned lower appellate court could have held that the plaintiffs suit for injunction simpliciter over the suit land not recorded in his name in the consolidation operation is maintainable?"

7. Learned Counsel for the Appellants submitted that when the Defendants have disputed the title and possession of the Plaintiffs over Ac.0.39 decimals of land and the Plaintiff is said to be in possession of Ac.0.37 decimals and 6 links of land, in field as against the map area coming to Ac.0.37 decimals; the First Appellate Court has erred in law by passing a decree for permanent injunction in the absence of any prayer for declaration of title over the land of Ac.0.39 decimals in favour of the Plaintiff and a finding of conclusive nature on that. He further submitted that when admittedly, the demarcation of the suit land, as applied for, has not been made and reached finality, the First Appellate Court ought not to have passed an order of injunction which itself appears to be vague. He submitted that the final records having been prepared under the provisions of OCH & PFL Act and there being prescribed forums under the said Act for rectification of the mistakes, if any, the First Appellate Court, on the face of such claim of mistake, as projected by the Defendant, is not right in passing the order of decree for injunction, which cannot even be executable with certainty.

8. Learned counsel for the Respondents submitted all in favour of the findings returned by the First Appellate Court. It was submitted that the Plaintiff's prayer in the suit is very clear for issuance permanent injunction against the Defendants not to come upon the suit land and cut any trees standing over the suit land as also not to put up any construction over the suit land which has been described at the foot of the plaint and, therefore, the Defendants by merely saying that the suit plots together do not measure Ac.0.39 decimals and as per the map finally prepared in the Consolidation Operation, the area measures Ac.0.36 decimals when in the field, its area is Ac.0.37.06 decimals, the suit filed by the Plaintiff, without advancing a prayer for declaration of right, title and interest over the suit land and simply making a prayer for permanent injunction, cannot be said to be falling foul of the proviso to section 34 of the Specific Performance of Relief Act.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement.

10. The suit land, as described in the plaint, comprises of three plots in total measuring Ac.0.39 decimals. It is ascertained by the Defendants that although in the Consolidation Record, the total area of these three plots, i.e., 316, 317 and 2225 has been shown to be Ac.0.39 decimals if the area is computed from the final map prepared in the Consolidation Operation, it would come to Ac.0.36 decimals when they say that in the field the Plaintiff's possession of these three plots actually concern with an area of Ac.0.37.06 decimals. Thus it is said that there has been a reduction of the area in the map and in the field, which is not in consonance with the area as indicated in the Record of Right and also the possession in the field.

In such state of affair in the pleading, when the evidence is not clear before the Court with regard to the above aspect of measurement of the suit land, the First Appellate Court, in my view has made an erroneous approach in saying that the burden of proof shifts on the Defendants to establish that the area is less in the field which was recorded on the ROR and if the Plaintiff is claiming the reduced area to have been there in the adjacent plots of the Defendants, it is for the Defendants to dispel the same. Fact remains that when P.W.1 has stated that the suit plots were demarcated by a private Amin, he has not filed and proved said Amin report. It is his evidence that on 22.05.2004, the Amin had measured the suit plots in his presence but he did not complete the measurement and his evidence is silent as to if any report has been presented by Amin and what happened in the said demarcation case. On the other hand, the Defendants have examined one private Amin, who has narrated in detail about the demarcation and stated about the total extent of land of the suit plots in comparison of the land records, map etc. He has also stated that the area of the plots of the Defendants is adjacent to the suit plots is in tact and comes to Ac.0.23 decimals.

In such state of affair in the evidence, the First Appellate Court having ordered that the Defendants are permanently restrained from entering upon the suit land or to make any construction by encroaching any portion of the suit land having due regard to the green demarcating fence between the suit plots and their plots; the same itself appears to be vague. Keeping in view the rival case as well as the evidence on record, the First Appellate Court, instead of straight away passing a decree for permanent injunction, as aforesaid, ought to have passed a decree for demarcation of the suit land of the Plaintiff in consonance with the record and map finally published under the provision of OCH & PFL Act by pressing into service the provision of

Order 7 Rule 7 of the Code. Moreso with the unverified disparity in the area in the record of right and map, the decree for permanent injunction, as passed being more likely to be inexecutable, such a course adopted by the First Appellate Court cannot sustain. In that view of the matter, the decree for permanent injunction, as passed by the First Appellate Court, is hereby set aside and instead, the Plaintiff's suit is decreed by passing a decree for demarcation of the suit land on comparison of the record of rights published in the Consolidation Operation and the final map prepared therein leaving it open to the Plaintiff to execute the said decree seeking deputation of Civil Court Commissioner to complete the exercise, as aforesaid.

11. In the result, the Appeal stands allowed in part, with the modification as indicated above. There shall, however, be no order as to cost.

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2022 (II) ILR - CUT-675

D. DASH, J.

RSA NO. 323 OF 2015

NARAYAN MOHANTA ..... Appellant

.V.

KRUPASINDHU MOHANTA & ORS. .....Respondents

WILL – Mode of proving – Held, the mode of proving of a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will under section 63 of the Indian Succession Act, 1925 and section 68 of the Indian Evidence Act, 1872.

Case Laws Relied on and Referred to :-

1. AIR 1959 SC 443 : H. Venkatachalla's Iyengar Vrs. B.N. Thimmajamma
2. AIR 1962 SC 567 : Rani Purnima Debi Vs.Kumar Khagendra Narayan Deb
3. AIR 1964 SC 529 : Shashi Kumar Banerjee v. Subodh Kumar Banerjee
4. AIR 1977 SC 77 : Jaswant Kaur v. Amrit Kaur
5. (1991) 1 OLR 551 : Radha Mohan Vr. Hari Bandhu
6. AIR 2002 SC 637 : Madhukar D. Shende Vrs. Tarabai Abe Shedage

For Appellant : M/s. Jagjit Panda, P.Das.

For Respondents: M/s. S.K.Nayak-2, Kintara, G.C.Ray, A.Behera & S.K.Nayak

JUDGMENT Date of Hearing : 13.07.2022 : Date of Judgment : 25.07.2022

D. DASH, J.

The Appellant by filing this Appeal under Section 100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and preliminary decree passed by the learned Addl. District Judge, Rairangpur in RFA No.05 of 2012.

By the same, the Appeal filed by the present Appellant under Section-96 of the of the Code being the unsuccessful Plaintiff in the suit has been dismissed and thereby the common judgment and preliminary decree passed by the learned Civil Judge (Senior Division), Rairangpur in Title Suit No.114 of 2001 and Title Suit No.116 of 2001 have been confirmed.

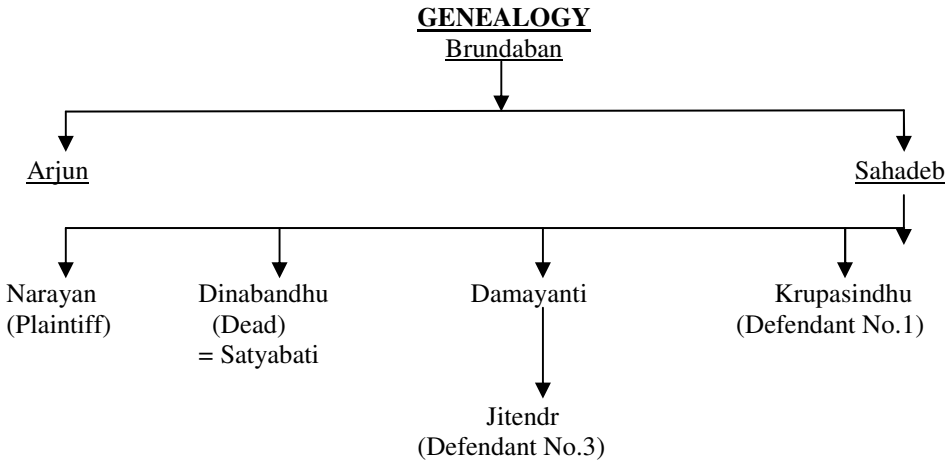
2. This Appellant as the sole Plaintiff had filed the suit i.e. Title Suit No.114 of 2001 for partition of the property described in Schedule-'B' and 'B-1' of the plaint arraigning the Respondents as the Defendants. The Defendant No.3 as the Plaintiff filed Title Suit No.116 of 2001 seeking declaration of his right, title and confirmation of possession over KA Schedule land claiming the same to have come to his hands consequent upon the bequeath made by the Satyabati in her favour by executing a Will. The Trial Court had taken up two suits for analogous hearing. The suit i.e. Title Suit No.114 of 2001, being preliminary decreed; the Plaintiff (Respondent), the Appellant No.1 (Defendant No.1) and Respondent No.2 have been held entitled to $1/4^{th}$ share each over the suit land. The Title Suit No. 116 of 2001 has been decreed partly. The Respondent No.3 (Plaintiff No.2) has been held entitled $1/4^{th}$ share over the land which is the subject matter of the said suit. The present Appellant being aggrieved by the common judgment and preliminary decree passed by the Trial Court having carried the Appeal has been unsuccessful.

The Appellant having died during pendency of the First Appeal, his legal representatives are come on record and are pursuing this Second Appeal.

The Respondent No.1 having died during pendency of the First Appeal, his legal Representatives are on record.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Title Suit No.114 of 2001.

3. As per the case of the Plaintiff; the inter se relationship of the parties run as under:-



Brundaban who is the common ancestor of the parties had lands at mouza Ichinda. On his death, his two sons namely, Arjuna and Sahadev succeeded to all those properties and as such the said lands were recorded in their names under Sabik Khata No.2. In course of time, Arjun and Sahadev separated themselves in metes and bounds and possessed land separately as of their shares being the owners. On the death of Sahadev, his three sons and one daughter Damayanti inherited the properties. They also purchased some land at village Redam in the name of Damayanti. It is stated that Damayanti being satisfied with the same had relinquished her right over the land of her father. So the Plaintiff and his brothers cultivated the land in separate portions for their convenience without there being any partition in metes and bounds. In the record of the Hal settlement, the land allotted to Sahadev out of the land under Sabik Khata No. 2 stood jointly recorded in the name of Plaintiff and his brother under Khata No. 174. Besides the above, some homestead land allotted to Sahadev out of Sabik Khata No.2 was wrongly recorded in Khata No.55. But the property is the property of the brothers. On 30.04.2001, the Plaintiff asked Defendant No.1 for partition of the Schedule-B and B-1 properties coming under Hal Khata No.74 and Khata No.55 respectively. Since, the Defendant No.1 turned down the offer, Plaintiff filed the suit for partition.

4. The Defendant Nos.2 & 3 contested the suit by filing separate written statement.

While traversing the plaint averments, the Defendant No.2 states that her brothers had never purchased any land in her name. She also denies to have ever relinquished her right over the suit land. It is stated that after Sahadev, his sons had partitioned his land in metes and bounds. On 17.12.1993, Dinabandhu died and his widow Satyabati succeeded to the share of Dinabandhu. During lifetime of Dinabandhu, the Defendant No.2 with her family were staying with him. After Dinabandhu, Defendant No.3 namely, Jitendra was looking after Satyabati. So Satyabati executed the Will in favour of Defendant No.3, who happens to be the son of Defendant No.2 and as such the Defendant No.3 based on such bequeath under the Will stepped into the shoes of the Satyabati on her death in respect of the interest that Satyabati had over the land which her husband had.

5. The Defendant No.3 in his written statement has stated that the three sons of Sahadev had partitioned amongst themselves without giving any share to Damayanti. Dinabandhu is stated to be in occupation of Ac.2.60 decimals of land. He being issueless had brought the parents of Defendant No.3 to his house. The land under possession of Dinabandhu has been better described in Schedule-M of the written statement. On the death of Dinabandhu, Satyabati being the wife succeeded to his properties. She had executed a Will on 21.12.1993 bequeathing her land in favour of Defendant No.3. On the death of Satyabati, the Defendant No.3 being the owner of the land has remained in possession of those lands.

6. At this stage, it may be stated that Defendant No.3 as the Plaintiff has also filed the suit i.e. Title Suit No.116 of 2001 seeking declaration of his right, title and interest over the land covered under the said Will with further prayer to confirm his possession over the same. The Plaintiff being the Defendant in Title Suit No. 116 of 2001 in that suit, challenged the factum of partition of the properties amongst the brothers in metes and bounds. It is stated that they with Dinabandhu had jointly purchased land at Rendam in the name of Damayanti and Damayanti had relinquished her right over the suit land. It is also stated that after death of Damayanti, Satyabati suffered from various chronic diseases and they were looking after her. She was never in a position to implication of Will nor was able to move and execute the Will as projected by Defendant No.3 and that execution of the so called Will is also questioned to be without any authority by the Testatrix namely, Satyabati.

7. In the above situation, the Trial Court had rightly taken both the suits for analogous hearing. In framing nine issues on the rival pleadings; coming

to answer issue no.6 with regard to relinquishment of the share of Damayanti over the property left by Sahadev, upon examination of evidence and their evaluation, the answer has been returned that there was never any relinquishment by Damayanti. Next proceeding to answer issue no.5 with regard to complete partition amongst the children of Sahadev upon detail discussion of evidence and their assessment, the Trial Court has answered the same in saying that there was no such partition in metes and bounds.

Then proceeding to answer the other important issue with regard to the execution and effect of the Will executed by Satyabati on 21.12.1993 admitted in evidence and marked Ext.A, the evidence let in by the parties have been scanned. The Trial Court has finally answered that Satyabati had validly executed the Will bequeathing her interest over the suit land in favour of the Defendant No.3 namely, Jitendra.

Having said as above, by applying the provision of Hindu Succession Act, 1956 as it stood after amendment introduced by the Amendment Act No.39 of 2005, the Plaintiff, Defendant No.1, their brother-Dinabandhu and Defendant No.2 have been held entitled to 1/4th share each over the suit land.

8. The Plaintiff being aggrieved by the said common judgment and preliminary decree had carried Appeal. The First Appellate Court in answering contentions raised before it with regard to the valid execution of the Will and its effect has affirmed, the finding of the Trial Court favouring Will to be given due effect to. Answers to the other issues as have been rendered by the Trial Court having been so affirmed. The Appeal has been dismissed.

9. This Appeal has been admitted to answer the following substantial questions of law:-

> (a) Whether the Courts below are right in recording the finding that the Will (Ext.A) has been duly executed by the Testatrix namely, Satyabati and it was so attested as required under law?
>
> (b) Whether the Courts below are right in holding that the execution of the Will (Ext.A) is free from any such suspicious circumstances so as to be given effect to as has been done?

10. Learned Counsel for the Appellant submited that the Courts below are not right in holding that Defendant No.3 has established the claim over the property by virtue of the Will Ext.A said to have been executed by Satyabati. He submitted that the evidence on record when are wholly insufficient to

record the finding that the Defendant No.3 as the beneficiary under the Will has proved the due execution and attestation of the Will, the Courts below have gone wrong in accepting the Will, Ext.A, as a Will executed by Satyabati so as to be given effect to. He submitted that the suspicious circumstances surrounding will having not been removed by the Defendant No.3 by leading, clear, cogent and acceptable evidence, the Courts below ought to have answered that issue in saying that the Will is not acceptable in the eye of law and therefore, the same ought to have been eschewed from consideration in support of the claim over the suit property as advanced by Defendant No.3.

11. Learned Counsel for the Respondents on the other hand submitted all in favour of the concurrent finding rendered by the Courts below. According to him, the circumstances which had been highlighted before the Courts below and are also highlighted here are not at all suspicious and on the basis of the evidence on record, the Defendant No.3 having duly proved the execution of the Will by Satyabati and its attestation as required under law, the Courts below did commit no mistake in recording the finding in favour of the Will.

12. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

13. In the instant case, the substantial questions of law standing to be answered concern with the sustainability of the Will said to have been executed by the Testatrix, Satyabati by bequeathing the properties in favour of the Defendant No.3 who is the beneficiaries under it.

14. At this juncture, before going to have a look at the evidence on record in judging the sustainability of the finding of the Courts below in upholding the Will, Ext.A; the settled position of law are required to be taken note of.

15. In case of ***H. Venkatachalla's Iyengar Vrs. B.N. Thimmajamma*****;** AIR 1959 SC 443, which has been reiterated in case of ***Rani Purnima Debi Vs.Kumar Khagendra Narayan Deb***; AIR 1962 SC 567 and in case of ***Shashi Kumar Banerjee v. Subodh Kumar Banerjee***; AIR 1964 SC 529, the Hon'ble Apex Court has held that:-

> "The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S.63 of the Indian Succession Act. The onus of proving the will is

> on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations".

The matter would thus stand for examination as to whether the beneficiary under the Will i.e. the Defendant No.3 has succeeded in establishing that the will was duly executed and attested and there is no such suspicious circumstance coming to stand on the way.

16. In case of ***Jaswant Kaur v. Amrit Kaur***; AIR 1977 SC 77, it has been said that:-

> "There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *R.Venkatachala Iyengar v. B.N. Thirnmajamma & Others*. (1) The Court, speaking through Gajendragadkar J., laid down in that case the following positions:-
>
> 1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters.
>
> As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
>
> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 68 of the Evidence Act, one attesting witness at least has .been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.
>
> 3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances

in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

17. In case of ***Radha Mohan Vr. Hari Bandhu***; (1991) 1 OLR 551, examining the matter of execution and attestation as contained in the provisions of Section-68 of the Evidence Act; it has been held that:-

"Execution means valid, proper and voluntary execution by signing the document out of free will with intention to give effect to it. Simply signing does not mean that the document has been executed. The executants should have appreciated an understood the contents. The mind should have moved with the pen. Whereas 'attestation' is for the purpose ensuring that the executants was the free agent and there was no fraud or pressure. When a document is required to be attested, the attesting witness shall be present to testify execution. It is meant to ensure that there has been no fraud or other vitiating circumstances".

18. In case of ***Madhukar D. Shende Vrs. Tarabai Abe Shedage***; AIR 2002 SC 637, which it has again been stated as under:-

> "The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers."

19. In the light of the aforesaid settled principles and with those as the touchstones, the case in hand has to be approached by having a look at the evidence so as to answer the substantial questions of law.

The Will has been admitted in evidence and marked Ext.A and it is in Odia. The Testatrix, Satyabati has signed on each page of the Will which consists of three pages. The Will has been written on stamp papers but not registered. the document Will being not compulsorily registerable for that reason, no such suspicion over the document can be entertained when for that the Will cannot be said to be having no legal sanction/backing for taking effect. The Testatrix Satyabati has signed in Odia and she is also the purchaser of the stamp papers which have been purchased on that very day of execution of the Will i.e. on 21.12.1993 and she has signed on the reverse side of the stamp papers in taken of said purchases. Besides Satyabati, the Testatrix, four other witnesses have signed on the said Will and the scribe of the Will being an Advocate's Clerk has signed with his endorsement at the foot of the document. All the four witnesses have signed on each page of the Will. True it is that there is no endorsement at the foot of the document that the contents of the Will were read over and explained to the Testatrix and she put her signatures after having understanding those to have been correctly written under her instructions, but that in my view is not of much significance in the case since here it is found that the Testatrix is not illiterate. She has signed in Odia and the Will too has been written in Odia. The scribe of the document examined as D.W. 3 and the attesting witness examined as D.W. 4 have deposed on oath that the contents of the Will were

read over and explained to the Testatrix. That part of the evidence has neither been shaken no any such features to entertain doubt over his version has come to surface. When also no any other feature surface in their evidence to infer even remotely that they are lying on that score. So, this does not stand as a suspicious circumstance surrounding execution of the Will, when through evidence of D.Ws. 3 and 4, that aspect stand explained.

20. True it is that here the Testatrix has died after about 13 days of execution of the Will. Given a look at the age of the Testatrix at that time which stood at forty five, normally a doubt would have arisen in mind as to why at such age she would be executing the Will. But with the pleading that she was suffering from chronic diseases and when here admittedly the death has taken place within two weeks of the execution of the Will, rather that circumstance in my view stand to provide justification for the Testatrix in her action of execution of the Will. The evidence of D.W.3 & 4 having been carefully gone through the Courts below have concurrently found that Satyabati was in a free state of mind to consciously execute the Will. The evidence on record are there to show that Dinabandhu and Satyabati were issueless and for that they had brought Damayanti, the mother of Defendant No.3 with her family, who used to stay with them and look after them. This however is said to be an introduction by relying on the recital in the Will that their stay was of recent origin. But if we go through the evidence of P.W. 2, it becomes clear that they were staying from the time when Defendant No.3 was five years old and therefore the recital in the Will on that score which too appears to be ambiguous is not a circumstance to adversely view the execution of the Will.

With the facts and circumstances as those emanate from the evidence and discussed as above; this Court is led to answer the substantial questions of law in saying that the Courts below are right in holding the Will, Ext.A to have been duly proved by the Defendant No.3 by leading clear, cogent and acceptable evidence with regard to its execution and attestation as required under Section-63 of the Indian Succession Act read with Section-68 of the Evidence Act. The substantial questions of law are answered accordingly which run to confirm the judgments and decrees passed by the learned Courts below.

21. In the result, the Appeal stands dismissed. There shall however no order as to cost.

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2022 (II) ILR - CUT-685

S. PUJAHARI, J.

CRLMC NO. 458 OF 2021

RAHUL KANHAR ..... Petitioner

.V.

STATE OF ODISHA ..... Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 451, 457 r/w section 56(2-a) of the Orissa Forest Act, 1972 – Whether section 56 of the 1972 Act can take away the power of Court vested in it under section 451 and 457 of Cr.P.C ? – Held, No.

Case Law Relied on and Referred to :-

1. (2008) 14 SCC 624 : State of Madhya Pradesh and Others v. Madhukar Rao
2. (2003)24 OCR (SC) 444 : Sunderbhai Ambala Desai v. State of Gujarat
3. (2004) 4 SCC 129 : State of West Bengal vrs. Sujit Kumar Rana

For Petitioner : M/s. Bibhuti Bhusan Mishra, J.Rath, G.R.Nayak
For Opp.Party : Counsel for the State

ORDER Date of Order : 21.07.2022

S. PUJAHARI, J.

1. This matter is taken up through Hybrid mode.

2. This application under Section 482 of Cr.P.C. has been filed by the Petitioner with a prayer to quash the order dated 8.2.2021 passed by the learned Additional District & Sessions Judge, Boudh in Criminal Revision No. 01 of 2020 confirming the order dated 23.11.2020 passed by the learned S.D.J.M., Boudh in Misc. Case No. 34 of 2020, with a direction to release the seized motor cycle bearing registration number OD-27-B-5854 in his favour.

3. Heard the learned counsel for the Petitioner and the learned counsel for the State.

4. As it appears the Petitioner's motor cycle was seized in connection with an offence stated to have been committed under the Wildlife (Protection) Act. Learned S.D.J.M., Boudh vide order dated 23.11.2020 passed in Misc. Case No.34 of 2020 rejected such prayer on the ground that the case was under investigation under Section 50 (8) of the Wildlife Protection Act by the Assistant Conservator of Forests of Mahanadi Wildlife Division, Nayagarh, and declined to release the same under Section 457 of

Cr. P.C. When a revision was carried against the said order, the same was confirmed vide the order impugned, assigning the reason that the aforesaid being the property of the State was incapable of being released by the SDJM under Section 457 of Cr. P.C., a confiscation proceeding under Section 56 (2-a) of the Orissa Forest Act had already been initiated.

5. Learned counsel for the Petitioner submits that Section 56 of the Orissa Forest Act has no application to this case and the learned Magistrate as such was not bereft of jurisdiction to allow interim release of the motor cycle in view of the power vested under Section 451 or 457 of the Code of Criminal Procedure, as the case may be. In this regard, he has drawn the notice of this Court to the decision rendered by the apex Court in the case of **State of Madhya Pradesh and Others v. Madhukar Rao**, reported in **(2008) 14 SCC 624**. In such premises, it is submitted that the impugned order be quashed and on taking note of the facts and submissions, especially the law laid down in the case of **Sunderbhai Ambala Desai v. State of Gujarat**, reported in **(2003)24 OCR (SC) 444**, the motor cycle in question be released in favour of the Petitioner interimly on suitable terms and conditions as this Court may deem it just and proper.

6. Learned counsel for the State, however, has defended the impugned order passed by the learned Magistrate, which has been confirmed in the revision.

7. Before appreciating the contention of the learned counsel for the parties on the question of sustainability of the impugned orders, it would be apposite to have a look to Section 56 of the Orissa Forest Act, which reads as thus:-

> "56. Seizure of property liable to confiscation – (1) When there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.
>
> (2) Every officer seizing any property under this section shall place, on such property a mark indicating that the same has been so seized and shall, as soon as may be, except where the offender agrees in writing to get the offence compounded, 1 [either produce the property seized before an officer not below the rank of an Assistant Conservator of Forests authorised by the State Government in this behalf by notification (hereinafter referred to as the authorised officer) or] make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made :

Provided that, when the forest produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer make, as soon as may be, a report of the circumstances to his official superior and the Divisional Forest Officer.

[(2-a) When an authorised officer seizes any forest produce under sub-section (1) or where any such forest produce is produced before him under sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, 3[he shall] order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence.

(2-b) No order confiscating any property shall be made under Sub-section (2-a) unless the person from whom the property is seized is given –

(a) a notice in writing informing him of the grounds, on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable times as may be specified in the notice against the grounds for confiscation; and

(c) a reasonable opportunity of being heard in the manner.

(2-c) Without prejudice to the provisions of Subsection (2-b), no order of confiscation under Sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorised officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool, rope, chain, boat, vehicle or cattle, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.

(2-d) Any Forest Officer not below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may, within thirty days from the date of the order of confiscation by the authorised officer under Subsection (2-a), either suo motu or on application, call for and examine the records of the case and may make such inquiry or cause such inquiry to be made and pass such orders as he may think fit:

Provided, that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(2-e) Any person aggrieved by an order passed under Sub-section (2-a) or Sub-section (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District Judge having jurisdiction over the area in which the property has been seized, and the District Judge shall, after giving an opportunity to the parties to be heard, pass such order as he may think fit and the order of the District Judge so passed shall be final.]

(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence is paid or until an order of the Magistrate directing its disposal is received.

[Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release.]"

8. Forest offence has been defined under Section 2(e) of the Orissa Forest Act, which is as follows:-

> "Forest Offence" - means an offence punishable under this Act or under the rules and includes the abetment of a forest offence;

9. A bare perusal of Section 56 of the Orissa Forest Act would go to show that the authorized officer is competent to make confiscation of the forest produce along with tools, ropes, chains, boats, vehicles or cattle used in committing such offence in exercise of the power under Section 56(2-a) and while the confiscation proceeding has been initiated, the court prosecuting the offenders, cannot invoke the jurisdiction under Section 457 Cr.P.C. for interim release either the forest produce or the tool, rope, chain, boat, vehicle or cattle used in committing such offence.

10. Admittedly, in this case the offence allegedly committed is one under the Wildlife Protection Act. Therefore, the very initiation of the proceeding under Section 56(2-a) of the Orissa Forest Act for confiscation of the motorcycle seized for the alleged commission of offence under the Wildlife Protection Act is misconceived.

11. Furthermore, in the case of Madhukar Rao (supra), the apex Court in no uncertain terms affirmed the power of the Magistrate to exercise jurisdiction under Sections 451 and 457 Cr.P.C. for release of any articles seized in connection with such cases. Learned Magistrate in oblivious to the aforesaid decision rendered in the case of Madhukar Rao (supra) refused to exercise the jurisdiction on the ground that the investigation is in progress. The said ground is unsustainable inasmuch as the apex Court in the case of ***Sundarbhai Ambala Desai vrs. State of Gujarat***, reported in (2003) 24 OCR (SC) 444 in paragraph 17 have held as follows:

> "Whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time."

12. It is also not known how the seized motorcycle allegedly used in commission of offence, is essential for further investigation. So the ground assigned by the learned S.D.J.M for rejection of the prayer is misconceived and the learned S.D.J.M appears to have exercised the jurisdiction vested with him with material irregularity. Furthermore, in the revision the learned Addl. Sessions Judge vide the impugned order confirmed the same though on

different reasons, which was also on a misconceived notion that since Section 56 of the Orissa Forest Act prohibits interim release of the articles in favour of the owner once a proceeding under Section 56 of the Orissa Forest Act has been initiated, the prayer cannot be acceded to or in other words the prayer made has been rendered infructuous. So also in this regard learned Addl. Sessions Judge has placed reliance on a decision of the apex Court in the case of ***State of West Bengal vrs. Sujit Kumar Rana,*** reported in (2004) 4 SCC 129. Furthermore, though learned Addl. Sessions Judge has referred to the statutory provision as well as the decisions rendered, but applied them wrongly. The same is apparent on the fact that when an offence is committed under the Orissa Forest Act in respect of any forest produce the same, the authorized officer assumes jurisdiction to initiate a proceeding under Section 56 of the Orissa Forest Act for confiscation. But in view of the definition of the 'offence' under the Orissa Forest Act, the very initiation of the confiscation proceeding under Section 56 of the Orissa Forest Act in the present case is incompetent one. In such a situation, the learned Addl. Sessions Judge could have held that by invoking the jurisdiction under Section 56 of the Orissa Forest Act, which was incompetent, the same cannot take away the power of the court vested in it under Section 451 and 457 Cr.P.C. The same is more so when exercise of jurisdiction under Section 56 of the Orissa Forest Act is palpably illegal. In such premises, even if Section 56 of the Orissa Forest Act prohibits for interim release of the articles seized, once the confiscation proceeding is initiated in respect of the articles seized, learned Addl. Sessions Judge could not have refused to release the same particularly when in the case of ***Madhukar Rao*** (supra) it has been held that the power of the Magistrate under Sections 451 and 457 Cr.P.C., as the case may be, for interim release of seized property is not ousted.

13. For the said reason, this Court quashes both the orders and remits the matter back to the learned S.D.J.M., Boudh to exercise its jurisdiction for interim release of the motor cycle seized and pass a reasoned order, not later than fifteen days of receipt of the certified copy of this order.

14. With the aforesaid order, this CRLMC stands disposed of.

15. Urgent certified copy of this order be granted on proper application.

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2022 (II) ILR - CUT-690

S. PUJAHARI, J.

CRLMC NO. 1367 OF 2022

BRAJA KISHORE SAHOO ..... Petitioner

.V.

SOUBHAGINI SAHOO ..... Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Scope of interference in case of order of maintenance – The petitioner and opp. party's marriage have been dissolved by a decree of divorce – The Opp.Party/wife being a destitute and divorcee, the Trial Court has saddled the petitioner with liability of maintenance, the Revisional Court did not interfere – Held, this Court in exercise of power under 482 Cr.P.C should not interfere with the same.

Case Law Relied on and Referred to :-

1. (2021) 2 SCC 324 : Rajnesh v. Neha.

For Petitioner : Mr. Sourya Sundar Das. Sr. Adv.
M/s. Pranab Ku. Ghose, S.Modi, S.Das.

For Opp.Party : M/s. Kaustuva Mohanty

ORDER Date of Order : 27.07.2022

S. PUJAHARI, J.

1. This matter is taken up through hybrid mode.

2. A Memorandum in favour of Mr. Sourya Sundar Das, learned Senior Advocate is filed by the learned counsel for the Petitioner to plead for the Petitioner, which be kept on record.

3. This application under Section 482 of Cr.P.C. has been filed by the Petitioner with a prayer to quash the order dated 12th April, 2022 passed by the learned Additional District & Sessions Judge, Athgarh in Criminal Revision No. No. 02 of 2002 confirming the order dated 27th December, 2021 passed by the learned S.D.J.M., Athgarh in Criminal Misc. Case No. 58 of 2016.

4. Heard Mr. Sourya Sundar Das, learned Senior Advocate appearing for the Petitioner and learned counsel appearing for the Opposite Party.

5. The Petitioner being saddled with liability to pay maintenance to his divorced wife @ Rs. 8,000/- per month by the order of the trial Court, which

has been confirmed by the revisional Court, has challenged the same on the ground that she having voluntarily withdrawn from the society of the Petitioner and their marriage having been dissolved by a decree of divorce, is not entitled to the maintenance and the Court below, therefore, could not have saddled the present petitioner with such liability. In alternative, it is also contended that if at all this Court does not interfere with such finding of the court below, the order as to the quantum of maintenance should be interfered with, inasmuch as the Petitioner is a retired teacher and after dissolution of marriage, he has married for second time and is having liability to maintain his family consisting of five members with an amount of Rs. 27,000/- only as monthly pension. To substantiate the same, he has placed reliance on the decision of the Apex Court in the case of ***Rajnesh v. Neha, reported in (2021) 2 SCC 324*** wherein at paragraphs 80 to 84 have held as follows:-

> 80. *"On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications.35*
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> *81. A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home.36 The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.*
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> *82. Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration : (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.*
>
> *83. Section 20(2) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and/or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.*

84. The Delhi High Court in Bharat Hedge v Smt. Saroj Hegde37 laid down the following factors to be considered for determining maintenance : (SCC OnLine Del para 8)

"1. Status of the parties.
2. Reasonable wants of the claimant.
3.The independent income and property of the claimant.
4. The number of persons, the non-applicant has to maintain.
5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.
6. Non-applicant's liabilities, if any.
7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.
8. Payment capacity of the non-applicant.
9. Some guess work is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.
10. The non-applicant to defray the cost of litigation.
11. The amount awarded u/s 125 Cr.PC is adjustable against the amount awarded u/s 24 of the Act."

6. Learned counsel for the Opposite Party, however, submits that the Opposite Party-wife being a destitute and divorcee and the Petitioner being liable to maintain the Opposite Party as mandated in the statute, the trial court has saddled the petitioner with the liability, and the revisional court did not interfere with the same. Therefore, this Court in exercise of the power under Section 482 of Cr.P.C. should not interfere with the same. So far as the quantum of the maintenance is concerned, he submits that the Petitioner is getting a provisional pension of Rs. 33,000/- as per the finding of the learned Magistrate, which is a matter of record. The same is also recorded in the revision. Petitioner is found to be in receipt of provisional pension of Rs. 33,000/- per month which is subject to fixation of final pension. Hence, the contention that he is getting only Rs. 27,000/- is not correct. The wife is entitled to commensurate standard of living with the husband and now-a-days Rs. 8,000/- is too meagre an amount to meet the requirement of a person living independently. Therefore, this Court should not interfere in this Criminal Misc. Case which is nothing but in the guise of a second revision.

7. No evidence having been led with regard to liability of the Petitioner in the trial court and the petitioner being a retired teacher in receipt of pension, and the opposite party being entitled to commensurate standard of living with the husband, this Court is not inclined to interfere with the order of the learned S.D.J.M., Athagarh and the order of the revisional court confirming the same.

8. With the aforesaid order, this Criminal Misc. Case stands dismissed.

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2022 (II) ILR - CUT-693

BISWANATH RATH, J.

W.P.(C) NO. 4602 OF 2016

BATAKRUSHNA SAHOO …….. Petitioner

.V.

COMMISSIONER, CONSOLIDATION, ODISHA, BHUBANESWAR & ORS. ……..Opp.Parties

ORISSA CONSOLIDATION OF HOLDING AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Sections 12, 36, 37 – The dispute regarding the suit land has been settled under the provision of section 12 of the Act – Whether in absence of revision under section 36 of the Act, a proceeding under section 37 of the Act, after lapse of 13 years was maintainable ? – Held, No. (Para-11)

Case Laws Relied on and Referred to :-

1. 2021 (II) OLR 1039 : Bhramarbara Sahoo & Ors. Vs. State of Orissa, (The Secy, Revenue Office at Secretariat, Bhubaneswar & Ors)
2. W.P.(C) No.19172 of 2009 (decided on 13.9.2019) : Ramgopal Khadiratna & Anr. Vs. State of Orissa (Principal Secy, Revenue Department & Ors)
3. Hon'ble Apex Court in Appeal Case No. 2464/2008 (decided on 30.04.2008) : Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur & Ors.
5. 2009 AIR SCW 6305 : Santosh Ku.Shivgonda Patil & Ors. Vs. Balasaheb Tukaram Shevale & Ors.
6. 2003 Supp. OLR 882 : Abhaya Charan Mohanty Vs. State of Orissa
7. (2007) 1 OLR 598 : Bhagaban Jena Vs. State of Orissa
8. W.P.(C) No. 3220 of 2019 : Siba Muduli Vs. Director, Consolidation & Ors.
9. (2017) 1 OLR 406 : Chaitanya Das (since dead) through L.Rs. Smt. Aladmani Das & Ors. Vs. Bibhuti Charan Das & Ors.
10. 2009 AIR SCW 6305 : Santosh Kumar Shivgonda Patil and Ors. Vs. Balasaheb Tukaram Shevale & Ors.
11. 2022 AIR CC 179 : Siba Muduli Vs. Director, Consolidation & Ors.
12. 2017 (1) OLR 406 : 71 (1991) CLT 322 : Laxminarayan Sahu Vs. State of Orissa
13. AIR 1983 SC 1239 : Mansram Vs. S.P.Pathak
14. 1993 (II) OLR 365 : Labanyabati Devi & Ors. Vs. Member, Board of Revenue 7 Ors.
15. (2009) 11 S.C.C. 53 : Ajab Singh and Ors. Vs. Antram and Ors.

For Petitioners : Mr. A.P.Bose, N.Hota, S.S.Routray, V.Kar, D.J.Sahoo, S.S.Dash & T.K.Ghose.

For Opp. Parties : Mr. Sonak Mishra, A.S.C.

JUDGMENT Date of Hearing : 07.07.2022 : Date of Judgment : 25.07.2022

BISWANATH RATH, J.

This writ petition involves a challenge to the quashing of orders under Annexures-1 and 2 and thereby affirming the order under Annexure-3.

2. Factual background involved in the case is that all the proceedings involved herein have been exercised by the competent authority under the provision of the Orissa Consolidation of Holdings & Prevention of Fragmentation of Land Act, 1972 (for short "The Act, 1972"). These proceedings have also a bearing in the W.P.(C). Nos. 4603, 4604, 4605, 4606 and 4608 all are of 2016 involving similar set of objection cases from very beginning. Fact reveals, initially 5 objection cases i.e. Objection Case Nos.2512, 1511, 2395, 2475 and 2629 all of 1981 were filed under Section 9 (3) of the Act, 1972 as seen from Annexure-2 involving the writ petition. Except one objection case i.e. Objection Case No.2395 filed by one Kasinath was partly allowed, all others were rejected. As a consequence of disposal of all 5 objection cases with allowing one objection case, 5 appeals under Section 12 of the Act, 1972 were filed. All the 4 appeals were allowed. This case however involves Appeal Case No.522 of 1981 arising out of Objection Case No.2511 of 1981 as appearing in Annexure-3 to the case at hand. Appeal vide Annexure-3 was allowed by judgment of the appellate authority also in a common judgment involving other 4 appeals i.e. Appeal Case Nos. 522, 523, 524 and 525 again all are of 1981. One of the appeal being partly allowed against one of the objection case, as clearly borne in Annexre-3, judgment of appellate Court dated 30th January, it is reported that as a consequence of the same, there has been consequential preparation of record-of-right in favour of the petitioner herein. Consequential orders for correction in record-of-right were also passed in the other 4 items but the dispute involved in other 4 writs separately disposed of. It is pleaded that there has been no Revision against all these Appeal orders as provided under Section 36 of the Act, 1972. On the other hand almost after 13 years, 36 number of villagers filed one consolidation revision appears to be a Revision under Section 37(1) of the Act, 1972 before the Commissioner, Consolidation, Bhubaneswar numbered as Revision Petition No.604 of 1995. It is stated here that there is one Revision involving all Appeal orders involving same prayer involving the properties involved in numbers of objection cases but, however, without assailing the Appeal orders already involved therein under Section 12 of the Act, 1972. The Revision was disposed of involving the petitioners in each of the writ petitions involved in each of the objection cases and appears to have been disposed of by the

judgment of the Commissioner dated 14th July, 2015 vide Annexure-1 thereby setting aside all the Appeal orders and further also the order of the Consolidation Officer passed in the proceedings under Section 9 of the Act, 1972. In the disposal of the Revision, the Revisional authority directed all lands except Ac.0.26 decimals out of Ac.40.73 decimals shall stand recorded in the name of Government vide Annexure-1. This Court from the order-sheet finds on entertaining the writ petition, notice was issued to all the opposite parties including 36 villagers preferring the Revision. Even though notice has been served on each of them, none has appeared here to contest the proceeding. Thus, this matter is decided on contest of petitioner involving each writ petition and the State, who in an attempt defend the Revisional order. The Revisional order impugned herein has been assailed firstly on the ground of limitation for the Revision being filed after 13 years. Secondly on the premises that since the dispute has been settled under the provision of Section 12 of the Act, 1972, in absence of revision under Section 36 of the Act, 1972 a proceeding under Section 37 of the Act, 1972 was *per se* not maintainable, since it is at the instance of private parties. Thirdly, the revisional authority failed in appreciating the case of occupiers on the basis of sale deed and there never exists a lease deed.

3. To support his case on the very grounds raised hereinabove, Mr.Bose, learned counsel appearing for the petitioner here also relies catena of decisions such as in the case of ***Bhramarbara Sahoo & Ors. Vs. State of Orissa, rep. thr. The Secretary, Revenue Office at Secretariat, Bhubaneswar & Ors***, *2021 (II) OLR 1039*, a judgment of this Court in the case of ***Ramgopal Khadiratna & another Vs. State of Orissa, represented through the Principal Secretary, Revenue Department & Others*** in W.P.(C).No.19172 of 2009 decided on 13.9.2019. Mr.Bose, learned counsel for the petitioner also relied on a decision of Hon'ble Apex Court in disposal of Appeal Case No.2464 of 2008 in the case of ***Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur & Ors.*** decided on 03.04.2008 and taken support the view thereof of the Hon'ble Apex Court in support of his claim on the Revision being barred by limitation. Written note is also filed on behalf of the petitioner to framework of the case history, grounds as well as the decision in his support. In the written notes, learned counsel for the petitioner also attempted to distinguish the citations at the instance of learned State Counsel.

4. In his opposition, Mr.Sonak Mishra, learned Additional Standing Counsel appearing for the State opposite parties while attempting to justify

the revisional order took this Court to the provision at Section 37(1)of the Act, 1972 and attempted to explain that under the provision the Revisional authority has enormous power and such a proceeding can be initiated at any stage of the matter and at any point of time. Further taking this Court to the discussions and findings of the Revisional authority, an attempt is also made to satisfy the Court that the Revisional authority since made an attempt to correct the irregularity, there is no harm in exercise of such jurisdiction as no illegality should be allowed to be perpetuated on the guise of technicalities. Taking this Court through a Division Bench decision of this Court in the case of ***Manas Ranjan Das And Ors. Vs. Consolidation Officer And Ors.*** Mr.Mishra, learned Additional Standing Counsel attempted to take support of the impugned order**.** ***A***n attempt is also made through the decision rendered in the case of ***Siba Muduli Vs. Director, Consolidation and Others.*** Mr.Mishra, learned Additional Standing Counsel taking help of the findings therein contended that the Division Bench held even proceeding initiated under Section 37 (2) of the Act, 1972 after 12 years permissible. It is finally under the premises that the proceeding involved an attempt of the petitioner to grab the Government land also a community land and further the impugned order involved the Revisional Authority was passed in complete compliance of the provisions of law guiding the field. Mr. Mishra, however has no dispute that the case decided by the Division Bench was a case under Section 37(2) of the Act, 1972 whereas the case at hand is under section 37(1) of the Act, 1972. Mr. Mishra, learned Additional Standing Counsel also contended that the Revisional authority was well justified in passing the order vide Annexure-1 and there is no need for interference in the same. Mr. Mishra, thus claimed that there is no need to interfere in the order vide Annexure-2. Mr. Mishra also in an attempt to justify the impugned orders in his counter to the claim of the petitioner on the citations attempted to submit that the decision in the case of ***Santosh Kumar Shivgonda Patil and Ors. Vs. Balasaheb Tukaram Shevale & Ors,*** *2009 AIR SCW 6305* since stand on different footing has no application to the case at hand. Further, on the premises that for the clear pleading of the tribal people came to know about the order of the competent authority hardly in 1993 had no difficulty in filing the revision in 1995. In the above premises, Mr. Mishra, learned Additional Standing Counsel contended that there is no infirmity in the impugned orders nor there is any illegality in entertaining the Revision required to be interfered with.

5. Considering the rival contentions of the parties, this Court finds the moot questions required to be considered here are (i) In the existence of an

order under Section 9(3) of the Act, 1972 reversed by Appellate Authority in exercise of power under Section 12 of the Act, 1972 if private parties aggrieved by such orders prefer Revision under Section 37(1) of the Act, 1972 in bypassing of the Revision under Section 36 of the Act, 1972?. (ii) Further the question required to be determined here is that the Revision under Section 37(1) of the Act, 1972 even though the provision at Section 37(1) of the Act, 1972 does not prescribe any time limit, if a Revision under Section 37 (1) of the Act, 1972 is entertained after 15 years?

6. It is needless to mention here that there has been divergent views expressed by different Single Benches of this Court. In some cases it is held that Revision of this nature for no time stipulation therein to be very much maintainable whereas in some case also held even there has been no time stipulation, yet the Revision should be brought within reasonable time. One such matter was taken up in division Bench of this Court being referred by Single Bench to asses correctness between two judgments of this Court in the case of ***Abhaya Charan Mohanty Vs. State of Orissa***, *2003 Supp. OLR 882* and in the case of ***Bhagaban Jena Vs. State of Orissa,*** *(2007) 1 OLR 598*. The Division Bench case taken help by learned State Counsel involved the case ***Siba Muduli Vs. Director, Consolidation & Ors***. and referred to hereinabove in W.P.(C).No.3220 of 2019. This case involved purely a case applying or not applying the limitation to a Revision under Section 37 (2) of the Act, 1972. It be stated here that the Revision involved in W.P.(C).No.3220 of 2019 dealt by Division Bench in its judgment dated 07.10.2021 involved a Revision under Section 37(2) of the Act, 1972 whereas the case at hand involved a case under Section 37(1) of the Act, 1972. By the time, the order of the Division Bench came up on 7th October, 2021, this Court finds this High Court in a Single Bench in the case of ***Chaitanya Das(since dead) through L.Rs. Smt. Aladmani Das & others Vs. Bibhuti Charan Das & Ors***. also dealt on same issue and in its judgment reported in (2017) 1 OLR 406 where this Court taking into account catena of decision including a decision of the Hon'ble Apex Court in ***Santosh Kumar Shivgonda Patil and Ors. Vs. Balasaheb Tukaram Shevale & Ors,*** *2009 AIR SCW 6305,* where the Hon'ble Apex Court dealing with a case if the statute is silent on the limitation aspect on Revision has come to hold that if time for preferring there is no prescription of time does not mean a Revision should come after unreasonable time. The Hon'ble Apex Court held to bring revision would be at least 3 years under Sections 2, 5, 7 of Maharashtra Land Revenue Code and finally came to hold that exercise of Revisional power after lapse of 17 years cannot be construed to be a reasonable time.

7. Similarly, so far State relying on the decision in ***Siba Muduli Vs. Director, Consolidation & Ors***., *2022 AIR CC 179,* the Division Bench finally in paragraph-14 came to observe as follows:

> "14. We further hasten to add here that this list is not exhaustive but is only illustrative. So, we answer the second point that "what is a reasonable time" in approaching the Court, is in fact a question of fact depending on the peculiar facts of each and every case and no strait jacket formula can be provided."

This Court here observes even in the above case the question what should be the "reasonable time was left open to be considered. The question what should be reasonable time since already answered through Hon'ble Apex Court judgment in (2009) 9 SCC 352, the Division Bench though did not take the Supreme Court decision into consideration, in the circumstance it appears both the above decision rather supports the case of the petitioner in the case at hand and in no circumstance delay of fifteen years can be construed to be within reasonable time. This view of the High Court is also gets support through the case in between ***Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors.*** decided on 03.04.2008 in Appeal (Civil) 2464 of 2008. Similarly the application of decision vide 1995 Sup. (3) SCC 249 as claimed by State is concerned, since the dispute involved a void order in the peculiar circumstance, the Hon'ble Apex Court after coming to observe the timing of noticing irregularity involving a void order came to observe delay does not come to play. This decision involves a different scenario, so not applying to the case at hand.

Considering the citation of the State through another Division Bench reported in 1999(1) OLR 649 to support its case, this Court finds Revision U/s. 37(1) of the Act, 1972 was filed by aggrieved party based on permission of this Court in disposal of OJC 390 /1984 in 1992 reported in 73 (1992) CLT 217 where High Court while quashing the order dated 30.03.1983 of the Commissioner however, observed since the party had not moved the Commissioner under Section 37 of the Act and in case they do so, the Commissioner will consider it on its own merit. As a consequence, a Revision under Section 37(1) was filed in 1995 (RC NO. KR 114/95) and was allowed on 18.10.1996. This Court here finds, the Revision under Section 37(1) of Act 1972 was filed in 1994 on being permitted by the High Court in the disposal of writ petition in 1992, thus there was no scope for getting into delay aspect, if any. Secondly, there was already exercise under Section 36 of the Act 1972 and even then the Division Bench in paragraph-9

of its judgment on entertainability of Revision came to observe "we may hasten to add that the Commissioner is not obliged to entertain all Revision under Section 37(1) of the Act. In a given case he may refuse to entertain such Revision but such order should be supported by valid reason. Further this view of the Division Bench again opposed to Hon'ble Apex Court judgment in (2009) 9 SCC 352, such decision cannot be applied any further.

8. This Court in the judgment in the case reported in 2017 (1) OLR 406 also referred to a Full Bench judgment of this Court in the case of ***Laxminarayan Sahu Vs. State of Orissa,*** *71 (1991) CLT 322* following a decision of the Hon'ble Apex Court in the case of ***Mansram Vs. S.P.Pathak***, AIR 1983 SC 1239, this Court dealing with a case of Revision entertained the revision under Section 19(2) of the O.L.R. Act also not providing time limit for preferring Revision came to hold even though there is no time stipulation in preferring a Revision under Section 19(2) of the OLR Act yet the Revision should have come within reasonable period of time. Similar observation is also made holding no Revision is entertainable after reasonable period of time also in exercise of power under Section 38-A of Odisha Estate Abolition Act. In the Full Bench, this Court finally came to hold that power of Revision under Section 12(3) of the O.P.L.E. Act could not have been invoked after 5 years. This Court in case of *Chaitanya Das Vs. Bibhuti Charan Das and others (supra)* also taken into account the case of ***Labanyabati Devi & Ors. Vs. Member, Board of Revenue 7 others,*** a case under Section 37(B) of the O.L.R. Act reported in ***1993 (II) OLR 365,*** this Court came to held that initiation of the proceeding against the petitioner therein after so much loss of time (12 years therein) remain unreasonable. It is in the support of the judgment referred to hereinabove, catena of other Single Bench judgments referred to hereinabove and on the decision of Hon'ble Apex Court referred to hereinabove, this Court deciding the case in *Chaitanya Das* (*supra*) dealing with the circumstances presently at hand held no Revision should have been entertained after 8 years of the order involved. This Court here finds in the proceeding before the Division Bench of this Court in the case of ***Siba Muduli Vs. Director, Consolidation & Ors.*** (*supra*) lost sight of all the above judgment. Further, the Division Bench in paragraph-14 finally answered on the question of limitation and observed what is the reasonable time in approaching the Court is in fact a question of fact thus dependant on the peculiar facts of the each and every cases and no straight jacket formula can be provided. This Court also relies on the decision of the Hon'ble Apex Court in the case of ***Ajab Singh and Others Vs. Antram and Others, (2009) 11***

Supreme Court Cases 53, which also clearly support the view of this Court in the case at hand and opposes scope for consideration of such aspect through *Siba Muduli (supra).* The case at hand also involved a serious question framed vide question No.1. In the process, this Court likes to take into account both the provisions under Section 36 and 37 (1) of Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, which are reproduced herein below:

> "36. Revision-(1) The Consolidation Commissioner may, on an application by any person aggrieved by any decision of the Director of Consolidation within ninety days from the date of the decision, revise such decision and for the said purpose, he may call for and examine the records;
>
> Provided that no such order shall be passed without giving the parties concerned a reasonable opportunity of being heard.
>
> (2) All orders passed under this section shall be final and shall not be void in question in any Court of law."
>
> "37(1) The Consolidation Commissioner may call for and examine the records of any case decided or proceedings taken up by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings and may, after allowing the parties concerned a reasonable opportunity of being heard make such order as he thinks fit."

Reading both the provisions, this Court finds Section 36 makes a clear provision enabling the persons aggrieved by a decision of the Director, Consolidation prefer Revision but however within 90 days of such decision whereas Section 37(1) as taken note hereinabove gives a power to the Commissioner to suo motu take up a proceeding for the purpose of satisfying himself under different headings mentioned herein. For the opinion of this Court once there is a clear statutory provision to challenge an order of the Director by the person aggrieved, looking to the cause title in the revision since it clearly disclosed that proceeding under Section 37(1) of the Act, 1972 was initiated by private personnel, for the opinion of this Court the proceeding under section 36 of the Act, 1972 would have been the right approach. In the event there was involvement of delay, nothing prevented such party for preferring revision under Section 36 of the Act, 1972 with an application for condonation of delay for consideration of the Revisional Authority. In no case a proceeding under Section 37(1) of the Act, 1972 would have been entertained in bypassing of clear statutory remedy of revision.

9. Considering the submission of Mr.Mishra, learned Additional Standing Counsel for ignoring the delay in preferring of Revision by the petitioners therein, this Court finds there involves a vital background in the case is that initially i.e. in the 1st stage there used to be a declaration and notification regarding consolidation in the particular area under the provisions of Section 3 of the Act, 1972. For the provision in Section 3 therein the Consolidation Officer shall cause public notice of the notification in the prescribed manner and the effect of notification the Consolidation area shall be deemed to be under Consolidation operation. Rule 4(3) of the Rules, 1973 if the notice is addressed to a number of persons or to persons in general, it shall be served in the manner prescribed for service of summons under the Code of Civil Procedure, 1908 or by proclamation and beat of drum and also by affixing a copy thereof in some conspicuous place in the village in the presence of not less than two persons. Looking to the manner of notice indicated hereinabove, it is just difficult on one's part residing in same consolidation area to claim that he has no information of consolidation operation in his/their area. Further looking to the next stage of the matter, once there is preparation of statement of principles under Section 8 & 9 of the Act, 1972, there is publication of records and issue of extracts and notices containing relevant extracts from the land register, showing rights and interests of land owners in relation to the land, specific shares of individual land owners in joint holders were necessary to ensure proper consolidation and in the event there is multiple land owners notice shall be issued to land owners mentioned in the land register. It is needless to mention that the Consolidation proceedings involve a lot of involvement including area visit, area mapping in the involvement of local Amin and that too involvement of all interested in property under such consolidation. Since such action are very localised and when private Opposite Parties claim that they are in occupation of disputed land it is very difficult to appreciate their claim that they remain blind on the consolidation operation taking place involving such area/land. Further under Subsection 3 of Section 9 there is scope for objection.

10. This Court here also takes note of Rule 19 dealing with manner of filing objection U/s.5(3), the Section 9 and dealings thereof which reads herein below :-

> **"19. Manner of filing objections under Sub-Section (3) of Section 9 or under Sub-Section (1) of Section 15.**- (1) Objections, if any, to entry in or omission from land register and other records and the statement of principles shall be made in Form No. 6 and shall be received by the Assistant Consolidation Officer, and the objector shall, within such time as the Assistant Consolidation Officer may direct,

file as many copies of objections as may be necessary to be served on every person whose interest may, in the opinion of such officer, be affected.

(2) When an objection is received under Sub-rule (1), notice thereof in Form No. 7 along with a copy of the objection shall be served on every person whose interest may, in the opinion of the Assistant Consolidation Officer, be affected thereby and any such person and the objector shall be called upon to attend at such time and place, as the Assistant Consolidation Officer, in case of objections to be disposed of by him under Sub-Section (1) of Section 10, or the Consolidation Officer in case of objections to be disposed of under Section 11, as the case may be, may fix for disposal of such objection.

(3) On the date fixed for hearing of the objection or any other date to which the hearing may stand adjourned, the Assistant Consolidation Officer or the Consolidation Officer, as the case may be, shall, after making such enquiry as he considers necessary and after giving the parties present an opportunity of being heard, pass such orders as he may deem proper :

Provided that in deciding objections on the basis of conciliation, the Assistant Consolidation Officer shall record the terms of conciliation in the presence of at least two members of the Consolidation Committee:

Provided further that while disposing of objections on valuation of land, houses, structures, trees, wells and other such improvements standing on land, the Consolidation Officer shall consult as many members of the Consolidation Committee as may be present in response to a notice to be issued to each of them for the purpose at least three days before the hearing of such objections."

Here also this Court finds, the proceeding in considering the objection is at Section 9 stage also very cumbersome one and it is very difficult not to notice of such operation by a person so much interested in such land. In the particular scenario, there is no chance for occupiers to come to say that entire proceeding conducted behind such person(s).

11. In the circumstances, this Court finds there is strength in the submission of Mr. Bose, learned counsel appearing for the petitioner in his challenge to the Revisional order. This Court while answering both the question framed in favour of the petitioner and against opposite parties hold the Revision under Section 37(1) of the Act, 1972 being entertained after at least 15 years further in available of a Revision under Section 36 of the Act, 1972, this Court declaring the order at Annexure-1 as bad, sets aside the same, as a consequence also sets aside the order at Annexure-2 thereby upholding the order of the appellate authority vide Annexure-3.

12. In the result, the writ petition succeeds. There is however no order as to cost.

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2022 (II) ILR - CUT-703

BISWANATH RATH, J.

W.P.(C) NO. 9502 OF 2022
WITH
W.P.(C) NO. 12872 OF 2022

RAJESH KU. AGARWAL & ORS. …….. Petitioners

.V.

REGIONAL DIRECTOR (E), MINISTRY OF CORPORATE AFFAIRS, KOLKATA & ORS. ……..Opp.Parties

WITH

IN W.P.(C) NO. 12872 OF 2022

KAPIL SINGHAL …….. Petitioner

.V.

REGIONAL DIRECTOR (E), MINISTRY OF CORPORATE AFFAIRS, KOLKATA & ORS. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226, 227 – Issuance of look out circular (LOC) by the Investigation Agency – There is no specific allegation on actual loan involving the petitioners and their company and any default there in – There is no declaration of NPA of any account involving the petitioners by any Bank as of now – Whether issuance of LOC against the petitioner is sustainable under law ? – Held, No – As allegation at this stage appears to be speculative and imaginary and in the circumstance, there cannot be taking away liberty of any of the petitioners – The Court imposed certain conditions for the overseas travel of each of the petitioners – Writ petition succeed.

(Paras 19 -20)

Case Laws Relied on and Referred to :-

1. ILR (2010) VI Delhi 706 : Sumer Singh Salkan vrs. Assistant Director & Ors.
2. Delhi High Court, W.P.(C) No. 5374/2021 & Crl.M.(Bail) 605/2021 (Decided on 12.1.2022) : Vikas Chaudhary vrs. Union of India & Ors.
3. 2022 Live Law (PH) 69 : Punjab & Haryana High Court, CWP-5492-2022 (O&M) [Decided on 5.4.2022] : Noor Paul vrs. Union of India & Ors.
4. Delhi High Court, W.P.(CRL) 714/2022 (Decided on 4.4.2022) : Rana Ayyub vrs Union of India & Anr.
5. Madras High Court, W.P.(C) Nos. 21305 & 20798 of 2017 (Decided on 23.7.20180 : Karti P.Chidambaram vrs. Bureau of Immigration :
6. W.P.No. 2477 of 2020 & WMP Nos. 2871 of 2020, 7332, 10903, 21891 and 3631 of 2022 (Decided on 7.3.2022) : Rahul Surana vrs. The Serious Fraud Investigation Office & Ors.
7. Telengana High Court, W.P.(C) No. 6892/2022 (Dated 6.6.2022) : Garikapati Venketeswara Rao vrs. Union of India & Ors.
8. Bombay High Court, Criminal Writ Petition No. 3058/2021 (Decided on 17.11.2021) : Chaitya Shah vrs Union of India & Ors.

9. High Court of Karnataka, its Bengaluru Sitting, W.P. No.11213/2022 (Decided on 20.06.2022) : Mrs. Leena Rakesh vrs. Bureau of Immigration & Ors.

For Petitioners : M/s. M.K. Mishra, Sr. Adv, T.Mishra, S.Das & S.S.Parida
For Opp. Parties : Mr. P.K.Parhi, ASGI & Mr. P.P.Behera, CGC.

JUDGMENT Date of Hearing : 13.07.2022 : Date of Judgment : 25.07.2022

BISWANATH RATH, J.

1. Both the Writ Petitions involve the following prayer :-

> "It is, therefore, humbly prayed that this Hon'ble Court may graciously be pleased to issue Rule Nisi calling upon the Opp. Parties to show cause and upon perusal of causes shown if any or upon insufficient causes shown make the said rule absolute by quashing the Look Out Circular issued against the Petitioner.
>
> And may pass any appropriate order/orders as deemed just, fit and proper.
>
> And may pass such other order/orders as deemed just and proper…"

2. For the grounds of challenge, even though independent persons involved but for the common nature of grounds involving both the Writ Petitions and common argument advanced by both side Counsel, on consent of the Parties, both the matters are taken up together and decided in one common judgment.

3. For substantial materials available in W.P.(C) No. 9502/2022, this case is taken up as a lead case.

4. Facts, as borne in the lead case, are Petitioner No. 1 is the Managing Director of M/s. Utkal Galvanizers Ltd., Petitioner No. 2 is the former Director, Petitioner No. 3 is one of the Directors of the Company and Petitioner No. 4 is the CFO of the Company. It is necessary to bring here that the sole Petitioner involving W.P.(C) No.12872 of 2022 is also one of the Directors of the Company, M/s.Utkal Galvanizers Ltd. As disclosed, O.P.2, the ROC-cum-OL, Odisha forwarded a complaint on 21.10.2020 made by one Bangla Informer through email dated 5.11.2020. The Petitioners denied the contents in the complaint in their email response dated 9.11.2020. Complaint and several email responses are available at Annexure-1 series. While the matter stood thus, almost after a gap of five months, O.P.2 on 13.4.2021 issued a letter to M/s.Utkal Galvanizer Ltd. disclosing therein that there has to be an inspection of the Company under Section 206 (5) of the

Companies Act, 2013 under the direction of the Ministry of Corporate Affairs, Government of India, vide Annexure-2. It is claimed, the Company co-operated with the O.Ps. in the entire process of inspection even presented therein as and when there is asking for personal appearance of any of them. There has been appearance of the persons so directed even the Company has also submitted written response to the queries raised by the O.Ps., vide Annexure-3 series. Through the pleading, it is claimed, looking to the whole correspondences as of now, there is no complain on the involvement of either of the persons in any offence under the penal provision of law. It is further claimed, while the matter stood thus, the Company Secretary of the Company, M/s.Utkal Galvanizer Ltd., Ms. Shaama Bano was prevented from travelling abroad at New Delhi International Airport by the Immigration Authorities. She was verbally informed by the Authorities that there was issuing of Look Out Circular (LOC) against all the key managerial personnel pending inspection of the Records and Accounts of the Company initiated under Annexure-1. Finding unnecessary harassment, the Managing Director of the Company, Petitioner No.1, vide letter dated 2.3.2022 received by O.P.1 on 3.3.2022 requested O.P.1 to consider the decision of imposing restrictions on overseas travel of the Company Directors and key managerial personnel. In the said letter, there has been also showing of urgency of some Petitioners, as they are to participate in a business of export dealing through trade so supposed to take place in the USA between 26th - 28th of April, 2022. Petitioner No.1 had also enclosed supportive documents in claiming such relief. It is alleged, in spite of such request, there is no response. In the meantime, vide letter dated 7.3.2022, there have been some further queries, which were replied on 21.3.2022. O.P.2 again issued a letter on 5.4.2022. The Petitioners claimed, they were in the process of submitting their replies while filing the Writ Petitions. Taking recourse to the Office Memorandum dated 27.10.2010 of the Ministry of Home Affairs, the Petitioners claimed, restricting the movement of the Petitioners as well as issuing LOC, if any, involving the Petitioners remains complete contrary to the Circular of its own, vide Annexure-6. It is claimed that the Circular referred to is an outcome of the judgment of Delhi High Court in case of *Sumer Singh Salkan vrs. Assistant Director & Ors.* The Petitioners in the pleadings also took support of the judgments of variety courts touching such issue, vide Annexure-7, 8 series, 9 series & 10 as well. It is on the premises that there is no initiation of any criminal proceeding nor there is any correspondence or observation available on Record indicating the Petitioners entangled in criminal

offences. While pleading that there is violation of Fundamental Rights of each of the Petitioners involved herein and there has been unnecessary harassment to each of the Petitioners in absence of their involvement in any non-compoundable offence as of now.

5. The Petitioners on their own have brought to the notice of this Court through Annexure-14 series that there is completion of investigation involving the Odisha part is concerned. Annexure-14 series also clearly depicts no involvement and non-compoundable offences involving the Petitioners. Through each of these documents, at the end of each document involving the show cause notices, vide Annexure-14 series, it is apparent that the Petitioners involved therein are all facing compoundable offences being covered under the provision of Section 441 of the Companies Act. The Petitioners claim that there is no material whatsoever available showing the Petitioners' involvement in non-compoundable offences, particularly, under the penal provision. The Petitioners also claim that they are all through cooperating. Thus the Petitioners through both the above Writ Petitions prayed for quashing the LOC involving the Petitioners.

6. Mr.M.K.Mishra, learned senior counsel appearing for the Petitioners on reiteration of the facts narrated herein above and after placing the notice so far issued to the Petitioners' Company and their responses, while not disputing that there is undertaking of an investigation under the provision of Section 207(3) of the Companies Act and that there has been full cooperation by each of the Petitioners representing the Company as of now. Demonstrated through the Circular at Annexure-3, which appears to be filed again by the Department Lawyer at Annexure-C to the additional affidavit dated 13.7.2022, taking through Clauses-H & I of the consolidated guidelines issued by the Government of India, Ministry of Home Affairs dated 22.2.2021 and at the same time, reading through series of show cause notices appended as Annexure-14 series issued on 15.6.2022, Mr.Mishra, learned senior counsel contended that even though the inspection proceeding involving the Petitioners commence since 13.4.2021, offences whatever alleged to have been committed by the Petitioners' Company remained compoundable as per their own disclosures in all such show cause notices appended as Annexure-14 series. Even answering on the preliminary affidavit and the additional affidavit of the Competent Authority, Mr. Mishra, learned senior counsel for the Petitioners taking through both the affidavits advanced his submission for quashing of the LOC on the premises that whole

submission and the process of investigation is yet to level the Company involving in any non-compoundable offence under any provision of law. The Petitioners are cooperating on the issue and in the meantime, almost one and half years from the commencement of such action of the Competent Authority and looking to the loss of time not only the Petitioners have already suffered for their unable to participate in the International Trade Fairs to attract their business, for the restrictions in the flying of the Directors of the Company if continues, it is claimed, there will be huge loss to the Company, which cannot be compensated otherwise.

Mr. Mishra, learned senior counsel at this stage took to this Court to the series of decisions to support the Petitioners' case. In the process, Mr.Mishra, learned senior counsel drew attention of this Court the decision of the Delhi High Court in ***Sumer Singh Salkan vrs. Assistant Director & Ors.*** **:** ILR (2010) VI Delhi 706, another case of Delhi High Court in the case of ***Vikas Chaudhary vrs. Union of India & Ors.*** : W.P.(C) No.5374/2021 & Crl.M.(Bail) 605/2021 decided on 12.1.2022, a decision of the Punjab & Haryana High Court in ***Noor Paul vrs. Union of India & Ors.*** : CWP-5492-2022 (O & M) decided on 5.4.2022 reported in 2022 Live Law (PH) 69, another decision of Delhi High Court in ***Rana Ayyub vrs Union of India and Another:*** W.P.(CRL) 714/2022 ***decided on 4.4.2022,*** a case of Madras High Court involving ***Karti P.Chidambaram vrs. Bureau of Immigration*** **:** W.P.(C) Nos.21305 & 20798 of 2017 decided on 23.7.2018 and another decision in ***Rahul Surana vrs. The Serious Fraud Investigation Office & Ors.*** : W.P. No.2477 of 2020 and WMP Nos.2871 of 2020, 7332, 10903, 21891 and 3631 of 2022 decided on 7.3.2022. In the process, Mr.Mishra, learned senior counsel for the Petitioners taking this Court to the above decisions attempted to draw the support of each of the decisions indicated herein above to support the Petitioners' case.

7. To avoid a doubt for the Petitioners not enclosing copy of the LOC while claiming setting aside the same through the Writ Petitions, this Court takes note of the contentions of the O.Ps. admitting existence of the LOC through Paragraph-6 of the preliminary counter affidavit at Page-242A, which reads as follows :-

> "6. That it is further submitted for the appreciation of this Hon'ble Court that the Ministry after receiving the representation/request of the Petitioners through the Regional Director (Easter Region) for the withdrawal of the Lookout Circular (LOC) have considered the same and the said request/representation was placed before the Screening Committee. The Screening Committee after verifying

representation was of the view that, at this juncture withdrawal of the LOC would be a premature step. The withdrawal can only be considered after the inspection report is received and the same is accepted by the ministry. Further the LOC can be withdrawn if, after the inspection it is found that no non-compoundable offences are reported."

8. Mr. P.K.Parhi, learned Assistant Solicitor General of India assisted by Mr.P.P.Behera, learned Central Government Counsel appearing for the O.Ps. in an attempt to seriously object the claim of the Petitioners, particularly, taking to the stage of the matter and the investigation is still in progress contended that the complain against the Petitioners involved herein received through one Whistle Blower in the Ministry of Corporate Affairs alleging that they are the key members of the M/s.Utkal Galvanizers Ltd. and planning to settle down outside India after taking a loan of Rs.600-700 Crores from various Banks. In the investigation process, it has also come to light that the Petitioners are the Directors of various Companies out of fifteen group companies including M/s.Utkal Galvanizers Ltd. registered in the State of Odisha. Mr.Parhi, learned Assistant Solicitor General of India resisted the Writ Petitions for the information of the Competent Authority of fleeing risk otherwise called as flight risk at the instance of the Petitioners. Looking to the stage of inspection, Mr.Parhi brought to the notice of this Court through Annexure-A regarding rejection of the request to take out the LOC and taking this Court to their own plea in the Writ Petitions that each of the Petitioners need to travel abroad involving countries like the USA and Dubai, contended, it is too early to consider the taking out of LOC involving the Petitioners.

9. It appears, the preliminary counter affidavit at the instance of O.Ps. was filed on 28.4.2022. The rejoinder affidavit was filed by the Petitioners on 1.5.2022. The Petitioners also filed an additional affidavit on 26.6.2022 bringing therein the level of charges as of now appearing through series of show cause notices. This Court nowhere finds any response to the plea of the Petitioners on the aspect of offences non-compoundable involving the Petitioners as of now.

10. Mr. Parhi, learned Assistant Solicitor General of India for the O.Ps. however took this Court to the further plea of the Department while bringing to the notice of this Court the Office Memorandum issued by the Government of India, Ministry of Home Affairs, i.e., consolidating guidelines for issuance of LOC. Reading through the same, Mr.Parhi attempted to justify issuance of LOC. Mr. Parhi further taking this Court to the response of the O.Ps. in

Paragraph-6 of the additional affidavit filed on 13.7.2022 contended that for the Petitioners' closure association/involvement in so many Companies and the area of investigation extended also to West Bengal, the Inspecting Officer of the Directorate of Ministry of Corporate Affairs has in the meantime already inspected almost fourteen companies other than the companies in Odisha. It is further contended that inspection having come to an end, reports are also submitted in the Ministry on 10.5.2022. It is further contended, further instruction from the Ministry is awaited. It is on the whole and looking to the gravity of allegations made against the Petitioners so far, Mr.Parhi contended, there is justification in issuing LOC against the Directors/KMPs of the Company where the Petitioners are actively involved. It is in the process, Mr.Parhi sought for rejection of the Writ Petitions on the premises of having no merit and premature one.

11. Considering the rival contentions of the Parties, this Court finds, there is no dispute that the Petitioners include Managing Director, Directors and CFO of the Company, M/s.Utkal Galvanizers Ltd. There is also no dispute that there existed a complain against the Petitioners by a Whistle Blower received by the Competent Authority and there was initiation of inspection of 15 nos. of Companies including that of M/s.Utkal Galvanizers Ltd. under the direction of the Ministry of Corporate Affairs. The Writ Petition pleading and O.Ps.' response through preliminary counter affidavit as well as the additional affidavit make it clear that inspection involving M/s.Utkal Galvanizers Ltd. being completed, the Petitioners are already issued with show cause notices, vide Annexure-14 series clearly indicating the offence involved is compoundable. The additional counter affidavit also disclosed, in the meantime, there has been already closure of the inspection involving the Petitioners involving fourteen other companies in the State of West Bengal. There is clear stand of the O.Ps. that the Petitioners are all through cooperating. It is claimed, even for report involving these fourteen companies outside Odisha already submitted since May, 2022, instruction of the Ministry of Corporate Affairs is still awaited. It appears, in the meantime, almost two months have passed. On perusal of the documents available at Pages-91 to 115 of the Brief, this Court finds, either the Company or the Petitioners have been several time rewarded for their best performance. Offences entangled the Petitioners as of now remain maximum within the frame working of Section 441 of the Companies Act, as clearly disclosed from Annexure-14 series. For reference of both sides to the Office Memorandum

dated 22.2.2021 also keeping in view the guideline existing since 27.12.2000 and the guidelines issued on 27.10.2010, 05.12.2017, 19.09.2018 and 12.10.2018 all taken into account find place at Annexure-C to the additional affidavit of the O.Ps. on 13.7.2022, this Court finds, the Government of India in the Ministry of Home Affairs taking into account the decision of the Delhi High Court and the guidelines framed therein by such High Court after due deliberation in consultation with various stake holders in supersession of the existing guidelines earlier issued by the same Ministry, with the approval of the Competent Authority has issued a plethora of consolidated guidelines, which shall be followed with immediate effect by all concerned, particularly for the purpose of issuance of LOC in respect of Indian Citizens and foreigners. Relevant guidelines for observance of the Competent Authority in issuing LOC. This Court finds through the provision at Clauses-H & I, there has been following prescription :-

> "(H) Recourse to LOC is to be taken in cognizable offences under IPC or other penal laws. The details in column IV in the enclosed Proforma regarding 'reason for opening LOC' must invariably be provided without which the subject of an LOC will not be arrested/detained.
>
> (I) In cases where there is no cognizable offence under IPC and other penal laws, the LOC subject cannot be detained/arrested or prevented from leaving the country. The Originating Agency can only request that they be informed about the arrival/departure of the subject in such cases."

Reading through the provisions at Clause-H, this Court finds, this is a guideline prescribing recourse to LOC is to be taken in cognizable offence under the Indian Penal Code (IPC) or other penal laws. Clause-I therein prescribes in cases where there is no cognizable offence under the IPC and other penal laws, the LOC subject cannot be detained, arrested or prevented from leaving the country. It further prescribes that the Originating Agency can only request that they be informed about the arrival/departure of the subject in such case. For the material disclosure as of now instead of issuing LOC, even assuming there is trace of some compoundable offences, the Originating Agency maximum requested the Petitioners to keep them informed about departure and arrival of the subject.

12. This Court here takes into account the plea of the O.Ps. in Paragraphs-7 & 8 of the additional affidavit read as follows :-

> "7. That the Look Out Notice was issued by the Ministry on 15.06.2021. Taking into consideration of the gravity of the allegation made in the complaint, the LOC was issued against the Directors/KMPs of the companies where the Petitioners are actively involved to ensure their presence during the course of Inspection and further course of action/proceeding.

> 8. That it is submitted that as per the method and procedure of the inspection the ROC report is not the final one. The ROC being the inspecting officer, has performed his duty to conduct the inspection under the direction of the Ministry but after the submission of the report the Ministry has to examine and take appropriate action either for further inspection/investigation or take appropriate steps for initiation of prosecution in accordance with law depending upon the case and circumstances. In the present case in hand the first stage of inspection is over but as there is serious allegation against companies and its key managerial persons (i.e. the Petitioners), there is issuance of LOC. Thus at this junction interference in the process of inspection or subsequent action will affect the public interest as well as the greater economic interest of the Nation."

Reading the aforesaid plea of the O.Ps., it becomes clear that inspection involving all the Companies has already been completed by the Inspecting Officer under the jurisdiction of the R.O.Cs., Odisha as well as West Bengal. So far Odisha part is concerned, the Petitioners are already in receipt of show cause ultimately establishing no involvement of non-compoundable offences. So far West Bengal part is concerned, there is specific plea that inspection not only completed with full cooperation of the Petitioners but reports so prepared have already been sent to the Ministry for its opinion and action, as appropriate and nothing is received as of now. The above thus discloses that investigation on all the allegations involving the Petitioners is already over. There is no possibility of allegation of non-cooperation in the inspection by any of the Petitioners. There is no complaining of non-coperation against any of the Petitioners. Further as of now there is no existence of the Petitioners' involvement in any non-compoundable offence. In the circumstance, this Court finds, continuance of LOC may be dangerous, as it had already affected the Fundamental Rights of the Petitioners to travel abroad for promotion of their business. The entire inspection is already over and any of the Petitioners movement to abroad can very well be controlled by setting out terms and conditions involving each of the Petitioners.

Looking to the entire plea of the O.Ps., so far it relates to putting the Petitioners in the category of flight risk and entire reading of the plea nowhere it discloses any foundation for putting the Petitioners to such category. Such claim is only based on bald statement while undisputedly there is no ascertainment of involvement of non-compoundable offence involving any of the Petitioners.

13. This Court here first takes into account the citations in ***Garikapati Venketeswara Rao vrs. Union of India and Others*** decided by the Telengana

High Court in W.P.(C) No.6892/2022 dated 6.6.2022, in the case of ***Chaitya Shah vrs Union of India and Others,*** a decision by Bombay High Court in disposal of Criminal Writ Petition No. 3058/2021 decided on 17.11.2021 and the last decision in the case of ***Mrs. Leena Rakesh vrs Bureau of Immigration and Others,*** a case decided by the High Court of Karnataka at its Bengaluru Sitting, a decision dated 20.06.2022 in W.P.No.11213/2022 relied upon by the learned ASGI for the Department finds the first decision already involved declaring the loan involving the company involved already NPA and proceeding under the provision of SARFAESI Act already commenced. Similarly the second case through paragraph-8 clearly disclosed, the petitioners therein not only worked under Mahul Choksi and Nirab Modi but have also deeply involved in their transactions. Thus, this Court finds, first two decisions relied upon by the learned ASGI doesn't come to his rescue. The third decision relied the by the learned ASGI even the petitioner involving a fraud transaction, a Bank's reporting fleeing of Petitioner may risk recovery and even after proceeding under provisions of the SARFAESI Act initiated, Karnataka High Court allowed the petitioner to have his Foreign Trip but subject to condition proposed.

14. In the grim situation, this Court now takes into account the decisions operating the filed as of now, which are discussed herein below.

In the case of ***Noor Paul vs Union of India and Others*** **:** reported in 2022 LiveLaw PH 69, Paragraphs-64, 65, 69 & 76 are extracted, as hereunder :-

> "(64) We may point out that the Office Memorandum No.25016/10/2017 – IMM dt.22.2.2021 placed for our perusal by the learned Additional Solicitor General (the latest one said to contain consolidated guidelines for issuance of an LOC) states:
>
> "In cases where there is non-cognizable offence under the IPC and other penal laws, the LOC subject cannot be detained/arrested or prevented from leaving the country. The originating Authority can only request that they be informed about the arrival/departure of the subject in such cases."
>
> (65) When there is admittedly not even an FIR registered against the petitioner, and there is no question of her being accused of any non-cognizable offence, no LOC could have been issued by respondent No.3 to detain the petitioner. At best, the respondent No.3 could have only given information to respondent No.2 about the arrival/departure of the subject according to the OM dt. 22.02.2021.
>
> (69) We are of the opinion that the quantum of the alleged default by the borrower by itself cannot be the basis for seeking issuance of an extreme process like an LOC for restricting the personal liberty of the petitioner to travel outside the country

without something more. The OM itself does not draw any line about the quantum of default by a borrower to a financial institution which would be considered detrimental to the sovereignty or integrity of India or to the economic interest of India and a quantum of default which would not fall in the said category.

(76) It may be that respondent No.2 entertained the strong apprehension and believed that the guarantors/directors of respondent No.5 might leave the country without paying the dues of respondent No.2 and without informing them and so sought LOC from respondents No.1, 3 & 4. But that by itself is not sufficient to seek issuance of an LOC since mere suspicion is not enough and it cannot take the place of proof."

Here the High Court of Punjab & Haryana considered the maintainability of the LOC while observing that quantum of loan cannot be a ground for issuing LOC and for the prescription in the guidelines, the O.Ps. are only required to inform the arrival and departure.

Paragraphs-41 & 42 of ***Vikas Chaudhary vs Union of India and Others*** : WPC 5374 of 2021 are extracted, as hereunder :-

"41. Before I conclude, I must also refer to the decisions relied upon by the respondents. In paragraph 11 of GSC Rao v. State of U.P.(2019) 106 ACC 437 on which learned counsel for the respondent no.3 has relied in support of its plea, that the mere fact of an accused cooperating with an ongoing investigation, can have no impact on whether a LOC ought to have been issued against him or not, the Court held as under:

"11. We are not inclined to extend the benefit to the revisionist-accused of the law laid down in the judgment of Karti P. Chidambaram (Supra) because in the present case, the LOC has been issued with a view to interrogating the revisionist in the matter at hand wherein the FIR has already been lodged and the investigation is going on. Merely because the revisionist so far had been cooperating with the investigation, may not lead us to believe that he would not evade his arrest in future. If some incriminating evidence comes on record against him, the possibility cannot be ruled out in this case of his fleeing abroad."

What clearly emerges is that in the aforesaid case, the Court was dealing with a situation, where a FIR had already been lodged and a criminal investigation was ongoing against the person against whom the LOC had been issued. The same was the situation in S. Martin v. Deputy Commissioner of Police SCC OnLine Mad 426. In the present case, as has already been noted, no proceedings under any penal law have, in fact, been initiated against the petitioner. These decisions are therefore, clearly distinguishable and do not, in any manner forward the case of the respondents.

42. For the aforesaid reasons, impugned LOC is wholly unsustainable and deserves to be quashed. However, keeping in view the respondent no.3's plea, that it is still awaiting inputs from the authorities at Dubai, upon receipt of which information,

> cases under various penal laws are likely to be initiated against the petitioner, I am of the view, that it would be in the interest of justice for the petitioner to inform respondent no.3, as and when he decides to leave the country, for the next one year."

Here the Delhi High Court held that looking to the background involved herein, the LOC was not sustainable, as the right to travel abroad is a Fundamental Right and the LOC was issued in absence of any pre-condition necessitating such a major requirement.

Paragraphs-73 & 74 of the decision in ***Karti P. Chidambaram vs. Bureau of Immigration*** **:** W.P.No.21305 of 2017 are extracted as hereunder:-

> **"**73. As observed above, the issuance of Look Out Circulars is governed by executive instructions as contained in the Office Memoranda Nos. 25022/13/78-F1 dated 05.09.1979 and 25022/20/98-FIV dated 27.12.2000, as modified by Office Memorandum dated 27.10.2010. Such LOCs cannot be issued as a matter of course, but when reasons exist, where an accused deliberately evades arrest or does not appear in the trial Court. The argument of the learned Additional Solicitor General that a request for Look Out Circular could have been made in view of the inherent power of the investigating authority to secure attendance and cooperation of an accused is contrary to the aforesaid circulars and thus, not sustainable.
>
> 74. It is, in the view of this Court, too late in the day to contend that whether or not to issue an LOC, being a executive decision, the same is not subject to judicial review. It is now well settled that any decision, be it executive or quasi-judicial, is amenable to the power of judicial review of the writ Court under Article 226 of the Constitution of India, when such decision has adverse civil consequences. An LOC, which is a coercive measure to make a person surrender and consequentially interferes with his right of personal liberty and free movement, certainly has adverse civil consequences. This Court, therefore, holds that in exercise of power of judicial review under Article 226 of the Constitution, the writ Court can interfere with an LOC. The question is whether the writ Court should exercise its discretionary jurisdiction to interfere with the impugned LOC."

Here the High Court of Madras held that the LOC can be issued only in cases where the accused in a criminal case was evading arrest and not appearing in the trial court.

"Paragraphs - 28-32 of the decision in ***Rahul Surana Vs. The Serious Fraud Investigation Office*** **:** W.P.NO.2477 OF 2020 are extracted hereunder :-

> "28. The investigation, even after the elapse of three years, is stated to reveal only prima facie materials and no concrete evidences are stated to have been found been found to implicate the petitioner or frame charges. Admittedly, however there are no proceedings against the petitioner so as to implicate him before the Criminal Court or in any other fora to justify the restrictions under which he has been placed.

29. Admittedly, there have been no instances when the petitioner has evaded summons/notices calling for his attendance/appearance. The Central Bureau of Investigation (CBI) has confirmed that there are no investigations that are ongoing in the case of the petitioner, though reserving their right to initiate appropriate action at an appropriate juncture in future.

30. No material is placed before the Court in support of the bald assertion that the petitioner is a flight risk and as a consequence there is no tangible material available, admittedly, to deny the petitioner of his Fundamental Right.

31. This Court, in the decision in the case of Karthi P.Chidambaram (supra) has stated as follows:

. . . . 63. Look Out Circulars are coercive measures to make a person surrender to the Investigating agency or the Court of law. In accordance with the order dated 26.7.2017 of the High Court of Delhi, the Ministry of Home Affairs issued Official Memorandum dated 27.10.2010 laying down the guidelines for issuance of Look Out Circulars. The said Circular provided: Recourse to Look Out Circular is to be taken in cognizable offences under IPC or other penal laws. The details in column IV in the enclosed proforma or regarding reason for opening LOC's must invariably be provided without which the subject of an LOC will not be arrested/detained. . . . .

70. The legality and/or validity of a Look Out Circular has to be adjudged having regard to the circumstances prevailing on the date on which the request for issuance of the Look Out Circular had been made. . . . .

73. As observed above, the issuance of Look Out Circulars is governed by executive instructions as contained in the Office Memoranda Nos.25022/13/78-F1 dated 05.09.1979 and 25022/20/98-FIV dated 27.12.2000, as modified by Office Memorandum dated 27.10.2010. Such LOCs cannot be issued as a matter of course, but when reasons exist, where an accused deliberately evades arrest or does not appear in the trial Court. The argument of the learned Additional Solicitor General that a request for Look Out Circular could have been made in view of the inherent power of the investigating authority to secure attendance and cooperation of an accused is contrary to the aforesaid circulars and thus, not sustainable.

32. In the light of the discussion as aforesaid, I am of the considered view that the petitioner's challenge to the LOC dated 09.12.2020 is liable to be accepted. Even assuming that the same has been extended for which no materials are placed before the Court, the respondents has not been in a position to establish that the settled parametres justifying the issue of an LOC are satisfied in this case. The mandamus, as sought for, is issued and this writ petition is allowed. MPs are closed with no order as to costs."

Here the Madras High Court again held that bald assertions the Petitioner is a flight risk is not sufficient to issue LOC and therefore, Madras High Court set aside the LOC.

15. This Court here finds, there is support of all above decisions to the case of the Petitioners.

16. Now reverting back to the factual aspect, this Court finds, even though there involves an allegation all through that there is information of the Petitioners fleeing away after taking 600 crores to 700 crores from different banks even after a preliminary counter affidavit and an additional affidavit by the Department, there is even no specific allegation on actual loan involved the Petitioners and their Company and any default therein. It is needless to observe here that there is no declaration of NPA involving any account involving the petitioner by any bank as of now. Allegation at this stage appears to be speculative and imaginary and in the circumstance, there cannot be taking away liberty of any of the petitioner.

17. The investigation even after so many lapses of time failed in bringing any concrete evidence to implicate the Petitioners or framing any of them charges under any penal law.

18. Undisputedly, there have been no instances when the Petitioners attempted to evade summons/notices calling for their attendance and/or searching involved, if any.

19. There is even no material produced as of now in support of assertion of the Department, the Petitioners have flight risk, thus the allegation is bald and without any substance.

20. In the factual background and position of law, this Court while declaring the LOC involving the Petitioners as bad in law and inoperative, makes it clear that the setting aside of LOC at the stage shall have no impact in case of any future ascertainment.

However considering that investigation involving all Establishments is over and the Department is waiting for the further advice of the Ministry, this Court is imposing certain conditions for the overseas travel involving each of the Petitioners as follows :-

> I. Each of the Petitioners if undertaking overseas travel, while providing such intimation, has also to produce his overseas travel plan with photocopy of Visa approval with the Company Registrar in the State of Odisha.
>
> II. In the event of necessity of foreign visit of any of the petitioners, he/she while providing the travel plan under condition-I herein above shall also be required to produce a Bank gurantee to the extent of Rs. 5,00,000/- (Rupees Five Lakh) in favour of the R.O.C., Odisha to remain valid for a period of six months at least.

III. Each of the Petitioners shall co-operate the Department whenever there presence will be sought for by the Department.

IV. Each of the Petitioners shall co-operate in any further investigation and/or inspection.

21. The Writ Petitions thus succeed. No order as to Cost.

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2022 (II) ILR - CUT-717

S.K. SAHOO, J.

CRLA NO. 346 OF 2016

ANAND VARDARAJ SUMMUGABEL PANDARAM ……..Appellant

.V.

STATE OF ODISHA ……...Respondent

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT,1985 – Offences under section 20(b)(ii)(c) of the Act – Non-compliance of sections 42 and 57 of the Act – Effect of – Held, when the evidence relating to the mandatory compliance of section 42 of the NDPS Act is doubtful and there is no cogent evidence relating to compliance of section 57 of the NDPS Act, the impugned judgment and order of conviction of the appellant under section 20(b)(ii)(c) of the Act and the sentence passed there under cannot be sustained in the eyes of law.

(Para-8)

Case Laws Relied on and Referred to :-

1. (2020) 1 Orissa Law Reviews 39 : Herasha Majhi & Ors. -Vrs.- State of Odisha
2. (2018) 70 O.C.R 340 : Ramakrushna Sahu & Ors. -Vrs.- State of Orissa
3. 1999 (II) Orissa Law Reviews (SC) 474 : State of Punjab -Vrs.- Baldev Singh
4. (2009) 44 O.C.R. (SC) 183 : Karnail Singh -Vrs.- State of Haryana
5. 1999 Criminal Law Journal 3672 : State of Punjab -Vrs.- Baldev Singh & Ors.
6. (2005) 4 S.C.C. 350 : State of Himachal Pradesh -Vrs.- Pawan Kumar & Ors.
7. A.I.R. 2001 S.C. 1002 : Gurbax Singh -Vrs.- State of Haryana
8. A.I.R. 1994 Supreme Court 1872 : State of Punjab -Vrs.- Balbir Singh
9. (2018) 71 O.C.R. 413 : Ghadua Muduli -Vrs.- State of Orissa
10. (2020) 79 O.C.R (SC) 924 : Mukesh Singh -Vrs.- State (Narcotic Branch of Delhi)
11. (1976) 1 SCC 15 : Bhagwan Singh v. State of Rajasthan
12. (1996) 11 SCC 709 : Megha Singh v. State of Haryana
13. (2018) 17 SCC 627 : Lal v. State of Punjab

For Appellant : Mr. Jugal Kishore Panda & Mr. Bikash Karna
For Respondent : Mrs. Susamarani Sahoo, A.S.C.

JUDGMENT Date of Hearing & Judgment: 27.07.2022

S.K. SAHOO, J.

The appellant Anand Vardaraj Summugabel Pandaram faced trial in the Court of learned 3rd Additional Sessions Judge-cum-Special Judge, Berhampur in 2(a) C.C No. 25/2015(N)/T.R. No.18/2015 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 12.08.2015 at about 9.55 a.m. he was found in unlawful possession of one white colour jari basta containing 28 Kgs. 500 grams of ganja (cannabis), one white jari basta containing 19 Kgs. of ganja (cannabis) and one blue colour trolley bag containing 18 Kgs. of ganja (cannabis) in total 65 Kgs. 500 grams at S.B.I. Chhak, Berhampur in the district of Ganjam without any authority or licence in contravention of section 8 of the N.D.P.S. Act.

The learned trial Court vide impugned judgment and order dated 19.05.2016/20.05.2016 found the appellant guilty of the offence charged and he was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-(rupees one lakh), in default, to undergo R.I. for one year.

2. The prosecution case, in short, is that on 12.08.2015 at about 6.30 a.m. while P.W.3 Arun Kumar Padhi, Inspector in-charge, E.I. & E.B., Berhampur was performing patrolling duty along with his staff, at that time, he received reliable information that one person has got down from the bus carrying ganja. P.W.3 recorded the information and intimated to his superior officer, i.e. Deputy Commissioner of Excise, Berhampur about such information and proceeded to S.B.I. Chhak along with his staff and detected that the appellant was sitting on a jari basta and beside him, another jari basta so also one black colour trolley bag were kept. P.W.3 suspected the appellant to be carrying some contraband articles in the jari bastas so also in the trolley bag and was waiting for the arrival of the bus to transport the same. He disclosed his identity to the appellant and also apprised him about his right to be searched before a Gazetted Officer or a Magistrate. The appellant gave his option in writing to be searched by P.W.3. P.W.3 gave his personal search to the appellant in presence of the witnesses and then personal search of the appellant was taken and two jari bastas and one trolley bag containing ganja were seized and by opening the same, he took a handful of recovered articles from inside the jari bastas and the trolley bag one

after another and by rubbing the same in his hand, from its smell, texture, colour and from his departmental experience of twenty two years, P.W.3 came to know that the articles contained in jari bastas so also the trolley bag was nothing but ganja. The weighment of the ganja was taken and one jari basta was found to be containing 28.500 grams of ganja, which was marked 'A', the other jari basta found to be containing 19 kgs. was marked as 'B' and the trolley bag containing ganja was found to be 18 kgs. was marked as 'C' and as such, in total 65.500 grams of ganja was seized and the same was recovered from the possession of the appellant. Paper slips were attached to the jari bastas as well as to the trolley bag after its seizure and it was sealed by using the personal brass seal of P.W.3 and the brass seal was handed over in the zima of A.S.I. of Excise Bhagaban Mahanandia (P.W.2) by executing zimanama Ext.2/2. The seizure list (Ext.1/2) of two jari bastas and one trolley bag was prepared in presence of the witnesses in which all of them including the appellant signed and the contents of the seizure list was read over and explained to the appellant and copy of the seizure list was also handed over to him, which he received by putting his signature. P.W.3 prepared the spot map (Ext.3/2) and after explaining the grounds of arrest, the appellant was arrested by P.W.3. P.W.3 brought the appellant, the seized articles and all the documents and produced before the learned Sessions Judge - cum- Special Judge, Berhampur on 12.08.2015 itself with a prayer for drawal of samples from the seized articles. The appellant was remanded to judicial custody and the learned Special Judge directed the learned S.D.J.M., Berhampur for drawal of samples. In pursuance of such order passed by the learned Special Judge, the seized jari bastas and the trolley bag containing ganja were produced before the learned S.D.J.M., Berhampur, who verified the seal, broke the seals of the jari bastas and trolley bag and drew samples in duplicate from the seized bags each containing 50 grams in total six packets and marked the sample packets as A1, A2, B1, B2, C1 and C2. The learned S.D.J.M. kept the broken seal in a separate envelope. The sample packets marked as A1, B1 and C1 along with the authorization letter of learned S.D.J.M., Berhampur were handed over to P.W.2 to be produced before the Asst. Chemical Examiner, D.E.C.T.L., Berhampur for chemical examination. The rest of the sample packets i.e. A2, B2 and C2 along with envelope containing the broken seal were kept in Court Malkhana and the bulk quantity of ganja in two jari bastas and one trolley bag were kept in the Excise Malkhana as per the order of the Court. P.W.3 submitted preliminary report to his superior authority on 13.08.2015 and on 17.08.2015 he received chemical examination report, which indicated that the sample packets A1, B1 and C1 were found to be containing ganja (cannabis) as defined under section 2(iii)(b) of the N.D.P.S. Act. P.W.3 requested his superior authority to return back the preliminary report for submission of final prosecution report and

on 22.08.2015 he received the same and on completion of investigation, he submitted prosecution report against the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act.

3. The appellant was charged under section 20(b)(ii)(C) of the N.D.P.S. Act to which he pleaded not guilty and claimed to be tried.

4. During course of trial, the prosecution examined three witnesses.

P.W.1 Sunil Das is an independent witness and he did not support the prosecution case for which he was declared hostile by the prosecution and cross-examined.

P.W.2 Bhagaban Mahanandia was the A.S.I. of Excise, E.I. & E.B., Berhampur and he stated that he was performing patrolling duty with P.W.3 on the date of occurrence. He further stated about the seizure of contraband ganja from the possession of the appellant in two jari bastas as well as one trolley bag. He further stated about the test conducted by P.W.3 to come to a conclusion that the recovered articles were nothing but Cannabis and about taking zima of brass seal of P.W.3, which was used in sealing the jari bastas as well as trolley bag. He also stated that the appellant along with the seized articles were produced before the learned Special Judge, Berhampur and the sample packets were handed over to him to be produced before the D.E.C.T.L., Berhampur.

P.W.3 Arun Kumar Padhi was the Inspector in-charge, E.I. & E.B., Berhampur, who not only conducted the search and seizure, but also investigated the case and submitted the prosecution report.

The prosecution exhibited twelve documents. Ext.1/2 is the seizure list, Ext.2/2 is the zimanama of brass seal, Ext.3/2 is the spot map, Ext.4/2 is the written option given to the appellant, Ext.5/2 is the written consent given by the appellant, Ext.6/2 is the drug testing chart, Ext.7/1 is the weighment chart, Ext.8/1 is the authorization letter of S.D.J.M., Berhampur, Ext.9 is the office copy of reason of belief, Ext.10 is the office copy of information sent to Deputy Commissioner of Excise, Ext.11 is the specimen of brass seal and Ext.12 is the C.E. report.

The prosecution also proved nine material objects. M.O.I is the brass seal, M.O.II is the jari basta containing 28 kg. 650 grams, M.O. III jari basta containing 19 Kg. ganja, M.O. IV is the blue colour trolley bag containing 18 kg. of ganja excluding the weight of bag, M.O.V is the sample packet A2, M.O.VI is the sample packet B2, M.O.VII is the sample packet C2, M.O.VIII is the envelope containing broken seal and M.O. IX is the remnants of cannabis.

No witness has been examined on behalf of the defence.

5. The learned trial Court after analysing the oral as well as documentary evidence available on record, came to hold that section 42 of the N.D.P.S. Act has been complied with as copy of the information was sent to the Deputy Commissioner of Excise vide Ext.10. It was further held that even though the independent witness (P.W.1) has not supported the prosecution case, but he admitted his signatures on different papers and therefore, the contention raised by the learned defence counsel that independent witness was not present during search, cannot be believed. Learned trial Court further held that there is no discrepancy in the evidence of the official witnesses and in view of the evidence on record, it can be said that the appellant was transporting the contraband articles violating section 8 of the N.D.P.S. Act. After taking into account the report given by the Chemical Examiner, the learned trial Court came to hold that the prosecution has successfully established its case under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellant.

6. Mr. Jugal Kishore Panda, Advocate being ably assisted by Mr. Bikash Karna, Advocate appearing for the appellant contended that the finding of the learned trial Court that section 42 of the N.D.P.S. Act has been duly complied with as copy of the information was sent to the Deputy Commissioner of Excise vide Ext.10, is not correct. It is argued that since no one from the office of the Deputy Commissioner of Excise has been examined and no document from the said office has been proved relating the receipt of Ext.10, it can be said that section 42(2) of the N.D.P.S. Act, which is mandatory in nature, has not been complied with and therefore, the entire prosecution case is vitiated. Learned counsel further argued that though P.W.3 has stated about preparation of preliminary report under section 57 of the N.D.P.S. Act, but such report has not been produced before the Court during trial and there is also no documentary evidence and no oral evidence except the statement of P.W.3 that such report was submitted to the superior authority in consonance with section 57 of the N.D.P.S. Act. It is argued that even though section 57 of the N.D.P.S. Act is not mandatory in nature, but the I.O. cannot totally ignore the same. It is further argued that there is non-compliance of the provision under section 50 of the N.D.P.S. Act and since P.W.3 is the officer, who conducted search and seizure on receipt of reliable information, he should not have been the Investigating Officer of the case, which has caused serious prejudice to the appellant and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mrs. Susamarani Sahoo, learned Addl. Standing Counsel for the State, on the other hand, supported the impugned judgment and contended that even

though independent witness has not supported the prosecution case, but in view of the settled position of law that on the basis of the evidence of the official witnesses, conviction can be sustained and since the evidence of P.Ws.2 and 3, who are the two official witnesses corroborated each other and no material discrepancies are found in their evidence and the evidence relating to search and seizure of contraband articles from the possession of the appellant is clear and cogent and the chemical examination report indicates that the seized articles were nothing but ganja, no fault can be found with the impugned judgment and the order of conviction and therefore, the appeal should be dismissed.

7. Adverting to the contentions raised by the learned counsel for the respective parties and after going through the evidence on record, there is no dispute that the prosecution examined three witnesses during trial, out of which the independent witness P.W.1 Sunil Das has not supported the prosecution case. He stated that he did not know the appellant and while he was going on the station road, he was detained by the excise people and at their instance, he signed on some papers and he proved his signatures on those papers. The prosecution declared P.W.1 hostile and cross-examined him but except confronting the previous statement to him, nothing more has been brought out from his evidence. The defence also cross-examined P.W.1 and he admitted that he signed on plain papers when no one was present at the spot. Therefore, the evidence of P.W.1 is in no way helpful either to the prosecution or to the defence.

Evidentiary value of two official witnesses:

Coming to the evidence of the two official witnesses, i.e. P.W.2 and P.W.3, in the case of **Herasha Majhi and others -Vrs.- State of Odisha reported in (2020) 1 Orissa Law Reviews 39**, it is held that merely because the independent witnesses have turned hostile, the evidence of the police witnesses cannot be disbelieved. Conviction can be based solely on the testimony of the official witnesses; condition precedent is that the evidence of such witnesses must be reliable, trustworthy and must inspire confidence. There is absolutely no command of law that the testimony of the police officials should always be treated with suspicion. Of course, while scrutinising the evidence, if the Court finds the evidence of the police officials as unreliable and untrustworthy, the Court may disbelieve them but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is based on the principle that quality of the evidence weighs over the quantity of evidence. The rule of prudence requires a more careful scrutiny of the evidence of the police officials, since they can be said to be interested in the result of the case projected by them. Absence of any corroboration from the independent

witnesses does not in any way affect the creditworthiness of the prosecution case. Non-supporting of the prosecution case by the independent witnesses in N.D.P.S. Act cases is a usual feature but the same cannot be a ground to discard the entire prosecution case. If the evidence of the official witnesses which is otherwise clear, cogent, trustworthy and above reproach is discarded in such cases just because the independent witnesses did not support the prosecution case, it would be an impossible task for the prosecution to succeed in a single case in establishing the guilt of the accused. Therefore, the Court has got an onerous duty to appreciate the relevant evidence of the official witnesses and determine whether the evidence of such witnesses is believable after taking due care and caution in evaluating their evidence.

Section 42 of the N.D.P.S. Act:

So far as the submission relating to non-compliance of the provisions under section 42 of the N.D.P.S. Act is concerned, in the case of **Ramakrushna Sahu and others -Vrs.- State of Orissa reported in (2018) 70 Orissa Criminal Reports 340,** this Court has held as follows :

> "Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Under section 42 (1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. The copy of information taken down in writing under sub-section (1) or the grounds of belief recorded under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act has to be sent to his immediate superior official within seventy-two hours.

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, the Hon'ble Supreme Court while discussing section 42 of the N.D.P.S. Act, held as follows:-

> "10. The proviso to Sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide Sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to Sub-section (1), shall forthwith send a copy of his belief under the proviso to Sub-section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

The decision rendered in the case of ***Baldev Singh*** *(supra)* was further considered by a five-Judge Bench of the Hon'ble Supreme Court in the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183** wherein it was held in the concluding paragraph as follows:-

> "17. In conclusion, what is to be noticed is **Abdul Rashid** did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did **Sajan Abraham** hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information (of the nature referred to in sub-section (1) of Section 42 from any person has to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.
>
> (c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the

> officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.
>
> (d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

In view of such settled position of law, now it is to be seen whether the contention raised by the learned counsel for the appellant that there is non-compliance of the mandatory provisions under sections 42(1) and 42(2) of the N.D.P.S. Act is sustainable or not.

P.W.3 has stated that on 12.07.2015 while he was performing patrolling duty at S.B.I. Chhak, Berhampur along with his staff, he received reliable information that one person got down from the bus carrying ganja and he immediately recorded information and intimated to his higher officer, i.e Deputy Commissioner of Excise, Berhampur about such information. He proved the office copy of the said reason of belief marked as Ext.9 (with objection) and the office copy of such information, which was received by the Steno Sri Mohapatra Babu of the Deputy Commissioner of Excise as Ext.10, the signature of Mahapatra Babu was marked as Ext.10/1 (with objection). The evidence of P.W.2, who was performing patrolling duty with P.W.3 is silent relating receipt of any reliable information, its recording by P.W.3 and intimation given to the superior officer, i.e. Deputy Commissioner of Excise. There is no material as to who carried Exts. 9 and 10 to the office of the Deputy Commissioner of Excise. P.W.3 has stated that he has not reflected in the PR that he had sent the Excise Constable Sri B.B. Nayak to his superior authority. The defence has suggested to P.W.3 that Ext.10 was not received by the Steno of Deputy Commissioner of Excise and that he had not sent the copy to the superior officer to which P.W.3

has denied. Admittedly, neither Mohapatra Babu, the Steno of Deputy Commissioner of Excise has been examined nor any other officer from the office of Deputy Commissioner of Excise has been examined to prove that Exts. 9 and 10 were received in the office of the Deputy Commissioner of Excise. No official register has also been proved from such office relating to receipt of those documents. There is no signature of any one from the office of Deputy Commissioner of Excise in Ext.9. Therefore, not only there is absence of any corroboration to the oral evidence of P.W.3 relating to receipt of any reliable information or recording of such information or sending information in writing to the superior officer, but also there is no documentary evidence to that effect. The document should have been seized by the Investigating Officer from the office of Deputy Commissioner of Excise to corroborate the evidence of P.W.3. Unless the compliance of section 42 of the N.D.P.S. Act is proved by adducing cogent evidence, in appropriate cases the whole prosecution case becomes suspicious. Thus, in the factual scenario, in absence of proving the corresponding documentary evidence and adducing corroborative oral evidence, it is very difficult to hold that there has been compliance of mandatory provision of section 42 of the N.D.P.S. Act.

Section 50 of the N.D.P.S. Act:

Though some discrepancies were pointed out relating to compliance of section 50 of the N.D.P.S. Act, but law is well settled as held by the Constitution Bench of the Hon'ble Supreme Court in the case of **State of Punjab -Vrs.- Baldev Singh and others reported in 1999 Criminal Law Journal 3672** so also the **State of Himachal Pradesh -Vrs.- Pawan Kumar and others reported in (2005) 4 Supreme Court Cases 350** that the provision of section 50 will come into play only in the case of personal search of the accused and not some baggage like the bag or container etc., which he may be carrying. A bag, briefcase or container etc. can, under no circumstances, be treated as body of a human being.They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Therefore, it is not possible to include these articles within the ambit of the word 'person' occurring in section 50 of the N.D.P.S. Act. Therefore, I am not able to accept the contention of the learned counsel for the appellant that in a case of this nature, there is requirement of compliance of section 50 of the N.D.P.S. Act.

Section 57 of the N.D.P.S. Act:

Coming to section 57 of the N.D.P.S. Act, it says that whenever any person makes any arrest or seizure under the N.D.P.S. Act, he shall, within forty-

eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

P.W.3 has stated that on 13.08.2015 he submitted the preliminary report to the superior authority and he further stated that he requested his higher authority to return back the preliminary report in order to submit the final prosecution report before the Court. The preliminary report has not been exhibited in the present case and there is neither any corroborative documentary evidence nor oral evidence regarding submission of such report before the superior authority.

In the case of **Gurbax Singh -Vrs.- State of Haryana reported in A.I.R. 2001 S.C. 1002**, it is held that it is true that the provisions under sections 52 and 57 of the N.D.P.S. Act are directory and violation of these provisions would not ipso facto vitiate the trial or conviction. However, I.O. cannot totally ignore the provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article.

In the case of **State of Punjab -Vrs.- Balbir Singh reported in A.I.R. 1994 Supreme Court 1872**, it is held that if there is non-compliance of the provision under section 57 of the N.D.P.S. Act or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

In the case of **Ghadua Muduli -Vrs.- State of Orissa reported in (2018) 71 Orissa Criminal Reports 413,** it is held that when the original report has not been produced and no competent witness from the S.P. office has been examined and no corresponding documents from the office of S.P. has been proved relating to receipt of the full report under section 57 of the N.D.P.S. Act, it is very difficult to accept that there is substantial compliance of such provision.

Therefore, in the case in hand, I am of the humble view that there is no acceptable evidence regarding compliance of section 57 of the N.D.P.S. Act.

Officer conducting search and seizure is the investigating officer :

The point raised by the learned counsel for the appellant that P.W.3 being the officer, who conducted search and seizure, should not have been the Investigating Officer of the case and it has caused serious prejudice to the appellant, has been adjudicated by the Constitution Bench of the Hon'ble Supreme Court in the case of **Mukesh Singh -Vrs.- State (Narcotic Branch of**

Delhi) reported in (2020) 79 Orissa Criminal Reports (SC) 924 wherein it is held as follows :

> "12. From the above discussion and for the reasons stated above, we conclude and answer the reference as under:
>
> I. That the observations of this Court in **Bhagwan Singh v. State of Rajasthan (1976) 1 SCC 15**; **Megha Singh v. State of Haryana (1996) 11 SCC 709**; and State by Inspector of Police, NIB, Tamil Nadu v. Rajangam (2010) 15 SCC 369 and the acquittal of the accused by this Court on the ground that as the informant and the investigator was the same, it has vitiated the trial and the accused is entitled to acquittal are to be treated to be confined to their own facts. It cannot be said that in the aforesaid decisions, this Court laid down any general proposition of law that in each and every case where the informant is the investigator there is a bias caused to the accused and the entire prosecution case is to be disbelieved and the accused is entitled to acquittal;
>
> II. In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case to case basis. A contrary decision of this Court in the case of **Mohan Lal v. State of Punjab (2018) 17 SCC 627** and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled."

8. In view of the foregoing discussions, when the evidence relating to the mandatory compliance of section 42 of the N.D.P.S. Act is doubtful and there is no cogent evidence relating to compliance of section 57 of the N.D.P.S. Act and P.W.3 being the officer, who conducted search and seizure has also investigated into the case and submitted the prosecution report, I am of the humble view that the impugned judgment and order of conviction of the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder cannot be sustainable in law.

Accordingly, the Criminal Appeal is allowed. The appellant is acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellant, who is in jail custody, shall be set at liberty forthwith, if his detention is not required in any other case.

Trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2022 (II) ILR - CUT-729

S.K. SAHOO, J.

CRLA NO. 479 OF 2016

RAJKISHORE NAYAK@RAJU …….. Appellant

.V.

STATE OF ODISHA ……..Respondent

(A) CRIMINAL TRIAL – Offences punishable under sections 366/376/506 of the Indian Penal Code r/w section 4 of the Protection of Children from Sexual Offences Act, 2012 – There is no material that while the victim was moving with the appellant as a pillion rider, she raised any shout to draw the attention of anyone or protested to the appellant and tried to stop the motor cycle – More so the victim has neither stated about the incident before the police in her 161 statement nor under 164 of Cr.P.C – Effect of – Held, her conduct in remaining silent throughout, even while moving in busy locality speaks a lot about her willingness/volition to move with the appellant in the motor cycle – Therefore the aforesaid charges under IPC are not sustainable in the eyes of law – The criminal appeal allowed. (Para 9)

(B) INDIAN PENAL CODE, 1860 – Section 361 – Distinction between 'taking' and "allowing a minor to accompany of a person" – Discussed. (Para 9)

(C) INDIAN PENAL CODE, 1860 – Section 376(1) r/w section 4 of POCSO Act – When the evidence of the star witness of the prosecution is shaky in nature? – Effect of – Held, it cannot be said that the prosecution has successfully established the charges. (Para-8)

Case Law Relied on and Referred to :-

1. AIR 1965 Supreme Court 942 : S. Vardarajan -Vrs.- State of Madras.

For Appellant : Mr. Anirudha Das

For Respondent : Mr. Manoranjan Mishra, A.S.C.

JUDGMENT Date of Hearing & Judgment: 28.07.2022

S.K. SAHOO, J.

The appellant Rajkishore Nayak @ Raju faced trial in the Court of learned Sessions Judge -cum- Special Judge, Kandhamal, Phulbani in G.R. Case No.25 of 2014 for the offences punishable under sections 366/376/506 of the Indian Penal Code read with section 4 of the Protection of Children

from Sexual Offences Act, 2012 (hereafter the 'POCSO Act') on the accusation that on 04.04.2014 at about 6.00 a.m. at village Padasahi, he kidnapped the victim 'R.D' who was a minor girl and committed rape on her and also threatened her not to disclose about the incident otherwise she would be killed.

The learned trial Court vide impugned judgment and order dated 23.03.2016 found the appellant guilty of the offences charged and sentenced him to undergo rigorous imprisonment for a period of eight years on each count for the offence under section 376(1) of the Indian Penal Code and section 4 of the POCSO Act and further sentenced to undergo R.I. for a period of one year on each count for the offences under sections 363 and 506 of the Indian Penal Code.

2. The prosecution case, as per the first information report, in short, is that on 04.04.2014 in the early morning, the victim had been to the field of Padasahi to attend the call of nature and while she was returning home, the appellant forcibly took her away from the place of occurrence on his motorcycle and committed rape on her inside a jungle and threatened her not to disclose about the incident, otherwise she would be killed and then then appellant took the victim to his relation's house and then left her in her house on 06.04.2014.

The first information report was lodged by the father of the victim, namely, Lal Mohan Digal (P.W.2) before the Inspector-in-charge of G. Udayagiri police station on 16.04.2014 and accordingly, G. Udayagiri P.S. Case No.50 dated 16.04.2014 was registered under sections 363/376/506 of the Indian Penal Code and section 4 of the POCSO Act.

P.W.7 Sukumar Hansda, S.I. of police of G. Udayagiri police station investigated the case. He examined the informant and other witnesses, visited the spot and prepared spot map marked as Ext.9 and on 24.04.2014 the victim was sent for medical examination and P.W.6 Dr. Sudipa Das, Associate professor of F.M and T Department of M.K.C.G. Medical College, Berhampur examined her and submitted the report marked as Ext.2/1. The appellant was arrested on 24.05.2014 and he was also sent for medical examination and P.W.4 Dr. Jyotiranjan Jena examined him and submitted the report vide Ext.5. The statement of the victim under section 164 of Cr.P.C. was recorded by the learned S.D.J.M., Phulbani. The wearing apparels of the appellant were seized after the medical examination as per seizure list Ext.14.

The nail clipping, pubic hair, blood sample, semen of the appellant were also collected by the doctor and it was seized as per seizure list Ext.15 and the seized exhibits were forwarded to S.F.S.L., Rasulgarh, Bhubaneswar through Special Judge, Phulbani for chemical examination and on completion of investigation, charge sheet was submitted against the appellant for commission of offences under sections 363/376/506 of the Indian Penal Code and section 4 of the POCSO Act.

3. The defence plea of the appellant is one of denial and it is pleaded that there was previous enmity between the family of the informant with the family of the victim, for which a false case has been foisted against him.

4. In order to prove its case, the prosecution examined seven witnesses.

P.W.1, the victim stated as to how she was forcibly taken by the appellant and raped and then kept in the relation's house of the appellant and how she was left by the appellant in her house. She stated her age to be sixteen years at the time of occurrence.

P.W.2 Lal Mohan Digal is the father of the victim and he is the informant in the case. He stated that the victim disclosed about the incident before him. He is also a witness to the seizure of wearing apparels of the victim.

P.W.3 Nirada Digal is the mother of the victim and she stated about the disclosure made by the victim about the occurrence before her.

P.W.4 Dr. Jyotiranjan Jena was the Medical Officer, C.H.C., G. Udayagiri who examined the appellant on police requisition on 24.05.2014 and proved his report vide Ext.5.

P.W.5 Sri Sukanta Nayak did not support the prosecution case and he was declared hostile by the prosecution.

P.W.6 Dr. Sudipa Das was the Associate Professor of Dept. of F.M. and T, M.K.C.G. Medical College, Berhampur and she examined the victim on police requisition on 24.04.2014 and proved the medical examination report marked as Ext.2/1.

P.W.7 Sukumar Hansda was the Sub-Inspector of Police of G. Udayagiri Police Station who is also the Investigating Officer in the case.

The prosecution exhibited as many as sixteen documents. Exts.1 is the 164 Cr.P.C. statement of the victim, Ext.2/1 is the Medical examination report of the victim, Exts.3, 11, 14 and 15 are the seizure lists, Ext.4 is the first information report, Exts.5 is the medical examination report of the appellant, Exts.6 and 13 are the police requisitions for medical examination of the appellant, Ext.7 is the police requisition for medical examination of the victim, Ext.8 is the Original High School certificate of the victim, Ext.9 is the spot map, Ext.10 and 12 are the requisitions for recording 164 Cr.P.C. statement of the victim, Ext.16 is the written prayer to send the seized exhibits to SFSL, Rasulgarh, Bhubaneswar for chemical examination.

5. The learned trial Court after assessing the oral and documentary evidence on record has been pleased to hold that there are no such contradictions to disbelieve the evidence of the victim (P.W.1) and the minor contradiction does not affect the veracity of the witness. It was further held that since the victim was examined medically after about three weeks of the occurrence, therefore, absence of any injury on her person or back does not affect her testimony. Learned trial Court further held that in a case of this nature, delay in lodging the F.I.R. cannot be a ground to discard the prosecution evidence. It was further held that implicit reliance can be placed on the evidence of P.W.1, the victim. The learned trial Court further held that the victim's date of birth as mentioned in Ext.8 was 03.03.1998 and it can be safely accepted and thus she was just over 16 years of age as on the date of occurrence. It was further held that since the victim was minor as on the date of occurrence, therefore, her consent if any, is inconsequential and it is clear from the prosecution evidence that the accused took away the victim, a minor girl from keeping of her parents without the consent and thus the offence under section 363 of the Indian Penal Code is accordingly established. It was further held that the prosecution has also successfully proved the offences under sections 376 (1) and 506 of the Indian Penal Code. It was further held that the plea of false implication is absurd and fanciful in the least. No parent more so in the rural community would embroil his minor daughter in such an unsavoury allegation in order to settle a score.

6. Mr. Anirudha Das, learned counsel appearing for the appellant contended that in the F.I.R. lodged by P.W.2, it is mentioned that on 05.04.2014 in the evening hours a report was presented by him in the police station but such report has not seen the light of the day. The F.I.R. that has been proved in this case and marked as Ext.4 was lodged twelve days after

the occurrence i.e. on 16.04.2014 which was ten days after the victim returned to her home and no satisfactory explanation has been offered by the prosecution regarding delay in lodging of the first information report. Learned counsel for the petitioner further submitted that from the statement of the victim as was recorded by police, at the first instance, she did not state about the commission of rape on her by the appellant, any threat given by the appellant to her not to disclose the incident before anybody or that the appellant opened her dress and pant. It is contended that when more than a month after the statement of the victim was recorded by the learned Magistrate, she disclosed about the commission of rape on her by the appellant. The explanation given by the victim regarding delayed disclosure about the incident is not acceptable. It is further submitted that the victim has stated that when she stayed in the house of the 'Kaka' of the appellant, there was no sexual assault on her there by the appellant and there is no corroboration from the medical evidence and therefore, there is no clinching material available on record to make out a case under section 376(1) of the Indian Penal Code and section 4 of the POCSO Act.

Learned counsel for the petitioner further submitted that though from the H.S.C. certificate proved by the prosecution, it appears that the victim was sixteen years and one month of age as on the date of occurrence but the doctor who examined her on police requisition stated that on the basis of her physical findings, dental examination, secondary sexual characters and radiological findings that the age of the victim girl would be in between seventeen and nineteen years. It is also argued that the conduct of the victim in not attending the call of nature in the place which is nearer to her house and going to a distant place crossing three Sahies and while sitting in the motor cycle of the appellant as a pillion rider, not raising any shout or protest during course of her journey for about distance of fifteen to twenty kilometers which was a busy road to draw the attention of others indicates that she on her own volition left her lawful guardianship and returned back and therefore, the ingredients of the offence of kidnapping would also not be attracted and it is a fit case where benefit of doubt should be extended in favour of the appellant.

7. Mr. Manoranjan Mishra, learned Addl. Standing counsel, on the other hand supported the impugned judgment and contended that as per the H.S.C. certificate, the victim was minor and she was aged about sixteen years and one month. The plea of consent is immaterial and delay in reporting the

incident before police in a case of this nature is not a ground to discard the prosecution version. It is argued that when the victim returned home, she disclosed before her parents about the occurrence and the parents decided to lodge the F.I.R. on 16.04.2014 and in such a scenario as rightly held by the learned trial Court that delay in lodging the F.I.R. cannot be a ground to discard the prosecution case. The learned counsel further submitted that the doctor examined the victim much after the date of occurrence and therefore, at that stage, it would not have been possible to find any sign or symptom of sexual intercourse with the victim or any injury on her person and therefore, it cannot be said that on account of non-corroboration from the medical evidence, the evidence of the victim is to be discarded.

8. Considering the submission made by the learned counsel for the respective parties and after going through the evidence on record, it appears that the victim who is the star witness on behalf of the prosecution has stated that on the date of occurrence i.e. 04.04.2014, she had gone to the field of Padasahi to attend the call of nature which is at a distance of about one kilometer away from her house. She further stated that the place of call of nature is situated towards Kalinga and in order to reach the place of call of nature, one has to cross three Sahies and she was attending call of nature fifty meters away distance from the last Sahi. The father of the victim being examined as P.W.2 stated that in their Sahi, there was a field for the purpose of attending call of nature and a small pond situates there and generally, the people of his Sahi attend call of nature in the said field and take bath in the small pond. In such a scenario, when a field was available nearer to the house of the victim for the purpose of attending call of nature, it is not conceivable that the victim would go to a distant place which is one kilometer away for attending call of nature crossing three villages alone in the early morning.

The victim stated that the appellant forcibly took her away from the place of occurrence on his motor cycle and committed rape on her inside a jungle by opening her dress and pant and also threatened her to kill, if she disclosed the incident to anybody. The victim admits in her cross-examination that she has not stated before the I.O. that the appellant committed rape on her inside the jungle and that the appellant opened her dress and pant and that the appellant threatened her as well as her parents to kill, if she would disclose the incident before anybody. No doubt, the victim has offered an explanation that the appellant threatened her to kill her and her parents and for that reason, she did not disclose the fact before the I.O., but

when the victim in spite of such threat, if any, had disclosed the incident before her parents and when the family has decided to lodge the F.I.R. and thereafter the victim was examined, it is strange that nothing has been stated against the appellant by the victim relating to commission of rape on her or opening of her dress or giving any threat to her. It is no doubt true that in the 164 Cr.P.C. statement which was recorded on 23.05.2014 i.e. more than a month after the lodging of the F.I.R., the victim has stated about commission of rape on her but in view of the delayed disclosure of such aspect before the Magistrate, particularly when the same has not been stated before the I.O. and when there is nothing in such statement recorded under section 164 of Cr.P.C. that any threat was given by the appellant to her not to disclose the incident, the evidence of the victim relating to commission of rape becomes suspicious.

The victim has stated that the appellant took her to the house of his 'Kaka' where she stayed with the family members of the 'Kaka' and during her stay at Kaka's house, the appellant had not sexually assaulted her and the appellant even did not reside in that relation's house.

The doctor (P.W.6) who examined the victim on 24.04.2014 found that the vaginal canal admits two fingers with resistance and there are no sign of recent sexual intercourse and that she was accustomed to penetrative sex act and there were no injuries detected on her person or in and around of her private parts to suggest forcible sexual intercourse.

No doubt, the victim's examination took place much after the alleged date of occurrence (04.04.2014) but when the f irst information report was lodged on 16.04.2014, it is not understood as to why there was eight days delay in the examination of the victim by the doctor. It is true that there are decisions of the Hon'ble Supreme Court and of this Court that delay in lodging of F.I.R. in sexual offences can be due to variety of reasons particularly, on account of the reluctance of the victim and her family members to go to the police to disclose about the incident which concerned the reputation of the victim and the honour of the family and they used to take time as to whether to give such report or not, but in a case of this nature when the decision has already been taken and the F.I.R. was lodged after twelve days of the occurrence and ten days after the victim returned home, the non-disclosure of the victim about the occurrence before the Investigating Officer at the first instance and disclosing the same before the Magistrate a month after the lodging of the F.I.R. creates suspicion about the truthfulness

of her version. Therefore, when the evidence of the star witness of the prosecution is shaky in nature, it cannot be said that the prosecution has successfully established the charge under section 376(1) of the Indian Penal Code so also section 4 of the POCSO Act against the appellant which deals with punishment for penetrative sexual assault. At this stage, it would be proper to mention that the learned trial Court has imposed sentence for both the offences i.e. under section 376(1) of the Indian Penal Code so also section 4 of the POCSO Act which was not proper and justified in view of section 42 of the POCSO Act.

9. So far as the offence under section 363 of the Indian Penal Code is concerned, the victim has stated that she sat on the motor cycle of the appellant as a pillion rider and the accused took her towards Kuruminga road and then he took her to village Bakingia and it took two hours to reach the village Bakingia. The evidence of the father of the victim who was examined as P.W.2 indicates that the accused was their neighbour and the accused and his family members were having visiting terms to his house. He further stated that village Katidingia is about 15 to 20 Kms. away from his village and if somebody would go to village Katidingia, he had to go through G. Udayagiri to Raikia road and G. Udayagiri to Raikia road is a busy road and some villages are situated both side of the road and villages, namely Kurmingia, Suheli, Bitingia, Kumbharakupa and other villages fall on the side of the road which leads to Padasahi to G. Udayagiri via Kalinga.

There is no material that while the victim was moving with the appellant as a pillion rider, she raised any shout to draw the attention of anyone or protested to the appellant and tried to stop the motor cycle. Her conduct in remaining silent throughout even while moving in busy locality speaks a lot about her willingness, volition to move with the appellant in the motor cycle.

In case of **S. Vardarajan –Vrs.- State of Madras reported in AIR 1965 Supreme Court 942**, it is held that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. When a girl who though a minor had attended the age of discretion moves with the accused from place to place and there is no evidence of any force by the accused, by no stretch of imagination, it can be said that she was taken away. The accused stated to have been taken her out of her keeping of her lawful guardianship. There is a distinction between ‘taking’ and allowing a minor to accompany of a person. The two expressions

are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same for the purpose of section 361 of the Indian Penal Code. When the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing voluntarily joins the accused, the accused cannot be said to have taken her away from the keeping of her lawful guardianship. Something more has to be shown in a case of this kind and that is some kind of inducement laid down and that is some kind of inducement held out by the accused or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

In view of the factual scenario in the case and the manner in which the victim accompanied with the appellant in his motor cycle and absence of any material that she raised any protest before anybody on the way or while staying in the house of the Kaka of the appellant, I am of the humble view that the prosecution has failed to establish the charge under section 363 of the Indian Penal Code.

10. So far as the offence under section 506 of the Indian Penal Code is concerned, no doubt the victim has stated that the appellant threatened her as well as her parents to kill, if she would disclose the incident to anybody after commission of rape but the victim admits that she has not stated so before the police in her 161 of Cr.P.C. statement. Such statement is also not there in the statement recorded under section 164 of Cr.P.C.. Therefore, the charge under section 506 of the Indian Penal Code is not sustainable in the eye of law.

11. In view of the foregoing discussions, I am of the humble view that the prosecution has utterly failed to establish any of the charges against the appellant and accordingly, the impugned judgment and order of conviction and sentence passed by the learned trial Court is not sustainable in the eye of law and hereby set aside. The appellant is acquitted of the charges under sections 363/376/506 of the Indian Penal Code read with section 4 of the 'POCSO Act'.

Accordingly, the Criminal Appeal is allowed. The appellant who is in jail custody shall be released forthwith if his detention is otherwise not required in any other case.

The trial 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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2022 (II) ILR -CUT-738

K.R. MOHAPATRA, J.

CMP NO. 1423 OF 2019

HIMANSU SEKHAR SRICHANDAN ……. Petitioner

.V.

SUDHIR RANJAN PATRA (SINCE DEAD) JULLY PATRA & ORS. …….Opp.Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order IX Rule 13 r/w section 5 of The Limitation Act – The real test for adjudication of a petition under Order IX Rule 13 explained with case laws.

(B) CODE OF CIVIL PROCEDURE, 1908 – Order IX Rule 13 – Whether the defendant can be permitted to file their written statement and contest the case in the consequences of setting aside an ex parte decree? – Held, No – The defendant cannot be permitted to file their written statement – They can only take part in the hearing of the suit without propounding their own case. (Para-10)

Case Laws Relied on and Referred to :-

1. (2016) 121 CLT 492 : State of Orissa & Anr. Vs. Smt. Sitanjali Jena
2. 1996 (I) OLR 534 : Nakul Swain Vs. Jogendra Das
3. (2015) 15 SCC 659 : GMG Engineering Industries & Ors. Vs. ISSA Green Power Solution & Ors.
4. (1998) 7 SCC 123 : N.Balakrishnan Vs. M. Krishnamuthy
5. (1988) 2 SCC 388 : Rafiq Vs. Munshilal
6. AIR 1991 Delhi 194 : Bank of India Vs. Mehta Brothers & Ors.
7. AIR 1955 SC 425 : Sangram Singh Vs. Election Tribunal, Kotah & Anr.
8. AIR 1964 SC 993 : Arjun Singh Vs. Mohindra Kumar & Ors.

For Petitioner : Mr. Bibekananda Bhuyan

For Opp.Parties : Mr. Suresh Ch. Tripathy (O.P.Nos. 1&2)
Mr. Keshab Ku. Pradhan (O.P.No. 3)

JUDGMENT Date of Judgment : 04.02.2022

K.R.MOHAPATRA, J.

1. Order dated 5th December, 2019 (Annexure-11) passed by learned Senior Civil Judge, Bhubaneswar in CMA No.31 of 2018 filed under Order IX Rule 13 CPC is under challenge in this CMP.

2. This CMP finds its genesis from CS No.1783 of 2011 filed by the Petitioner for declaration of his right, title, interest and possession over the suit schedule land as well as for a decree to declare that Defendant No. 1 has

no authority to alienate the suit land and also to declare that the two registered sale deeds bearing Nos. 3530 and 3533 of 2000 are not binding on the Plaintiff as well as proforma Defendant Nos. 4 and 5. A relief of permanent injunction against Defendant Nos. 1 to 3 was also sought for. The suit schedule land pertains to Plot No.133 to an extent of Ac.0.177 decimals and Plot No.134 to an extent of Ac.150 decimals under Khata No.291 situated in mouza Jharapada. The Opposite Party Nos.1 and 2 herein are Defendant Nos.2 and 3 in the suit. Defendant No.4 appeared on 4th December, 2015 and filed his written statement alone in the suit. Defendant No. 5(a) on appearance filed a memo and adopted the written statement of Defendant No.4. The contesting Opposite Parties, namely, Defendant Nos. 2 and 3 appeared on 20th March, 2012 and filed a petition for time to file their written statement. However, in spite of several adjournments they did not file written statement. Order dated 20th June, 2012 of the suit reveals that Defendant Nos. 2 and 3 on their appearance through Sri Gyanaranjan Mohapatra, Advocate filed a petition for adjournment to file written statement which was rejected. On 6th November, 2013 although Defendant Nos.2 and 3 filed hazira but they neither filed their written statement nor prayed for time for filing of the same. Subsequently on 24th November, 2016 issues were settled. On 27th March, 2017, the Plaintiff filed evidence in affidavit. On 4thJuly 2017, when the suit was called on for hearing, Defendant Nos. 2 and 3 were absent on call and were set *ex parte*. Thus, PW-1 was examined and exhibits 1 to 9 were admitted into evidence. In due course, the case was posted to 15th July, 2017 for argument. On that date, Defendant Nos.1 to 3 also filed a petition for adjournment for which the suit was adjourned to 17th July, 2017, on which date, the argument was heard and the judgment was pronounced on 18th July, 2017. The decree was drawn up subsequently and was signed on 27th July, 2017.

2.1 Subsequently on 13th March, 2018, Defendant Nos.2 and 3 filed CMA No.31 of 2018 under Order IX Rule 13 CPC to set aside the *ex parte* decree along with an application under Section 5 of the Limitation CMP No. 1423 of 2019 Act to condone the delay in filing the CMA. In the CMA, the Defendant Nos. 2 and 3 took a stand that they along with Defendant No.1 entered appearance in the suit on 6th November, 2013 through their counsel and sought for adjournment for filing written statement. When the suit was posted to 24th November, 2016 they could not take proper step as the Clerk in-charge had met with an accident and sustained a fracture of femur. He resumed his work only in the month of August, 2017. Their Advocate,

namely, Sri Gyanaranjan Mohapatra was also suffering from ligament fracture for which the Defendant Nos. 2 and 3 were kept in dark about the progress of the suit and were set *ex parte*. Consequently, the *ex parte* judgment and decree was passed. It was specifically pleaded in the said CMA that on 4th January, 2018, the Defendant Nos. 2 and 3 learnt about the decree and requested the Advocate's Clerk to obtain the copy of the judgment. Accordingly an application for obtaining the certified copy of the judgment and decree was made on 8th January, 2018, which was made available to them on 17th February, 2018. Within thirty days thereafter, the petition under Order IX Rule 13 CPC (CMA No.31 of 2018) was filed. The Plaintiff/Petitioner who was the Opposite Party No.1 in the said CMA contested the case by filing objection stating that no sufficient cause was shown either for condonation of delay or for setting aside the *ex parte* judgment and decree. In support of their case, the Defendant No.3 was examined as PW-1, the Advocate's Clerk, namely, Sri Srikanta Kumar Das as PW-2 and Advocate Sri Gyanaranjan Mohapatra as PW-3. On the other hand, the Plaintiff/Petitioner examined himself as DW-1 and one Dr. Jayakrishna Mishra was examined as DW-2. The documents relied upon by Defendant Nos.2 and 3 were marked as Exts.1 to 7 and that of the Plaintiff/Petitioner as Ext.A. Learned Senior Civil Judge took up hearing of the petition for condonation of delay along with the CMA filed under Order IX Rule 13 CPC and by order dated 5th December, 2019 allowed the CMA by condoning the delay, for which this CMP has been filed.

3. Mr. Bhuyan, learned counsel for the Petitioner submitted that the limitation for filing an application under Order IX Rule 13 CPC is governed under Article 123 of the Limitation Act, which provides two modes for determining the starting point of limitation, i.e., (i) thirty days from the date of the decree, when the applicants have appeared in the suit; and (ii) thirty days from the date of knowledge when summons were not duly served. In the instant case, Defendant Nos.2 and 3 had entered appearance in the suit through their Advocate and in spite of several adjournments did not file their written statement. Thus, clause (i) of Article 123 of the Limitation Act has application for determining the starting point of limitation in the case. The *ex parte* judgment was passed on 19th July, 2017 and the application under Order IX rule 13 CPC was filed on 13th March, 2018. The averments made in the petition for condonation of delay as well as the evidence of the witnesses of Defendant Nos. 2 and 3 reveal that on 4th January, 2018, they came to

know about the *ex parte* decree. In order to succeed in a Petition under Order IX Rule 13 CPC, the applicant has to show sufficient cause for his non-appearance on the date when the suit was called on for hearing. Explanation offered by Defendant Nos.2 and 3 does not disclose any cause of delay till 4th January, 2018 much less about sufficient cause for their non-appearance on the date when the suit was called on for hearing. The *ex parte* hearing commenced from 4th July, 2017 and the Defendant Nos.1 to 3 were set *ex parte* on that date. Subsequently, the judgment was pronounced on 19th July, 2017 followed by signing of the decree on 27th July, 2017. No explanation having been offered by Defendants No.2 and 3 for their non-appearance on the date when the suit was called on for hearing, learned Senior Civil Judge has committed gross error in allowing the petition under Order IX Rule 13 CPC. The evidence of PW-3, namely, Sri Gyanaranjan Mohapatra, learned counsel appearing for Defendant Nos.2 and 3 deposed that he suffered from ligament fracture from 29th July, 2017 and recovered on 11th April, 2018. He also stated in his evidence that he was under treatment and was bedridden during that period. In his evidence, he also deposed that he informed his clients, namely, Defendant Nos.2 and 3 about the judgment and decree after he came to know about the same on 3rd January, 2018. It is his evidence that he had instructed Defendant Nos.2 and 3 to remain present in the Court for filing written statement. Although the Defendant Nos. 1 to 3 were set *ex parte* on 4th July, 2017, but no prayer for setting aside the *ex parte* order was made by Defendant Nos. 2 and 3 although their counsel appeared and filed petitions for adjournment on 4th July, 2017, 7th July, 2017 and 15th July, 2017. As such, the inordinate delay caused in filing the petition under Order IX Rule 13 CPC should not have been condoned and the petition under Order IX Rule 13 CPC ought not have been allowed.

3.1 It is his submission that while exercising power under Order IX Rule 13 CPC, the trial Court is expected to exercise its discretion judiciously. The Court while exercising its discretion cannot brush aside the mandatory requirements of Order IX Rule 13 CPC. In the instant case, learned Senior Civil Judge neither considered the demeanor of the party seeking such relief nor discussed about the requirements of law while passing the impugned order. Relying upon the ratio in the case of ***State of Orissa and another Vs. Smt. Sitanjali Jena***, reported in ***(2016) 121 CLT 492***, he submitted that on setting aside an *ex parte* decree though the suit is restored to file, but the Defendants cannot be relegated back to the position prior to the date of

hearing of the suit. He would be debarred from filing written statement. At the same time he can participate in the hearing of the suit by cross-examining the witnesses of the Plaintiff, adducing evidence without propounding his own case in the suit and advancing argument. He, therefore, submitted that even if this Court comes to a conclusion that the discretion exercised by learned Senior Civil Judge is legal and justified, still then the Defendant Nos. 2 and 3 cannot be permitted to file written statement and propound their own case in the suit. In view of the above, he prayed for setting aside the impugned order.

4. Mr. Tripathy, learned counsel for Opposite Party Nos.1 and 2 (Defendant Nos.2 and 3 in the suit) vehemently countenancing such submission made lengthy argument defending the impugned order. It is his submission that sufficient cause has to be construed on the touchstone of pragmatic parameters as set out in ***Nakul Swain Vs. Jogendra Das***, reported in ***1996 (I) OLR 534***. The expression '*sufficient cause*' must receive '*liberal construction*' so as to advance substantial justice, as laid down in the case of ***GMG Engineering Industries and Others Vs. ISSA Green Power Solution and Others***, reported in ***(2015) 15 SCC 659***. The law of limitation is founded on public policy. Rules of limitation are not meant to destroy the rights of the parties available under law (See ***N.Balakrishnan Vs. M. Krishnamuthy***, reported in ***(1998) 7 SCC 123***. There may be some lapses on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. When learned Senior Civil Judge has discussed the evidence available on record and found sufficient cause for condoning the delay in filing application under Order IX Rule 13 CPC and set aside the *ex parte* decree, this Court in exercise of supervisory jurisdiction under Article 227 should not re-assess the same and substitute the finding of learned Senior Civil Judge by its own. It is his submission that Defendant No.3, who was examined as PW-1, deposed that he came to know about the *ex parte* decree in the month of January, 2018. He (P.W.-1) had not engaged any other advocate except Sri Gyanaranjan Mohapatra to defend his case. On 4th January, 2018, he for the first time came to know about the *ex parte* decree from his Advocate, then from the Advocate's Clerk. Similarly, Sri Gyanaranjan Mohapatra, who was examined as PW-3, in his evidence, stated that Defendant Nos.2 and 3 had entrusted him to conduct CS No. 1783 of 2011 in the Court of learned Senior Civil Judge, Bhubaneswar. On the first day of their appearance, he and the Advocate's Clerk, namely, Sri Srikanta

Das had assured Defendant Nos. 2 and 3 to take all possible steps for them in the suit. They also assured them to inform the position of the suit from time to time and they (Defendant Nos. 2 and 3) need not come to Court on each date of posting. It was also deposed by PW-3 that Defendant Nos.2 and 3 were instructed to come to Court when they would be informed. The Advocate's Clerk, namely, Srikanta Das was taking all the steps required in the suit. Written statement on behalf of Defendant Nos.2 and 3 could not be filed as they were waiting for filing of the written statement of Defendant Nos.4 and 5, who were the venders of Defendant Nos.2 and 3. Unfortunately, during pendency of the suit, Sri Gyanaranjan Mohapatra, learned counsel appearing for Defendant Nos.2 and 3 suffered from ligament fracture and waist cramp. He was under physiotherapy from 29th June, 2017 to 11th April, 2018. Since he was under treatment and was bedridden and the Advocate's Clerk did not inform him about the status of the suit, he could not inform the Defendant Nos.2 and 3 about the same.

5. Mr. Tripathy also relied upon evidence of PW-2, who in his evidence reiterated the statement of P.W.-3 and deposed that on the date of appearance he along with Mr. Mohapatra, learned counsel assured Defendant Nos.2 and 3 to take all possible steps in the suit and informed that their presence is not required on each and every date of posting of the suit. They will be informed when their presence would be required. He met with an accident and after recovery he did not inform either the Defendant Nos.2 and 3 or Sri Gyanaranjan Mohapatra about the status of the suit. Only on 4th January, 2018 he informed Defendant No.3 that the suit has been decreed *ex parte*. The certified copy of the *ex parte* judgment and decree was applied on 8th January, 2018, the same was notified on 5th February, 2018 and after submission of requisites, the certified copy was made available to him on 17th February, 2018. On receiving the same, PW-2 handed it over to Defendant No.3. Thereafter, CMA was filed. Thus, it is clearly proved that the Defendant Nos.2 and 3 had no knowledge about the *ex parte* judgment and decree till it was informed by PWs-2 and 3. Thereafter, CMA was filed without any further delay. Thus, no fault can be attributed to Defendant Nos.2 and 3 for the delay in filing the petition under Order IX Rule 13 CPC. It is his submission that the Hon'ble Supreme Court made it clear that legislature has conferred power to condone delay by incorporating Section 5 to the Limitation Act. Ordinarily, a litigant does not stand to benefit by delayed lodging of an application or appeal. Refusing to condone delay can result in a

meritorious matter being thrown out at very threshold. When delay is condoned the highest that can happen is that, a cause would be decided on merits after hearing the parties. Every day delay must be explained does not mean that, a pedantic approach should be made. He also drew attention of this Court to the findings of learned Senior Civil Judge to arrive at the impugned conclusion. Hence, Mr. Tripathy, learned counsel for Opposite Parties submitted that learned Senior Civil Judge has committed no error in exercising the discretion by setting aside the *ex parte* judgment and decree. The Defendant Nos. 2 and 3 have also paid the cost of Rs.50,000/- as condition precedent for setting aside the *ex parte* judgment and decree. It is his submission that the subject matter of dispute is a valuable piece of land, which is situated at prime locality of the Bhubaneswar town, which is the State's capital. Loss, if any, caused to the Plaintiff has already been compensated on payment of a hefty cost. He therefore prayed for dismissal of the CMP.

6. Before delving into the rival contentions of the parties, it is to be kept in mind that Order IX CPC deals with appearance of parties and consequences of their non-appearance in the suit. Rule 13 of Order IX CPC deals with setting aside the decree passed *ex parte*. It provides that if the Court is satisfied that either the summons was not duly served on the Defendant or that the Defendant was prevented by sufficient cause from appearing in the Court when the suit was called on for hearing, the Court shall make an order for setting aside the decree as against him on such terms as to cost as it thinks fit. Thus, it essentially provides two contingencies under which an *ex parte* decree can be set aside. The first contingency is when the summons is not duly served on the Defendant. The second one is, if summon is duly served, then the Defendant has to show sufficient cause to the satisfaction of the Court for his nonappearance on the date when the suit was called on for hearing. In the instant case, the situation falls under second category. Admittedly, the Defendant Nos.2 and 3 were duly served with the summons; they appeared through learned counsel and sought for adjournment on several occasions to file written statement. They were admittedly set *ex parte* on 4th July, 2017 on which date the suit was called on for hearing. Although learned counsel for Defendant Nos. 2 and 3 subsequently filed petitions for adjournment dated 7th July, 2017 and 15th July, 2017, but no prayer to set aside the *ex parte* order was made nor the written statement was filed on their behalf. Admittedly, the *ex parte* judgment was pronounced on

19th July, 2017 and the decree was drawn up on 24th July, 2017 and was sealed and signed on 27th July, 2017. Article 123 of the Limitation Act provides that when summons were duly served on the Defendants, the limitation for filing of petition under Order IX Rule 13 CPC commences from the date of passing of the *ex parte* decree. The period of limitation for filing of such application, as provided under Article 123 of the Limitation Act, is thirty days. Admittedly, the petition under Order IX Rule 13 CPC was filed on 13th March, 2018 along with a petition under Section 5 of the Limitation Act. Materials available on record reveal that Defendant Nos.2 and 3 have made an endeavour to explain the delay in filing the petition under Order IX Rule 13 CPC stating that on 4th January, 2018 they came to know about the *ex parte* decree from their learned Advocate and thereafter from the Advocate's Clerk. Immediately thereafter, steps were taken to obtain certified copy of the judgment and decree, and after obtaining the same on 17th February, 2018, the petition for setting aside *ex parte* decree was filed, within thirty days, i.e., 13th March, 2018.

7. Mr. Tripathy, learned counsel for the Opposite Party Nos.1 and 2 (Defendant Nos.2 and 3) made an endeavour to justify the delay in filing the petition under Order IX Rule 13 CPC stating that Defendant Nos. 2 and 3 had no knowledge about the *ex parte* decree and they should not suffer for the latches, if any, on the part of their Counsel. Learned Senior Civil Judge on assessment of the materials available on record observed that P.W.-2 sustained fracture of femur in an accident and P.W.3 suffered from ligament fracture. In support of his case, he relied upon the ratio decided in ***Rafiq Vs. Munshilal***, reported in ***(1988) 2 SCC 388***, wherein, it is held as follows :-

> *".....What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K.Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. ....."*

He also relied upon the ratio in *Bank of India Vs. Mehta Brothers and others*, reported in *AIR 1991 Delhi 194*, in which it is held that the real test for

adjudication of a petition under Order IX Rule 13 CPC is whether the litigant upon learning about the *ex parte* decree takes immediate steps in filing the application seeking setting aside of *ex parte* decree. He also relied upon the case law in *Nakula Swain (supra)*, in which this Court held that the Courts have to judge the application under Order IX Rule 13 CPC on the touchstone of pragmatic parameters. Also relying upon the ratio in the case of *N. Balakrishnan (supra),* Mr. Tripathy submitted that the Law of limitation is founded on public policy. Rules of limitation are not meant to destroy the right of parties. Primary function of the Court is to adjudicate the dispute and to advance substantial justice. Further, in the said case, it is held that be it an appeal or any other case, if it is proved that there are some lapses on the part of the litigant concerned, but that alone is not enough to turn down his plea and to shut the door against him.

8. Suffering of P.Ws.-2 and 3 is of little significance, when on assessment of evidence learned Senior Civil Judge came to a categorical finding that the Defendant Nos. 2 and 3 had no knowledge about passing of the *ex parte* decree till 4th January, 2018. On scrutiny of materials available on record vis-à-vis applying the avowed principle of law as discussed above, it brings out a clear picture that Defendant Nos.2 and 3 on getting information of the *ex parte* decree immediately took step for setting aside the same. The material available on record of course suggests that there are certain latches on the part of learned counsel to whom Defendant Nos.2 and 3 entrusted the case and relied upon. Another aspect is clear from scrutiny of materials on record that Defendant Nos.2 and 3 had no knowledge of the *ex parte* decree till 4th January, 2018 when they were informed by Mr. Mohapatra, learned counsel engaged by them. Lack of knowledge is also a sufficient cause for condonation of delay. Due to lack of knowledge of the *ex parte* decree, the Defendant Nos. 2 and 3 could not take steps to set aside the same within the statutory period. Explanation of sufficient cause for non-appearance of Defendant Nos.2 and 3 on the date when the suit was called on for hearing is also because of lack of knowledge. In my view lack of knowledge having been established prepondering the probabilities, this Court is of the considered opinion that Defendant Nos. 2 and 3 have shown sufficient cause for their non-appearance on the date when the suit was called for hearing. On a close reading of the impugned order, it appears that learned Senior Civil Judge has made his best endeavour and discussed the matter in detail with reference to materials available on record to set aside the *ex parte*

decree. When this Court is satisfied that the discretion has been exercised judiciously by the learned Senior Civil Judge, no interference is warranted with regard to setting aside the *ex parte* decree.

9. The next issue that arises for consideration is that as a consequence of setting aside of the *ex parte* decree whether Defendant Nos.2 and 3 can be permitted to file their written statement and contest the case. Law is no more *res integra* on this issue. As held in the case of ***Sitanjali Jena (supra)***, this Court relying upon the ratio decided in the case of ***Sangram Singh Vs. Election Tribunal, Kotah and another*****,** reported in ***AIR 1955 SC 425*** and ***Arjun Singh Vs. Mohindra Kumar and others***, reported in ***AIR 1964 SC 993***, has held as under;-

> *"8. Thus the logical sequitur of the analysis made in the preceding paragraph is that when an ex parte decree is set aside and the suit is restored to file, the defendants cannot be relegated back to the position prior to the date of hearing of the suit. He would be debarred from filing any written statement in the suit, but then he can participate in the hearing of the suit inasmuch cross-examine the witness of the plaintiff, adduce evidence and address argument."*

10. In view of the above, I have no hesitation to hold that though the *ex parte* decree is set aside, the Defendant Nos.2 and 3 cannot be permitted to file their written statement. They can only take part in the hearing of the suit without propounding their own case. However, they
can advance their argument on the basis of the materials available on record only.

11. With the aforesaid observation, the CMP is disposed of.

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2022 (II) ILR - CUT-747

B.P. ROUTRAY, J.

FAO NO. 22 OF 2019

DIVISIONAL MANAGER, NATIONAL INSURANCE CO. LTD. …. Appellant

.V.

F@P. JYOTI REDDY & ORS. ….. Respondents

COMPENSATION – Payment of interest – Whether the direction of commissioner for Employees Compensation-cum-Deputy Labour Commissioner for payment of interest @12% per annum upon default

payment is sustainable? – Held, Yes – As per the decision of Hon'ble Apex Court the position has been settled that the interest is payable on the compensation amount from the date of accident. (Para 6)

Case Laws Relied on and Referred to :-

1. AIR 1976 SC 222 : Pratap Narain Singh Deo vs. Srinivas Sabata & Anr.
2. AIR 1999 SC 3502 : Kerala State Electricity Board & Anr. vs. Valsala K. & Anr.
3. 2019(2) T.A.C. 461 (Ori.) : Sr.Div.Manager, N.I.Co.Ltd. vs. Suresh Ku.Behera & Anr.
4. FAO No. 535 of 2014 (disposed of on 4th May 2022) : Deputy Chief Engineer (Construction-I), East Coast Railway vs. K.Summon Reddy & Anr.

For Appellant : Mr. P.K. Mahali
For Respondents: Mr. B. Mohanty

JUDGMENT Date of Judgment: 20.06.2022

B.P. ROUTRAY, J.

1. The present appeal by the Insurer-Appellant is directed against the judgment dated 30th July, 2018 of the Commissioner for Employees Compensation-cum-Deputy Labour Commissioner, Cuttack in E.C. Case No. 510-D/2011 wherein compensation to the tune of Rs. 5,52,510/- has been granted to the claimants on account of death of the deceased in course of and arising out of his employment as a labourer under Respondent No.6.

2. The claimants are the wife, old parents and children of the deceased. The deceased died on 23rd October, 2011 at the project site of ARSS Infrastructure Project Ltd. at Bhubaneswar due to accidental electrocution. The deceased was 40 years old and the compensation has been calculated taking his monthly income at Rs. 6,000/-.

3. The Appellant challenges the award mainly on the grounds that, when the deceased died at Bhubaneswar Project Office, the insurance coverage was taken for the project work of Cuttack-Paradeep Road and as such the same is not covered within the insurance package. Secondly, as per the policy, the insurance was taken for the rate of wage at Rs.2281.25 per month for the workman and therefore, the income of the deceased at Rs.6,000/- per month is beyond the coverage amount and for that excessive amount, the Insurer-Appellant cannot be held liable which should be paid by the employer.

4. Before delving further, it needs to be mentioned at the outset that the employment of the deceased under Respondent No.6, the ARSS Infrastructure Project Ltd. as a labourer is not disputed. As per the averments

of the claimants and Respondent No.6, the deceased at that relevant time had been to Bhubaneswar site office in connection with some ancillary work to the Project concerned i.e., for Cuttack-Paradeep road. So in other words, neither the claimants nor the owner/employer dispute the employment of the deceased for the project work of Cuttack-Paradeep Road and his death at Bhubaneswar Project Office. What is contended by the Insurer that the deceased was not an employee in respect of the insured project work of Cuttack-Paradeep Road is not found substantiated with material facts. Neither the insurer did adduce any evidence nor the employer too, to rebut the contention of the claimants. The insurer taking advantage of the death of the deceased at Bhubaneswar Project Office is developing his case as such without any supporting materials. So, in absence of any material in support of the Appellant's contention regarding death of the deceased unconnected to Cuttack-Paradeep Road Project work cannot be acceded for the mere reason that the death happened at Bhubaneswar Project Office.

5. Next coming to the contention with regard to the income of the deceased and the insurance coverage, admittedly the wage amount covered within the policy is Rs. 2281.25 and it is the further admitted case of the employer and the claimants that the deceased was getting Rs. 6000/- per month. The status of the deceased as an unskilled labourer also remains undisputed. The rate of minimum wages prescribed during October, 2011 for unskilled labourer was Rs.90/- per day and therefore, the monthly rate of wage mentioned in the insurance policy is found matching to the said amount. But it is the admission of the employer that the deceased was getting Rs.6,000/- per month. Thus, keeping in view of such admission of the employer (Respondent No.6), no illegality is seen in fixing the monthly rate of wage of the deceased at Rs. 6,000/- by the learned Commissioner. But the question is, whether the Insurance Company would be held liable for such compensation amount calculated upon the enhanced monthly wage amount, or his liability should be confined to the amount as per the contract in the insurance policy. When the rate of wage as per the insurance policy does not violate the minimum wage rate prescribed by the competent authority, and as per admission of the employer the labourer (employee) was paid such enhanced wage, which is without any legal bar, then it would be inappropriate to say that the Insurer would only be liable to such extent of amount as per the contract because it is all about welfare of the poor employee (workman). As such, the insurer is held liable to pay the entire compensation amount since the validity of the insurance policy is unquestioned.

6. Learned counsel for the Appellant further contends that the direction for payment of interest @12% per annum upon default payment within thirty days from the date of award is unsustainable for clear provision enshrined in Section 4-A of the E.C.Act. In the case of ***Pratap Narain Singh Deo vs. Srinivas Sabata and another, AIR 1976 SC 222*** and ***Kerala State Electricity Board & another vs. Valsala K. & another, AIR 1999 SC 3502***, the position has been settled that the interest is payable on the compensation amount from the date of accident. This Court also in the case of ***Senior Divisional Manager, National Insurance Company Ltd. vs. Suresh Kumar Behera and another, 2019(2) T.A.C. 461 (Ori.)*** and ***Deputy Chief Engineer (Construction-I), East Coast Railway vs. K.Summon Reddy and another (FAO No.535 of 2014 disposed of on 4th May, 2022)*** have clarified the position and settled the law that the interest is payable from the date of accident.

7. In the result, the appeal is dismissed as no reason is found in favour of the Insurer-Appellant to interfere with the impugned award.

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2022 (II) ILR -CUT-750

S.K. PANIGRAHI, J.

CRLMP NO. 1238 OF 2018

SMT. GEETA DEVI AGARWAL & ORS. ……..Petitioners

.V.

STATE OF ORISSA ……..Opp.Party

MINES AND MINERALS (DEVELOPMENT & REGULATION) ACT, 1957– Sections 4(1), 4(1A), 21(1), 23 r/w Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 – Whether the 'vicarious' liability of the Directors / Key Managerial Personnel can be imputed automatically? – Held, No – The prosecution would have to make averments with regard to the specific role played by the accused Directors/Key Managerial Personnel and demonstrate that such person was "in charge of the affairs of the company" and is directly and intrinsically connected to the crime alleged – Charge against the petitioner is quashed. (Paras 37- 39)

Case Laws Relied on and Referred to :-

1. (2009) 10 SCC 184 : Neelu Chopra vs. Bharati
2. (2010) 10 SCC 660 : Asoke Basak V. Maharastra
3. (2005) 10 SCC 228 : Anil Mahajan V. Bhor Industries
4. (1995) 6 SCC 194 : Rupan Deol Bajaj v. Kanwar Pal Singh Gill
5. AIR 1992 SC 604 : State of Haryana v. Ch. Bhajan Lal
6. AIR 1988 SC 709 : Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre
7. AIR 1998 SC 128 : M/s Pepsi Foods Ltd v. Special Judicial Magistrate
8. [1915] A.C. 705 HL. : Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co Ltd.
9. [1957] 1 QB 159. : H.L Bolton Co. Ltd., v. T.J Graham and Sons
10. (2011) 1 SCC 74 : Iridium Indian Telecom Limited v. Motorola Inc.
11. (2008) 5 SCC 662 : S.K. Alagh v. State of U.P.
12. (2015) 4 SCC 609 : Sunil Bharti Mittal v. CBI
13. (1989) 4 SCC 630 :Sham Sunder v. State of Haryana
14. (2008) 5 SCC 668 : Maksud Saiyed v. State of Gujarat
15. (2010) 10 SCC 479 : Maharashtra State Electricity Distribution Co.Ltd. v. Datar Switchgear Ltd
16. (2013) 4 SCC 505 : GHCL Employees Stock Option Trust v. India Infoline Ltd.
17. AIR 2012 JHAR 148 : Bihar MICA Exporters Association vs. State of Jharkhand & Ors.
18. 2009 (II) OLR 407 : Surendra Kumar Agarwal vs. State of Orissa & Ors.
19. 2021 SC 503 : Pradeep S. Wodeyar V. The State of Karnataka
20. (2010) 3 SCC 330 : National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal
21. (2008) 5 SCC 668 : Maksud Saiyed v. State of Gujarat
22. (2012) 5 SCC 661 : Aneeta Hada v. Godfather Travels & Tours (P) Ltd.

For Petitioners : Mr. B.S. Tripathy

For Opp. Parties: Mr. Karunakar Gaya, A.S.C.

JUDGMENT Date of Hearing : 09.02.2022 : Date of Judgment: 18.02.2022

S.K. PANIGRAHI, J.

1. These petitions under Articles-226 and 227 of The Constitution of India have been filed with a prayer to quash the criminal proceedings emanating from Case No. 2 (C) CC No. 07 of 2011, for the alleged commission of offenses under Sections-4(1), 4(1A,)21(1) and 23 of the Mines and Minerals (Development & Regulation) Act, 1957 and Under Rules 3, 6, 12(3), 12(4) and 18 of the Orissa Minerals (Prevention of theft, Smuggling and illegal mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007, which is pending in the Court of learned J.M.F.C, Kujanga.

2. Shorn of unnecessary details, the facts of the present matter are as follows:

i. In pursuance to the letter of The Mining Officer, Cuttack dated 02.12.2020, a truck bearing registration No. OR-05W-0779 was seized on 03.12.2010.The said truck belonged to Sri. Trupti Ranjan Das. The seizure

was made on the ground of using fake transit passes for the transportation of iron ores from the stockyard at Manguli, Cuttack belonging to M/S Gananayak and Co, to M/S GNG Exports at Paradip Port.

ii. Confiscation proceedings against the seized trucks were initiated vide C.P. Case No.69/2010, for the offence enumerated under the ambit of Sec. 23(C) of M&M(DR) Act.,1957.Another, FIR No. 5 dated 02.02.2011 was lodged on the strength of a complaint filed by DDM, Jajpur road at Paradip Marine Police Station, against Sri. Trupti Ranjan Das and M/S Gananayak and Co.

iii. On verification of records by the State level Enforcement Squad and the Mining Squad of Mining office, Jajpur road and Mining office of Cuttack, it was found that the 125 fake transit passes out of Form-G books were used by M/S Gananayak and Co , for the illegal transportation of iron ore fines to the tune of 1842.640 MT valued at Rs.22,92,244/- (approx.).An F.I.R was lodged before the IIC, Tangi Police Station vide P.S. Case No.7/2011 against accused M/S Gananayak. & Co. and its Proprietor Sajan Kumar Joshi and Vivek Kumar Joshi, corresponding to G.R. Case No.60/2011, pending before learned SDJM(S), Cuttack.

iv. A complaint case, 2(c) C.C. No.7/2011 was lodged in the Learned Court of JMFC (P), Kujang by the DDM, Jajpur road against Gajanan Agrawal (Dead) along with the petitioners No.1 to 3 , making them jointly and severally liable or the acts of Sri. Trupti Ranjan Das. The petitioners are the partners in the firm of M/S GNG Exports. The learned JMFC(P), Kujanga took cognizance of the offenses against the present petitioners U/s.21(c) of MMDR Act, and under Rule-18 of OM Rules, 2007 and issued Summons. In the said complaint case, it has been prayed to confiscate the6000 MT (approx) of iron ore fines stored at Paradip port of M/S GNG Exports.

v. A brief background study of M/S GNG Exports reveals that, it is a registered firm based in West Bengal involved in exporting iron ore fines since 1993. From the year of 2008 they started exporting iron ore fines from the ports of Paradip, Odisha. They were granted the license for storing iron ore fines at Paradip port area vide License No. 13595. The validity of the said license was bracketed in the period between 06.12.2008 and 05.12.2010. An application for renewal was filed on 02.12.2010. However, it got rejected under Rule-6 of Orissa Mineral Rules, 2007, due to the non-production of mandatory information.

3. Learned Counsel for the petitioners Shri Bhabani Shankar Tripathy vehemently submits that the learned J.M.F.C, Kujanga, has taken cognizance of the complaint case 2(c) C.C. No.7/201 without verifying the genuineness

of the allegation. The petitioner had moved this court on an earlier occasion vide WPCRL No.197/2011 for quashing the said complaint case, but the court was not inclined to interfere with the proceeding of the court below at that point in time since the investigation of the case was underway. However, the court had dismissed the petition with an observation to move the court at a subsequent stage of the proceeding. Further, the investigation is now complete and the charged sheet has already been submitted. It is clearly evinced out in the charge sheet that the transit passes were issued by M/S Gananayak and Co for the vehicle bearing Regd. No.OR-05W-0779, which belonged belonged to Sri Trupti Ranjan Das. Prima Facie evidence to bring in charges under Sections-420, 468, 471 and 34 of IPC, against the Sajjan Kumar Joshi, the proprietor of M/S Gananayak and Co. have been found. The charge sheet has been filed against Kumar Joshi, the proprietor of M/S Gananayak and Co. However, no incriminating evidence is found against the petitioners or M/S GNG Exports so as to sustain the complaint case. Furthermore, the Mining Officer, Cuttack had lodged an FIR before the lIC, Tangi Police, Cuttack in Tangi P.S. Case No.7/2011 dt. 09.11.2010 corresponding to G.R. Case No.60/2011 pending before the court of learned SDJM(S), Cuttack, with specific allegations against M/s. Gananayak & Co. for forging 121 Transit Passes which were used for transporting Iron Ore Fines. The Deputy Director Mines, Jajpur Road had deliberately and willfully suppressed the aforesaid facts and filed the aforesaid case in furtherance of the motive to harass and humiliate the petitioners by arraying them in multiple criminal proceedings. Continuing with such proceedings will be nothing but the blatant abuse of the process of law. No case against M/S GNG Exports is made out since they were bona fide purchasers of iron ores from M/S Gananayak and Co., and were under the impression that the transit passes were valid and not forged. Moreover, as the exporter M/S GNG Exporters had very little means of determining the genuineness of the transit passes.

4. Learned Counsel for petitioners also submitted that the complaint case suffers from technical laches. He placed reliance on the case of ***Neelu Chopra vs. Bharati***[1], wherein the Hon'ble apex court held that :

> "5. In order to lodge a proper complaint, mere mention of the sections and the language of those sections is not be all and end of the matter. What is required to be brought to the notice of the court is the particulars of the offence committed by each and every accused and the role played by each and every accused in committing of that offence.".

1. (2009) 10 SCC 184

Again, in the case of ***Asoke Basak V. Maharastra***[2], the Hon'ble Supreme court observed that, it would be difficult to hold that a complaint, even ex facie, discloses the commission of an offence by the accused in the absence of any specific averment demonstrating the role of the accused. Perusal of the make complaint would it crystal clear that the allegations made in the impugned complaint are absolutely vague and even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence and/or the complaint does not disclose commission of any offence by the petitioners as Partners of GNG Exports u/s. 21(1) of MMDR Act, 1957 and Rule-18 of OM Rules, 2007.

Additionally, the counsel contended that mere mention of words like " in connivance with me M/S Gananayak and Co.", "cheated" "fraud" in the complaint, does not establish the guilt of M.S GNG Exports. Reliance was placed on the case of ***Anil Mahajan V. Bhor Industries***[3],wherein the Hon'ble Supreme Court has held that :

> "8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay.".

5. Per contra, Ld. Senior Counsel for the State opposes the petitions on the grounds that the license granted to M/S GNG Export expired on 05.12.2011 and the iron ore fines were procured via fake transit passes. Thereby, the 6000 M.T (valued at Rs.74,64,000) of iron ore fines stored over the granted port area to M/S GNG Export were illegal and unauthorized, and their seizure was rightful. Further, as verified by the State level Enforcement Squad along with Mining Squad of Mining Office. Jajpur Road and Mining Office, Cuttack, 125 illegal transit passes out of Form-G books bearing Numbers.030967, 031028, 031146 & 031147 were used by M/s. Gananayak & Company during the period from September, 2010 to November,2010 for the transportation of Iron ore fines in connivance with M/s. GNG Exports & its partners, to the tune of 1842.640 MT valued at Rs.22,92,244/- (approx.). Thus, M/S GNG Exports and Sri.Trupti Ranjan Das have committed offenses falling under the purview of Sections-4 (1-A) of Mines and Minerals (Development & Regulation) Act, 1957 read with Rule- 12(3) and (4) of Orissa

2. (2010) 10 SCC 660 **3.** (2005) 10 SCC 228

Minerals Rules, 2007.Moreover, the petitioner had earlier filed a writ petition (Crl.) No.197 of 2011, wherein the subject matter of challenge was almost same. This Hon'ble Court vide order dtd.5.8.2011 was pleased to dispose of the same holding that, the proceeding in 2(C) CC No.7 of 2011 can not be quashed in its entirety after taking all aspects into consideration. Hence, on the self same ground the present application is devoid of any merit and hence liable to be dismissed.

6. Heard Ld. Counsels for the parties and perused the materials on record. Before adverting to the facts of the case, it is apposite to refer first to the law applicable to the facts of the present case. It is well settled that though the discretionary and supervisory powers of the High Court under Articles- 226 and 227 of The Constitution of India are very wide in amplitude, yet they are not unlimited. Nevertheless, it is trite that the powers under the said provisions have to be exercised sparingly and with caution to secure the ends of justice and to prevent the abuse of the process of law. Where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged, ex facie, the High Court would be justified in in invoking its powers under Articles- 226 and 227 to quash the criminal proceedings. Reference may be made to the Hon'ble Supreme Court's decision in ***Rupan Deol Bajaj v. Kanwar Pal Singh Gill***[4].

7. In the case of ***State of Haryana v. Ch. Bhajan Lal***[5], the Hon'ble Apex Court has held that an FIR can be quashed at the initial stage where the allegations made, even if taken at their face value and accepted in its entirety, do not prima facie constitute any offence or make out a case against the accused. The Hon'ble court observed that :

> "105. In the exercise of the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:
>
> (a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

4. (1995) 6 SCC 194 **5.** AIR 1992 SC 604

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

8. The aforesaid proposition of law was again reiterated by the Hon'ble Apex Court in ***Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre***[6], the Supreme Court has observed as follows:

"7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

9. In the case of ***M/s Pepsi Foods Ltd v. Special Judicial Magistrate***[7], the Hon'ble Apex court held that a Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does

6. AIR 1988 SC 709 **7**. AIR 1998 SC 128

not debar the accused from approaching the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him, and still he must undergo the agony of a criminal trial.

10. In the present case, the Petitioners herein have all been charged under Section-21(1) of the Mines and Minerals (Development & Regulation) Act, 1957 and Under Rule-18 of the Orissa Minerals (Prevention of theft, Smuggling and illegal mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007.At this juncture, it would be apposite to refer to the relevant statutory provisions and examine the legal position.

11. Section-21(1) of the Mines and Minerals (Development &Regulation) Act, 1957 attaches penal liability to acts falling under he purview of Section-4(1) and section-4(1A) of MMDR Act, 1957. Sections-4(1) and 4(1A) read as follows :

> (1) No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder:

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement:

> [Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, 6 [the Atomic Minerals Directorate for Exploration and Research] of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited., a Government company within the meaning of 7 [clause (45) of section 2 of the Companies Act, 2013 (18 of 2013), and any such entity that may be notified for this purpose by the Central Government]:]
>
> [Provided also that nothing in this sub-section shall apply to any mining lease (whether called mining lease mining concession or by any other name) in force immediately before the commencement of this Act in the Union territory of Goa, Daman and Diu.]

(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

12. Rule-18 of the Orissa Minerals Rules, 2007 reads :

"**18. Penalties**. - (1) Whoever undertakes or causes to undertake illegal mining, transports or stores any mineral otherwise than with the provisions of Section 4 (1) and or 4 (1A) of the Act is punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twenty five thousand rupees or with both and in the case of continuance of such illegal activity with an additional fine which may extend to five hundred rupees for each day during which such illegal activity continues after conviction for the first such contravention.

(2) Whoever contravenes any of the provisions of these rules shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both and in the case of continuation of contravention with an additional fine which may extend to five hundred rupees for each day during which such contravention continued after conviction for the first such contravention.

(3) Whenever any lease-holder transports the mineral raised in his lease without a valid permit or valid transit pass or in excess of the quantity and quality permitted or mentioned in the transit pass, it shall be treated as violation of the provisions of these rules and breach of the covenants of the lease and shall be liable for penalty as provided."

13. It is alleged that the petitioners are vicariously liable for the acts of their agent namely Sri. Trupti Ranjan Das, who was involved in the transportation of the minerals by using fake transit passes.

14. Learned Counsel for the petitioners argued that them being a exporter firm, did not hold the means to ensure the veracity of the transit passes. Additionally, vicarious liability is not attracted in the present case.

15. The rule of criminal liability is derived from the Latin maxim *Actum non facit reum, nisi mens sit rea*, which essentially means that a forbidden act or omission has to be done with a deliberate intent to do it. Trouble arose when the question of 'how to' make a company/ corporation/ corporate entity liable for criminal offences. It is an undenying fact that a company can, in fact, partake or commit a forbidden act or omission, but the vexed question has been as to how the intent of a juristic person can be proved. Therefore, the courts developed what is termed as the 'Doctrine of Attribution'. As per this doctrine, in the event of an act or omission leading to the violation of the law, the mens rea i.e. the intent of committing the act would be 'attributed' to all those who were in charge of the company at the time of the commission of the offence.

16. Directors, Managers, key Managerial Personnel were brought to court to account for the contraventions of law performed by them under the guise or the legal façade of the company. This doctrine is akin to what is otherwise termed as 'lifting the corporate veil' in order to examine the ones who are the 'alter ego' of the company.

17. Under the aforesaid principle of "doctrine of attribution" the effort of the courts has been to take legal proceedings against juristic entities to a just and reasonable conclusion. Merely because a corporate entity cannot be imprisoned, taking a view that persons who were in charge of the management of these companies should be left scot-free would have been an unfair and irrational approach. It is with such a backdrop that these aforesaid principles have to be understood. When there is an allegation against a juristic or corporate entity the endeavour is to ascribe or attach liability to those particular persons in charge of the affairs of the company in question, who are actually pulling the strings and running the show. It is for these reasons that the principle of 'doctrine of lifting of corporate veil' was evolved and expounded by the courts of law. Under this principle based on the materials on record, the court pinpoints or identifies the particular persons who were pulling the levers of the machinery that is a juristic entity. Having identified such persons who were actually directly involved or in charge of the affairs of the company the criminal liability is fastened or is attached to such persons and such persons only. There might be situations where a number of persons constitute the management of a corporate entity however, only by virtue of them holding a position on the management of such entity would not automatically make them liable.

18. It is due to this reason that the courts are compelled to embark upon a journey to lift the veil behind which the persons in the management of the company are crouching behind in order to camouflage or insulate themselves from any liability. Thus, having 'lifted' the so-called veil, liability attaches to those individuals who are identified to be the culprits hiding behind the juristic veil. This is the sum and substance of the principle of the "doctrine of attribution". Similarly, these persons who are identified as the 'will and mind' are called the 'alter ego' of the company as they are the ones who were acting as such and had taken the company down the path of such criminality. It is thus seen that all these principles owe their origin to the principle of 'attribution' and it is this doctrine of attribution which is, the endeavour of fastening liability on certain individuals, within the management of the

company in question while invoking either of the principles of "lifting of corporate veil" or while identifying the "alter ego" of the defaulting company.

19. As early as 1915 the House of Lords in the celebrated case of ***Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co Ltd.***[8], while trying an offence under the Merchant Shipping Act applied the 'doctrine of attribution' to identify Mr. Lennard, who was the owner of the ship and also responsible for the management of the ship, as the "directing mind and will" of the company. Subsequently, in ***H.L Bolton Co. Ltd., v. T.J Graham and Sons***[9], the Court likened companies to a human body and their brain to the directors of the company, and applied the doctrine of attribution to criminal cases. This principle though used and relied upon in India from time to time, was finally discussed extensively and applied by the Hon'ble Supreme Court in ***Iridium Indian Telecom Limited v. Motorola Inc.***[10].

20. However, with courts across the country increasingly accepting the view that the Directors, Managers, Promoters etc. were the "mind and will" of the company, an unfortunate problem arose wherein all such designated personnel of the company started being prosecuted whether or not they were actually "in charge of the affairs of the company".

21. Coming down heavily on this worrying trend, the Hon'ble Apex Court has, time and again, sternly deprecated this practice and attempted to draw a clear distinction between personnel of a company who are "actively in charge of the affairs of the company" and those who are not. Therefore, company might not be indictable, but those particular members in charge of it are. In this regard, it would be useful to advert to the observations made by a three-Judge Bench of the Hon'ble Supreme Court in ***S.M.S. Pharmaceuticals v. Neeta Bhalla*** (supra), wherein the Hon'ble Supreme Court held that;

> "5. … a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words 'if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding'. The words 'sufficient ground for proceeding' again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and

8. [1915] A.C. 705 HL. **9.** [1957] 1 QB 159. **10.** (2011) 1 SCC 74

where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.

...

8. The officers responsible for conducting the affairs of companies are generally referred to as directors, managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. The word 'director' is defined in Section 2(13) of the Companies Act, 1956 as under:

'2. (13) 'director' includes any person occupying the position of director, by whatever name called;'

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to the powers of the Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company."

22. It would also worthwhile at this stage to extract the following observations made in ***S.K. Alagh v. State of U.P.***[11] by the Hon'ble Supreme Court of India;

"19. As, admittedly, drafts were drawn in the name of the company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself."

11. (2008) 5 SCC 662

23. Furthermore, the Hon'ble Supreme Court in ***Sunil Bharti Mittal v. CBI***[12] held;

> "42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.
>
> 43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision."

24. The Hon'ble Supreme Court in ***Sham Sunder v. State of Haryana***[13] observed ;

> "9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold."

25. In ***Maksud Saiyed v. State of Gujarat***[14], the Apex Court held;

> "13. Where a jurisdiction is exercised on a complaint petition filed in, terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

26. The same principle has been unambiguously reiterated in ***Maharashtra State Electricity Distribution Co.Ltd. v. Datar Switchgear Ltd***[15] and ***GHCL Employees Stock Option Trust v. India Infoline Ltd.***[16].

12. (2015) 4 SCC 609 **13.** (1989) 4 SCC 630 **14.** (2008) 5 SCC 668
15. (2010) 10 SCC 479 **16.** (2013) 4 SCC 505

27. It is now well established that if the statute implicates specific liability on the constituent members of a company, then they can be arrayed for contravention. Statutes mandatorily have to contain a provision to fix vicarious liability. Section-23 of the MMDR Act, 1957 affixes the concept of vicarious liability on companies. Section-23 reads :

> "Offences by companies. - (1) If the person committing an offence under this Act or any rules made thereunder is a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> Explanation.—For the purposes of this section,— (a) "company" means any body corporate and includes a firm or other association of individuals; (b) "director" in relation to a firm means a partner in the firm."

28. I shall now delve into the question of whether or not these offenses the Petitioners have been charged with are prima facie made out against them hereinunder.

29. A bare perusal of the language of Section-4 and Section-4(1A) of the MMDR Act, 1957, explicitly debars the storage and transportation of any mineral without a valid permit. M/S GNG Exports was granted the permit to store iron ore fines vide License No. 13595 of 06.12.2008 in its RS-6 plot at Paradip Port. However, the validity of the license had lapsed on 05.12.2010 and the renewal was underway but not complete. Clearly, it attracts the liability of unauthorized storage as enshrined under Section-4(1A) of MMDR Act, 1957.

30. In the case of ***Bihar MICA Exporters Association vs. State of Jharkhand and Ors.***[17], the Hon'ble High Court of Jharkhand has succinctly held that ;

> "In the background of the discussion made in the earlier part of this judgment, obviously this provision of Section 23-C has been introduced by the parliament in the year 1999 consciously with the object of preventing illegal mining,

17. AIR 2012 JHAR 148

transportation and storage of mineral in order to suppress every serious mischief of illegal mining within the country, incidences of which have surfaced in different States and are of enormous proportions. The effect of such illegal mining is not only having an adverse effect on public exchequer by denying it valuable revenue but at the same time has the effect of degrading and denuding the environment. As such, it has also a long term effect of decline of scarce natural resources of the country such as minerals, forests reserve etc. The National Mineral Policy, 2008 also seeks to develop a sustainable frame work for optimal utilization of the country's natural mineral resources for the Industrial growth of the country and at the same time improving the life of the people living in the mining areas, which are generally located in the backward and tribal regions of the country. These resources are not to be frittered away and exhausted by any generation. Every generation owes a duty to all the succeeding generation to develop and preserve the natural resources in the country and preventing pollution, which is in the interest of the mankind. It is recognized by the Parliament and Parliament has declared that it is expedient in the public interest that the Union take under its control regulation of mines and development of minerals. Seen in the aforesaid light, the introduction of the aforesaid provision of Section 23-C with the expression "for the purposes connected therewith" is to be read in a manner to carry out the legislative intent and object. Section 23-C therefore intends to prevent illegal mining, transportation, storage of mineral in question and for the purposes connected therewith i.e. buying and selling of illegal mined minerals. It cannot be said that the persons indulging in the activity of buying or selling or trading of such minerals can escape the rigour of law while only those who are indulging in mining, transportation and storage thereof are to be subjected to the regulatory regime. Such a construction could defeat the very aim and object of the Legislature.".

31. Additionally, in the case of ***Surendra Kumar Agarwal vs. State of Orissa and Ors***[18], the Hon'ble Orissa High Court had expounded that :

"The 2007 Rule has been enacted by the State Government in exercise of power under Section 23C of the MMDR Act for prevention of theft, smuggling and illegal mining and to regulate the possession, storage, trading and transportation of minerals in the State of Orissa. Rule 12 of the 2007 Rules provides for seizure and confiscation of minerals raised or transported, stored, sold, supplied, distributed, delivered for sale or processed, without any lawful authority."

32. The liability of the petitioners can be arrayed for the illegal storage of iron ore mines. With regard to the same, the Hon'ble Supreme court, in the case of ***Pradeep S. Wodeyar V. The State of Karnataka***[19] has held that ;

"80. Vicarious liability and Section 23 of MMDR Act A-1 submitted that the charge-sheet does not ascribe any role to A-1 and hence the process initiated against him must be quashed. The appellants in support of their argument relied on Sunil Bharati Mittal (supra), Shiva Kumar Jatia v. NCT of Delhi 60 , Sunil Sethi v. State

18. 2009 (II) OLR 407 **19**. 2021 SC 503

of Andhra Pradesh 61 and Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd. 62 In Sunil Bharati Mittal (supra), a three- judge Bench of this Court observed that the general rule is that criminal intent of a group of people who undertake business can be imputed to the Company but not the other way around. Only two exceptions were provided to this general rule: (i) when the individual has perpetuated the commission of offence and there is sufficient evidence on the active role of the individual; and (ii) the statute expressly incorporates the principle of vicarious liability. Justice Sikri writing for a three-judge Bench observed:

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision."

"82. Section 23(1) of the MMDR Act stipulates that where the offence has been committed by accompany, every person who at the time of the commission of the offence was in-charge of and responsible for the conduct of business shall be deemed to be guilty of the offence. The proviso stipulates that nothing contained in sub-section (1) shall render such a person liable to punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence of preventing the commission of the offence.".

33. In the case of ***National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal***[20], the Hon'ble Apex court has reiterated that;

"39 . (v) If the accused is a specific averment in the complaint and by virtue of their position they are liable to be proceeded with €-84. The test to determine if the Managing Director must be charged for the offence committed by the Company is to determine if the conditions in Section 23 of the MMDR Act have been fulfilled i.e., whether the individual was in-charge of and responsible for the affairs of the company during the commission of the offence. In view of the above decisions, the submissions which has been urged on behalf of the appellant cannot be acceded to. The determination of whether the conditions stipulated in Section 23 of the MMDR Act have been fulfilled is a matter of trial. Moreover, it is evident that the charge sheet, as a matter of fact, ascribes a role to A-1 and A-2 for the payment of transportation. Therefore, there is a prima facie case against A-1, which is sufficient to arraign him as an accused at this stage".

34. Additionally in the case of ***Maksud Saiyed v. State of Gujarat***[21], the Hon'ble Apex court observed that :

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of

20. (2010) 3 SCC 330 **21**. (2008) 5 SCC 668

> the Company when the accused is the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities".

35. Hence, adducing liability for the unauthorized storage of iron ore fines on the partners of M/S GNG Exports is well within the ambit of law and its intent.

36. It is noticed that in enactments where criminal liability sought to be Affixed on a company, the provisions usually provide for "offences/ contravention by companies". That being the case when an offence is attributed to a company, the same is done on the strength of a statutory prescription, there is no question of any "vicarious liability". Thus, the arguments that are made, time and again, before courts of law as regards to the vicariousness of liability of certain persons in the management of a company, is in essence a misnomer. It is for the simple reason that when the statute itself provides for a provision for the prosecution of a company, the only exercise that has to be done thereafter, is the application of the doctrine of attribution (supra) in order to pinpoint or fasten the liability upon the individuals within the larger body of persons occupying the management of the company.

37. Thus, the so called 'vicarious' liability of the Directors/ Key Managerial Personnel cannot be imputed automatically. In the absence of any statutory provision to this effect, if it is to be deemed to be included under the IPC, even then the prosecution would have to make averments with regard to the specific role played by the accused Directors/ Key Managerial Personnel and demonstrate that such person was "in charge of the affairs of the company" and is directly and intrinsically connected to the crime alleged. One classic example of such an express provision fastening liability on the directors of a company is Section 141 of the Negotiable Instruments Act, 1881. In ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd.***[22] also, the principle of "alter ego", was applied only in one direction, as in if a body corporate was being charged with an offence, then the principle would be applied to pinpoint to the group of person(s) who guide the business who had criminal intent, and not vice versa so as to lead to the fallacious conclusion

22. (2012) 5 SCC 661

that all the management personnel of the company possessed criminal intent. There has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. Other examples wherein a specific statutory provision has been created to fasten/affix liability on a company and the directors in charge of itare liable under some specific statutes like Section 10 of the Essential Commodities Act, 1955; Section 42 of the Foreign Exchange Management Act, 1999 and Section 17 of the Prevention of Food Adulteration Act, 1954.

38. M/S Gananayak and Co. was involved in supplying iron ore fines to M.S GNG Exports. The supply was facilitated by the truck bearing registration number- OR-05-W-0779. The origination of the fake transit passes was caused by M/S Gananayak and Co. The petitioners are the partners in M/S GNG Exports. They were not involved in causing the transportation of iron ore fines . They were the receivers of iron ores and not the employer of transportation. This implicates M/S Gananayak and Co can be brought in under the purview of "transport or store or cause to be transported" as enshrined under Section-4(1A) OF MMDR Act, 1957 and not the petitioners. Accordingly, the principle of vicarious liability cannot be attached to the petitioners.

39. In light of the discussions made herein above, I am not inclined to quash the proceedings in Case No. 2 (C) CC No. 07 of 2011 in its entirety. However, this court concedes to the fact that the petitioners cannot be brought under the cloak of liability for the transportation of iron ore fines vide fake transit passes. Hence, the proceedings in Case No. 2 (C) CC No. 07 of 2011, pending before the J.M.F.C, Kujang is quashed to the extent of charges attaching liability against the unauthorized transportation of iron ore fines against the petitioners. Nevertheless, the charges for the unauthorized storage of iron ore fines are sustained.

40. At the cost of repetition, it is emphasized that nothing shall be construed to come in the way or prejudicially affect the fair trial in so far as the Petitioners in Case No. 2(C) CC No. 07 of 2011 are concerned. Ordered accordingly.

41. The CRLMP is accordingly disposed of.

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2022 (II) ILR -CUT-768

MISS SAVITRI RATHO, J.

CRLREV NO. 692 OF 2018

1. RAMESH CHANDRA PANDA ..... Petitioners
2. SUBHASHREE PANDA@ SAHU

.V.

STATE OF ORISSA (VIGILANCE) .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 397 read with Section 401 – Scope of revisional court in interfering the framing of charges – Offences under the Prevention of Corruption Act, 1988 – Held, challenge to an order of charge should be entertained only in the rarest of rare cases – Therefore not inclined to interfere with the impugned order.

Case Laws Relied on and Referred to :-

1. AIR 1980 SC 522 : State (SPE Hydrabad) Vs. Air Commodore Kailash Chand
2. AIR 1962 SCC 1073 : R.R. Chari vrs. The State of Uttar Pradesh
3. AIR 1964 Odisha 152 : Bipin Ch. Moharana vrs. Republic of India
4. (2016) 9 SCC 598 : L.Narayana Swamy vs. State of Karnataka & Ors.
5. (2018) 16 SCC 299 : Asian Resurfacing of Road Agency vs. Central Bureau of Investigation
6. AIR 1953 All 470 : Ram Dhayan Singh vs. State
7. AIR 1954 Bom 109 : State of Bombay vs. Vishvakant Srikant
8. (1998) 6 SCC 411 : Kalicharan Mahapatra v. State of Orissa

For Petitioners: Mr.M.K.Mohapatro, on behalf of Mr. P.K Behera.

For Opp.Party : Mr. Sangram Das, Standing Counsel, Vigilance

JUDGMENT Date of Judgment : 25.07.2022

SAVITRI RATHO, J.

In this Criminal Revision, the petitioners have challenged the order dated 20.07.2018 passed by learned Special Judge (Vigilance), Jeypore in G.R. Case No. 04 of 2012 rejecting the application filed for discharge by the petitioners and framing charge against them for commission of offences punishable under Section 13 (2) read with Section 13 (1) (e) of the Prevention of Corruption Act, (in short, "the P.C. Act") and Section 109 of the Indian Penal Code (in short "the IPC").

2. The prosecution case in brief is that on the allegation of possession of disproportionate assets to the known source of income of the petitioners,

Koraput Vigilance P.S. Case No. 5 of 2012, under Section 13 (2) read with Section 13(1) (e) of the P.C. Act, 1988 was registered by the Koraput Vigilance Division. During investigation, it was found that Petitioner No.1 (Ramesh Chandra Panda) completed A.M.I.E. from Madras in the year 1989 and joined in the PH Division, Rayagada on 04.10.1989 as a stipendiary Engineer with consolidated pay of Rs.2000/- per month, and from 2005 his consolidated pay was enhanced to Rs.7000/- per month up to August, 2009. At the time of institution of this case, on 10.02.2012 he was posted as Asst. Engineer, PHD, Koraput, NAC. In 1991, Petitioner No.1 got married to Petitioner No.2 Subhashree Sahu and at the time of marriage cash of Rs.16,000/- for conveyance, and Rs.15,000/- towards purchase of scooter was received by accused-petitioner No.1. Accused No.2 was engaged as a radio artist from July, 1994 up to 10.07.2011 and her total income during that period is stated to be Rs.22,452/-. The total income of both the petitioners constituting a family from known sources for the check period is stated to be Rs.16,90,182/-, and expenditure is stated to be Rs.10,88,994/-. The assets acquired by the accused persons during the check period are stated to be one three storied building constructed over plot Nos.255, 249, 256 in Khata No.263/76 situated at mouza Jeypore L.R., donger land-II of Ac.1.73 cents situated at Tumbarla mouza, under Nabarangpur Tahasil vide plot Nos.151, 152, 153 in Khata No.283 vide document No.951/2004 of D.S.R., Nabarangpur for Rs.22,490/-, donger land-II of Ac.0.74 situated in Tumbarala mouza under Nabarangpur Tahasil covered by plot No.809, in Khata No.185, plot Nos.140,141, in Khata No.95 purchased in the name of Subhashree Sahu vide document No.950 of 2004 of D.S.R., Nabarangpur for Rs.9,620/-, house site measuring 60'X60' (0.08 cents) situated at Tumbarala mouza, under Nabarangpur Tahasil covered by plot No.809, in Khata No.185, plot Nos.64, 807, 808, 810 in Khata No.186 purchased in the name of Subhashree Sahu on 06.07.2007 vide document No.863 of 2007 of D.S.R., Nabarangpur for Rs.1,38,900/-, and other house hold articles, electrical gadgets, furniture, gold and silver ornaments, vehicle, bank deposits and postal deposits. The total value of the movable and immovable assets has been worked out as Rs.39,16,826/-. Neither of the accused persons have filed any income tax return for the check period. After completion of investigation, charge sheet under Section 13 (2) read with 13 (1) (e) of the P.C. Act against Petitioner No.1 - Ramesh Chandra Panda and under Section 13 (2) read with 13(1)(e) of the P.C. Act and Section 109 of the Indian Penal Code (in short "the IPC") against the Petitioner No. 2-Subhashree Sahu, has been filed.

3. The petitioners filed an application under Section 239 Cr.P.C for discharge which the learned Sessions Judge-cum-Special Judge (Vigilance), Jeypore has rejected vide order dated 20.07.2018 holding that the necessity of sanction for prosecution against the accused persons and occasion of grave prejudice caused to them may be the subject matter of appreciation of evidence and it was to be seen prima facie if the accused No.1 along with accused No.2 wife had acquired immovable and movable properties cost of which is shown to be Rs.39,16,826/- as against his probable income from all known sources shown to be Rs.16,19,182/- and there was nothing to show that the materials available on record were insufficient to frame charge against them for commission of offences under Section 13(2) read with Section 13(1)(e) of the P.C. Act, 1988, read with Section 109 of the I.P.C and accordingly framed charge under the aforesaid Sections against them.

4. The representation dated 14.01.2013, chargesheet under Section – 207 Crl.P.C, petition for discharge and the impugned order dated 20.07.2018 have been filed alongwith the Criminal Revision Application as Annexure-1 Annexure-2, Annexure-3 and Annexure-4 respectively. Mr. M.K. Mohapatro, learned counsel on behalf of Mr. P.K. Behera, learned counsel for the petitioners has filed a written note of submission dated 02.12.2021 and a date chart dated 05.07.2022 along with six annexures (Annexures - 5 to 10). Annexure-5 is the order dated 11.08.2014 passed by the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.2327(c) of 2014, Annexure-6 is the letter no.1587 dated 03.02.2015 issued by Chief Engineer, P&H (Urban), Annexure-7 is the order no.7 in O.A. No.2327(c) of 2014, Annexure-8 is the cognizance order in Vigilance P.S. Case No.05 of 2012, Annexure-9 is the judgment passed by the learned tribunal in O.A. No.2327(c) of 2014 dated 06.01.2017 and Annexure-10 is the order passed in W.P.(C) No.27128 of 2017 dated 30.01.2018.

5. Mr. Sangram Das, learned Standing Counsel for the Vigilance Department has filed a note dated 01.12.2021 and a memo dated 04.07.2022 along with-

> i.) Copy of disengagement order dated 02.08.2014 from which it is apparent that the petitioner has been disengaged from service with immediate effect for his involvement in Koraput Vigilance P.S. Case No.42 dated 15.07.2011, and
>
> ii.) Copy of order dated 06.01.2017 passed by the learned OAT in O.A. No. 2327 (C) of 2014.

6. Mr. Mohapatra, learned counsel on behalf of the petitioners has submitted that during investigation, the petitioners had submitted the documents before the I.O. showing their income and expenditure. But without considering the same, the I.O. proceeded in an illegal and arbitrary manner with the investigation. Petitioner no.1 had submitted a detailed representation to his employer and prayed to consider his case before granting of sanction of prosecution or any action. The I.O. without considering the documents submitted by the petitioners and without obtaining sanction from the competent authority, submitted charge sheet against the petitioners on 08.05.2015. After receipt of the charge sheet in the absence of sanction, the learned trial Court took cognizance vide order dated 23.09.2015 and issued summon to the petitioners. On their appearance, the petitioners were granted bail. After receipt of police papers, the petitioners found that neither the I.O. had considered the documents submitted by them during investigation nor obtained sanction for prosecution.

His further submission is that Petitioner No. 1 had joined in the Housing and Urban Development Department as Asst. Engineer on DLR basis on 4.10.1989. His pay was enhanced from time to time and on 15.12.2005 his appointment was made contractual and he was appointed against regular vacant sanctioned post. Koraput Vigilance Case No.5 of 2012 was registered on 10.12.2012 and disengagement letter was issued on 01.08.2014 and the termination letter was stayed vide order dated 11.08.2014 (Annexure-5) passed by the learned Orissa Administrative Tribunal, Cuttack.The tribunal had directed that the impugned order of termination dated 01.08.2014 if not implemented so far, would be stayed till filling of the counter. The order of termination has not been implemented as it was not received by the petitioner no-l's authority before the interim order was passed by the learned Tribunal on O.A. No 2327(C)/2014 and the interim order has been extended till disposal of the Original Application. Vide order dated 12.05.2015 (Annexure-7), the learned tribunal directed for sanctioning and disbursing his current salary from August 2014. The O.A. was finally allowed on 06.01.2017 and the order of termination of the petitioner No 1 was quashed (Annexure-9.) The State had approached this Court in W.P.(C) No. 27128/2017 wherein the Hon'ble High Court confirmed the order passed by the learned Tribunal vide order dated 30.1.2018 (Annexure-10). He was finally relieved from service with effect from 30.6.2020 on attaining the age of superannuation vide letter no.11449/HUD, Bhubaneswar dated 26.6.2020. The learned Tribunal while extending the service of the petitioner from

23.12.2011 to 25.12.2012 has mentioned in the said order that, "*He* w*ould be appointed against the regular post of Assistant Engineer by the cadre controlling Department provided he is found eligible and recommended for such posts by the O.P.S.C.*" Referring to orders of the learned Tribunal he submitted that the petitioner no.1 was for all purposes was in service when order of cognizance was passed on 23.09.2015 and therefore it was necessary to obtain sanction for his prosecution and in absence of sanction, the case cannot proceed. He relies on the judgment of the Supreme Court in the case of ***State (SPE Hydrabad) Vs. Air Commodore Kailash Chand*** reported in ***AIR 1980 SC 522*****,** stating that the Apex Court upheld the judgment of the Andhra Pradesh High Court which had quashed the proceeding under the PC Act due to lack of sanction in case of an Air Force Officer who had been appointed temporarily after retirement. He has also submitted that Petitioner No.2, the wife of petitioner, has been tagged in this case for abetting the principal accused for committing the offence. She is entitled for discharge in the event the order of cognizance as well as charge is not sustainable against the principal accused petitioner no-1.

7. Mr. Sangram Das, learned Standing Counsel (Vigilance) relying on the decisions in the case of ***R.R. Chari vrs. The State of Uttar Pradesh*** reported in ***AIR 1962 SCC 1073*** and in the case of ***Bipin Chandra Moharana vrs. Republic of India*** reported in ***AIR 1964 Odisha 152*** submitted that a '*public servant'* is a person who is a permanent employee. The Petitioner No.1 who was working on contractual basis in Koraput NAC, was therefore not employed permanently by the Government of Odisha in the Department of Housing and Urban Development. Thus, the petitioner being a contractual employee and not a permanent employee, standing in the footing of a temporary employee, no sanction was required for his prosecution. Even assuming that sanction was necessary in case of the petitioner who was a contractual employee, it is apparent from order dated 02.08.2014 that the petitioner had been disengaged from service, much before 23.09.2015, the date when cognizance of the offences was taken and summons was issued for appearance of the petitioners. As the petitioner No.1 was not in service on that date, it was not necessary to obtain sanction for prosecution of the petitioner who had been disengaged on 01.08.2014. This order of disengagement has been set aside by order dated 06.01.2017 passed in O.A. No.2327 of 2014. But whether the petitioner No.1 was working after his disengagement and the nature of work being discharged by him on the date cognizance was taken and necessity of obtaining sanction in these circumstances,

can only be considered at the time of trial by adducing evidence and not by the High Court in an application under Section 397 read with Section 401 of the Cr.P.C . His alternate submission is that as petitioner No.1 was working as a contractual Assistant Engineer on the date the offence was committed and as an estimator subsequently when the cognizance of the offences was taken, therefore, no sanction was required for his prosecution as both the posts are different. In support of his submission, he relied on the decisions in the case of ***L.Narayana Swamy vs. State of Karnataka & Others*** reported in ***(2016) 9 SCC 598*** **and** ***Asian Resurfacing Of Road Agency vs. Central Bureau Of Investigation*** reported in ***(2018) 16 SCC 299.*** In exercise of power under Sections 397 and 482 of Cr.P.C, this Court should interfere in framing of charge only in the rarest of rare cases and this is not such a case and there being no patent error in jurisdiction and as the plea of lack of sanction can be raised and considered during trial, the impugned order does not call for any interference.

8. I have heard the learned counsels, gone through date chart, written note of submission and documents (Annexures) filed by the learned counsel for the petitioners, and the note and documents filed by the learned Standing Counsel Vigilance.

9. The expression public servant is defined in Section 2 (c) of the PC Act and provides as follows :

> "2(c) *"Public servant" means,--*
> (i) *person the service or pay of the Government or remuneration by the Government by fees or commission for the performance of any public duty .*
> (ii) *any person in the service or pay of the local authority;"*

The Supreme Court in ***R.R. Chari vrs. The State of Uttar Pradesh*** reported in ***AIR 1962 SCC 1073*** has interpreted the term "employed" to mean permanently employed" but the same is not relevant for the purpose of this case as petitioner No.1 may not have been a permanent employee, but that he is covered under this definition cannot be disputed as on the date of registration of the case, his pay was being paid by the State Government. So it is not necessary to delve on that aspect.

10. The provision relating to grant of sanction which is contained in Section 19 of the Prevention of Corruption Act , which provides as follows :

> "**Section – 19** ***Previous sanction necessary for prosecution***.
> *(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,*

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation. For the purposes of this section,
(a) error includes competency of the authority to grant sanction;
(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

11. Sub-section (1) provides that no Court should take cognizance of the offences punishable under Sections 7, 10, 11, 13 and 15 without previous sanction and the Government or authority who is to give the sanction. Sub-section (2) provides that if doubt arises as regards the Government or authority who is to accord sanction, the Government or authority who would have been competent to remove the accused when the offence was committed,

should accord sanction. A combined reading of sub-sections (3) and (4) make the position clear that notwithstanding anything contained in the Cr.P.C., no finding, sentence and order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in the sanction required under sub-Section (1), unless in the opinion of that Court a failure of justice has in fact been occasioned thereby.

12. In the case of ***Bipin Chandra Moharana*** (supra) reported in***: AIR 1964 Odisha 152,*** the petitioner therein was working as a temporary employee in the postal department and his services were terminated before cognizance of the offences under Section 5 (1) (c) of the PC Act were taken against him for which this High Court relying on the decisions in ***Ram Dhayan Singh vs. State :AIR 1953 All 470, State of Bombay vs. Vishvakant Srikant : AIR 1954 Bom 109,*** held that no sanction was required for proceeding against him under the PC Act. It was further held referring to the decision in ***RR Chari*** (supra) that the word "*employed"* that no sanction was necessary and the trial was not illegal. This Court also held as follows :

> *...."8. Learned counsel for the appellant also contended that in the absence of sanction as required under Section – 6 of the Prevention of Corruption Act , the trial is illegal . But here by the time the cognizance of the offence was taken , the services of the accused were already terminated (Ex. 14) and as such , he had ceased to be a public servant on the date when cognizance was taken . It is well settled that no sanction is necessary to such cases, vide ram Dhyan Singh vs State , AIR 1953 All 470 State of Bombay vs Viswakant Srikant , AIR 1954 Bom 109"...*

In the case of **A*ir Commodore Kailash Chand*** (supra), the accused a member of the Indian Air Force after retirement had been reemployed for a period of two years with effect from 16.06.1965 in the Auxiliary Air Force. A charge-sheet was submitted against the respondent for having committed offences under section 5 (2) of the Prevention of Corruption Act, 1947, during the period 29.03.1965 and 16th March 1967. Considering the nature of duties assigned to him, the Supreme Court held that he was a public servant and sanction was required for his prosecution and did not interfere with the order of the High Court which had quashed the proceedings against him. But while doing so, the Supreme Court has held as follows :

> *"……It follows therefore, that the prosecution must prove that at the time when the cognizance of the offence was taken, the respondent ceased to be a public servant. In the instant case, the Special Judge appears to have taken cognizance on June 19, 1969 at a time when the respondent continued to be a public servant having been*

re-employed and as referred to above his services were terminated only on 01.04.1968 8 but he continued to be a member of the Auxiliary Air Force upto 15.06.1970 that is to say, a long time after the cognizance of the offence was taken"

In the case of ***Kalicharan Mahapatra v. State of Orissa*** reported in ***(1998) 6 SCC 411*****,** the Supreme Court has held as follows:

"A public servant who committed an offence mentioned in the Act, while he was a public servant, can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time, the Court can take cognizance of the offence without any such sanction."

It went on to further hold that the High Court was wrong in quashing the prosecution proceedings in so far as they related to offences under the P.C. Act as the petitioner was no longer in service on the date cognizance was taken .

In the case of ***L. Narayana Swamy vs. State of Karnataka & Ors*** reported in ***(2016) 9 SCC 598,*** two questions of law arose for consideration. The second question is relevant for this case, i.e. : .

…" (*2) Whether a public servant who is not on the same post and is transferred (whether by way of promotion or otherwise to another post) loses the protection under Section 19(1) of the P.C. Act, though he continues to be a public servant, albeit on a different post?"….*

The relevant portions of the decision are extracted below :

….."20. Likewise, in the case of ***Prakash Singh Badal & Anr. v. State of Punjab & Ors*** *, the contention of the appellant in that case that permission to obtain sanction throughout service was necessary, was negatived in the following manner:*

"24. The plea is clearly untenable as Section 19(1) of the Act is time and offence related.

Section 19(1) of the Act has been quoted above.

25. The underlying principle of Sections 7, 10, 11, 13 and 15 have been noted above. Each of the above sections indicates that the public servant taking gratification (Section 7), obtaining valuable thing without consideration (Section 11), committing acts of criminal misconduct (Section 13) are acts performed under the colour of authority but which in reality are for the public servant's own pleasure or benefit. Sections 7, 10, 11, 13 and 15 apply to aforestated acts. Therefore, if a public servant in his subsequent position is not accused of any such criminal acts then there is no question of invoking the mischief rule. Protection to public servants under Section 19(1)(a) has to be confined to the timerelated criminal acts performed under the colour or authority for public servant's own pleasure or benefit as categorised under Sections 7, 10, 11, 13 and 15. This is the principle behind the test propounded by this Court, namely, the test of abuse of office."

21. It clearly follows from the reading of the judgments in the cases of ***Abhay Singh Chautala*** *and* ***Prakash Singh Badal*** *that if the public servant had abused entirely different office or offices than the one which he was holding on the date when cognizance was taken, there was no necessity of sanction under Section 19 of the P.C. Act. It is also made clear that where the public servant had abused the office which he held in the check up period, but had ceased to hold 'that office' or was holding a different office, then sanction would not be necessary. Likewise, where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction. However, one discerning factor which is to be noted is that in both these cases the accused persons were public servants in the capacity of Member of Legislative Assembly / by virtue of political office. They were not public servants as government employees. However, detailed discussion contained in these judgments would indicate that the principle laid down therein would encompass and cover the cases of all public servants, including government employees who may otherwise be having constitutional protection under the provisions of Article 309 and 311 of the Constitution…"*

.."23 In the case of the present appellants, there was no question of the appellants' getting any protection by a sanction. The High Court was absolutely right in relying on the decision in ***Prakash Singh Badal*** *to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19, P.C. Act. Where the public servant had abused the office which he held in the check period but had ceased to hold "that office" or was holding a different office, then a sanction would not be necessary. Where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction."……*

In the case of ***Asian Resurfacing Of Road Agency vs. Central Bureau Of Investigation*** reported in ***(2018)16 SCC 299*****,** the Supreme Court has held that **:**

….*"34. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to reappreciate the matter.*

13. The position of law is thus clear that challenge to an order of charge should be entertained only in the rarest of rare cases an accused facing prosecution for offences under the P.C. Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences or was working in a different post.

14. In the present case the accused had admittedly been disengaged from service after registration of the case and before the date when the Court took cognizance of the offences. Learned counsel for the petitioner has stated that he continued in service till his superannuation recently on account of orders passed by the learned OAT while the learned Standing Counsel for the Opposite party has submitted that petitioner No.1 was working as a contractual assistant engineer on the date the offence was committed and as an estimator when the cognizance of the offences was taken which is in a different capacity. The documents relied upon by learned counsel for the petitioners have been filed alongwith the date chart. Therefore, whether petitioner No.1 was continuing in service on the date cognizance of the offences or had been re-engaged / reemployed in a different capacity / job when order taking cognizance of the offences was passed is a question which should be considered by the learned trial Court on the basis of evidence adduced before it by the parties. The question whether in the absence of sanction, there has been any real failure of justice cannot be decided unless the evidence has been recorded.

15. I am therefore not inclined to interfere with the impugned order, rejecting the application for discharge and framing charge against the petitioners for the offences punishable under Section 13 (2) read with Section 13 (1) (e) of the P.C. Act and Section 109 of the IPC .

16. The Criminal Revision is accordingly dismissed.

17. As the case is of the year 2012 and charge has been framed since five years, the learned Special Judge (Vigilance), Jeypore shall do well to proceed with the trial expeditiously. A copy of this order be sent to the learned Special Judge (Vigilance), Jeypore for compliance.

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2022 (II) ILR -CUT-778

MRUGANKA SEKHAR SAHOO, J.

WPC (OAC) NO. 4096 OF 2013

MINATI SAHOO ……..Petitioner

.V.

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

ORISSA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULES, 1990 – Whether a married daughter is entitled to get compassionate appointment under Rehabilitation Assistance Scheme ? – Held, Yes.
(Paras 12 &13)

Case Laws Relied on and Referred to :-

1. W.P.(C) No. 28966 of 2011 (decided on 11.08.2021) : 2022(II) CLR 64 : Urbashi Sahoo v. State of Orissa & Anr.
2. 2017 (II) ILR-Cut-896 : Bibhuti Bhusan Patnaik v. State of Odisha & Ors.

For Petitioner : Mr. Sidheswar Mallick with Mr. P.C.Das.

For Opp.Parties : Mr. T.K. Praharaj, Standing Counsel

JUDGMENT Date of Hearing : 12.05.2022 : Date of Judgment : 27.07.2022

MRUGANKA SEKHAR SAHOO, J.

The writ petition has been filed by the petitioner challenging the order dated 27.09.2012, passed by the Deputy Secretary to Government, Home Department-opposite under Annexure-14, rejecting her application for appointment under Rehabilitation Assistance Scheme after death of her father while he was working under the Government under the provisions of Orissa Civil Services (Rehabilitation Assistance) Rules,1990.

2. In the present case, after the father of the petitioner Sri Nrusingh Charan Sahoo, passed away on 15.02.2006 while working as Havildar Major of Odisha State Armed Police (OSAP), OSAP 4th Bn., Rourkela, the application was filed by the petitioner on 02.06.2006. The same was sent to the Collector, Dhenkanal vide office letter no.4292/E dated 21.08.2006 from the OSAP 4th Bn., Headquarter, Rourkela to furnish distress certificate. The Collector, Sundargarh vide letter no.790/Esstt. dated 19.04.2008 furnished the annual income of the family to be Rs.1000/- and also intimated the family pension per annum received by the wife of the deceased employee (mother of the petitioner) to be Rs. 4524/- x 12 + 1000/- making it total of Rs. 55288/- which is below the ceiling limit of Rs. 60,000/- fixed by the Government for being considered for appointment under the provisions of Rehabilitation Assistance Scheme/Rules.

3. The Government accorded sanction by letter of Home Department, letter no.56174 dated 14.12.2009 intimating the DG & IG of Police, Orissa, Cuttack for filling up of vacancies in the rank of Junior Assistants /Junior Clerks under Rehabilitation Assistance Scheme, i.e., to be granted to the petitioner.

4. The State Police Headquarters by letter no.22118 dated 20.04.2010 intimated the petitioner regarding the documents required to be produced by her for getting appointment under Rehabilitation Assistance Scheme.

5. The matter remained in a kind of flux till it was rejected in 2012, i.e., evident from Annexure-14 as well as Annexure-17.

6. It is submitted by the learned counsel for the petitioner referring to the averments made in the original application as well as the counter dated 01.11.2016 filed by the AIG of police, office of DG & IG of police on behalf of the State-respondents that the only ground of rejection of the candidature of the applicant-petitioner was that she is the married daughter of the deceased-employee.

It is further submitted that the authorities have ascribed no other reason other than the factum of the petitioner getting married for rejecting her Rehabilitation Assistance appointment after the Government, Home Department by office letter no.56174 dated 14.12.2009 (Annexure-4) has accorded permission for such appointment.

Learned counsel for the petitioner further relies on the decision of Division Bench of this Court dated 11.08.2021 passed in W.P.(C) No. 28966 of 2011: *Urbashi Sahoo v. State* to contend that marriage of a daughter cannot disentitle her to get benefit of the appointment under Rehabilitation Assistance Scheme.

7. On 23.03.2022 after hearing the learned counsel for the parties, the following order was passed :

> *"The writ petition has been registered before this Court on 06.12.2021 after the original application was transferred, upon abolition of the Odisha Administrative Tribunal, Cuttack Bench, Cuttack.*
>
> *On perusal of the available order-sheets of the learned Tribunal, it is found that the matter was never taken up after 16.01.2017.*
>
> *It is submitted by the learned counsel for the petitioner referring to the averments made in the original application as well as the counter dated 01.11.2016 filed by the AIG of police, office of DG & IG of police on behalf of the State-respondents that the only ground of rejection of the candidature of the applicant-petitioner was that she is the married daughter of the deceased-employee.*
>
> *It is further submitted that the authorities have ascribed no other reason other than the factum of the petitioner getting married for rejecting her Rehabilitation Assistance appointment after the Government, Home Department by letter dated 14.12.2009 has accorded permission for such appointment.*

Learned counsel for the petitioner further relies on the decision of division Bench of this Court dated 11.08.2021 passed in W.P.(C) No.28966 of 2011: Urbashi Sahoo v. State to contend that subsequent marriage of a candidate cannot disentitle her to get benefit of the Rehabilitation Assistance Appointment.

Learned Addl. Government Advocate prays for some further time to obtain instruction regarding the contention raised at the bar.

Accordingly, list this matter on 12.05.2022.

8. Learned Standing Counsel submits that he has obtained instructions as directed by order dated 23.03.2022. It is fairly submitted by the learned Standing Counsel that, at this stage, it is not available under law for the authority to add any further reasons or alter the reasons those were given for rejecting the application of the petitioner, who applied for employment under the Rehabilitation Assistance Scheme as per the Orissa Civil Services (Rehabilitation Assistance) Rules,1990.

9. The order of rejection are indicated by Annexure-14 dated 27.09.2012 passed by Deputy Secretary to Government, Home Department-opposite party no.1 as well as Annexure-17 dated 13.08.2013 DG & IG of Police, Odisha, Cuttack.

10. Counter on behalf of the State-opposite parties is also perused. Paragraph-2 (internal page-3) of the counter dated 01.11.2016 filed by the AIG of Police, Personnel, State Police Headquarters, Odisha, Cuttack is extracted herein :

"The rejection order was duly communicated to the applicant vide Home Department letter No.38243 dated 27.09.2012 (Annexure-14 of the O.A.). As the applicant did not meet the eligibility criteria in terms of Rule 2(b) of Odisha Civil Service (Rehabilitation Assistance) Rules,1990 (copy enclosed) and subsequent amendments thereon, her appointment could not be considered under Rehabilitation Assistance Scheme since she is a married daughter of the deceased employee. Basing on allegation made in the O.A. No.1631(C)/2009 filed by Manjulata Sahoo v. State of odisha and others, two Junior Clerks namely; Urbasi Sahoo and Ethel Biswasi Lugun of D.P.O. Angul were discharged from service w.e.f. 9.12.2009 even after rendering 1 year and 8 months of service. Apart from the above ca ses, the following 05 more applicants in the year 2008, 01 candidate in the year 2010 and 02 in the year 2012 were not considered for appointment under Rehabilitation Assistance Scheme on the ground that they were found married before their appointment.

In the counter, the details of eight candidates whose employment was terminated, being daughters of the deceased employees, is also given.

11. In considered view of this Court, after the decision rendered in ***Urbashi Sahoo v. State of Orissa and another*** decided on 11.08.2021 in W.P.(C) No.28966 of 2011: 2022(II) CLR 64, rejection of the candidature of a married daughter for compassionate appointment under Rehabilitation Assistance Scheme, is untenable.

12. In ***Urbashi Sahoo v. State of Orissa and another*** decided on 11.08.2021 in W.P.(C) No.28966 of 2011, relying on the earlier decision of this Court rendered in the case of ***Bibhuti Bhusan Patnaik v. State of Odisha and others*** reported in ***2017 (II) ILR-cut-896,*** it has been held that daughter cannot be denied employment on the ground that the Orissa Civil Services (Rehabilitation Assistance) Rules,1990 provides only for employment of the wife of the deceased employee or son.

13. Since for rejecting the claim of the petitioner apart from the ground that the candidate being a married daughter, no further reason is available or there is no other reason that could be available to be given by the authorities; in view of ***Urbashi Sahoo*** (supra), the order dated 27.09.2012 (Annexure-14) rejecting the application of the petitioner for appointment under Rehabilitation Assistance Scheme is set aside.

14. It is directed that the recommendation of the authorities of the OSAP, 4th Bn., the sanction accorded by the State Government and the letter issued by the State Police Headquarters to consider the appointment of the applicant are to be given effect to forthwith.

15. Since about sixteen years have passed when the applicant applied for appointment under Rehabilitation Assistance Scheme and almost nine years have been spent in litigation, in the interest of justice and fair play, the age of the petitioner shall not be a factor to consider her for a suitable job under the Rehabilitation Assistance Scheme by the authority, according to her present physical fitness.

16. With the above observation, the writ petition is allowed. In the facts and circumstances of the case, there shall be no order as to costs.

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2022 (II) ILR -CUT-782

R.K. PATTANAIK, J.

CRLMC NO. 2209 OF 2009

MANORANJAN JENA & ORS. ……..Petitioners

.V.

STATE OF ODISHA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power of the High Court – Offences U/s. 20(3) of the Railway Protection Force Act, 1957 r/w Section 197 Cr.P.C. – The deceased was arrested involving an offence punishable under Section 3(a) of the Railway Property (Unlawful Possession) Act and subsequently, he died while under treatment at the Hospital – The petitioners were on duty at the relevant point of time – Whether, the petitioners could have been prosecuted for committing the alleged offences or they should have been discharged from the offence ? – Held, the Court is of the opinion that the petitioners shall have to face trial which cannot be derailed on the ground of sanction as per section 197 Cr.P.C.

Case Laws Relied on and Referred to :-

1. (2008) 40 OCR (SC) 463 : Anjani Kumar Vrs. State of Bihar & Ors.
2. CRR No.1030 of 2001 (decided on 08.10.2002) : Montek Singh Vrs. State of West Bengal & Anr.
3. 2000 Cr.L.J. 424 : Naresh Mohan Prasad Vrs. State of Bihar & Ors.
4. (2004) 28 OCR (SC) 94 : State of Orissa Vrs. Ganesh Chandra Jew
5. 1995 (II) OLR 284 : Kremjit Mohananda Vrs. Mohampani Karua & Anr.
6. 2000 Cr.L.J. 4631 (SC) : Abdul Wahab Ansari Vrs. State of Bihar
7. AIR 1967 SC 776 : P.Arulswami Vrs. State of Madras
8. 1979(4) SCC 177 : B.Saha and others Vrs. M.S. Kochar
9. (1994) 7 OCR 326 : Kartikeswar Naik Vrs. Satyabadi Mallik

For Petitioners: Mr. S.K. Pal
For Opp.Party : Mr. K.K. Das, ASC

JUDGMENT Date of Judgment : 04.07.2022

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is filed by the petitioners assailing the impugned order dated 27th June, 2009 (Annexure-4) passed in S.T. Case No.754 of 2001 by the learned Additional Sessions Judge (FTC), Jagatsinghpur on the grounds inter alia that it is illegal and against the weight of evidence on record and contrary to the provisions of Section 20(3) of the Railway Protection Force Act, 1957 (in short 'the RPF Act')as well as Section 197 Cr.P.C. and therefore, the same is liable to the interfered with and set aside.

2. The petitioners are the members of the RPF and as such, the RPF Act, 1957 is applicable to them for all purposes besides the provisions of the Cr.P.C. The contention of the petitioners is that protection is provided to the members of the RPF in view of Section 20(1) of the RPF Act which prescribes that any member of the RPF having done any act in discharge of duty, it shall be lawful

for him to plead that such act was performed under the orders of a competent authority. It is further contended that the mandatory provision of Section 20(3) of the RPF Act was not complied with before initiating the prosecution against the petitioners.

3. The petitioners contend that on 11th September, 1996 at 12.30 pm, a goods train was stopped for nearly 40 minutes between Kandarpur Down House and distance signal due to engine work and during that time, some miscreants committed theft of two distributor valves and in that connection, after information was gathered, petitioner No.1 and other officials conducted a joint search during the night hours and on 12th September, 1996, noticed three persons carrying some items and on being intercepted, two of them fled away and one was apprehended and he was found to be in possession of the distributor valves, whereafter, F.I.R. was lodged, seizure was made and the said accused, namely, the deceased was arrested and forwarded to the court of S.D.J.M., Jagatsinghpur on 14th September, 1996. After the production of the said accused, as it appears, he was having some medical conditions for which had to be shifted to SCB Medical College & Hospital, Cuttack and during that time, died later to which U.D. Case No.556 of 1996, dated 15th September, 1996 was registered at Mangalabag P.S. After two days i.e. on 16th September, 1996, the wife of the victim accused lodged F.I.R. (Annexure-2) at Biridi Outpost alleging that her husband was assaulted by the RPF police for which he died. On the strength of the F.I.R., Jagatsinghpur P.S. Case No.313 of 1996 under Section 302 read with 34 IPC was registered which corresponds to G.R. Case No.724 of 1996. After investigation, the local police submitted charge sheet under Section 304 IPC and other offences and the learned S.D.J.M., Jagatsinghpur took cognizance of it and thereafter, the case was committed to the Court of Sessions before which a petition under Section 227 of Cr.P.C. was filed and the same was rejected and then the petitioners approached this Court in CMC No.509 of 2003 which was disposed of by order dated 24th April, 2009 (Annexure-3). Pursuant to the direction in Annexure-3, the learned court below once again considered the plea of discharge and finally, passed the impugned order under Annexure-4 dated 27th June, 2009 in S.T. Case No.754 of 2009. In fact, the court below was not inclined to discharge the petitioners and accordingly, dismissed their plea for discharge challenging which the petition was filed for indulgence of this Court once again in exercise of its inherent jurisdiction.

4. Heard Mr. S.K. Pal, learned counsel for the petitioners and Mr. K.K. Das, learned ASC appearing for the State.

5. Mr. Pal would contend that the learned court below did not consider applicability of Section 20 of the RPF Act, where under, protection is provided to the members of the Force. In fact, it is contended that no notice was issued before initiating the criminal action which is mandatorily required under Section 20(3) of the RPF Act. That apart, considering the facts on record, as submitted by Mr. Pal, though the accused died after he was arrested and it was alleged to be on account of injuries received by him but then, no complaint was registered by him at the time of production before the S.D.J.M., Jagatsinghpur and in any case, the petitioners were discharging official duties and in that connection, the arrest was caused and therefore, they enjoy an immunity in view of Section 197 Cr.P.C. Notwithstanding the above, the learned court below, as according to Mr. Pal, lost sight of the fact that the petitioners are members of the RPF and could not have been subjected to prosecution without compliance of the above provisions and therefore, the impugned order under Annexure-4 cannot be sustained. In support of such contention, Mr. Pal cited the following decisions, namely, **Anjani Kumar Vrs. State of Bihar & others (2008) 40 OCR (SC) 463; Montek Singh Vrs. State of West Bengal and another in CRR No.1030 of 2001 decided on 8th October, 2002; Naresh Mohan Prasad Vrs. State of Bihar and others 2000 Cr.L.J. 424; State of Orissa Vrs. Ganesh Chandra Jew (2004) 28 OCR (SC) 94; Kremjit Mohananda Vrs. Mohampani Karua and another 1995(II) OLR 284; and Abdul Wahab Ansari Vrs. State of Bihar 2000 Cr.L.J. 4631 (SC)**. All the above judgments except Montek Singh and Naresh Mohan Prasad (which are under Section 20 of the RPF Act) are in relation to Section 197 Cr.P.C. relying upon which Mr. Pal urged that the petitioners cannot be criminally prosecuted for the alleged incident since it happened during and in course of discharging official duty.

6. Mr. Das, on the other hand, submits that the impugned order under Annexure-4 is justified since the deceased who was arrested and subsequently admitted in hospital for treatment died on account of shock arising out of combined effect of the injuries associated with Hepatitis as per the opinion of the doctors and such injuries (19 external and 10 internal) have been indicated in the PM report. Since the deceased was arrested in connection with a theft case and was subsequently beaten up while in custody alleged to have received so many injuries which finally proved to be fatal and therefore, according to Mr. Das, the petitioners did not any right or authority to treat him in such manner and their actions cannot be said to be a part of any duty or official function and therefore, the learned court below did not commit any error in not discharging them and hence, the impugned decision suffers from no infirmity and thus, not to be disturbed.

7. The facts which are not in dispute are that the deceased was arrested in 2CC Case No.49 of 1996 involving an offence punishable under Section 3(a) of the Railway Property (Unlawful Possession) Act and subsequently, he died while under treatment at the hospital and that the petitioners were on duty at the relevant point of time.

8. The question is, whether, the petitioners could have been prosecuted for having committed the alleged offences or they should have been discharged by the learned court below? The learned court below distinguished the citations submitted on behalf of the petitioners and ultimately held that a case is prima facie made out for framing of charge and accordingly, passed the impugned order under Annexure-4. The conclusion of the learned court below is that the deceased received good number of injuries which led to his death and it was no part of the official duty of the petitioners to assault or beat him up while being in custody and on such ground, the plea of discharge was rejected. Mr. Pal contends that apart from Section 197 Cr.P.C., the learned court below was to consider Section 20(3) of the RPF Act which it did not. While advancing such an argument, Mr. Pal placed reliance on **Montek Singh and Naresh Mohan Prasad** (supra). The Court is to examine the above contention of Mr. Pal in order to find out and ascertain, whether, the learned court below rightly took cognizance of offences against the petitioners under Annexure-4.

9. In Montek Singh case, prosecution was launched against an RPF official with the allegation in the F.I.R. that the accused assaulted and illegally detained persons in custody but the Calcutta High Court held that such allegation prima facie shows that the acts complained of are committed in course of official duty and before commencement of legal proceeding, one month notice was not issued which is required as per Section 20(3) of the RPF Act for which it was quashed in exercise of jurisdiction of under Section 482 Cr.P.C. Similarly in **Naresh Mohan Prasad** (supra), the Patna High Court concluded that non-compliance of Section 20(3) of the RPF Act before initiation of the proceeding cannot be sustained and accordingly, in similar facts and circumstances quashed the prosecution by exercising inherent jurisdiction. It is not brought to the notice of the Court if at all any such notice was issued in terms of Section 20(3) of the RPF Act. The question of application of Section 20 of the RPF Act vis-à-vis legal proceeding was discussed in Montek Singh and it was held therein that it would apply to criminal prosecutions and accordingly, the case registered against the RPF officials was quashed for failing to observe Section 20(3) of the RPF Act. It is not claimed by Mr. Das, learned ASC that there was any intimation to the petitioners and their superior authorities before registration of the case. So,

the point is that whether in absence of any such compliance of Section 20(3) of the RPF Act, the proceeding in S.T. Case No.754 of 2001 pending before the learned court below can at all be sustained. The law is well settled that before initiating a legal proceeding either civil or criminal, notice is required to be issued to the official alleged of having committed any civil wrong or offence which is mandatory in view of Section 20(3) of the RPF Act which has been reiterated in **Montek Singh and Naresh Mohan Prasad** ibid.

10. Regarding the protection provided to the public servants under Section 197 Cr.P.C., Mr. Pal relied upon the case of **Ganesh Chandra Jew** (supra). In the above decision, the Apex Court held and observed that Section 197 Cr.P.C. is to protect responsible public servants against institution of vexatious criminal proceedings for offences alleged to have been committed while discharging or purporting to act which is reasonably connected with the official duty and was not merely a cloak for doing objectionable act; if while performing such official duty, the public servant acted in excess of his duty but there is proximity between the act complained of and the performance of duty, the excess would not be sufficient ground to deprive him of the protection.

11. In this connection, another decision of the Supreme Court in **P. Arulswami Vrs. State of Madras AIR 1967 SC 776** may perhaps be profitable to refer, wherein, it has been held that not every offence committed by a public servant that requires sanction under Section 197(1) Cr.P.C; not even every act done by him while he is actually engaged in the performance of his official duty; but if the act complained of is directly concerned with the duties so that if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. As further held therein that it is the quality of the act that is important and if it falls within the scope and range of his official duty, the protection contemplated by Section 197 Cr.P.C. could be attracted.

12. Section 197(1) provides that when any person who is or was a public servant not removable from office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction in the manner prescribed. In **B. Saha and others Vrs. M.S. Kochar 1979(4) SCC 177**, the Supreme Court held that the words 'any offence alleged to have been committed by a public servant while acting or purporting to act in discharge of official duty' employed in Section 197(1) Cr.P.C. are capable of a narrow as well as wide interpretation; if the words are construed too narrowly, the provision would be rendered sterile, for it is no part of an official duty to commit an

offence and never can be; in the wider sense, the words would take under their umbrella every act constituting an offence committed in the course of same transaction in which the official duty is performed or purports to be performed; the right approach to the import of the said words lies between two extremes and while on the one hand, it is not every offence committed by a public servant while engaged in the performance of official duty entitles protection under Section 197 Cr.P.C. but an act constituting an offence directly and reasonably connected with his official duty would certainly require sanction. The aforesaid decision of the Apex Court in B.Saha with regard to the expression 'acting or purporting to discharge official duty' was referred to by this Court in **Kremjit Mohananda** case (supra), wherein, it was held that sanction would be necessary in the action directly or indirectly or reasonably connected with the official duty. In the above decision, an earlier case of this Court in **Kartikeswar Naik Vrs. Satyabadi Mallik (1994) 7 OCR 326** was cited, wherein, it was held that even if any excess was committed while effecting or carrying out arrest, it cannot be said that the same was completely divorced of the official duty and therefore, prior sanction under Section 197 Cr.P.C. may be necessary.

13. As to the present case, the deceased was no doubt arrested in connection with a theft case and was later produced before the court below. It is revealed from the record that the victim had number of injuries on his body detected during the post-mortem. It is not disputed that the PM report pointed out as many as 19 external and 10 internal injuries on the person of the deceased, which is quite unexpected and unusual. Even if the deceased did not report to the court about any ill-treatment, while being produced but was not taken into custody by the Jail Superintendent looking at his health condition, for which, had to be sent to the hospital, where he died. So many external injuries found on the body of the deceased would certainly point fingers towards the petitioners and suspectful of their conduct. With regard to the plea on the applicability of Section 20 (1) of the RPF Act, it has been the defence of the petitioners but the alleged overt acts are difficult to be comprehended and accepted in the guise of performing duty on the orders of the competent authority. So far as Section 20(3) of the RPF Act is concerned, it is claimed that the provision was not complied with, a defence which may be examined by the court during trial subject to any prejudice shown to have been caused to them for its non-observance. In any case, considering the extent of injuries, external as well as internal, it is really difficult on the part of the Court to distinguish the case of the petitioners to say that their conduct was in a way reasonably connected to duty. If such a plea of the petitioners is accepted, it would then be difficult to segregate case from case and all kinds of misconduct may have to be condoned on the ground that what was done was on

account of duty or while performing or purporting to act in due discharge of duty, which can never be said as the legislative intent vis-a-vis Section 197 Cr.P.C. Having arrived at such a conclusion, the Court, without expressing anything on the merits of the case, is of the opinion that the petitioners shall have to face trial which cannot be derailed on the ground of sanction.

14. Accordingly, it is ordered.

15. In the result, petition filed under Section 482 Cr.P.C. by the petitioners stands dismissed for the reasons stated herein above.

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2022 (II) ILR -CUT-789

SASHIKANTA MISHRA, J.

W.P.(C) NO. 34237 OF 2020
WITH
(W.P.(C) NOS. 34240, 34243 & 34247 OF 2020)

AKSHAYA KU. MOHANTY …….. Petitioner

.V.

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

W.P.(C) NO. 34240/2020
BINAPANI PADHY
W.P.(C) NO. 34243/2020
PRAJNA PARAMITA PANDA
W.P.(C) NO. 34247/2020
ANITA BEHERA …….. Petitioner(s)

.V.

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

REGULARIZATION – Orissa Group-B Post (Contractual Appointment) Rules, 2013 – Whether Petitioners appointed under a Temporary Plan Scheme are eligible to be regularized as per 2013 Rule – Held, Yes – Mere nomenclature cannot be a determinating factor as regards the true nature of a particular job – The Rules, 2013 are applicable to the case of the Petitioners. (Paras 12,14)

For Petitioners : Mr. Ashutosh Mishra
For Opp.Parties: Mr. Nihar Kanta Praharaj, AGA (S&ME)

JUDGMENT Date of Hearing : 22.07.2022 : Date of Judgment : 27.07.2022

SASHIKANTA MISHRA, J.

1. All these writ petitions involve common facts and points of law. For convenience, they were heard together and have been disposed of by this common judgment.

2. Pursuant to the advertisement issued by the Director, TE and SCERT (Opposite Party No.3) for the post of Teacher Educators for 13 old DIETs (District Institute of Education and Training) on contractual basis, The Petitioners submitted their applications and after having gone through the process of competitive examination, they were selected on a consolidated remuneration of Rs.9,300/- per month. It is stated that Petitioner in W.P.(C) No.34237/2020 was posted in DIET, Khurda. Odisha, Petitioner in W.P.(C) No.34240/2020 was posted in DIET, Khurda, Odisha, Petitioner in W.P.(C) No.34243/2020 was posted in DIET, Remuna, Odisha and Petitioner in W.P.(C) No.34247/2020 was posted in DIET, Dolipur, Odisha. Such appointment was for a period of one year to be renewed from time to time. While the matter stood thus, the Orissa Group-B Post (Contractual Appointment) Rules, 2013 (in short 'the Rules, 2013') was framed. Rule 9(a) of the said Rules provides that a person appointed in a contractual post shall continue as such for a period of six years and Rule 16(a) provides that on the date of satisfactory completion of six years of contractual service, he shall be deemed to be regularly appointed. The Petitioners were also granted Grade Pay as provided under Rule 10 of the said Rules. By order dated 19.7.2017, the Government in G.A. Department clarified that Rules, 2013 would also be applicable to the recruitments for which advertisement was issued prior to commencement of the said Rules. Petitioners in W.P.(C) Nos. 34237/2020, 34240/2020, 34243/2020 and 34247/2020 completed six years of their continuous service on 19.04.2018, 19.06.2018, 19.04.2018 and 03.04.2018 respectively. As such, they claim to be regularized in service.

3. It is further stated that the Teacher Educators appointed in the year 2015 were given regular appointments, whereas Petitioners having been appointed since 2012 were not regularized. Petitioners submitted several representations to the Authorities but to no avail. They, therefore, approached the erstwhile Orissa Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. No.2116/2019.Vide order dated 17.7.2019, the Tribunal directed the Opposite Parties-Authorities to consider the grievance of the Petitioners within a period of two months. Pursuant to such direction, Opposite Party No. 3

vide letter dated 28.10.2019 submitted a favourable proposal to the Secretary to Government in School and Mass Education Department (Opposite Party No. 2), which was not considered. The Petitioner, therefore filed a contempt petition vide CONTC No.1167/2020 before this Court after the abolition of the Tribunal. This Court took up the matter and vide order dated 18.8.2020, directed the Opposite Party No. 2 to act as per the direction of the Tribunal within a period of 15 days. Such order was also not complied, for which, the Petitioner filed another contempt application being CONTC No. 4053/2020, which was again disposed of granting 15 days time to Opposite Party No. 2 to comply with the order with intimation to the Registry so that on failure to comply the orders of this Court, the Registry shall issue suo-motu contempt proceeding against the Opposite Party No.2. Pursuant to this order, the Opposite Party No. 2 vide Office Order dated 11.11.2020 (Annexure-11 to the writ petition) rejected the case of the Petitioner. Being aggrieved by such rejection, Petitioners have approached this Court seeking the following relief:

> "In the above stated circumstances, the Petitioner humbly prays that your Lordships shall be graciously pleased to admit the Writ petition & quash the Order No-16100/Dtd.11.11.2020 issued by Opp. party No-2 & may direct the Opp. parties more specifically Opp. party No.-2 to regularize the service of the Petitioner w.e.f. 19.04.2018 i.e. the date petitioner has completed 6 years of Contractual Service with all service and financial benefits within a fixed time as directed by this Hon'ble Court.
>
> AND
>
> For which act of your Lordships kindness, the Petitioner shall ever pray as in duty bound."

4. Counter Affidavit has been filed by Opposite Party No.2 wherein, referring to sub-rule 3 of rule 3 of the Rules, 2013, it is stated that the Petitioners having been appointed under a Temporary Plan Scheme are not eligible to be regularized as per the said rules.

5. The Petitioner has filed a rejoinder affidavit refuting the contention in the counter affidavit by stating that the very fact that the Petitioners have been working since 29.03.2012 shows that there is requirement of work. It is further stated that as per the information obtained by the Petitioner under the RTI Act (enclosed as Annexure-15 to the writ petition), the post of Contractual Teacher Educators belong to CSP Scheme during 2012-13 and 2013-14 and State Plan w.e.f. 2014-15. Further, Opposite Party No. 3 has clarified that the post of Teacher Educators (Contractual) are regular in nature and the salaries of all the teacher faculties are covered under Centrally

Sponsored Scheme of Teacher Education as Central and State share in the ratio of 60:40. It is a Continuous Plan Scheme.

6. Heard Mr.Ashutosh Mishra, learned counsel for the Petitioner and Mr.N.K.Praharaj, learned Additional Government Advocate for School and Mass Education Department.

7. It is argued by Mr. Mishra that the rejection of the claim of the Petitioner for regularization as per Rules, 2013 on the ground that the said rules did not apply to the Petitioners as they have been appointed under Temporary Plan Scheme is not only factually erroneous but also illegal. Petitioners have been rendering satisfactory service to the State for the last 10 years and similarly placed Teacher Educators engaged much after them, have been given regular appointments. It according to Mr. Mishra amounts to gross discrimination. That apart, Opposite Party No.2 has himself clarified that the Petitioners are appointed against Continuous Plan Scheme and therefore cannot be equated with those appointed under Temporary Plan Scheme.

8. Per contra, Mr. N.K. Praharaj, learned Additional Government Advocate for School and Mass Education Department has argued that the Petitioners claim regularization as per the provision of Rules, 2013. Admittedly, Petitioners were appointed under a Centrally Sponsored Scheme of Restructuring and Reorganization of Teacher Education by Government of India and their appointments were co-terminus with the said scheme. Therefore, as per sub-rule (3) of rule 3 of the Rules, 2013, the said rules cannot be made applicable to the Petitioners and therefore, Opposite Party No. 2 has rightly rejected their claims.

9. There is no dispute that the Petitioners were appointed in pursuance to advertisement issued in the year 2011 for engagement of Teacher Educators on contractual basis on monthly remuneration of Rs.9,300/-. As per the terms of such engagement, once the Petitioner executed a contract/agreement with the Govt., the same shall be extended for subsequent period by a fresh contract. In the advertisement it is mentioned under the tenure of engagement as under:

> **5. Tenure of Engagement:**
>
> The tenure of engagement for Teacher Educators on contractual basis will be for an initial period of one year or up to the last day of the month of February in coming year whichever is earlier. The contractual engagement is extendable on year to year

basis subject to satisfactory performance. The engagement will be coterminous with the Centrally Sponsored Scheme of Restructuring and Reorganization of Teacher Education by Government of India. The Teacher Educator, thus engaged, shall not claim for permanent absorption either in DIET or any other Government institution on termination. The engagement can also be terminated at any time without assigning any reason thereof.

10. The Petitioners were engaged in the year 2012 and as such, they have completed six years of service in the year 2018. The claim for regularization of the Petitioners has been rejected as already stated by invoking rule 3(3) of the Rules, 2013 published vide notification dated 17.01.2014, which runs as follows:

3. Applicability:

(1) These rules shall apply to direct recruitment to such Group 'B' Posts as the Government may decide by notification from time to time.

Provided that the State Government may by notification exclude any post from the purview of these rules.

(2) They shall also apply to the categories of Contractual Appointments made under rule 4 from the date of contractual appointment, if any, made under rule 5.

(3) These rules shall not apply to following categories of Contractual Appointments, namely:-

(a) Temporary Plan Schemes (including those under Centrally Sponsored Plan Scheme, Externally Aided Projects);
(b) Temporary Establishments; and
(c) Tenure Based Posts;

Provided that persons appointed on contractual basis under these schemes prior to the commencement of these rules, who are below 45 years shall be allowed to participate in the recruitment process under rule 5 for any Group-B Posts. If they satisfy all other eligibility criteria for such post as laid down in the relevant recruitment rules and shall be allowed relaxation of upper age limit for entry into Government service.

NOTE: Persons appointed under sub-rule (2) and proviso to sub-rule (3) shall get the benefit of these rules only after they were recruited and appointed to any post under rule 5.

11. The question is/can appointment/engagement of the Petitioners be treated as being made under Temporary Plan Scheme. The Government in School and Mass Education Department in its letter dated 24.08.2020 sought for clarification from the Opposite Party No.3 as to whether the contractual appointment in the DIET of the State belongs to Temporary Plan Scheme or is a Continuous Plan Scheme? In response, Opposite Party No.2 vide its letter dated 08.09.2020 inter alia stated as follows :

> "In inviting a reference to the Government letter on the subject cited above, I am to inform you that the following Teacher Educators were appeared on contractual basis in the year, 2012 against sanctioned post of Teacher Educators in 13 old DIETs as per the direction in Government letter No.SME-XII-S&ME-Trg.57/2010-10174/SME dated 17.06.2010 (copy enclosed)
>
> 1. Ms. Prajna Paramita Panda, Teacher Educator (Contractual), DIET, Balasore at Remuna.
> 2. Ms. Binapani Padhy, Teacher Educator (Contractual) DIET, Khurda.
> 3. Ms. Anita Behera, Teacher Educator (Contractual), DIET, Dollpur.
> 4. Shri Akshaya Kumar Mohanty, Teacher Educator (Contractual), DIET, Khurda.
>
> The said posts of Teacher Educators (Contractual) are regular in nature not Temporary Plan Scheme and the salaries of all teaching faculties of DIETs and BIETs cover under the Centrally Sponsored Scheme of Samagra Shiksha (Teacher Education) as Central and State Share is 60:40 which is a Continuance Plan Scheme. Those Teacher Educators were posted against the sanctioned post and working since 2012.
>
> In view of the above, I would like to request Government to kindly consider the prayer of the above named Teacher Educators along with other 02 similarly footed Teacher Educators, namely, Ms.Ayesha Tanwir, Teacher Educator (Contractual), DIET, Khurda and Ms. Tapaswini Nayak, Teacher Educator (Contractual) DIET, Dollpur. The representation of both the Contractual Teacher Educators have already been communicated to Government this Directorate letter No.6241 dated 29.10.2019 for regularization of their services as per GA Department Notification No.1147/Gen dated 17.01.2014 so as to enable this Directorate to redress their genuine grievance as well as to comply the orders of the Hon'ble Court.

Surprisingly, in the counter affidavit, however, Opposite Party No.2 has again referred to rule 3(3) of the Rules, 2013 to contend that the Petitioners come under the Temporary Plan Scheme.

12. Considering the rival contentions of the parties and the relevant materials on record, this Court is of the considered view that mere nomenclature cannot be a determinating factor as regards the true nature of a particular job. Admittedly, the Petitioners were engaged under the Centrally Sponsored Scheme and such engagement is said to be co-terminus with the said scheme. The scheme as such appears to have been continued for 10 years and there is nothing on record to suggest that it shall be discontinued at any time in the near future. Even otherwise, as per the resolution dated 30.11.1990 laying down the personnel policy of DIETs, there was no provision for engagement of Contractual Teacher Educators for DIETs. In spite of the same, Petitioners were engaged on contractual basis.

13. Be that as it may, as per the information obtained by the Petitioners, the Opposite Party No.2 has categorically stated that the post of Contractual Teacher Educators belongs to Centrally Sponsored Scheme during 2012-13 and 2013-14 and State plan is continued even in 2014-15. All these facts cumulatively suggest that the work rendered by the Petitioners (Teacher Educators) is permanent in nature and not a temporary engagement. In any case, 'temporary scheme' is one which remains in operation for a limited period as the word "Temporary" would suggest and would therefore, not apply to engagements, that have continued for 10 years and more. There is another aspect of the matter, the Government after coming into force of the 2013 rules has appointed 103 Teacher Educators in different DIETs in terms of G.A. Department Notification dated 17.1.2014. Undoubtedly, the said Teacher Educators would be performing exactly the same work as the Petitioners. But there is huge disparity in the remuneration, inasmuch as, the said Teachers are being given basic pay of Rs.9,300-34,800 + Grade Pay of Rs.4,200/-, whereas the Petitioners are being paid consolidated remuneration of Rs.9,300/- + Grade Pay of Rs.4,200/-. This obviously amounts to gross discrimination between the similarly placed employees.

14. For the foregoing reasons, therefore this Court has no hesitation in holding that the Rules, 2013 are applicable to the case of the Petitioners. Further, the Petitioners having rendered 6 years of contractual service without any blemish, are entitled for regularization in service.

15. In the result, all the writ applications are allowed. The impugned order No.16100 dtd.11.11.2020 passed by the Opposite Party No.2 is hereby quashed. The Opposite Party No.2 is directed to issue necessary orders to regularize the services of the Petitioners as per rules with effect from the date of their completion of 6 years of contractual service with all service and financial benefits within a period of four months from the date of communication of this order or on submission of certified copy thereof by the Petitioners.

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2022 (II) ILR -CUT-795

A.K. MOHAPATRA, J.

WPC (OA) NO. 1033 OF 2008

PRASANNA KU. DAS …….. Petitioner

.V.

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

ORISSA CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULE 1962 r/w AMENDMENT RULES, 2000 – Rule-15, Sub Rule (10) – Non-compliance of procedure laid down in the rule, while issuing show cause notice as well as imposing penalty by the Disciplinary Authority – Effect of – Held, the order of punishment is unsustainable in law.

(Para 13)

Case Laws Relied on and Referred to :-

1. WPC (OA) No. 995 of 2008 (decided on 03.03.2022) : Abhimanyu Giri vs. State of Odisha & Ors.
2. O.A. No.1179 of 2008 (decided by the Tribunal on 05.05.2018) : Mukunda Dev Upadhyaya vs. State of Odisha & Ors.

For Petitioners : M/s. Ajit Rath, R. Rath, R.Mohanty & D.K.Mitra

For Opp.Parties: Mr. P.C.Das, ASC (O.Ps. 1 & 2)
None appears for O.P. No. 2.

JUDGMENT Date of Hearing : 13.05.2022 : Date of Judgment : 30.06.2022

A.K. MOHAPATRA, J.

1. Initially the applicant-petitioner approached the Orissa Administrative Tribunal, Bhubaneswar Bench by filing an Original Application. On abolition of the Tribunal, the Original Application has been transferred to this Court and registered as WPC (O.A.). Since the pleadings are complete from both sides, the matter is being taken up for final hearing today.

2. Heard Mr. Ajit Rath, learned counsel for the Petitioner and Mr. P.C. Das, learned Additional Standing Counsel for the State. None appears for the OPSC-Opposite Party No.3 despite valid service of notice.

3. The brief facts of the case, in a nutshell, is that the Petitioner who is working as a Junior Engineer (Civil), Anandapur Barrage Sub-Division, Section No.III Agarpada in the district of Bhadrak under Executive Engineer, Baitarani Division, Salapada, Keonjhar, faced a departmental proceeding No.25467, dated 18.07.2002, drawn up jointly along with four others which includes three Junior Engineers and one Assistant Engineer in Class-II Gazetted rank, in connection with the work of improvement to the Soso Branch canal Road of Anandapur Barrage Project from RD.00 K.M. to 18.70 K.M. under Anandapur Barrage Sub-Division, which work was one of the works executed under the Agreement bearing No.51 F-2/97-98 and which was to commence on 20.08.1997 to be completed within a period of eleven calendar months, subsequently extended till 18.6.1999. In the said proceeding, the Petitioner was found guilty and punishment was imposed by the Department of Water Resources as per the Order of the Hon'ble Governor bearing No. 396 dated 25.04.2008, directing

recovery of Rs.12,57,800/- from him. The proceeding and the punishment being in violation of the provisions of the Orissa Civil Services (Classification, Control & Appeal) Rules, 1962 as well as the principles of natural justice and being arbitrary and discriminatory are under challenge in the present writ petition.

4. In filing this Petition, the Petitioner has challenged the procedure followed involving the punishment order by the Disciplinary Authority. The main thrust of the argument involving the punishment order by the Disciplinary Authority remains, when the Enquiring Officer on completion of enquiry suggests exemption of the Delinquents including the Petitioner from the charges if the Disciplinary Authority wants to differ from the view of the Enquiring Officer following the provision in the Orissa Civil Services (Classification, Control & Appeal) Amendment Rules, 2000, particularly keeping in view the Sub-Rule (10) of the Rule-15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 before passing order of punishment, it was incumbent upon the Disciplinary Authority to first send a show cause notice along with report of the Enquiring Officer asking the Delinquent to submit his views. It is urged that even assuming that the Enquiring Officer had suggested in favour of the Delinquents and such contingency was not available and the Disciplinary Authority desired to differ from the view of the Enquiring Officer, the Disciplinary Authority was required to issue a show cause notice on punishment along with a statement of its finding taken together with brief reasons of disagreement, if any, with the findings of the Enquiring Officer stating penalty proposed to be imposed on them and calling the Delinquents to submit their response within a specific period of time.

5. Mr. Ajit Rath, learned counsel for the Petitioner while refuting the allegations made in the show-cause notice has submitted that Petitioner as a Junior Engineer along with four Assistant Engineers and three other Junior Engineers have executed the work namely 'Improvement to the SOSO Branch Canal of Anandpur Barrage Project, RD 00 K.M. (RD for Reduced Distance) to 18.70 K.M. under AIBP (Accelerated Irrigation Benefit Programme) Assistance Scheme'. The charge is based on the inspection by S.E. Vigilance Technical Wing on dt.12.2.2000, the report of which was submitted on 23.2.2000. The allegation based on such inspection is confined to the road on the Right Embankment, which is metal road (admittedly due to paucity of funds black topping was not done). The said road work involves from RD 00 K.M. to RD 18.7 K.M. Inspection was done by S.E., Vigilance by inspecting the road condition at regular intervals with respect to 10 places from RD 00 K.M. to RD 10 K.M. by digging open the metal and the moorum surface below it. The technical Inspector Report was given on 23.02.2000 which has been annexed to

the writ petition. On perusal of the said report, it is found that no deviation is noted in item wise quantity stipulated in the agreement till the 7th running bill. In fact, the total work was covered under the 7th running bill. On inspection, the S.E., Vigilance found that there is no appreciable difference between their measurements and the measurements taken by the Department. However, the S.E. Vigilance found that the top layer of metal surface is not uneven but the same is full of loose metals. For such deterioration of the top surface, the reasons given on visual assessment are as follows :-

a) Metals used are not well graded as per specification

b) Inadequate compaction.

He, however, gave further reason on such assessment that allowing loaded traffic over metal surface without black-topping is likely to cause damage to the top surface. He also stated that he was informed that soon after the work was finished, traffic was allowed. He further gave the reason that usually surface dressing is provided to avoid such damage to the metal surface. He further opined that damage noticed on the surface and on the road within two years is mainly due to inadequate rolling, dry and wet stage during construction operation and use of hand broken metals (not well graded). Such assumption has been denied by the present Petitioenr as the opinion is based on conjecture and surmises. On the basis of such opinion, he made responsible to the JEs and AEs in charge of the aforesaid work. It is submitted that the charge is based on sole inspection report and neither the S.E. Vigilance nor any Competent Officer have been examined to prove the genuineness of the said report.

6. Further, in reply to the inquiry report, learned counsel for the Petitioenr submits that the contents of such inquiry report, which finds mention in subsequent paragraphs, has taken into account the unprecedented Super Cyclone that took place on 30th and 31st October, 1999 that caused devastation to the Canal Bank and the area and water flowing on the surface of the road on the canal Bank. This has not been taken into account in the report dtd.23.02.2002. The delinquent officer gave detailed reply by satisfactorily meeting all the charges and denying them as per Annexure-3.

7. Against such group of Engineers, the Government has appointed the Executive Engineer, Salandi Irrigation Division as Inquiring Officer and Assistant Executive Engineer, Baitarani Division, Salapada as Presenting Officer. As it reveals, the Inquiry Officer vide Annexure-6 took up the first hearing in his office on 27.02.2002 and second hearing was held on 20.01.2003, on which date, the hearing was associated with the spot visit. On the first hearing, the log book of the road roller was verified by the department and the

same was called for to be produced. On the second hearing, cross-examination against the delinquent officers and verification of log book was made. The Inquiring Officer dug three patches each covering 1 sq. meter between the span RD 00 M.M. to RD 6.10 K.M. and examined the same and found that 10 to 20% of the hard granite metal layer to have been disturbed and loosened. Besides some depressions and pot hole were also developed. As per the agreement which finds mention in the written show cause statement to the charge. The grading of the metals, as per Indian Road Congress (IRC) standard is between 25 mm to 62 mm. The Inquiring Officer on digging, found that the metal used was between 25 mm to 62 mm. He found that 0.5 to 1% of the metals have skin surface. He further found that the compaction hours of rolling, as per schedule was 963 hours and the actual rolling was 1002 hours. He further found such cross-examination of the witness that during the Super Cyclone the road was submerged in water and therefore the condition of the road deteriorated. Subsequently, heavy vehicles were running for relief and other works resulting in further deterioration of the road condition. Accordingly, the Inquiring Officer concluded that the road being submerged for three days, there being plying of the relief vehicle before the sub-base was well drained, the same may have caused such damage to the surface. With regard to the water content, there was flexibility of the pavement before stability of the road which influences the soil texture of water contents. Besides the density, frost action, shrinkage and other climatic factors influenced the road surface, i.e, such plying being done before the road surface attended the precondition of construction. He accordingly concluded that the Super Cyclone alone partly damaged the road at different places. Besides that, the plying of the heavy vehicles on such surface thereafter and final conclusion was that the damage is due to the Super Cyclone is rather the correct factor than the execution of substandard work. He accordingly recommended the exoneration/ exemption of the alleged officers against whom such allegation was made.

8. After receipt of such report, the Govt. recommended exemption of charges over the charged officers without giving an iota of reason with respect to the findings of the Inquiry and by mentioning the Gravity of Charges and as such proposed recovery of an amount of Rs.12,57,800/- from each of the five officers. It is further submitted that the action of the Government surprised the present Petitioner as to how such figure could be reached and on what basis. Therefore, to issue such a show cause is grossly arbitrary and illegal. It is also stated that in view of the amendment caused to Rule 15(1) of the OCS (C.C. & A) Rules, 1962, if the disciplinary authority proposes to proceed with the proceeding and the inquiry, a simple show cause attaching the inquiry report is to be given only

after receiving the reply on such show cause, if dissatisfied, a second show cause with a proposed punishment is to be issued. Therefore, there is gross violation of the statutory provision in issuing such a show-cause proposing punishment. It is alleged by the Petitioner that Government on receipt of inquiry report issued show-cause notice on 16.09.2006 (Annexure-8) but in the said show-cause notice there was no whisper nor any reason has been given with respect to differing from the inquiry report and directed to recover an amount of Rs.12,57,800/- from the officers. It was stated that reply was given on 15.2.2007 (Annexure-9). In the meantime, the Government forwarded a copy of the proceeding record and asked for the opinion of the OPSC with regard to the penalty amount against the five delinquent officers. Accordingly, the Government straight away proposing punishment before complying with the Rule 15(10)(1)(A) of OCS (CCA) Rules, 1962. The delinquent in his defence gave his reply on 15.2.2007 (Annexure-9). He also enclosed Page 24 of Salandi Sanskar Report (showing the terrible devastation took place in the flood arising out of the Super Cyclone over the topping of the embankment and submerging a huge area around it. Para 2.2.5 was quoted therein showing huge quantity of water flow causing devastation to overtopping the bank, thousands of villages and lakhs of people being affected and lakhs of houses being collapsed besides causing loss of human lives. The Government vide letter dated 26.06.2007 referred the matter to OPSC for their consideration and OPSC found that the entire amount of Rs.62,89,003/- of the work improvement to the SOSO Canal (instead of the alleged fault found with respect to the improvement to the right bank canal road has been divided by the government amongst five officers including one JE who is dead suggesting recovery and on the basis of the report of the OPSC, the Govt. proposed to recover the amount of Rs. 12,57,800/- from each of the delinquent officers, excluding the dead officers. In the facts and circumstances of the case, the Petitioner submits that the proceeding and the punishment based on such proceeding is vitiated and the Petitioner's prayer needs to be allowed and all service benefits needs to be given to him on the said basis.

9. In support of his contention, he relies on the judgments in the case of ***Abhimanyu Giri vs. State of Odisha & Others*** in ***WPC(OA) No.995 of 2008, decided on 03.03.2022*** and in the case of ***Mukunda Dev Upadhyaya vs. State of Odisha & Ors.*** In ***O.A. No.1179 of 2008 decided by the Tribunal on 05.05.2018.***

10. Mr. Ajit Rath, learned counsel for the Petitioner thus challenged the impugned order for being contrary to the established principle. It is in the above background, taking this Court to Annexure-7, the enquiry report and Annexure-8, the show cause notice issued by the Disciplinary Authority, Mr. Rath, learned counsel for the Petitioner contended that there is gross-violation of the Rules

governing the field and in the circumstance, particularly for non-compliance of the provisions of the Rules, the punishment order is vitiated. With the above ground of challenge, learned counsel for the Petitioner also brings to the notice of this Court the judgment of the Odisha Administrative Tribunal, Bhubaneswar involving one of the Delinquents involved in the same enquiry referring to Paragraphs-8 to 10 of the judgment dated 5.5.2018 involving O.A. No. 1179/2008 submitted that the Tribunal in disposal of similar proceeding for the reasons therein not only quashed the impugned order of the like nature but also directed the Respondents therein to draw and dispose of the retiral benefits in favour of the Applicant which was held up by the authorities on account of the impugned order within a period of three months. It is stated that there is no challenge to such order any further. It is in the above legal background, learned counsel for the Petitioner prayed this Court for setting aside the impugned order at Annexure-8 & 14 also granting similar benefit to the petitioner.

11. Per contra, Mr. P.C.Das, learned Additional Standing Counsel for the State referring to the pleadings as well as disclosures contended that keeping in view the Disciplinary Authority's disagreement with the order of the Inquiring Officer, a report was called for from the Engineer-in-Chief, Water Resources, and thus contended that the show cause notice in Annexure-8 even though nowhere disclosed the observation of the Disciplinary Authority dependent on such exercise, however the show cause at Annexure-8 was based on such a report existing with the Disciplinary Authority and thus contended that there is no defect in the ultimate conclusion of the disciplinary proceeding, vide Annexure-14 requiring to be interfered with. Mr.Das, however, did not dispute the statutory provision under the O.C.S. (C.C. & A.) Amendment Rules, 2000 prescribing the manner of disposal of the disciplinary proceeding in such contingency. In reference to the order of the Tribunal Passed in O.A. No.1179/2008, learned counsel for the Petitioner submitted that in the said case the show cause and order of penalty since discussed in the view of the Engineer-in-Chief, it stands on a different footing. Mr.Das, learned Additional Standing Counsel in the circumstance, contended that the decision, if any, involving ***Mukunda Dev Upadhyaya vrs. State of Orissa & Ors.*** has no relevancy to the case at hand.

12. Considering the rival contentions of the Parties and keeping in mind the grounds of challenge to the show cause notice at Annexure-8 as well as the enquiry report at Annexure-7, the Enquiring Officer finally reached the following conclusion:-

> "I, therefore, conclude that as enquiry was conducted lately after Super Cyclone, the surface of the road was partly damaged in different places. The apprehension of

> damage due to submergence of road due to Super Cyclone'99 is rather correct than the execution of substandard work. Hence officer alleged may be exempted from the charges framed against them. This is submitted for the perusal of Govt. to decide the further action as deem fit."

Reading the aforesaid, there should remain no doubt that the plea of the Delinquent therein that the suffering involved is an outcome of the Super Cyclone taking place in the entire area at the relevant point of time, the apprehension of damage as raised by the Delinquent was well understood in the enquiry and the Enquiring Officer thus rightly directed exemption of the Delinquent including the Petitioner from the charges framed against them. It is taking into consideration here the show cause notice at Annexure-8, this Court finds, Annexure-8 reads as follows :-

> "Whereas disciplinary proceeding under Rule-15 of the O.C.S.(C.C.& A) Rules, 1962 has been initiated against the above officers for commissions and omissions made by them vide this Department Memorandum No.25467, dated 18.7.2002;
>
> Whereas, the Executive Engineer, Salandi Canal Division, Bhadrak was appointed as Inquiring Officer to enquire into the charges leveled against the aforesaid officers vide Department of Water Resources order No.41315 dated 20.11.2002;
>
> Whereas, the Inquiring Officer after completion of enquiry has furnished the record of enquiry to this Department vide his letter No.18, dated 27.9.2003;
>
> Whereas, government after careful consideration of the enquiry report and gravity of the charges have proposed to recover an amount of Rs.12,57,800/- from each of the officers;
>
> And now they are directed to submit their representations as they may wish to make against the proposed punishment of Government within a period of 15(fifteen) days from the date of receipt of this show cause notice, failing which the matter shall be decided in accordance with existing rules."

Reading the whole show cause notice, this Court finds, even though an allegation is made that the Disciplinary Authority by issuing the show cause notice has relied on the report of the Engineer-in-Chief but there is absolutely no such disclosure with regard to issuance of show cause notice, vide Annexure-8. It is at this stage of the matter, this Court after examining Annexure-14 found that Annexure-14, the penalty order of the Disciplinary Authority, has however a disclosure of giving such punishment keeping in mind the view of the Engineer-in-Chief and on the recommendation of the O.P.S.C. This Court thus finds, the so called view of the Engineer-in-Chief did not come into existence at least till issuing the show cause notice, vide Annexure-8. In the above background, this Court takes into account here the provision at Rules (i)(a), (b) & (c) of the Orissa Civil Service (Classification, Control and Appeal) Amendment Rules, 2000, which read as follows :-

> "(i)(a) If the inquiring officer is not the disciplinary authority, the disciplinary authority shall furnish to the delinquent Government servant a copy of the report of the inquiring officer and give him notice by registered post or otherwise calling upon him to submit within a period of fifteen days such representation as he may wish to make against finding of the Inquiring Authority;
>
> (b) On receipt of the representation referred to in Sub-clause (a) the disciplinary authority having regard to the findings on the charges, is of the opinion that any of the penalties specified in Clauses (vi) to (ix) of Rule 13 should be imposed, he shall furnish to the delinquent Government servant a statement of its findings along with brief reasons for disagreement, if any, with the findings of the inquiring officer and give him a notice by Registered post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty…
>
> (c) On receipt of the advice from the Commission the disciplinary authority shall consider the representation, if any, made by the Government Servant and the advice given by the Commission and shall pass appropriate orders in the case."

13. Before adverting to three stages requirement needs to be undertaken by the Disciplinary Authority in the factual scenario of the matter, this Court here observes that for the clear recommendation for exemption by the Enquiring Officer, there might not be requirement of following the Clause-(i)(a) taken note of herein above but in the event the Disciplinary Authority was to differ from the view of the Enquiring Officer and proposes to impose punishment in clear disagreement with the recommendation of the Enquiring Officer compliance of Clause-(i)(b) is a must. As per the above provision, while issuing show cause notice, the Disciplinary Authority shall furnish to the Delinquent-Government Servant a statement of its finding along with the brief reasons of disagreement, if any, with the findings of the Enquiring Officer and give him a notice by Registered Post or otherwise stating the penalty proposed to impose on him and calling upon him to submit within a specified time such representation, as he may wish to make against the proposed penalty. There is no such observation in connection with issuance of the show cause notice, vide Annexure-8. As a consequence, looking to the challenge of the Petitioner to the punishment order at Annexure-14, this Court finds, in issuing notice under Annexure-8, mandatory statutory provision have not been followed. Further, in violation of Clause-(i)(b) of the aforesaid Rules, the views of the Engineer-in-Chief which is the foundation of the punishment order, even did not form part of the show cause notice and the punishment imposed also appears to be based on extraneous material and without even involving the Petitioner through the second stage. This Court while declaring the show cause notice at Annexure-8 as bad, is also of the considered view that the foundation in issuing the punishment order at Annexure-14 is also lost and as such the order of punishment is unsustainable in law.

14. Moreover, taking into consideration the judgment of the Tribunal relied on by the learned counsel for the Petitioner and claiming parity, looking to the benefit granted by the Tribunal in similarly situated case, this Court finds, in disposal of O.A. No.1179/2008, the Tribunal, vide Paragraphs-9 & 10 has come to observe as follows :-

> "9. Normally in such circumstances, the matter would have been remitted to the Disciplinary Authority to take corrective measures from the appropriate stage. But in this case since the applicant has retired since long and the matter has been delayed, there may not be any need to further delve into the issue to avoid delay.
>
> 10. In view of the above discussion, the O.A. is allowed. The impugned order at Annexure-6 is liable to be quashed and is quashed. Accordingly, respondents are directed to draw and disburse all retiral benefits in favour of the applicant, held up on account of the impugned order, within a period of three months from the date of receipt of copy of this order. With these orders, the O.A. is disposed of."

15. In brief, the Tribunal while interfering with the impugned order considering the fact that the Delinquent had already retired since long and there has been sufficient delay in the meanwhile, while interfering with the impugned order therein, setting aside the same directed the Competent Authority for drawing and disbursing of retiral benefits in favour of the applicant therein. The present case also involves one of such Delinquents and it also involves the same enquiry and the loss of time in the meantime. In such view of the matter, this Court finds it difficult to have a different view than the view taken by the Tribunal in the earlier case involving some of the Co-Delinquents. As a consequence, this Court while setting aside the order at Annexure-8 as well as the order at Annexure-14 further directs the Disciplinary Authority to treat the Petitioner to be continuing in service in the post he was holding at the time of initiation of disciplinary proceeding and to calculate all consequential benefits including arrear dues and release the arrear dues held up on account of the impugned order by completing the entire exercise within a period of three months keeping in view the suffering of the Petitioner on account of latches of the Disciplinary Authority. Looking to the great loss of time in the meantime in illegally withholding the dues of the Petitioner, this Court while directing for release of the entire arrear dues also awards interest @ 5% per annum, which is also required to be calculated within the aforesaid period of three months and release the same in favour of the Petitioner.

16. The Writ Petition thus succeeds. There shall be no order as to costs.

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2022 (II) ILR -CUT-805

V. NARASINGH, J.

W.P.(C) NO. 13253 OF 2014

PRAFULLA KU. SAMAL .....Petitioner

.V.

CHAIRMAN, ORISSA FOREST DEVELOPMENT CORPORATION LTD. & ORS. .....Opp.Parties

SERVICE LAW – Disciplinary Proceeding – Judicial interference – When warranted ? – Held, there is cavil that the Courts will not act as an Appellate Court and re-assess the evidence laid in domestic inquiry – But at the same time it has to be borne in mind that the Courts are not supposed to close their eyes where violation of principle of natural justice is tell-tale and also the decision making process, as in the present case is tainted with prejudice resulting the impugned order of dismissal from service – Treating the period of unauthorized absence from duty till the date of his dismissal as "no work no pay" is shockingly disproportionate and need judicial interference – This Court directs that the petitioner is entitled to 50% back wages for the period mentioned above. (Paras 34, 39)

Case Laws Relied on and Referred to :-

1. AIR 2000 SC 22 : The High Court of Judicature at Bombay v. Shashikant S. Patil and another
2. AIR 2011 S.C.1931 : State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya
3. 2006 (Supp-I) OLR-288 : Choudhury Niranjan Mohapatra vrs Andhra Bank & Ors.
4. (1989) 1 SCC 764 : H.L. Tehran & Others v. Union of India
5. (1987) 4 SCC 431 : K.I. Shephard & Others Vs. Union of India
6. (2007) 1 SCC 331 : Shekhar Ghosh v. Union of India
7. 2022 SCC online SC 284 : Union of India v. Managobinda Samantaray.

For Petitioner : Mr. Sanjib Mohanty

For Opp.Parties: Mr. C.A. Rao, Sr. Adv. (O.P. No.1)
Mr. S.K. Behera (O.P. No.2)

JUDGMENT Date of Hearing and Judgment : 20.07.2022

V. NARASINGH, J.

1. Petitioner was a field Assistant of Opposite Party-Corporation. Being aggrieved by the Order passed by the Appellate Authority dtd. 30.08.2013 at Annexure-19, confirming the order of dismissal passed by the Disciplinary Authority (Divisional Manager, OFDC, Boudh (CKL) Division) dtd.13.02.2009 at Annexue-17 has preferred the present Writ Petition.

2. Learned counsel for the petitioner submits the petitioner who is an Orthopedically Handicapped person was appointed as a mate in Sambalpur Division in the year 1987 and in the year 1989 his services were regularized. He was subsequently promoted to the rank of Field Assistant. While working as Field Assistant the petitioner was transferred from Angul C.K.L Division to Boudh Division by order dtd.06.01.2006 (Annexure-3). It is contended by the learned counsel for the petitioner that taking into account his physical disability he ought not to have been transferred.

3. Be that as it may, the petitioner made a representation to the Authority on 19.01.2006 (Annexure-5) for cancellation of his order of transfer. As ill luck would have it pending such consideration the petitioner's mother passed away and the petitioner applied for leave and thereafter on account of his personal illness, the petitioner extended his leave and when the petitioner was undergoing treatment, by order dtd. 20.02.2006 at Annexure-10, he was unilaterally relieved from Angul and directed to join at his new place of posting i.e., Boudh.

4. It is submitted by the learned counsel for the petitioner, because of the compelling circumstances though he could not join his new place of posting. Yet, the Departmental Proceeding was initiated against him on 27.10.2006 for the following dereliction of duties;

(i) Disobedience of Order.
(ii) Unauthorized absence of duties.
(iii) Negligence in duties.
(iv) Gross misconduct by the petitioner.

5. It is submitted by the learned counsel for the petitioner that he is governed by the Service Rules of the Orissa Forest Corporation and Rule 124 thereof deals with the procedure for imposing major penalty which is attracted in the case at hand.

6. It is the contention of the learned counsel for the petitioner that no opportunity was given to the petitioner and acting in a high handed manner throwing all norms to the wind, the petitioner was dismissed from service and the appellate Authority without any application of mind confirmed that order as such the same warrants interference by this court.

7. Learned Senior Counsel Mr. Rao relying on the assertions in the Counter Affidavit and documents annexed thereto submits that adequate opportunity as envisaged under the Rules were given and it is because of the persistent attempt by the petitioner not to receive the notices, there was no alternative left with the Disciplinary Authority but to pass the impugned order.

8. It is further submitted that the Appellate Authority has dealt with each of the contentions raised by the petitioner as such there was no infirmity as alleged.

9. It is also the stand of the Opposite Party-corporation that that the inquiry being in the nature of fact finding one, it is not open for this Court to make a microscopic examination of the materials on record and the same being in the realm of factual dispute is beyond the scrutiny of the Court. More so, when at the appellate stage, admittedly, opportunity was given to the petitioner including personal hearing and therefore the Writ Petition does not merits consideration of this Court.

To substantiate their stand the Opposite Party-Corporation relied on the following judgments:-

(a) Judgment of the Apex Court reported in **AIR 2000 SC 22, The High Court of Judicature at Bombay v. Shashikant S. Patil and another;**

> *"The Division Bench of the High Court seems to have approached the case as though it was an appeal against the order of the administrative/disciplinary authority of the High Court. Interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such inquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the inquiry has been properly conducted . The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article-226 of the Constitution. "*

(b) AIR 2011 Supreme Court 1931 State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya,

> ***"6.** It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will whenever interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations."*

(c) 2006 (Supp-I) OLR-288 Choudhury Niranjan Mohapatra vrs Andhra Bank and Others.

> ***"14.*** *It is the settled principle of law that disciplinary authority is the sole judge of facts and where appeal is presented, the appellate authority has co-extensive power to appreciate the evidence or the nature of punishment. It is also the settled principle that normally the High Court and the Apex Court do not interfere with the finding of fact recorded at the domestic inquiry, but if the finding of guilt is based on no evidence, it would be a perverse finding that would be amenable to judicial scrutiny. A broad distinction has therefore to be maintained between the decision which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonble person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied on, however compendious it may be, the conclusion would not be treated as perverse and the finding would not be interfered with."*

10. It is on record that, vide Annexure-3, dtd. 06.01.2006 an Office Order was passed by the Opposite Party –Corporation through the Chairman-cum-M.D. transferring Field Assistant from one Division to another. It is a composite transfer order relating to numbers of Field Assistant including the petitioner.

11. The name of the petitioner appears at Serial No. 11 and it is indicated that he is transferred from Angul to Boudh in such transfer order.

12. It is on record that, on account of sad demise of the mother of the petitioner, he had sought for leave and was initially granted such leave and later on he extended the leave under Letter dtd. 18.02.2006 at Annexure-8.

13. It is worth noting that the letter dtd. 18.02.2006 was addressed to the Sub-Divisional Manager, OFDC, Ltd., Panchamahala, Sub-Division, Angul. It was sent by Registered Post but for reasons best known the same was not accepted by the addressee and such letter is at page-21 of the writ petition with the following endorsement;

"Addressee refused so return"

14. It is apt to state that by order dtd. 20.02.2006 at Annexure-10 referring to the order of transfer herein before adverted to the petitioner was unilaterally relieved and directed to join his new place of posting at Sub-Division, Boudh. For alleged, violation of such transfer order to Boudh as Field Assistant, the Disciplinary Proceeding in question was initiated.

15. At this stage, learned counsel for the petitioner places reliance on a communication issued by the General Manager, (A&B) at the level Head Office to Divisional Manager (CKL), OFDC, Ltd. Boudh Division relating to the Proceeding against the present petitioner.

16. In order to appreciate the tenor of the said letter the same is extracted hereunder;

> "ORISSA Forest Development Corporation Limited
> (A Government of Orissa Undertaking)
> A/84, Kharvelnagar, Bhubaneswar-751 001
> No. 2625, Estt (F)/2/2007
>
> Dated, Bhubaneswar the Feb, 2007.
>
> To.
> The Divisional Manager (CKL),
> OFDC, Ltd, Boudh Division,
>
> Sub: P.C. of Sri Prafulla Kumar Samal, Field Asst- unauthorized absence from duty.
> Ref: Your letter No. 5254, dt. 28.10.2006 and this Office letter No. 2082 dt. 27.01.2007.
>
> Dear Sir,
>
> Enclosed, find herewith a copy of revised notice published in News Paper "PRAGATIBADI" at this level, which is self explanatory, you are directed to take follow-up action for termination on long absence of above named Field Assistant with disposal of Departmental Proceedings drawnup against him and report compliance.
>
> Yours Faithfully,
> Sd/-
> Encl:- As above" General Manager (A & P)

On a bare perusal of the said letter, it can be seen that the Divisional Manager, OFDC Ltd, Boudh Division who admittedly is the Disciplinary Authority was mandated to take "follow up action for termination on long absence of above mentioned Field Assistant with disposal of Departmental Proceeding drawn up against him and report compliance".

17. Such action of the General Manager has been sought to be justified in the Counter in Paragraph-14 that the same is nothing but an administrative instruction.

18. There is no reply to the ex-facie direction issued to the Disciplinary Authority to take action for termination and disposal of Departmental Proceeding and report compliance as noted.

The silence of Corporation speaks volumes about the arbitrary manner in which the power has been exercised.

19. On going through the communication at Annexure-15 directing termination of petitioner even when the Departmental Proceeding is pending, this Court has no hesitation to hold that the authorities have signally failed in their duty to act fairly prejudging the issue even before the Disciplinary Proceeding has culminated and as a Subordinating Authority the Disciplinary Authority only went through the motion to comply with the direction as issued in Annexure-15.

20. It is also curious to note that in Paragraph-3 of the Counter, the authorities have tried to justify their stand stating that a notice was published in the Odia Daily **Prajatantra** dtd. 23.04.2009 intimating about the drawal of the Departmental Proceeding for convenience of ready reference, the same is extracted hereunder;

> *"Finally the opposite party was bound to publish a notice in the daily Odia news paper,* ***"The Prajatantra"*** *dtd. 23.04.2009 intimating about drawal of Departmental Proceeding as well as asking him to resume his duty and also to Cooperate with the Departmental Proceeding. But as petitioner did not respond either by joining at Boudh (C-KL) Division or by filing defence statement against the disciplinary proceeding, finding no other way the Disciplinary Authority had to finalize the Departmental proceeding exparte as per the documentary evidence available before him."*

And it is submitted that since the petitioner did not resume his duty in spite of such notice, there was no option left with the Disciplinary Authority but to pass the impugned order.

21. This court had occasion to examine the paper publication which is annexed at Annexure-E at Page-56. On a bare perusal of the said notice it can been seen that the same is a post facto intimation of conclusion the Departmental Proceeding and in fact it is mentioned therein that the petitioner has been dismissed from OFDC services with effect from the date of issuance of the order and period of un-authorised absence from duty till the date of his dismissal treated as "no work no pay". Notice so published is extracted hereunder;

> *"NOTICE*
> *Sri Prafulla Kumar Samal earlier working as F.A. of Orissa Forest Dev. Corpn. Ltd. With present address At/Po: Arahat, Dist: Dhenkanal in Boudh (CKL) Division and been unauthorisedly absent without joining duties with effect from 21.02.06 is hereby informed that on disposal of Departmental Proceeding by the Divisional manager, Boudh (CKL) Division vide o.o. No.55 dt. 13.02.2009 that "he is dismissed from O.F.D.C. services with effect from the date of issuance of order" and " the period of unauthorized absence from duty till the date of his dismissal is treated as " No work no pay". He is also informed to received his orders from the office of Divisional Manager, OFDC Ltd., Boudh (C-KL) Division on any working day.*
>
> *Sd/- MANAGING DIRECTOR "*

22. The recitals in the counter coupled with the annexure is a testimony of the lackadaisical approach of the authorities to try and justify the unjustified.

23. Regarding notice to the petitioner in compliance with the Provision contained in Rule-124 of the Service Rule, nothing is placed on record that the notices were ever served on the petitioner. It is vaguely justified by the Corporation that since the petitioner refused to accept the notices, there was no other option left with the corporation but to proceed with the inquiry ex-parte and it is submitted that since the petitioner was given post decisional hearing at the appellate stage, he cannot complain of any prejudice.

24. The order of the Appellate Authority is at Annexure-19. The facts relating to delinquency of the petitioner under the heading "facts" has been noted as under by the Appellate Authority;

> "The appellant was informed through paper publication in Daily Odia News Paper "Pragatibadi" dtd. 18.01.2007 to resume duty immediately failing which follow up action will be taken against him as deemed proper.

In spite of all the above efforts taken by the Disciplinary authority, D.M., OFDC Ltd., Boudh (C-kl) Division & D.M., OFDC Ltd., Angul Division, the appellant has neither joined in his duty nor cooperated in the enquiry. Hence the Disciplinary Authority has taken Ex-Parte decision on the basis of documentary and circumstantial evidence to meet the ends of justice vide O.O. No. 55 Dt. 13.02.2009 with the following punishment.

> (1) The delinquent Sri Prafulla Kumar Samal, F.A. is dismissed from OFDC Service with effect from the date of issue of this order.
>
> (2) The period of unauthorized absence from duty till the date of his dismissal from OFDC Service is treated as "No work no Pay". "

25. The paper publication in Odia daily newspaper "Pragatibadi" dtd. 18.01.2007 adverted to by the Appellate Authority under the heading the facts above is not on record nor any explanation could be submitted by the learned Senior Counsel appearing for the Corporation as to why the same was not placed on record, though the same has a great bearing on the point at issue regarding violation of natural justice. And, because of such nonsubmission of the paper publication as referred to above, no option is left with this Court but to draw adverse inference and negate the contention of the Opposite Party-Corporation that the petitioner was informed by paper publication.

26. The finding of the Appellate Authority hence was clouded by erroneous assertions regarding following of principle of natural justice which is ex-facie contrary to the materials on record.

27. One of the specific grounds of appeal was that no opportunity was given to the delinquent-petitioner to defend his charges before issuance of the ex-parte order and in the comments of the Disciplinary Authority, Paragraph-8 thereof, it has been stated as under;

> "He did not even submit his defence statement even though D.P. drawal was published in the News paper"

The Appellate Authority taking note of the finding of the Disciplinary Authority in their response in Para-8 as quoted above reiterated that,

> *"The appellant was also informed through Odia News Paper 'Pragatibadi' dt. 18.01.2007 (copy of letter no. 2625 dt. 05.02.2007 of Head office enclosed as Annexure-H & H1) that the Disciplinary Authority shall dispose the Disciplinary Proceeding ex-*

parte for unauthorized long absence beyond 11 months after 15 days of publication on failure of the appellant to resume in his duty with OFDC Ltd. at Boudh (C-KL) Division.

In spite of the above News paper publication also, the appellant did not join in his duty"

28. As already stated the paper publication in Odia daily newspaper 'Pragatibadi' dtd. 18.01.2007 is not on record and the Head Office Letter No. 2625 dtd. 05.02.2007 as referred to by the Appellate Authority quoted hereinbefore, clearly in no uncertain terms establishes that Disciplinary Authority was directed **"to take follow up action for termination on long absence of the above named Field Assistant with disposal of the Departmental Proceeding drawn on against him and report compliance."**

29. In fact, the only paper publication which is on record and quoted above falsifies the assertion of the authorities that the petitioner was ever intimated regarding the drawal of D.P.

30. It is apt to note that the Corporation has taken prevaricating stand before this Court in the Counter Affidavit regarding the paper publication in as much as while in Pargraph-3,while replying to Paragraph-1 of the Writ Application it is stated thus.

> "Finally the opposite party was hound to publish a notice in the daily Odia news paper, "The Prajatantra' dt. 23.04.2009 intimating about drawal of Departmental Proceeding as well as asking him to resume his duty and also to Co-operate with the Departmental proceeding. But the petitioner did not respond either by joining at Boudh (C-KL) Division or by filing defence statement against the disciplinary proceeding. Finding no other way the Disciplinary Authority had finalized the Departmental proceeding on ex-parte basis as per the documentary evidence available before him."

Whereas in Paragraph-17, it is stated that the paper publication is an intimation of dismissal.

31. Learned Senior Counsel Mr. Rao for the Corporation submitted that because of the post decisional hearing at the appellate stage including personal hearing the stand of the petitioner that he did not have adequate opportunity to defend himself is thoroughly misconceived in as much as it cannot be said that any prejudice has been caused to the petitioner.

32. Such submission of the learned counsel for the Corporation does not stand to reason in as much as it is the settled position of law that post decisional hearing at the Appellate stage in a case at this nature can never subserve the principles of natural justice.

In this context this Court relies on the judgments of the Apex Court in the case of (1989) 1 SCC 764 (H.L. Trehan and Ors Vs. Union of India & Ors), (1987) 4 SCC 431 (K.I. Shephard & Ors. Vs. Union of India) and (2007) 1 SCC 331 (Shekhar Ghosh Union of India).

In the case of H.L. Tehran & others v. Union of India (1989) 1 SCC 764 in para-12 & 13 therein, the Apex Court observed as follows;

> **x x x x x"12**. *It is, however, contended on behalf of CORIL that after the impugned circular was issued, an opportunity of hearing was given to the employees with regard to the alterations made in the conditions of their service by the impugned circular. In our opinion, the post-decisional opportunity of hearing does not subserve the rules of natural justice. The authority who embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity. In this connection, we may refer to a recent decision of this Court in K.I. Shephard v. Union of India. What happened in that case was that the Hindustan Commercial Bank, the Bank of Cochin Ltd. And Lakshmi Commercial Bank, which were private banks, were amalgamated with Punjab National Bank, Canara Bank and State Bank of India respectively in terms of separate schemes drawn under Section 45 of the Banking Regulation Act, 1949. Pursuant to the schemes, certain employees of the first mentioned three banks were excluded from employment and their services were not taken over by the respective transferee banks. Such exclusion was made without giving the employees, whose service were terminated, an opportunity of being heard. Ranganath Misra, J. speaking for the court observed as follows: (SCC pp. 448-49, para 16)*
>
> *We may now point out that the learned Single Judge for the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could not represent and their case could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action.*
>
> *It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.*
>
> ***13.** The view that has been taken by this Court in the above observation is that once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution. The High Court, in our opinion, was perfectly justified in quashing the impugned circular***." x x x x x**

In the case of K.I. Shephard & Others Vs. Union of India (1987) 4 SCC 431 in para-16, the Apex Court has held as under;

> x x x x x ***"16.** We may now point out that the learned Single Judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand the normal rule*

> *should apply. It was also contended on behalf of the respondents that the excluded employees could now represent and their cases could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.***"x x x x x**

In Shekhar Ghosh v. Union of India reported in (2007) 1 SCC 331 the Apex Court held as follows;

> **x x x x x** ***"14.*** *A post decisional hearing was not called for as the disciplinary authority had already made up its mind before giving an opportunity of hearing.*
>
> *Such a post-decisional hearing in a case of this nature is not contemplated in law. The result of such hearing was a foregone conclusion.*
>
> ***15.*** *In K.I. Shephard v. Union of India this Court opined:(SCC p.449, para 16)*
>
> *"It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."*
>
> ***23.*** *In this case, the respondents accept that the appellant was entitled to a hearing. All the necessary ingredients of principles of natural justice were thus required to be complied with. The appellant as noticed hereinbefore had not been given adequate opportunity of hearing in as much as: (i) the hearing was sought to be given was a post-decisional one, which is bad in law; (ii) a copy of the complaint was not supplied to the appellant at furtherance if not proposed that a mistake was sought to be rectified; (iii) no charges were framed; (iv) no witness was examined; and (v) no inquiry officer arrived at any finding that the appellant was guilty of the charges levelled against him.***"**
> **x x x x x**

Evaluated on the scale of the judgments referred to hereinabove this Court is of the considered view that the judgment cited by the corporation in the cases of ***Shashikant S. Patil, Nemi Chand Nalwaya and Andhra Bank (Supra)***, have no application in the present case since in none of those cases there has been gross violation of principles of natural justice as in the case at hand.

33. Law relating to power of this Court to interfere with a order passed by the Disciplinary Authority has been well set out in the following judgments.

> B.C. Chaturvedi Vs. Union of India (1995) 6 SCC 749, *Union of India Vrs. Ex-Constable Ram Karan (2022) 1 SCC 373*, *Pravin Kumar Vrs. Union of India and Others (2020)9 SCC 471* and in the case of *Union of India and Others vrs. Mangobinda Samantary 2022 SCC OnLine SC 284,*

The Apex Court in the case of Union of India v. Managobinda Samantaray 2022 SCC online SC 284 in Para-9 has observed as under;

> **x x x x x "Para-9.** *Quantum of punishment is within the discretionary domain and the sole power of the decision-making authority once the charge of misconduct stands proved. Such discretionary power is exposed to judicial interference if exercised in a manner which is grossly disproportionate to the fault, as the constitutional courts while exercising the power of judicial review do not assume the role of the appellate authority. Writ jurisdiction is circumscribed by limits of correcting errors of law, procedural error leading to manifest injustice or violation of principles of natural justice. The decision are also disturbed when it is found to be ailing with perversity. On the question of quantum of punishment, the court exercising the power of judicial review can examine whether the authority has been a reasonable employer and has taken into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and excluded irrelevant matters. In the context of quantum of punishment these aspects are examined to consider whether there is any error in decision making process. On merits of the quantum of punishment imposed, the courts would not interfere unless the exercise of discretion in awarding punishment is perverse in the sense the punishment imposed is grossly disproportionate B.C. Chaturvedi v. Union of india, (1995) 6 SCC 749 Pravin Kumar v. Union of India, (2020) 9 SCC 471 Chairman-cum-Managing Director, Coal india Ltd. & Another v. Mukul Kumar Choudhuri & Others, (2009) 15 SCC 620."* ***x x x x x***

34. There is no cavil that the Courts "will not act as an Appellate Court and re-assess the evidence laid in domestic inquiry.". But at the same time it has to be borne in mind that the Courts are not supposed to close their eyes where violation of principle of natural justice is tell tale and the decision making process as in the present case is tainted with prejudice resulting in the impugned orders of the Disciplinary Authority as well as the Appellate Authority dismissing the petitioner from service. For which, this Court is persuaded to quash the orders of Disciplinary Authority and Appellate Authority at Annexures-17 & 19 respectively.

35. The next question which confronts this Court is to whether to direct for denovo inquiry as is the norm as submitted by the learned senior counsel for the Corporation or treat the case at hand as an exceptional one and pass consequential orders.

36. The manner in which the Disciplinary Authority was directed to ensure for termination of the delinquent petitioner in pending departmental enquiry and report compliance thereof and coupled with the prevaricating stand of the authorities relating to intimation regarding the departmental proceeding to the petitioner which resulted in the exparte order shocks the conscience of this Court for which this Court is impelled to depart from the normal course of directing for denovo inquiry.

37. The petitioner has joined the organization in 1987. learned counsel for the petitioner has filed a memo indicating that his date of birth is 01.04.1958 would have retired on completion of the age of superannuation in the year 2018 (30.04.2018). The Departmental Proceeding was initiated after about 19 years and for alleged non-joining at the new place of posting. The petitioner was placed under

suspension and ultimately the order of dismissal at Annexure-17 was passed on 13.02.2009 and affirmed by the Appellate Authority (Annexre-19).

38. The period of unauthorized absence from duty till the date of dismissal treated as 'no work no pay' is shockingly disproportionate. And, on this aspect the Court respectfully relies on the judgment of the Apex Court in the Case of ***India and Others vrs. Mangobinda Samantary (Supra).***

39. Keeping in view the arbitrary nature in which the power was exercised by the authority in terminating the petitioner in a prejudged manner and taking into account the normal age of superannuation of the petitioner i.e., 30.04.2018, this Court directs that the petitioner shall be entitled to 50% of the back wages for such period he could not work because of the impugned order of dismissal affirmed by the Appellate Authority.

40. And, the entirety of the period of unauthorized absence which culminated in the order of dismissal shall count towards grant of terminal benefits, as due and admissible.

41. The petitioner be paid his emoluments as per his entitlement within a period of six months from the date of production/receipt of copy of this judgment. In the result, the Writ Petition is allowed and there shall be no order as to cost.

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